

John Ayliffe
P A R E R G O N
H.N.L.
JURIS CANONICI ANGLICANI:

O R, A

COMMENTARY,

By way of

S U P P L E M E N T

T O T H E

Canons and Constitutions

O F T H E

CHURCH of ENGLAND.

Not only from the Books of the CANON and CIVIL LAW,
but likewise from the STATUTE and COMMON LAW of
this REALM.

Whereunto is prefix'd, by way of INTRODUCTION,

First, A brief Account of the CANON LAW in general; how and from
whence it had its Rise and Beginning in the Church; and how it advanced itself, by
the Subtlety of the *Romish* Clergy, after the Seat of the *Roman* Empire was removed
to *Constantinople*, and Barbarism had invaded the Politer Nations of *Europe*.

Secondly, The Reader has also here a Particular of the Books wherein this
Law was written: With the several Authors Names, the respective Times wherein
they compiled them, and the best Commentators thereon: With many other Curious
and Historical Remarks on this Law, &c.

By JOHN AYLIFFE, L. L. D.

And late Fellow of *New College* in *Oxon*.

*Behold! I have not laboured for my self alone, but for all them that seek
after Knowledge.*

Ecclesiasticus, Chap. xxiv. Ver. 34.

The SECOND EDITION.

L O N D O N,

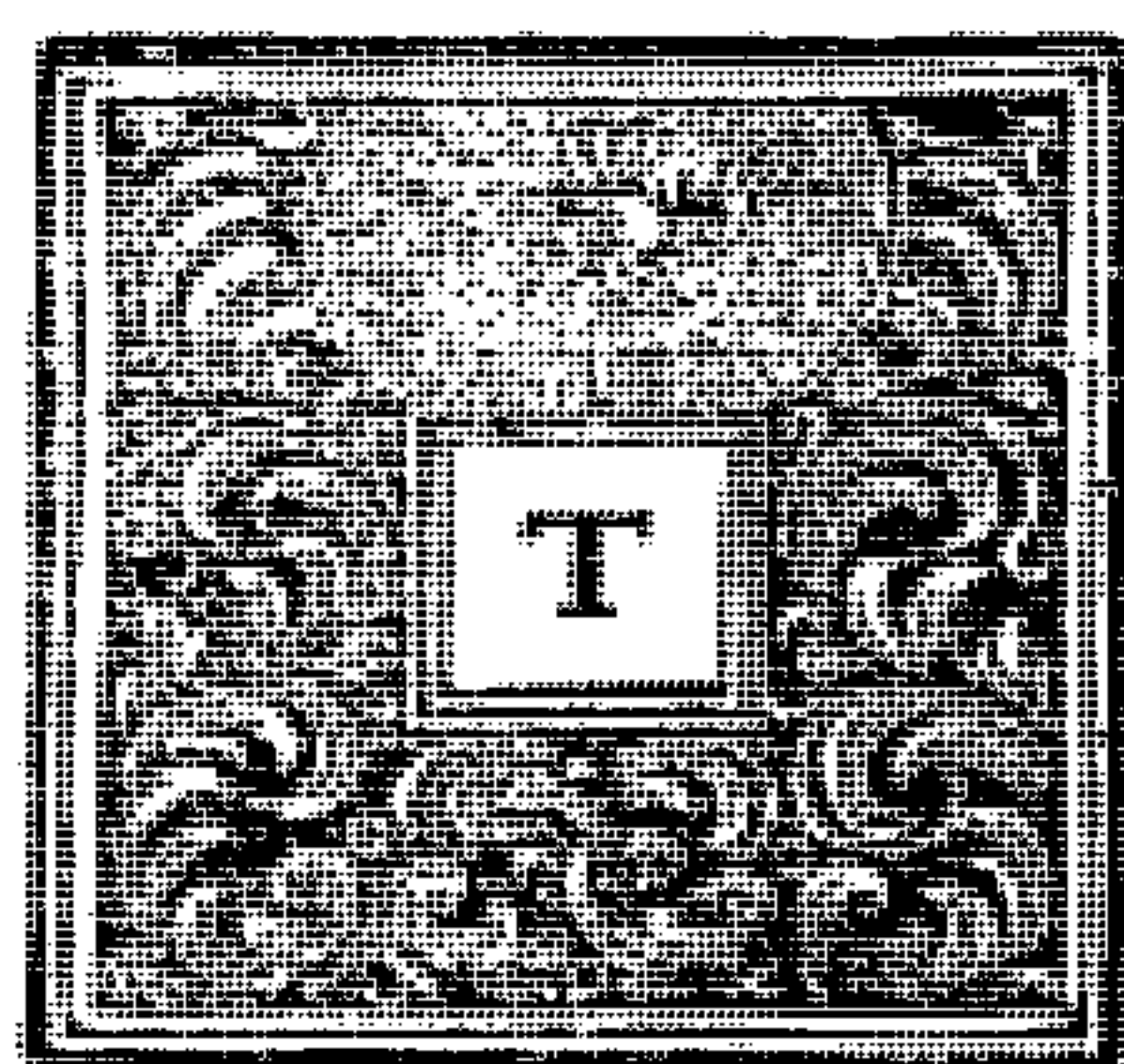
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M.DCC.XXXIV.



T O T H E
RIGHT HONOURABLE
PETER Lord *KING*,
B A R O N of
O CKHAM in the COUNTY of *SURREY*,
A N D
Lord High Chancellor
O F
G R E A T - B R I T A I N.

MY LORD,



THE honest Ambition I express in the Desire of being known to a Person of your Lordship's High Character, will, I hope, be an Excuse as well as a Reason for my offering the following Sheets to your Lordship's perusal and Patronage: For to whom should Men of Letters address themselves for Refuge and Protection against the Cavils of the Injudicious and Peevish, but to him whose Learning and Wisdom are universally acknowledg'd to be attended with an unbiass'd Impartiality; and who by a particular Sweetness of Temper has engaged the Affections of the most forward and ignorant Calumniators of useful *Literature*? Therefore,
A though

though as a just Judge of the Performance itself, I ought always to stand in Fear of your Lordship's strictures and Critical Remarks thereon, were the Work more correct than it is; yet I perswade my self, from the due Sense (I have) of your Lordship's almost inimitable Candor and Goodness towards the rest of your Fellow-Subjects, that you will rather chuse to pardon the Presumption of a Writer in prefixing your great Name to a Work, tho' but rudely finish'd (when it is the Fruit of his painful Endeavours) than condemn it in the whole for some few Faults, you may (possibly) find therein.

——— *Non ego paucis*
Offendar maculis, &c.

My Lord, was the well-natured Decree of one of the most discerning Criticks on Human Writings, we meet with recorded in Story, as well as of an upright and judicious Censor of Men's Actions. But whether I deserve such an indulgent Sentence from a Judge no less accurate and forgiving than that ancient Poet, I must submit to your Lordship, and other unprejudic'd Readers to determine in my Behalf: For I will not take upon me to pre-engage or anticipate your good Opinion in favour of the Work itself; because (I know) nothing can pass your Lordship's Judgment in respect of the Author, but the Truth and real Value of the Performance. My greatest Satisfaction is, that I have your Lordship for my Patron as well as my Judge, if the Cause will bear your Esteem, and my Hopes have been not a little heighten'd by the kind Encouragement and Subscription of so many Gentlemen and Persons of Quality, eminent for their Learning.

BUT lest I should be thought to support the Credit of this Performance entirely on so noble a Patronage, and on the Encouragement lent thereunto by a Number of Valuable Subscribers, give me leave (I beseech you) *my Lord*, to say something in Vindication of the Work itself: Which tho' it might have been treated by an abler Pen, yet I can add this with no small Comfort to my self, *viz.* That the Faults, which may (perhap.) be found therein, are neither gross, wilful nor frequent; but such as might have escaped a more intelligent Writer. And as my Design in now publishing it, is, not to give Offence to any particular Set of Men, tho' some of them may (peradventure) think themselves wounded thro' the Sides of Tyranny and Superstition; but only to do some small Service to the Courts wherein I have had the Honour

once

once of being a Practitioner, and to administer Light to such as sit in Darkness, under the Veil of Popery, and the Prejudices of their own Education : So, in communicating these Collections to the World under the present Form, I promise my self the Approbation of your Lordship, and of all such as wish well to the *Protestant* Religion, if the Performance of this Essay deserves it. Such as it is, I here humbly offer it with all Deference and Respect to your Lordship's View and Acceptance, as the Labour of my younger Days, when I first enter'd on the Profession of the Law, and had Thoughts of undertaking a more extensive Work of a much more useful Nature to the Court your Lordship presides over, if I had met with any Encouragement from the Publick : But at present I am worn out with long and painful Studies, and oppressed in the Circumstances of my Fortune, thro' the Frauds of some, and the fatal Misrepresentations of others. But my Business here is not to arraign the Proceedings of the Unjust ; but with Pleasure to contemplate the Perfections of that Man, who, by his equal Distributions of Justice, commands all our Thanks and Admiration.

A N D, therefore, that I may not dwell altogether on my self, when I have so large a Field of Virtues to expatiate in ; and as (I am sure) the Publick, out of a grateful Sense of the many Blessings it receives from the Influence of your Lordship's known Abilities in that sublime Station, wherein your own Merit, and the Justice of so gracious a Prince, has placed you, expects I should say something of them (tho' your Lordship should decline the Verdict) I hope your Lordship's Modesty will not be offended with the just Eulogies of those, who can make no other Returns of Gratitude for the great Services you are pleased to do your Country, but by their Acknowledgments of them. Your Benevolence, *my Lord*, has made you the Object of every Man's Delight and Esteem ; and your Steadiness to the Rules of Honesty has plainly shewn, that Popularity (even in a degenerate Age) may be founded on vertuous Actions. These are Qualities, *my Lord*, which hold fast the Friend, and attract the Stranger ; and have been the Security of those great Numbers, who, in all your Lordship's private as well as publick Capacities, have sought to obtain you for their Judge and Protector.

I need not, *my Lord*, remember to you your great and wonderful Rise in the World ; because your Lordship's Humility and Condescension is such in the Height of Power, beyond what is common to other Men advanced, as to be ever before-hand with Mankind in acknowledging our first setting

ting out in this Stage of Life : But I must beg leave to lay before you, what all Men, besides your Lordship, are unanimously agreed in, I mean your deep Searches into sound Divinity, your Retirements into the History of past Ages, and a consummate Knowledge of the Laws of your Country. For you have added to your natural Endowments, which (without Flattery) are very eminent, the Superstructures of Study, and the Knowledge of good Authors. But above all the Advantages of a learned Education, your Lordship has distinguish'd your self by an inherent Probity, as well as by a peculiar Humanity, which have given a Lustre to all your Actions. Others have owed their Greatness to the Principles of Party and Faction in the State ; and to a daring Boldness in pushing on their own Fortunes : But your Lordship has climbed the several Degrees of Honour by a sedate Honesty, and a true Zeal for the *Protestant Succession*. I should proceed further in your Lordship's just Praises ; but I know to whom I dedicate----Minds truly Great and Good delight to profit Mankind without expecting the Applause due to their generous Actions. But the World will pay this Tribute to your Lordship, maugre all your Endeavours to avoid the Acceptance of it : For the *Orphan* and the *Suitor* already proclaim the Person, by whom they have Right convey'd to them ; the *Lawyer* rejoices to see his Approaches to the Court for Equity made free and easy to him by a patient Hearing of the Cause he espouses ; and the good *Subject* extols the Fidelity of a sincere Patriot in all your Counsels at the Board. That your Lordship may live long for the Encouragement of Learning in the Schools, the Support of Probity in the State, and as a Guardian of righteous Dealings among all Men, of what Degree or Condition soever, under your Lordship's Jurisdiction, is the united and hearty Prayer of all that wish well to Mankind ; and in a very particular manner of him, who is with all Duty and Respect,

My LORD,

Your Lordship's

Most Obedient, Devoted, and

Humble Servant,

JOHN AYLIFFE.

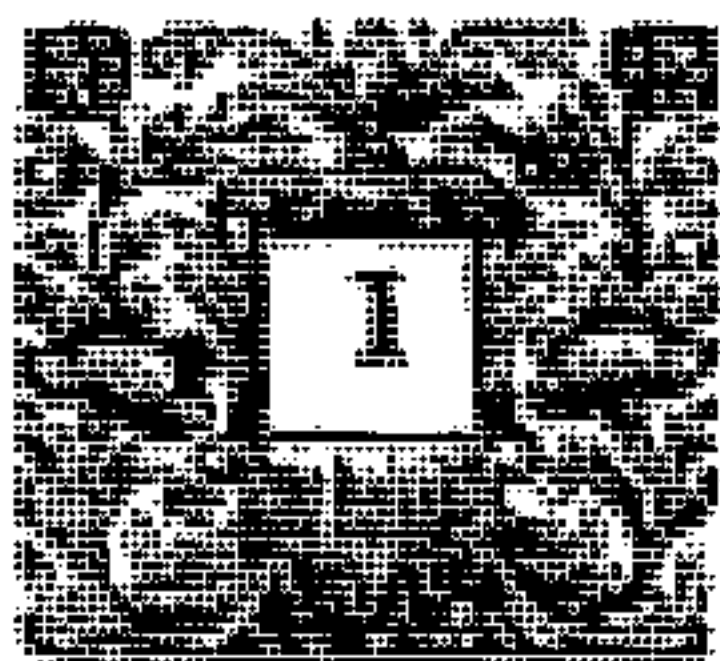


A N

Historical Introduction

To the following

W O R K.



I H A V E at length, for certain Reasons, been induced to publish a Supplement to the Canons and Constitutions of the Church of *England*, from a large Collection of Readings and Observations principally drawn from the Books of the *Canon-Law*, when I was a Practitioner in the Ecclesiastical Courts, and had a Prospect of succeeding to some Chancellorship, or other Preferment in the Church of the like Nature. And as I first undertook this Labour for my own Sake and private Advantage alone, so, now having finish'd it without any Good to my Self, I humbly offer it up, as a Sacrifice of my Studies, to the Publick; not only with a Design of doing some Service to my Country, by illustrating the Force and Practice of the *Canon-Law*, as far as it has been receiv'd, and is now observ'd among *Englishmen*, but also with a Purpose of exposing the Errors and Superstition of the *Romish* Church; and of setting forth the Pride, Ambition, and Tyranny of the Clergy over the Members of its Communion: than which, nothing can be more absurd and wicked in Men, who would be thought to embrace the true Christian Religion, under a Spirit of Piety, Holiness, and Humility.

I have, in the Introduction to this Work, given some Account of the *Canon-Law* in general; how and from whence it had its Rise and Beginning in the Church, and how it advanced itself apace by the Subtlety and Cunning of the Clergy under the See of *Rome*, after the Seat of the *Roman* Empire was transferred and removed to *Constantinople*, and after the utmost Barbarism had invaded the politer Nations of *Europe*.

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have likewise herein attempted to deliver a particular Relation of the Books themselves wherein this Law was written, with the Name of the several Authors and Compilers of them, the respective Times wherein they were wrote and compiled, and the best Commentators thereon. And, lastly, I have herein endeavour'd to evince and shew, That the ancient *Canon-Law* received in this Realm, is a part of the Law of the Kingdom in all Ecclesiastical Cases, if it be not repugnant to the Royal Prerogative, or the Customs, Laws, and Statutes of the Realm. This being my chief Design by this Introduction, I shall proceed, *First*, to shew what I mean by the *Canon-Law*, in order to establish my first Inquiry.

Now the *Canon-Law* is so called from the *Greek* Word *κανων*, which in *English* signifies a Rule, because the *Canon-Law* is as a Rule of Life unto all Christians in Matters relating to Church-Discipline; and being chiefly collected from the Decrees of Councils, is explain'd and govern'd by them in a great Measure, as by a * Rule: and these Decrees are distinguished into Canons, and divided into Chapters. The most ancient Collection seems to be that of the Apostolical Canons, or Constitutions; which were formerly among the *Papists* of great Weight and Authority, tho' the *Protestants*, and even some of the more honest and sincere *Papists* themselves have long since shewn, That these Canons had not their Original from the Apostles, but were of a much later Date. *Franciscus Turrianus* the Jesuit, indeed, believes, That these Canons were, about the 45th Year of *Christ*, composed by the Apostles themselves; and has published a Book on purpose to prove, (as he imagines) that the Canons, commonly called *Apostolical*, were made by those Holy Men; and being committed to Writing since by *Clemens Romanus*, a Disciple of the Apostles, were by him reduced into the Form we now have them. And as *Sixtus Senensis*, in his second Book of his *Bibliotheca*, under the Name of *Clemens*, concurs with *Turrianus* in this Opinion; so another † Person says, That these Canons were made by the Authority of the Apostles, and were wrote by *Clemens Romanus*, a Disciple of *Peter*, according to the Tradition of the Apostles, in the *Greek* Tongue, as now delivered to us; and that the Abbot *Dionysius Exiguus*, being well skill'd in that Language, and an eminent Writer in the Time of *Justin* the Emperor, translated them into *Latin*, with all the Accuracy and Fidelity he was Master of. But *Bellarmino*, in his Book touching *Ecclesiastical Writers*, thinks, That only fifty of these Canons are genuine, and of lawful Authority, rejecting the other thirty five, as not serving the crafty Purposes of the Church of *Rome*: And *Baronius* in his ** Annals, and *Possevine* the Jesuit, in his *Apparatus*, are of the like Opinion, for the very same Reason. *Binius*, in his first Tome of the Councils, contends for all of them, besides the sixty fifth and the eighty fourth of these Canons. *Dionysius Exiguus*, who translated them into *Latin*, makes no more than fifty of them, or (at least) has translated no more; nor has *Isidore Mercator* inserted more of them in his Collection. But yet, *John* Bishop of *Antioch*, commonly called *Antiochenus*, who liv'd in the sixth Century, says, That our Lord's Disciples and Apostles did, by the Means of *Clemens*, publish eighty five Canons; and so many of them were receiv'd and confirm'd by the second Canon of the sixth General Council, vulgarly call'd the Council of *Trullo*, held in the Year 692. as may be seen in the first Tome of the General Councils, towards the beginning of the

* 33 Dist. Cap. 1 & 2.

† Fran. Long. a Coriolano.

** Ad ann. 102.

the second Chapter. And these eighty five Canons are found in several Editions of the Councils, tho' the *Papists* have thought fit to omit some of them, that make against their Corruptions in Religion: And Bishop *Beveridge* has recorded this same Number in his *Codex Canonum*; tho' *Gregory Haloander* has only inserted eighty four of them in his Body of the Law.

John Dallee is of *Opinion, that these Canons were made by some certain Impostor or other, after the Year of our Lord 450; and *Tho. Cambenus*, who has, in a Book of his printed at London 1689. detected the Roman Forgeries committed in the Edition of the Councils of the four first Centuries, does also acknowledge these Canons to be suppositious. But Bishop *Beveridge* opposes this Conjecture, and believes they were made either in the second or third Century: So that all the Decrees of the Church, during the first Century, being therein digested, they were as a Code unto the Primitive Church, according to which the Discipline and Policy of the Church was to be administred. I do easily assent and agree with Bishop *Beveridge*, that these Canons were made in the third Century, since they are cited, and appeal'd to by the Ecclesiastical Writers of the fourth Century. Nor will I deny them proper Authority, since they seem to have their Rise from the Doctrine of the Apostles; and, therefore, and for no other Reason, they were called the Apostolical Canons; and were appeal'd to in the Synod of † *Nice*, the Synod of ** *Antioch*, and in other Synods; tho' I will not presume to affirm, that they were particularly receiv'd in the Church. In the *Canon-Law* they are reckon'd as Apocryphal Books, and among the Apocryphal Canons: which surely they had never been, if the Church had receiv'd them by Publick Authority in the early Ages of Christianity. *Gelasius*, in a Council or Synod of seventy Bishops, held at †† *Rome*, reckons them as such; whose Decrees we have extant in the Books of the *Canon-Law*, saying, That the Book of Apostolical Canons was an Apocryphal *** Book: And, again, such Things as are preach'd and written by Hereticks, or Schismatics, the Catholick and Apostolick Church of *Rome* no wise receives, among which Writings are reckon'd these Canons. But Bishop *Beveridge*, and Bishop *Pearson*, do both doubt, whether there ever was any such Decree publish'd by *Gelasius*, since no Author ever mentioned the same till three hundred Years after *Gelasius* his Death. 2dly, Supposing this Decree to be ever so genuine; yet 'tis uncertain, whether these Words, viz. *Liber Canonum Apostolorum Apocryphus*, were truly inserted in it or not; since they are not to be met with in *Justellus*, and other Manuscript Copies. And this appears so much the more plainly, from the Words of *Hinckmare* Bishop of *Rheims*, against *Hinckmare*, Bishop of *Lauden*, who says, 'That tho' *Gelasius*, in a Catalogue of Books receiv'd by the Catholick Church, and in other Authentick Writings, and in the History of the Council of *Nice*, the Council of *Constantinople*, the Council of *Ephesus*, the Council of *Chalcedon*, is not entirely silent touching these Canons, yet he has not put them among Apocryphal Writings. Yea, if this Decree of *Gelasius* was ever so genuine, yet it immediately appears from thence, that *Gelasius* only rejected those Writings as Apocryphal, which were not receiv'd by the Church.

Now from this different Account of the Number of these Canons, and from the Corruptions of them, I believe there have been several Matters intermix'd therein, which are entirely foreign to their first State and Purity,

* vid. Pseudep. Can. † A. D. 325. ** A. D. 341. †† A. D. 493. *** 15 Dist. c. 3. 27 & 64.

Purity ; from whence the *Papists* at this Day confirm their *Dogmas* and Opinions. Therefore since, as *Ger. a Mastricht* has plainly shewn, they had not their Original from the Apostles themselves : there have been several Matters interpolated and tack'd to them at different Seasons, as Occasion serv'd this or that Set of Men. Tho' Bishop *Beveridge* plainly shews, that these Canons contain nothing in them contrary to the Manners and Rites of the Church in the third Century. *Melchior Canus* among the *Papists*, in the second Book of his * *Loci Theologici*, thinks, That these Canons ought not to be deem'd Apostolical, nor will he have them to be reckon'd among the sacred Book, according to the Desire of other *Romanists*. And *Cabassutius* in his Account of the Councils, is of the same Opinion, and so likewise is † *Natalis Alexander*. Among the *Protestants* who hold these Canons to be less Apostolical, we may reckon Archbishop *Usher* in his Dissertation touching the Writings of *Ignatius*, *Luke Osiander* ** in his Church-History, *Rob. Coke* in his *Censura de Canonibus Apostolorum*, *Andrew Rivet* in his first Book of Criticism, †† *John Dalree* in his *Pseudepigraphæ Apostolorum*, *** and the *Centuriators* of *Magdeburg* †††.

Albaspinæus thinks ****, that these Canons were not all of them made at one and the same Time, but that some of them were made in the first, and some in the second Century, by the Apostles and their Successors, and that some others were added in the third Century, tho' they still retain the Name of *Apostolical* Canons : And other Authors say, that this *Farrago* was nothing else but an Abridgment or an *Epitome* of the Acts of private Councils, and of Matters enacted and establish'd by private Bishops, that had the Government and Administration of the *Greek* Church before the Council of *Nice*. But *Gerard a Mastricht*, is of a contrary Opinion, believing that if this was an *Epitome* of Transactions establish'd in the Church before the *Nicene* Council, they had been entirely inserted in the *Codex Canonum* of the Universal Church, which yet was not then done. But I do not look upon this as a good Argument ; since only those Canons that were then receiv'd by the Church, were inserted in this *Code*, which at length, in Process of Time, happen'd also in Respect of the Apostolical Canons themselves. I have dwelt the longer on this Subject of the Apostolical Canons, because they have been the Occasion of so much Dispute among *Protestant* and *Papist*, and some have been so weak as to think them genuine, and of Apostolical Birth : But yet they seem to me to be one of the chief Pillars, on which the Policy of the Church and the *Canon-Law* itself is founded.

Plettenberg, in his Introduction to the *Canon-Law*, informs us, that this Law had its Rise and Beginning even from the very Infancy of the Church itself : But as he was a *Popish* Writer, fond of Antiquity to support the Power and Grandeur of the Hierarchy, we ought to have but little Regard to his Assertion in this Point ; unless he would be understood not to mean the Papal *Canon-Law* as now established in the *Roman* Church, nor any part thereof ; but the Canons of particular Churches only. For 'tis certain there were some Rules and Canons made for the Discipline and Government of particular Churches in those early Ages of Christianity, tho' the same are now lost in the Ruins of succeeding Times : Which were afterwards in Process of Years supply'd by the Decrees of Provincial Synods and General Councils. For 'tis not to be suppos'd, that the

* Cap. 10. † Ad fac. 1. Dis. 17. 18. 19. 20. ** lib. 3. c. 1. †† lib. 1. c. 1. *** lib. 3. c. 34. ††† Cent. 1. lib. 2. c. 7. **** 1. Ob. c. 13.

the Communion of the Church could long subsist after the Death of the Apostles, without some other Laws and Obligations, holding Men to Peace and Concord among themselves, than those contain'd in holy Writ : Considering the Pride and Passions of Men, and an overweaning Conceit of their own particular Ways in point of Divine Worship, and the Ceremonies of it. But whether these Laws were made by the Priesthood alone, or by the whole Communion of the Church represented, I shall enquire hereafter in another Place.

Gregory of *Tbolouse*, a pretty good *Civilian* and a *Canonist* in the *Romish* Church, defines the *Canon Law* to be a positive Law, ordain'd and given to the Catholick Church by several Popes, or (at least) approved of by them : Directing the Actions of all Christian Believers immediately to the Worship of God, and to Christian Peace and Justice ; (which consists in Purity of Faith, Integrity of Behaviour, and in observing the Commands of God and the Church) but ultimately directing their Actions to the ends of Eternal Happiness. But *Gratian* himself * as well as *Piringhius*, confounds the *Canon* and *Papal-Law* together : The latter being only in Propriety of Speech stiled *Jus Pontificium*, from the Popes, who were the Authors of it, and from whom it had its Force and Authority. For this *Papal-Law* chiefly consists of the *Decretum*, and the *Decretal* Epistles of several Popes : But the *Canon-Law*, properly and strictly speaking, is that Law, which consists only of the Canons of General and Provincial Councils. But, says *Gratian*, there are some of the Canons which are the Popes Decrees ; and some of them that are the Statutes and Decrees of Councils : And, therefore, the *Canon-Law*, in a large Sense of it, is Threefold, *viz.* *First*, That which is properly so called. *Secondly*, That which is in *Latin* stiled *Jus Pontificium*, or, in *English*, the *Papal-Law*. And, *Thirdly*, That which is term'd *Jus Ecclesiasticum*, or the *Law of the Church*. The first depends on the Canons of Councils alone ; and from a Collection of these it derives its first Original. The *Jus Pontificium*, or *Papal-Law*, was compiled and made up of the Decrees and Epistles of several Popes, and entirely depends on Papal Usurpation and Authority ; and on the Sayings of the ancient Fathers of the Church. And the *Jus Ecclesiasticum*, or Law of the Church, contemplates and takes in the State and Government of the Church, and the Laws at this Day receiv'd from and by the Church.

Under the Appellation of a Canon, we may reckon every Ecclesiastical Constitution whatsoever : And from hence the Word *Canon*, being taken in a large Sense, is the same as a Canonical, or Ecclesiastical Constitution. For tho' a Constitution, properly speaking in the Sense of the *Civil-Law*, is that Law which is made and ordained by some King or Emperor ; yet, the *Canonists*, by adding the Word *Sacred* to it, make it to signify the same as an Ecclesiastical Canon. Now a Canon is so called, because it is, or (at least) ought to be a Rule unto every Man's Actions in the Affairs of the Church, and of Religion itself, by leading him to a right and regular way of living in Point of Practice †. But strictly taken, it is used for a Constitution, or Law made and enacted in some General Council, as in the third Distinction here-under quoted †, where the Reader may see the Difference between a *Canon*, a *Decree*, a *Decretal Epistle*, a *Dogma*, a *Sanction*, an *Interdict*, and a *Mandatum*. And 'tis, moreover, to be observ'd ; That every Canon, or Ecclesiastical Constitution may be stiled a Law, since a Law, distinguish'd

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* 3 Dist. c. 2.

† 3 Dist. c. 2.

guish'd by the *Latin* Word (*Lex*) is nothing else but a Constitution reduced into Writing. Yea, the Canons of the Church are very rightly term'd *Ecclesiastical* Constitutions ; but the Constitutions of the *Civil-Law* are in *Latin* properly stiled *Leges Seculi*, or Secular Laws : And from hence the *Civil-Law* in the general Import thereof, is, as it were, the *Jus Civium*, or a Political Law.

The Canons of General Councils, according to *Isidore*, in the sixth Book of his *Etymologies* *; had their Rise and Beginning from the Time of the Emperor *Constantine the Great*. For in the foregoing Ages of Christianity, thro' the great and raging Persecution thereof, the Church in General had but little Power of instructing the People therein, and of governing the Community by any known Body of Laws, other than what our Saviour *Christ* and his Apostles had left behind them in the Sacred Book of the New Testament. And from hence it is, according to some, that the Christians were divided into several Heresies, during the three first Centuries of the Church ; because (say they) the Bishops had not the Power of meeting together in one Place to confirm the Faith, and to establish wholesome Laws and Institutions for the Government of the Church at large, till the Reign of the aforesaid Emperor : For he was the first of all the *Roman* Emperors that was a Christian, and empower'd the Christians to assemble freely together, and to enact Laws for the Ends aforesaid. I will not here take upon me to determine, whether this Grant of Power has done any great Service to Religion or not, since the Clergy in many Places have got it into their own Hands : But, sure I am, they have much exalted and magnified themselves hereon, and from a limited Concession of meeting, whenever the Emperor thought fit to call them together, (for so was that first Grant) they have since in several Countries, contrary to the Welfare and Peace of the Commonwealth, and the legal Establishment of the Civil Power, erected themselves into an Independent State, and do claim to assemble, whenever they think proper to disturb the Quiet of the Community ; and not when the Prince shall judge it reasonable and necessary.

Plettenberg, in his aforesaid Preface or Introduction, observes ; That the *Canon* or *Ecclesiastical-Law* admits of various Titles and Appellations in our Law-Books. *First*, says he, it is called the *Canon-Law* from the *Greek* Word *κανων*, (as already hinted) signifying a *Rule* ; because it prescribes and chalks out to us a Rule or Method for the well-governing of our Lives and Actions in Religious Matters, or (at least) ought to do so †. *Secondly*, It is in *Latin* stiled *Jus Pontificium*, from the Popes that were the Authors of it (as aforesaid), and who are in *Latin* called *Pontifices*. *Thirdly*, 'Tis term'd *Jus Ecclesiasticum*, from the *Greek* or *Latin* Word *Ecclesia*, denoting the Church, which is directed and govern'd by it. *Fourthly*, 'Tis also in *Latin* stiled *Jus Sacrum*, either from the Matter and Subject therein contain'd, or else because it is directed to some sacred End and Purpose. *Fifthly*, 'Tis call'd *Jus Divinum*, not that it did immediately proceed from God himself, for that is not true ; but because it either contains some Matters taken out of Holy Writ, or else (as the *Papists* would make us believe) that the Canons were dictated by the Gift and Inspiration of the Holy Ghost ; or else because they are Conclusions deduced from certain Principles of the Divine Law ; or, *Lastly*, Because the *Canon-Law* was made by him,

* Cap. 16.

† 3 Dist. c. 1 & 2.

him, who (according to the *Romanists*) has the Power of Binding immediately from *Christ* himself^{**}: Which Power we Protestants entirely deny. *Emanuel Gontsalex*, in his *Apparatus* touching the Origine and Progreſs of the *Canon-Law*, thinks, that this Law ought to be called the *Divine*, as well as the *Canon-Law*; ſaying, That the Law which contains theſe Eccleſiaſtical Laws, is ſometimes called the *Divine*, but more frequently the *Canon-Law*: And there he gives the ſame Reaſons for it as I have now remembred. The Words *Jus Eccleſiaſticum* in a general Senſe of them, denote any Rule, according to which a Man ought to proceed, and be judged by in Church Matters; that all Things may be done Decently and in Order, as *St. Paul* adviſes.

We read, that in ſome of the firſt Ages of the Church two or three Dioceſſes met together, and did by joint Conſent, or Suffrages, make Canons and Decrees for themſelves; which, beſides the Canons of General Councils, they made uſe of for deciding of controverſial Matters among themſelves. Whereupon in the Provincial Dioceſſes of *Aſia*, *Pontus*, and the *East*, there were ſeveral Canons publiſh'd by the Council of *Ancyra*, *Neo-Ceſaria*, *Gangrena*, *Antioch*, and *Laodicea*: And theſe Canons were of Force among ſuch Biſhops, by whoſe Authority and Suffrages they were made. But afterwards all the Biſhops and Churches of the *East* were oblig'd, by the Authority of the Council of *Conſtantinople*. Soon after the Council of *Nice* theſe Canons were collected together; and became of Publick Uſe in the Church, by rejecting and throwing out ſuch as were contrary herunto. But under the *Nicene* Canons even thoſe were included, which were eſtabliſh'd for ſome Time before this Council was held, in particular Synods and Aſſemblies; the *Nicene* Council receiving thoſe Canons †. In the Time of the fourth Century, there were ſeveral Collections of Canons made, which were of great Uſe and Authority in the Chriſtian Church. And, among thoſe, ſoon after the Council of *Nice*, the *Codex Canonum* of the Univerſal Church had its Riſe and Beginning: Which Code is alſo by another Name in *Latin* called *Corpus Canonum*^{**}; and that in no wiſe improperly. For as the *Civil-Law* is ſtil'd a *Corpus Juris*, or Body of Law, in the ſame manner as *Homer's* Works are ſtil'd *Corpus Homeri*, conſiſting of all the Books, and the ſeveral Parts thereof, belonging to that Poet: So likewiſe may this Code be call'd a *Corpus Canonum*, and the whole Body of the *Canon-Law* a *Corpus Juris*. For *Cicero* in his Letter to his Brother *Quintus* obſerves, That the Word *Corpus* is taken for any written Body, or Collection whatſoever. And as the *Corpus* of the *Civil-Law* contains the *Digeſt*, the *Code*, the *Novels*, and the *Inſtitutions*; ſo likewiſe does that of the *Canon-Law* comprehend the *Decrees*, the *Decretals*, the *Clementines*, and the *Extravagants*; and alſo the *Inſtitutions*.

Though we do not certainly know who was the Author of this *Codex Canonum*, yet, if we may believe ſome Manuſcript Copies, *Stephen* of *Ephesus* †† was the reputed Author thereof, tho' he rather ſeems to me to be the Enlarger, than the firſt Compiler of it. In the firſt Edition of this ſame Code, we only meet with 138 Canons, viz. 25 Canons of the Council of *Ancyra*, 14 Canons of the Council of *Neo-Ceſaria*, 59 of the Council of *Laodicea*, and 20 of the Council of *Gangrena*^{***}. This Collection increaſed in the Time of the

* Matt: 16. v. 19. † Jerom. Hiſt. lib. 8. cap. 26. ** Maſtricht: N. 27. Fran. Flor. par. 2. p. 253. †† Pet. de Mar. lib. 3. cap. 3. N. 4. *** Maſtricht. N. 36.

the Council of *Chalcedon*, even to the Number of 207 *Canons*; so that the 25 *Canons* of the Council of *Antioch* were added thereunto, as were likewise the seven of the Council of *Constantinople*, the eight of *Ephesus*, and the 29 of the Council of *Chalcedon* *. And that this *Code* might have full and ample Authority in the Church, it was confirmed not only by the Fathers of the Council of *Chalcedon* †, but also by the Emperor *Justinian* himself **, and afterwards ratify'd by the pretended Power of divers Popes, and Councils. But in Process of Time various and several *Canons* were added to this *Code*, as the 85 *Apostolical Canons*, the *Canons* of the Council of *Sardica*, being in Number 21, the *African Canons*, and some Canonical Epistles written by *Theophilus*, *Dionysius*, *Petrus*, *Athanasius*, and *Timotheus*, Bishop of *Alexandria*, *Gregory*, Bishop of *Neo-Cæsaria*, *Basil* Bishop of *Cæsaria* in *Cappadocia*, *Gregory the Theologian*, *Amphilochius*, *Iconius*, and *Gennadius*, Patriarch of *Constantinople* †. And afterwards in Course of Time, several Papal Decrees were added hereunto, so that after the Time of the *Nicene* Council, the Church began to be govern'd by a Twofold Law, viz. by the Law of God, which is founded in the Holy Scriptures, and by the *Canon-Law*, properly so call'd, contain'd in the *Codex Canonum*. We have at this Day several Editions extant of this *Code*, one publish'd by *Christoph. Justellus* at *Paris* ††, in Folio; and another by *Gerhard. Theod. Mezier* at *Helmstadt* ***, in Quarto. And *Justellus's* Son has again publish'd the same at *Paris* †††, in his *Bibliotheca Juris Canonici*; adding hereunto the *Canons* of the Councils of *Ephesus* and *Chalcedon*. The *Code* of the Oriental Church, which was confirm'd in the Council of *Trullo* at the sixth General Council held at *Constantinople*, is in some respect different from this *Code*; wherein the *Canons* of the Council of *Sardica* were omitted, partly because they were first publish'd in *Latin*, and partly because they contained some Matters which are contrary to the Doctrine of the Church of *Rome*.

Next to the *Code* of the Universal Church succeeded that of the *African* Church: For the *African* Church not only made use of the *Code* of the Universal Church, but even us'd a particular Collection of their own ****; this Collection being made out of such *Canons* as were peculiar to the *African* Church: As from the *Canons* of the Council of *Hippo*, the *Canons* of the first, second, third, fourth, fifth and sixth Councils of *Carthage*, and from those of the seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth and fifteenth Council of *Carthage*, and from the *Canons* of the Council of *Miletum*. This *Code*, consisting of 138 *Canons*, was first wrote in the *Latin* Tongue by an uncertain Author, and by Private Authority alone, tho' it was afterwards confirm'd by the fifteenth Council of *Carthage* †††, either under the Name of the Council of *Carthage*, or the Council of *Africa*; and it was then translated into the *Greek* Language, and inserted not only in the *Code* of the Oriental Church, but it was also receiv'd by *Dionysius Exiguus* into the *Codex Canonum* of the *Roman* Church, and publish'd by the care of *Justellus* *****.

The Church of *Rome* did also, according to the Example of the Eastern Churches, make use of a particular *Code* of *Ecclesiastical Canons*, by translating the *Canons* of the Eastern and Universal Church, into

* Pet. de Mar. de Conc. Can. cap. 2.

*** A. D. 1643.

††† A. D. 1561.

***** vid. Justell. Præf. ad Biblioth. Jur.

† Can. 1.

** Nov. 131. cap. 1.

**** Maffricht. N. 96.

†† A. D. 1610.

††† A. D. 419.

into the *Latin* Tongue. This *Code* of the *Canons* of the *Roman* or *Western Church* contains the *Apostolical Canons*, the *Canons* of the Councils of *Nice*, *Ancyra*, *Neo-Cæsarea*, *Gangrena*, *Antioch*, *Laudicea*, *Constantinople*, *Ephesus*, *Chalcedon*, *Sardica*, *Carthage*, *Africa*, a *Treatise* of the *Primacy* of the *Roman Church*, the *Decrees* of several *Popes*, as *Siricius*, *Innocent*, *Zozimus*, *Boniface* the *First*, *Celestine*, *Leo* the *First*, *Hilary*, *Simplicius*, *Felix*, *Gelasius*, *Anastasius*, *Symmachus*, *Hormisdas*, and *Pope Gregory*: *Leo* the *Fourth*^{*}, and other *Popes* appealing to this *Code*. *Cresconius*, an *African Bishop*, who liv'd about the Year 690. has given us an *Abridgment* or *Breviary* of this *Code* in 300 *Canons*; omitting some whole *Canons* of Councils, and the *Decrees* of *Popes*. *Peter Pitbou*, in his *Historical Synopsis*, takes Notice of the *Collections* of some uncertain *Canons*; yet these *Collections* seem to me to be the same with the *Codex Canonum* either of the *Roman*, or *Universal Church*. We have several *Testimonies* from the *British Historians*; That the *British Church* made use of the *Code* of the *Roman Church* during the *Time* of *Popery* here among us: For according to *Bede*, in the fourth Book of his *Church History* †, we read of *Theodore* Archbishop of *Canterbury*, who wrote a Book, intituled, *Patrum Canones*, which was approv'd by the Council of *Hereford*. He, moreover, adds, That in the third Year of King *Egfrid's* Reign^{**}, this *Theodore* summon'd a Council of *Bishops* to meet together with such as were acquainted with the *Laws*; and made Choice of the *Canonical Decrees* of the *Fathers*: And, soon after reciting *Theodore's* own Words themselves, who was President of this Council, he adds, viz. "I intreat you, my beloved Brethren, that we all of us preserve the *Decrees* and *Determinations* of the *Holy Fathers* uncorrupted." *Peter de Marca*, in his *Dissertation* touching the ancient *Collectors* of *Canons*, says, That the *Roman Church* was govern'd only by the *Canons* of the *Nicene Council*, as *Pope Innocent* the *First* shews, in his *Epistle* to the *Clergy* of *Constantinople*.

Dionysius Exiguus, who was a *Scythian* by Birth and Nation, being a Person of some Eminency for his Learning, did, in the sixth Century, under *Theodorick*, King of the *Goths*, compile another *Code* of *Canons*: For he translated the *Greek Code* of *Canons* into the *Latin Tongue*, chiefly at the Request of *Stephen*, Bishop of *Salona*. But this *Code* herein differs from the former of the *Roman Church*, since it does not number its *Canons una serie*, and by an uninterrupted Order, but assigns to each Council its proper *Canons*; and at the beginning of every new Council he also begins afresh to number its *Canons*. But *Dionysius's Code* extends itself to the Number of 165. which is the third Canon of the first Council of *Constantinople*: And of this Council we find seven *Canons* in the *Greek Code* of the *Universal Church*; and only three in the *Roman Code* of *Canons*. After this *Dionysius* begins to number or reckon Twenty seven *Canons* of the Council of *Chalcedon*; and likewise to number the *Canons* of the Council of *Sardis*, which are only publish'd in the *Latin Tongue*. But the *African Canons* at length bring up the Rear, being made by the *African Councils*; and by a new way of Numbring, consist of 138: So that this *Code* of *Dionysius* was partly collected and compiled from the *Greek Synods*, and partly from the *Western Councils*. This Collection contains almost the same *Canons* of Councils as the *Greek Code* of the *Universal Church* publish'd

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^{*} Dist. 20 cap. 1.

† Chap. 5.

^{**} A. D. 673. Cassiodor. Lect. cap. 22.

publish'd by *Justellus* in the Year 1590. Soon after this a Collection of Papal Decrees down from the Time of *Siricius* to the Papacy of *Anastasius* was subjoin'd hereunto, to which Collection is prefix'd an Epistle directed to *Julian* the Presbyter, who liv'd towards the end of the sixth Century. There are some Decretals added by other Persons, being such as were enacted from the Time of Pope *Hilary* to that of Pope *Gregory* the Younger. This *Code* of *Dionysius* was receiv'd by the *Roman Church*, and offer'd by Pope *Adrian* the First to *Charlemagne* then being at *Rome* for the Government of the Western Churches, tho' 'tis a great Doubt, whether it be still remaining, and whether it was receiv'd in *France*; according to the Opinion of *Sirmond* in his Preface to the ancient Councils of *France*. Yet *Anton. Pagus*, in his Criticism on * *Baronius*, thinks; that the Decretal Epistles of the Popes were sometimes used by the ancient Synods of *France*. About the same time *Fulgenius Ferrandus*, a Deacon of the Church of *Carthage*, who liv'd in the Days of *Justinian*, made an Abridgment of the Canons, wherein he has included all the Discipline of the Canons within the Compass of 232 Chapters, having a good Regard to several Matters therein contain'd; and has also plac'd these Canons and Decrees, as they do best agree unto each Chapter. *Baronius*, without any reasonable Foundation, confounds this Person with *Cresconius*: But *Mastricht* has fully shewn the Agreement and Disagreement of each of them. *Peter Pitbon* first publish'd this ** Agreement in *Latin* from a Manuscript Copy belonging to the Church of *Troyes*; and afterwards the same was again publish'd at †† *Paris*, with the *Code* of the *Roman Church* by *Chiflet*, in *Octavo*.

About the same time also, wherein *Justinian* reign'd, *John* of *Antioch*, (commonly call'd *Scholasticus*) Patriarch of *Constantinople****, likewise distributed all the Ecclesiastical Canons, which had any Force in the Eastern Church, into 50 Titles, assigning to each Title such Canons as had been made and establish'd either about the same Matter, or else touching Matters of the like Nature. In this Collection he has inserted the 85 Apostolical Canons, the 20 Canons of the Council of *Nice*, the 25 of the Council of *Antioch*, the 59 Canons of the Council of *Laodicea*, 21 Canons of the Council of *Sardis*, the 20 Canons of the Council of *Gangrena*, the 25 Canons of the Council of *Ancyra*, 14 Canons of the Council of *Neo-Cesarea*, six of the Council of *Constantinople*, seven of the Council of *Ephesus*, 27 of the Council of *Chalcedon*, and 68 Canons or Decrees of *St. Basil*, as he is called, without observing any Order of Time or Series of Numbers. But he was the first of the *Greeks* that added the 85 Apostolical Canons, the 21 Canons of *Sardica* and the 68 Canons of *Basil*; which he has translated at large, and not given us in Brief. Pope *Nicholas* the First seems to have a View to this Collection; and, by way of Respect, styles it a *Concordia Canonum*: Because all the *Concordant Canons*, as ranged and distributed under certain Heads and Chapters, were herein reduced to a perfect Harmony and good Agreement with each other. And tho' *Fran. Floreus* ascribes this Work to *Theoderet* Bishop of *Cyrrus*, who liv'd 130 Years before *Scholasticus*; yet *Christoph. Justellus* has sufficiently shewn from ancient Manuscripts, That this was the Collection of *John. Scholasticus*. There is a *Nomo-Canon* of the same *Scholasticus* now extant consisting of fifty Titles, wherein he reports an Opinion extracted from the Canons,

* An. 527. N. 11. † Viſt. Tun. Chron. p. 43.
*** Can. Lect. ant. Tom. 6, p. 413.

** A. D. 1588.

†† A. D. 1618

nons of Councils; and subjoins a Decree of the Emperor *Justinian* in his *Novels* *. But tho' this Collection was made by private Hands; yet it was heretofore of great Authority in the Church, till it was abolish'd by *Photius's* *Nomo-Canon*, as being a more full and compleat Collection. This Collection of *Scholasticus* continu'd in Manuscript almost unknown to the World for many Years, till *Christoph. Justellus* first publish'd it in his *Bibliotheca Juris*, having procur'd the same from his Son *Hen. Justellus*.

The next Collection of Canons was that which was made by *Martin Bracarenfis*, a *Spanish* Bishop †, soon after the middle of the sixth Century. For it being found, that the ancient Version was in no wise accurate; he, with much Pains, made a new one and adorn'd it with a great deal of Learning. This Work is divided into ten Parts. The first Part contains such Canons as relate to Persons, Estates and Church Rites and Ceremonies. The second treats of such Things as appertain to Laymen (as we call them). ** But tho' he translated several Things from the *Greek*; yet he has made a Mixture of some Things by borrowing from the *African* and *Western* Councils, and also from those of *Spain*; as from the first Council of *Toledo*, and from the Councils of *Bracara*, where he was Bishop. There are two Editions of this Collection; the one called the *Old* and *Vulgar* Edition, which we meet with in the Collection of Councils, and in the *Bibliothèque* of the ancient *Canon-Law*; the other called the *Modern* Edition, which (*Garcias a Loyasa* says) he publish'd from ancient Manuscripts in the Collection of *Spanish* Councils.

Then follows the Collection of *Cresconius*, an *African* Bishop, stiled also by the Title of *Concordia Canonum*, and compil'd in the seventh Century; in which Collection we meet with all the Canons of Councils entire, and the Decrees of the Popes; which Collection is distinguish'd from an Abridgment of the Canons made by the same Author. We find this Collection in the *Bibliotheca Juris*, first publish'd from a Manuscript Copy in the Library at *Clermont*. In the twelfth Century was publish'd a *Synopsis Canonum* in *Greek* and *Latin*, which is ascrib'd to *Alexius Aristinus*, and was made *** by Order of *Johan. Comnenus*, Emperor of *Constantinople*; wherein the Order of Councils is well observ'd ††. But since *Alexius Aristinus* himself, in his *Scholia* on this *Synopsis*, criticises on the Author, we may conclude him not to be the**** Author: And about the middle of this Century, Master *Simeon*, a Lawyer, wrote an *Epitome* of the Canons, but in a Method and Order different from the former †††. For he first places the Apostolical Canons, then those of the General Councils, and then next come those of particular Synods, as that of *Ancyra*, *Sardica*, *Neo-Cesarea*, *Gangrena*, *Antioch* and *Laodicea*: And, moreover, he has added the *African* and *Trullan* Canons, and the three Canonical Epistles of *Basil*. At length, *Arsenius*, a Monk; and afterwards Patriarch of *Constantinople*, under *Theodor Lascharis* the Younger, about the Year 1255, collected a *Synopsis Canonum* out of the Councils and Fathers approv'd of in the *Trullan* Council; in which accurate Method is contain'd the whole Knowledge of Canonical Discipline, under One hundred fifty one Titles; and in the end of each Title he has added some Heads of *Concordant-Laws*. Therefore this Work in all its Manuscript Copies goes also by the Title of a *Nomo-Canon*. These three *Epitomes* were

* Nov. 131. cap. 2. † Greg. Tur. Hist. Fran. lib. 5. 38. ** Appen. Tom. 1. § 33. *** A. D. 1130. †† Maffricht, N. 281. **** Bev. Prolog. SS. 26. ††† Maffricht, N. 293.

were first publish'd from the Manuscript Copies or the *French* King's Library, together with some other Collections of Canons of the same Kind in the *Bibliothèque* of the ancient *Canon-Law*. There are some other Collections of Canons, which were receiv'd in the *Greek Church*; but they are such as were made by private Hands, which Bishop *Beveridge* has recorded in his *Synodicon*, with the other Canons of Councils, wherein we have a particular Collection of Canons belonging to the *Greek Church*: And herein we meet with the *Syntagma Alphabeticum* of *Mat. Blastar*, containing all Things that are comprehended in the Sacred Canons of the Church. *Constantin. Harmenopolus*, a Judge of *Thessalonica*, who liv'd about the middle of the Twelfth Century, has also given us an *Epitome* of the Sacred Canons, out of the Canonical Code of the *Eastern Church*, which *Freberus* publish'd.

The *Western Church* had also their *Code* of Canons, (besides the *Code* of the Universal Church) which they made use of; and hereupon the *Gallican Church* had their *Code* turn'd into *Latin* *. For it is said in the *Bibliotheca Juris* above-mentioned, That even the *Gallican Church* made use of the ancient *Canon-Law*, viz. That of the four first General Councils, and all those Canons, which were confirm'd to them, and receiv'd by the Catholick Church: But yet it was not according to the Translation of *Dionysius*, but according to another more ancient Version, viz. That which is contain'd in *Isidore's* Collection of the Councils publish'd at *Cologn*. The Council of *Paris* mentions the *Codex Canonum* of the *Gallican Church* in a Cause of *Prætextatus*, Bishop of *Rheims*; and *Gregory Turonensis*, in his † History, styles it a Book of Canons, saying, "That King *Chilperick* has insert-
"ed a new Canon thereinto, which is in some Measure Apostolical;
"and that this Canon was not in the old *Code* of Canons of the Uni-
"versal Church". But it appears, that the Apostolical Canons were not receiv'd by the *French* King before this Time, but were then altogether unknown to that Nation. *Sigebert*, King of *France*, in a Letter to *Desiderius*, Bishop of *Quercy*, professedly declares his Design of preserving the Canonical Decrees and Rules of the Church, as his Parents before him had observ'd them. And the *French* Bishops under *Childebert*, King of the *Austrasii*, or of that People now called *Lorainers*, in the Council of *Metz*, remov'd *Ægidius* Bishop of *Rheims* from his Sacerdotal Order, upon their reading the Canonical Sanctions. Nor do I in the least doubt, but that the *Spaniards*, in the Beginning of Christianity among them, did make use of the Law of the ancient Canons contain'd in the *Code* of the Universal Church **; having so great a Zeal and Affection for it, that whenever they subscrib'd to their Synods, they always us'd this Form, viz. *Saving the Authority of the ancient Canons*, as we may observe in their Subscriptions to the Sacred Council of *Trullo*, and others. And the Council of *Bracara*, held *A. D.* 563. expressly mentions the *Code* of the aforesaid Canons, in these Words, viz. "Bi-
"shop *Lucretius* said, I think it necessary, if it pleases your Brotherhood,
"that the Institutions of the Holy Fathers should be made known to
"you by being acquainted with the ancient Canons; and tho' all of
"them need not be read, yet some few of them ought to be read for
"instructing the Clergy in Church Discipline". And all the Bishops hereunto made Answer, *That it was their Pleasure that it should be so*; and so onwards. To this *Spanish* Collection we find some Constitutions of
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* *Præf. Biblioth. Jur. Canon. vet.*† *Lib. 5. cap. 18.*** *Diſſa Biblioth. p. 24.*

of the *Gallican* Church; and some Decretals of Popes added and inserted. We meet with several ancient and modern Canons of the *British* Church, in Sir *Henry Spelman's* Edition of the *English* Councils; from whence 'tis plain, That the *English* made use of the *Greek* Canons, and also of the *African* and *Gallican Code*, as *Mastricht* observes, who out of *Bede* has given ten Canons of the *British Code*.

After the Collection of the Canons succeeded the *Penitentials* of the ancient * Church, from whence the *Canon-Law* has borrow'd several Things, as may be seen particularly in the *Decretum*, if we examine the Rubricks of the *Decrees*. These *Penitentials* were introduc'd into the Christian Church, the better thereby to ascertain the Degrees of Publick Pennance receiv'd in the ancient Church†: But these *Penitentials* were never establish'd by Publick and Canonical Authority. And the Council of *Paris* order'd such of them to be abolish'd as were written contrary to the Authority of the Canons‡. *Burchard* Bishop of *Worms* mentions three of these *Penitentials* in a very particular manner; and out of these three he has collected his large Volume of Canons. And the first of these three was in the *Roman Penitential*, the second was that of *Theodore* **, and the third was that of the Venerable *Bede*. The *Penitential* of Pope *Gregory* the Third is still extant in one of the Volumes of the Councils. *Canisius* has publish'd the *Penitential* of *Hilthgarius* Bishop of *Cambray*; and the *Penitential* of *Gregory* the Great is much extoll'd by the Papists††. And in our Libraries we have still extant the *Penitentials* of *Peter Pictaviensis*, *Peter de Flamesburg*, and of *Alan de Insulis*. Father *Morin* in his Book of Publick Pennance, has collected several of these *Penitential* Canons; and so likewise has *Anton. Augustinus*. Hereunto we may also add the *Penitential* Book of *Rabanus Maurus*, wherein he discourses of the various and several Kinds of Ecclesiastical Punishments. But when the Rigour of Publick Pennance ceas'd in the Church, the use of *Penitentials* then ceas'd also. *Du Fresne* informs us, That the *Penitentials* or Book of Pennance, was a Book containing such Matters as related to the imposing of Pennance, and the Reconciliation of the Person that suffer'd Pennance. But to proceed,

It has been already observ'd, That that Part of the *Canon-Law*, which is stiled *Jus Pontificium*, or the Papal-Law, and of which I am next to treat, is distinguish'd and separated from the *Canon-Law* properly so called; it being that Law, which consists of the Rescripts, Decretal Epistles and Constitutions of several Popes, which they publish'd from time to time on the vast Increase of the Papal Power and Authority. And this Part of the *Canon-Law* had its Rise and Beginning from the Ruin of the *Roman* Empire, being built and founded on the Papal Power alone. For after the Seat of the Empire was translated from *Rome* to *Constantinople*, several of the *Europeans* began to revolt and fall off from the Empire; and even before *Justinian's* Time the *Gauls*, *Spaniards*, *Germans*, and soon after his Death the *Italians* shook off the Yoke of this mighty Empire. For *Gaul* was then in Subjection to the Kings of the *Franks*, *Spain* to the *Gothick* Kings, *Italy* to the Kings of *Lombardy*, and *Germany* was govern'd by several of its own Princes. For in those Times we meet with no other Right of Government acquir'd, but what was purchas'd by the Sword; all manner of

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* Vid. du Fresne Penitential. † Edm. Martene de ant. Eccl. Disc. cap. 17. ‡ Thomassin. c. l. N. 11. ** Cave Script. Eccles. Hist. Lit. p. 327. †† Du Fresne. c. l.

Learning being eclips'd under the Covert of the grossest Ignorance. The Laws which then govern'd were deriv'd from those People, which the *Romans* deem'd *Barbarians*, viz. from the *Franks*, *Goths* and *Lombards*; the *Roman Law* lying bury'd under that rude *Chaos* of Things, and Confusion of Manners, which every where appear'd at that Time. But during this Period of Darknefs, the Zeal and Affection, which even some of those Men bore to the Christian Religion, was so great, that many of them were prevail'd on to Reverence the Bishops and Clergy to such a Degree, that almost all the People voluntarily submitted themselves to the Commands of the Church, and to the Jurisdiction of the Bishops of *Rome*: Giving very ample Testimonies of their Piety in building Churches, Sacred Colleges, and splendid and magnificent Monasteries; which were erected in those Times of Ignorance, and are still enjoy'd by other Nations and People succeeding them. Princes being thus overcome by the Means of this Charity, and prevail'd on by the Artifices of the Clergy, did with great Ardour embrace and receive the Canons of the Church, and the Writings and Opinions of the Fathers; and at length the Decrees and Constitutions of Popes: Which proceeding from Men of Learning, made a great Figure among the rude and unpolish'd Laws of those People, and in that Age of Darknefs. And hence it was, that they were better affected to the Canons of the Church, than to their own Laws. Touching the Canons of Councils, *Justinian* order'd and establish'd, That the Decrees of the four first General Councils should be held and esteem'd in the same Manner as the Holy Scriptures themselves; namely, The Councils of *Nice* and *Constantinople*, the first Council of *Ephesus*, and that of *Chalcedon*; and their Canons should be observ'd as Laws for the Christian Church. By *Decrees* I here mean such Ordinances as relate to Matters of Faith and Doctrine, and by *Canons* such Laws as relate to the Actions and Manners of Men, and to Church-Discipline. After *Justinian's* Time the Authority of Canons made and publish'd either by General or Provincial Councils increas'd apace, as did also the Writings of the Fathers of the Church; and after this the *Decisions* of Ecclesiastical Controversies made by several Popes, which could not be drawn from, and determin'd by the Canons of Councils, and the Writings of the Fathers. For the Popes, upon Application made to them in such Cases where these Decrees and Canons were silent, did after the manner of the *Roman Emperors*, write back their Thoughts and Determinations; and these Determinations were stiled *Rescripts* or *Decretal Epistles*, having the Force of Laws: And, according to the Rescripts, the Law was for some Ages govern'd and directed in the Ecclesiastical Courts, when the Power of the Clergy was rampant, and the Pope dominic'd over all Christendom. But there was no certain Ecclesiastical Law reduced into Writing, till the Time of the Emperor *Lotharius*.

Among the most celebrated Collectors of the Papal Law we may reckon *Isidore Mercator*, by some called *Piscator*; whose Collection of Councils and Decretals is still extant, being made in the eighth Century: Wherein we have the *Decretal Epistles* of the first Popes or Bishops of *Rome*, from the Time of *Clemens Romanus* (as is pretended) to that of Pope *Siricius*; whereas those, after the Time of Pope *Siricius*, are hardly to be met with. But the Pope *Nicholas* the First approv'd of these Decretals, yet some of the *Papists* themselves have plainly rejected them as spurious. *Anton. Possesine*, in his *Apparatus*, says, That *Isidore Hispan-*
lensis

Isidus was the Author of this Collection; but then again like a Jesuit he contradicts himself. But *Caspar Ziegler* has sufficiently shewn, that *Hispalensis* could not be the Author; because in his Work he takes Notice of the * second and † sixth Councils of *Toledo*; so that he wrote forty Years and upwards after the Death of *Isidor. Hispalensis*, who dy'd in the Year 636. And, moreover, because he has inserted in his Collection the Letters of Pope *Gregory* the Second, Pope *Gregory* the Third, and Pope *Zachary*, who all sat in the Apostolical See after the Year 700. And *Plettenberg* for the same Reason seems to be of the same Opinion. Nor is this Collection reckon'd among the Works of *Isidor. Hispalensis* by *Braulius* and *Ildephonso*, nor by *Grialius* and *Loaysa*, who publish'd the same from ancient *Exemplars*. *Luitprandus* in his ‡ *Chronicon*, touching this Author, says, That *Isidor* Bishop of *Yaticca*, who was present at the sixteenth Council of *Toledo*, compiled the Order of that Council and a Collection of the Councils, which in his *Chronicon* is stil'd the Collection of *Isidore Piscator* or *Mercator* (as you please) for such was *Isidore's* Surname. But some will have it, this Compiler was called *Isidore Peccator*, because formerly some Bishops were wont to inscribe themselves in Councils by the Appellation of *Peccatores*; as appears from the third Council of *Paris*, the second and third Council of *Tours*, and the first Council of *Malcon*. The *Centuriators* of *Magdeburg* were the first among the Protestants that discover'd this grand Imposture of the Papists; against whom the Jesuit *Turrianus* has undertaken to defend this Collection. But *David Blondel*, a Frenchman of great Learning, has very fully detected this Fraud, who publish'd the suppositious Epistles which *Isidore Mercator* ascrib'd to some of the Roman Popes. Wherefore we may reckon *Jardanus Chrysopolitanus* to be the most ancient Collector of the Papal-Law, whose Work, bearing the Title of *Candela*, was never printed, but remains still in Manuscript. In the Beginning of the tenth Century *Regino* an Abbot of the Monastery of *Prumiensis* did by *Rathlode's* Order, who was Archbishop of *Treves*, compile and publish two Books touching Church-Discipline from ancient Canons, and particularly from Papal Decrees **.

In the eleventh Century *Burchard* Bishop of *Worms*, a *Hessian* by Birth and Nation ††, at the Request of *Brunicho* Provost of the Church of *Worms*, began to digest the Ecclesiastical Laws for the Advantage of his own Church: And this he did out of the Holy Scriptures, the Canons of the Church, the Decrees of Popes, and out of the Writings of the Fathers, and *Penitentials* of the ancient Fathers. This Collection he entitled, *Magnum Canonum Volumen*, and distinguish'd it into 100 Books or Titles. But in collecting this Work he has not shewn much Judgment, having inserted several spurious and suppositious Matters out of the *Pseudo-Isidore* ‡‡. About the middle of this Century he was succeeded in his Undertaking by *Anselm Lucensis*, who wrote a Collection of Canonical Sentences, which contains also several Things equally *** Spurious. Tho' some deny *Anselm* to be the Author of this Collection, because it exhibits some Decrees of Pope *Urban* the Second, and succeeding Popes, who (notwithstanding) liv'd after *Anselm's* Time. Then about the End of this Century *Ivo* Bishop of *Chartres* †††, collected the *Decretum*, being divided into seventeen Parts; and the *Pannormia*, by others called the *Pannormia*, which was divided into eight Parts. In which Books he chiefly

* A. D. 678. † A. D. 681. ‡ A. D. 719. * Baluz. Pref. ad Ant. Augustin. de Emend. Grat. Cave ut supra. p. 415. † Mastricht. N. 254. *** Mastricht. 261. 262. †† Cave ut supra. p. 457.

chiefly follows *Burchard*. But some ascribe this *Pannonia* to *Hugo Catalaunus*. Much about the same Time *Deus-Dedit*, a Cardinal Presbyter of the Church of *Rome* *, made a Collection of Canons, according to *Baronius*: But he wrote before *Ivo*, tho' he liv'd in *Ivo's* Time. Of this Author's Version there are two Parts. The first Part treats of the Privileges of the See of *Rome*; and the other Part of his Work was a Collection of *Canons*. *Blondel* says, That the Collection of *Canons* compil'd by *Deus-dedit*, was taken from the *Quisquillæ* of *Pseudo-Isidorus*. *Gregory* the Priest also made a Collection of *Canons*, which is stiled *Polycarpus*; and *Bernardus Papiensis* also made a Collection of *Canons* stiled *Populetum* †: But both these are very obscure. But I know not whether this Collection of *Gregory's* ought to be referr'd to the eleventh or twelfth Century; which Collection is not printed as I know of, but may be found among the Manuscripts in the *Vatican Library*.

Omnibonus is said to have succeeded these Persons in the fifth Year of *Frederick* the Emperor, who wrote a Book *De Concordantia Discordantium Canonum* ‡; and divided it into two Parts: The first is divided into sixteen Distinctions; and the second into thirty seven Causes by divers Questions. And this Book from the Author's Name is stiled *Omne Bonum*. And, in the Time of Pope *Alexander* the Third, formerly a Monk of *Bononia* and then a Cardinal, he was followed by *Gratian* **, who added many Things hereunto; and out of sixteen he made them an Hundred and one Distinctions; and by his Means the Doctrine of the *Canon-Law* is become more Authentick: And for this Work Pope *Alexander* made him a Cardinal. *Gratian*, as *Omnibonus* had done before him, entitled this Work, as aforesaid; because he hereby endeavour'd to reconcile the Decrees of the Church, as they differ'd from the *Canons* thereof, to each other ††: And after he had compar'd the same, he dedicated it to Pope *Eugene* the Third ‡‡; tho' it does not equally appear that it was ever confirm'd. But this Collection was taken from *Dionysius Exiguus*, *Isidore*, and other Collectors of the *Canons*, and chiefly from *Burchard* and *Ivo*, but written in a different Order and Method. But I shall now hasten to that Part or Volume of the *Canon-Law*, vulgarly so called, which is in *Latin* stiled the *Decretum*, and in *English* the *Decrees*; being now in Use in the Schools.

This Work was in the first Place compil'd by *Ivo* Bishop of *Chartres*, as aforesaid; and was at length amended and compiled *de novo* by *Gratian* an *Etrurian* or *Tuscan* Monk of the *Benedictine* Order ***, whilst he was a Student at *Bononia* in the Monastery of *St. Felix*; and was afterwards confirm'd and approv'd of by Pope *Sixtus* the Third: But *Alexander*, in the Preface to his Work, says, 'That *Gratian* liv'd in the Year 1150. at *Bononia*, and compil'd this Book in the Monastery of *St. Proculus*; it being the Book, which Pope *Innocent* the Third read there as a Professor of Divinity. And tho' *Gratian's* Book be said to be an Undertaking of a private Nature, as being compil'd by a private Man; yet because it is read in the Schools, and commonly approv'd of by the People, it is binding and valid; and may be quoted and made use of for the Decision of Causes, where the Papal Law prevails. *Trithemius* and *Maranta* say, it was approv'd of by Pope *Eugene* the Third. But whoever first approv'd of it, it does not much import, since

* Mastricht. N. 273. † Mastricht. N. 274. ‡ Albericus ad an. 1446. ** Pancirol de clar. legum Interp. lib. 3. cap. 2. †† Ant. Aug. de emend. Gr. lib. 1. Dial. 1. p. 3. ‡‡ Pancr. lib. 3. cap. 2. *** Car. Sigon. de epis. Bonon. lib. 2. p. 156.

since it is at this Day undoubtedly an Authentick Book in all the Popish Countries : Because Pope Gregory the Thirteenth has confirm'd it in his Bull granted to the Printers, calling it, with the *Decretals*, the *Sextus Decretalium*, and the *Clementines*, by the Name of the Body of the *Canon-Law*. Now this Volume of the *Canon-Law* called the *Decretum* is divided into three Parts, according to the Number of the several Subjects it treats of. The first is stiled the *Distinctions*, the second is term'd the *Causes*, and the third is a Treatise concerning *Consecration*. The first Part treats of the Principles and Elements of this Law, and of the several Parts and Species thereof, and of the Rights of Ecclesiastical Persons ; and this Part consists of an Hundred and one *Distinctions*. In the Twenty first of these *Distinctions* we have the Elements and Principles of this Law laid down and deliver'd to us. Then in the Seventy three following *Distinctions* we have an Account of the Origin of the Clergy, the Form of their Institution or Ordination, their Manner of Life, Offices, &c. And the eight last of these *Distinctions* treat of the Pope's Jurisdiction. The second Part of the *Decretum* exhibits to us an Account of Judicial Matters, and such as relate to the Affairs of the Church in Point of Judicature : And this it does by the Means of Thirty six *Causes*, so called ; because some certain Cause or Case in Law is propounded at the Head or Beginning of the Law ; certain Questions afterwards arising from thence to be decided thereupon. And the third Part of the *Decretum* contains a Discourse of the Jurisdiction of the Ecclesiastical Ministry ; giving an Account of the Laws Rites and Ceremonies of the Church, and of Ordinations and Consecrations ; and all this it does in five *Distinctions*. But all these Things for the sake of Memory, are summ'd up in these Verses.

*Una cum centum Distinctio sit tibi primâ ;
Sex ac triginta Cause sunt parta secundâ ;
Tertia consecrat ac finit Distinctio quinta.*

And tho' it be doubted, whether the Treatise touching Pennance, and the third Part of the *Decretum* be Gratian's or not, because he does not seem very Orthodox in these two Parts* ; yet they are for the most Part ascrib'd to him, the Stile well agreeing with the other Part of his Writings ; and he himself appeals to them as his own †. But 'tis certain, that by the Number of Chapters no Volume was thus distinguish'd before the Edition publish'd by Anton. Contius. And, again, he soon after says, That this Treatise touching Pennance seems not to be Gratian's, but that of some other Person a little more ancient, and before him : For this whole Treatise seems to have been a Translation, and is not to be met with in the ancient *Exemplars*. In the first Part of the *Decretum* the Number of the *Distinctions* is to be quoted, and sometimes the *Initial* Words of the *Canon* or Chapter ; and these promiscuously put together with the Number of the *Distinction* itself ‡ ; as may be seen in the Explanation of the Marginal Quotations from the Books of the *Canon-Law* prefix'd unto the Body of this Work. In the second Part the Number of the *Chapter*, *Cause* and *Question* is quoted : And the same also is observ'd in his Treatise touching Pennance** ; only with the Word *Pen.* being added††. In the third Part the Number of the

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Chapter

* Maffricht. N. 320. Fran. Flor. Tract. de Authorit. Collect. Gratian. † Ant. Aug. lib. 1. Dial. 18. p. 288. ‡ Maffricht. N. 322. †† 63 Dist. cap. 22. ** 12 Q. 1. cap. 13. †† Pen. 5. Dist. cap. 6.

Chapter and the *Distinction* occurs, with the Word or Syllable *Coni* added thereunto. The Numbers and Summaries of the Chapters were not added by *Gratian* himself; but the Numbers were first added by *Anton. Contius*, and the Summaries seem to have been added by Degrees by such as publish'd the first Editions of his Works.

Altho' this Work was wrote by private Authority (as already remark'd) yet it was immediately receiv'd in all Places; so that the Popes themselves did often appeal unto *Gratian*: But it no where appears, that Pope *Eugene* the Third establish'd it by any Publick Law, tho' it was tacitly promoted by the See of *Rome* for the better advancing the Papal Authority, and for suppressing the Power of the Emperor. From hence it was that the *Decretists* had their Rise and Beginning, even under the Reign of the Emperor *Frederick Barbarossa*; who, by endeavouring to defend the pretended Rights of the Pope, did all of them in a great Measure give Birth to that long contested Dispute between the *Guelphs* and *Ghibelins*. But some of the Papists do even confess, That this Part of the Papal-Law was never otherwise receiv'd, than as Credit was given to the Author. For tho' this became a Work of great Authority among some, yet others have found several Errors of a monstrous Size therein*; and (particularly) it has been thought worthy of Correction, because it contain'd several Things not only false and spurious†, but nefarious‡ and uncertain too**. And, among these Things, it must be own'd; That several Things were found therein contain'd, which plainly overthrow the affected Monarchy of his pretended Holiness. Dr. *Duck* will have it, That *Gratian* compil'd this Book of Decrees under the Papacy of Pope *Eugene* the Third, about the Year 1157; extracting the same from the Canons of Councils, the Opinions of the Fathers, and from such Papal Constitutions, as the Popes either made and publish'd of themselves, or else by and with the Advice of the Cardinals; to which he added some of the Imperial Laws: Moreover, inserting therein some of his own Sayings, and some Rubricks added thereunto. But the Authority of all these Laws (says he) thus compil'd, is now much disputed, through the frequent Mistakes of *Gratian* in quoting the Canons of Councils, the Sayings of the ancient Fathers, and the Papal Constitutions themselves: For many of these in their Originals, from whence taken, are found quite otherwise than *Gratian* has reported them. And his Sayings and Rubricks meet with little or no Credit and Authority among learned Men; because, as a private Man, he had not the Power of enacting Laws. And the *Canonists* make no other Account and Use of his Sayings and Rubricks than they do of the Opinions of one of their own Doctors or Masters; herein differing from *Gratian*, and only giving him the Power of interpreting, and not of making Laws. But the *Canonists* say, That this *Code* has been approv'd of by Custom and common Usage; and setting aside the Rubricks and Sentences of *Gratian* himself, 'tis publickly read in Foreign Universities, and receiv'd in the Courts of almost all Christian Nations, especially since the Confirmation of it by Pope *Gregory* the Thirteenth, who employ'd several Men of eminent Learning to correct and amend the same. Many Persons do extol this *Code* for its great Use and Service to Divines and Lawyers, towards the better understanding both of the Law of God and Man; it abounding
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* Fr. Flor. de Auth. Collect. Grat. p. 307. † Ziegl. Dissert. Prælim. SS. 38. ‡ 34 Dist. cap. 4. Ant. Aug. de emend. Grat.

with the Opinions of the Fathers, and the Decrees of the ancient Councils. And tho' *Gratian* has been often out in transcribing them, and in inserting herein several Things from spurious and uncertain Authors; yet *Covarruvias*, *Contius* and *Anton. Augustin* Bishop of *Lerida*, to whom the *Civil* and *Canon-Law* are much indebted for their Purity and Beauty in particular, have taken a great deal of Pains to explain and correct this Book of the Decrees, and to restore it to its former State. These Books of Decrees written by *Burchard* and *Ivo* aforesaid, as they never attain'd the Force of Laws; so after *Gratian's Code* was publish'd were entirely neglected and out of Use.

Soon after the Publication of the *Decretum*, there arose several Commentators thereon, either thro' the obscure and ambiguous Sense of the Decrees themselves, or else with a Desire of flattering the Pope and the Clergy with a Power they do not meet with in the Decrees: For as the *Civil-Law* met with several Doctors and Interpreters thereon, so likewise has the *Canon-Law* done the same Thing in a Manner no wise inferior to the others in Number, Knowledge and Authority, but only in Point of Honesty and fair Dealing with the Law itself. Among these Commentators on the *Decretum* we may reckon *Laurent. Cremensis*, *Vincent. Castillionæus*, and *Hugo Vercellensis* *. After these came *Tancredus a Corneto*, an *Etrurian* †, and *Sinabaldus Fliscus*, otherwise called Pope *Innocent* the Fourth ‡, *Joh. Semega* or *Seneca*, commonly stiled *Teutonocus*, who reform'd the Glosses of such as went before him, and made some new Glosses of his own **. This Gloss was afterwards enlarg'd by *Bartholomæus Brixienfis* ††, and several others. But after Pope *Gregory* the Thirteenth had order'd an Amendment of the *Decretum*, those *Roman* Correctors, who were the Pope's own Creatures, subjoin'd to each particular Chapter some certain Notes of their own, whereby they point out the same Canon among the more ancient Collectors of the Canons, as already remember'd, and shew how the same may be found in their Collections; all which Notes, in the *Roman* Edition of the *Decretum*, and in the Body of the *Canon-Law*, with the Glosses, and in the two *Pitbou's* Edition, are read in the Margin; but in the other Editions they are placed at the Bottom of the Page ‡‡. Besides the foremention'd Commentators, the Reader has on the *Decretum*, the Commentaries of *Guido de Bajiso* Archdeacon of *Bononia*, *Joh. de Turrecremata*, *Joh. de Sancto Georgio*, the Provost of *Alexandria*, &c.

The second Part of the *Canon-Law* vulgarly so called is the Pope's *Decretal Epistles*, which are of the same Authority with the Decrees themselves, being in the like Manner digested into the Body of the *Canon-Law*: For this Part of the Law we have in the five Books of the *Decretals* of Pope *Gregory* the Ninth, and in the sixth of the same Title by *Boniface* the Eighth; which, with the *Clementines* and *Extravagants*, make up the entire Body of the *Canon-Law*. But tho' the *Decretals* are by the *Canonists* compar'd unto the Canons of General Councils, and are (among Papists) of equal Authority with them; yet a *Decretal Epistle* is sometimes only *Local*, and not extended to any other Place than that unto which it was sent, unless it be by way of Consequence or Implication of Law: And 'tis the same Thing if it be *Personal*. But a General *Decretal*, which is sent and directed to all Persons, binds

* Pancirol. lib. cap. 3. 3. † Cap. 4. ‡ Cap. 5. ** Panc. lib. 2. cap. 6. †† Lib. 3. cap. 7.
 ‡‡ Maffricht. N. 324.

binds and obliges all Men that are Subject to the Pope's Jurisdiction: And whenever a *Decretal* commands or forbids any Thing to be done, it imports a Necessity; but when it only permits and advises a Thing to be done, then every Man is freely left to himself either to observe or not observe it. Now a *Decretal Epistle* is that Law, which the Pope gives as an Answer unto such Persons as do consult him about any Matter relating to the Church. And these *Decretals* having obtain'd their Authority in the Council of *Rome* ***, were introduc'd and receiv'd in the Church even from the Time of the eighth Century, by laying aside almost all the Canons of General Councils*. And that the Popes might hereby confirm their own Power the better, they joyn'd more and more Force to these *Epistles* every Day †: So great a Havock did the Pope make with the ancient Law of the Church, in order to establish a Spiritual Monarchy or Hierarchy on the Ruin of Christianity.

After *Gratian's* Time the first Collection of *Decretal Epistles* or *Constitutions*, which were then publish'd as distinct from the Canons, was that which was compil'd and made by *Bernard* Provost of *Pavia*, under the Papacy of *Alexander* the Third, who by his own private Industry, collected all the *Decretals* of the several Popes, down from the Papacy of *Lucius* to the Time of Pope *Celestine*; and digested them under certain Titles, to the end that this Work might be as a Supplement to *Gratian's Code* ‡. This Collection was made from such Councils and Fathers as *Gratian* had omitted: And *Anton. Augustinus* has publish'd this Book in his Collection of ancient *Decretals*, in the Beginning of this Volume **. The second Collection was made by *Job. Vallenfis*, and (as some say) by *Gilbert.* and *Alan.* but I rather think from the Compilments of these two last nam'd, about the Beginning of the thirteenth Century, in Pope *Alexander* the Fourth's Time ††. The next Collection was made under the Papacy of Pope *Innocent* the Third, by *Peter de Benevento* the Pope's Notary; and this was done by the Command and Order of the Pope himself; and being collected from the Rules and Registers of this Pope, was called the *Roman Collection* or Edition ‡‡. But as these Collections were only made by private Hands, the *Romanists* intreated Pope *Innocent* the Third, that a new Collection might be made by publick Authority, which this Pope order'd to be compil'd from the General Canons of the *Lateran* Council, and from his own Constitutions; and being publish'd A.D. 1210. was stiled the fourth Collection ***. A fifth Collection was also made in this Papacy by Order of the fourth *Lateran* Council, which Collection consisted of Seventy one Chapters or Constitutions; and the *Decretals* publish'd after the third Collection, were added hereunto. The sixth or (as others say) the fifth Collection was made by *Tancred* of *Bononia*, about the Year 1227. wherein we meet with the *Decretals* of Pope *Honorius* the Third †††: But this last Collection was never publish'd, till *Cironius* Chancellor of the University of *Toulouse*, lately publish'd it upon finding the same in the Library at *Montferrat*; and adding learned Commentaries thereunto, he has therein explain'd such Things as relate to the History of that Time, and the Knowledge of the Law; and which were entirely omitted in all the former Glossographers ‡‡‡. *Augustinus* omitted this when he published the four first Collections of the *Decretals*. The seventh
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*** A.D. 494. * 15 Dist. cap. 3. † Baluz. Præf. ad Ant. Aug. Dialog. SS. 2. ‡ Fr. Flor. de Merh. & Auth. Coll. Gr. SS. 4. ** Maffricht. N. 338. †† Maffricht. N. 346. ‡‡ Maffricht. N. 342. *** Maffricht. N. 350. ††† Maffricht. N. 358. Franc. Flor. cap. 4.

or (as some say) the sixth Collection, which is now in Use, was made in the Papacy of *Gregory* the Ninth, and compil'd by that Pope's Chaplain *Raymund de Penna Forti* *, out of such Collections as had been formerly put together **, and from such Constitutions as were therein omitted †. And herein *Gregory* has inserted several of his own Constitutions, which he made without being consulted by *Litigants* on the †Case; and some, which he borrowed from the *Civil-Law* ††, lest Men should have Recourse to the Books of that Law, which he resolv'd to suppress as much as lay in him ‡. And tho' *Gregory* declares, he has lopt off many superfluous Parts of the former Collection; yet the Lawyers often complain of him, as having taken away several profitable Branches of the Law, and added some others more obscure ‡‡: And, therefore, the former Collections are frequently consulted. So that according to *Anton. Contius*, *Gregory's* Collections are often too short and obscure and cannot be understood without a View of the ancient Collections. The Order of the Titles is the same as in the former Compilments; and are 185 in Number. The Number of the *Chapters* and *Rubricks* of the Title is wont to be quoted out of these, by adding the Word *extra*, or else the Letter (X.) because they are *extra Decretum*.

There are several Persons that have publish'd Glosses and Commentaries on this Collection of the *Decretals*, as *Ruffinus*, *Sylvester*, *Ricardus Anglus*, *Rodoicus* surnam'd *Modicipassus*, *Pet. Corbolus* otherwise called *Bolixtus Hispanus*, *Bertrand*, *Damasius*, *Alan. Anglicus*, *Peter* Provost of *Pavia*, *Pet. Galensis* of *Volterra*, *Bernard* of *Compostella*, *Laurent. Vincent*, *Castillion* of *Millain*, *Joh. Teutonicus* and *Tancredus*, who have also publish'd Glosses on the *Decretum*, as aforesaid. The Persons succeeding these were *Guil. Naso*, and *Jac. de Albenga* Bishop of *Faenza*, *Goffredus*, *Innocentius*, *Phil. Hostiensis*, *Pet. Sampso*, *Aegidius* of *Bononia*, *Aretinus*, *Fran. Vercellensis*, *Boatinus* of *Mantua*, and the Archdeacon. There are also some Anonymous Authors, that have wrote a Book on these *Decretals*, entitled, *Suffragium Monachorum*; but as this Work is Erroneous, and imperfect in many Places, so it is of little Use. After these came Fryar *James* Canon of *St. John's on the Mount*: But *Bern. Botton* a *Parisian*, about the Year 1240. collected the Glosses of all these Persons into one Body, and enlarg'd the same, having taken all their Reputation for Learning on himself, But as these Writers on the *Canon-Law* have propounded several Absurdities in their Glosses, and are frequently guilty of much Trifling, it has passed into a Proverb, *Magnus Canonista, magnus Asinista*.

After this the compiling of *Decretals* ceas'd for some Time, till Pope *Boniface* the Eighth, in the third Year of his Papacy, towards the end of the thirteenth Century ***, committed the compiling of a new Body of *Decretals* to three Cardinals, viz. *William* Archbishop of *Ambrun*. *Berengarius Fredellus* Bishop of *Bourges*, and *Rich. de Senis* Vice-Chancellor of the Church of *Rome*. This sixth Book of the *Decretals* consists chiefly of those of Pope *Innocent* the Fourth, Pope *Alexander* the Sixth, Pope *Urban* the Fourth, Pope *Clement* the Fourth, Pope *Gregory* the Ninth and Tenth, and those of Pope *Boniface* himself; and also of the Constitutions of the Council of *Lyons*, under Pope *Innocent* the Fourth †††, and under Pope *Gregory* the Tenth ‡‡. This Collection is divided into five Books, and as many Titles almost as the Collection of

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Pope

* A.D. 1230. † Schot. Bibl. Hisp. Tom. 2. p. 186. ‡ Mar. Par. ** 352. †† Ziegler. Discurs. Præl. N. 515. ‡‡ Duar. Præf. Tract. de Sac. Min. *** A.D. 1298. ††† A. D. 1247. ‡‡‡ A. D. 1272.

Pope Gregory the Ninth; being as it were a Supplement to those Books and Titles*: And here in this sixth Book of *Decretals*, Pope Boniface has explain'd several Things very doubtfully deliver'd by Pope Gregory the Ninth. After the compiling thereof Pope Boniface did, by a particular Bull command this Book to be receiv'd and admitted in all Courts of Law, and Universities too†. But it containing several Things contrary to the French King's Interest, and being compil'd at a Time when the Controversy was on Foot between Philip de Valois and Pope Boniface the Eighth, it was never receiv'd in France‡, as it has been in all other Parts of Christendom; it being calculated entirely for the Power and unrighteous Gain of the Roman See. And, as it has been already observ'd, that in quoting Pope Gregory's *Decretals*, we make use of the Word *Extra* or the Letter (X.) so here it is noted, that when we quote the sixth Book of the *Decretals*, we either add the Word *sexto* to the Initial Words of the Law, or to the Number of the Title and Chapter; and sometimes this Figure (vi.) is made use of, as I have more clearly describ'd it at the Beginning of this Work. Joh. Andreas, an eminent Doctor of the Canon-Law, has wrote some Glosses on this sixth Book of the *Decretals*.

About the beginning of the fourteenth Century Pope Clement the Fifth caus'd the Constitutions of the Council of Vienna, as well as his own, to be collected into five Books, included almost under the same Number of Titles with the *Decretals* of Pope Gregory and Pope Boniface; and order'd the same to be publish'd on the 12th of the Calends of April, ** 1313. in a Publick Consistory. And as he dy'd immediately afterwards, they were scarce transmitted to the Universities before his Death††: Which was at length perform'd by his Successor Pope John the Twenty second, in the Year 1317. who, on the Publication thereof, gave them the Titles of *Clementines*. In quoting the *Clementines* we prefix the Word (*Clem.*) to the Number of the Book, Title and Chapter; as the Word (*Extrav.*) is prefix'd in quoting the *Extravagants*. For what succeeded the *Clementines* were twenty Constitutions of Pope John the Twenty second, and some other Popes, which are called the *Extravagants*‡; for that they being written in no Order or Method, *vagan-tur extra Corpus Collectionum Canonum*: Yet they are collected and digested into certain Titles. But these being collected by Private Authority alone, about the Year 1340. were never receiv'd as a Publick Law; being the Invention only of the afore said Pope for aggrandizing the Power of the See of Rome. This same Pope reviv'd the Rules of Chancery***, and the Right of Annats†††, belonging to the Bishop of Rome; and on this Account, at the Time of his Death, he left behind him an immense Heap of Riches. At the latter end of the fifteenth Century, the *Extravagantes Communes* of divers Popes were collected, viz. of Pope Eugene the Fourth, Calixtus the Third, Paul the Second, and Sixtus the Fourth. But this Collection was made also by private Authority, according to the Order and Method of the *Decretals*; and it was in such a manner, that the fourth Book is wanting: But both of these Collections of the *Extravagants* have been since receiv'd into Use in Foreign Countries as proceeding from several Popes; and (as it seems) added to the Body of the Canon-Law by the Doctors of this Law.

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* H. Siero Ann. ad a. 1297. † Vid. Bull. Bon. 8. ‡ H. Siero. ad a. 1301. 1302. ** March 21. †† Aventin. Ann. Broir. lib. 7. cap. 15. N. 18. †† Born. Guid. vit. Joh. 22. p. 108. *** Vid. Gomel. †† Gomel.

The Body of this Law, therefore, consists of these Parts, *viz.* of the *Decretum*, the *Decretals* of Pope Gregory the Ninth, the *Sixth Book* of the *Decretals*, the *Clementines*, the *Extravagants* of Pope John the Twenty second, and the *Extravagantes Communes*. The *Decretum* was compil'd after the manner of the *Pandects*; and the *Decretals* after the Form of the *Code*; the *Sixth Book* of the *Decretals*, the *Clementines* and the *Extravagants* were fram'd after the Fashion of *Justinian's Novels*. For as the *Decretum* in the *Canon-Law* answers the *Pandects* in the *Civil-Law*, and the *Decretals* the *Justinian Code*; so do the *Clementines* and the *Extravagants* answer the *Novels*: For as yet we had no such Thing as *Institutions* in the *Canon-Law*. But to compleat the whole, Pope Paul* commanded John Lancellot to write the *Institutions* or *Elements* of the *Canon-Law*. Wherefore the said Lancellot, taking Advice thereon, and with a Desire of gaining some Reputation to himself, did by this Pope's Order compile a Volume of *Institutions* after the Method of *Justinian's*, reducing them into four Books; and these being printed at Rome under the Papacy of Gregory the Thirteenth, were added to the Body of the *Canon-Law*. For it took him up several Years to finish this Work; and tho' he had well examin'd and revis'd the same, yet he could by no Means obtain the Approbation of Pope Pius the Fourth touching the same: So that this was publish'd only in his own Name. For, on his Return to his own Country of *Perugia*, he thus publish'd it in his own Name†, lest he should be hinder'd by the Council of *Trent*, or be oblig'd to alter several Things therein according to the Decrees of that Council, which he refus'd to do on earnest Intreaties to this end. In the Fourteenth Century, under Pope Paul the Fifth, Endeavours were us'd at the pressing Instances of Cardinal Scipio Cabellutio Galcot, Oddo Bailiff of *Narnicus*, and Lean. Ganganetto, three eminent Lawyers, to have these *Institutions* approv'd, but they could no more prevail on Pope Paul the Fifth than on Pope Pius the Fourth: For they only obtain'd to have these *Institutions* added to the *Canon-Law*, without any Confirmation. The Glosses and Annotations of two Professors at *Perugia*‡ were afterwards added to these *Institutions*, the one a Divine, the other a Lawyer: And there have been several Comments thereon written, as by Jo. Doria, Casper Ziegler, and lately by Christian. Thomasius and others. Anton. Cucchus also, after ten Years Labour in writing *Institutions* of the *Canon-Law*, publish'd the same in the Month of *September*, 1567. but without the Pope's Approbation.

But several Errors having been discover'd in this Body of the *Canon-Law*, Anton. Demochares and Anton. Contius, two learned Frenchmen, did in the sixteenth Century by their own private Authority attempt to reduce all the Decrees of *Gratian* into some better Order and Method, which they did with pretty good Success**. But the Work was a Matter of so much Toil and Difficulty, that it could not be entirely accomplish'd by those two Men. So that after the Council of *Trent* was ended, Pope Pius the Fifth chose some Cardinals and several Doctors for restoring *Gratian's Code* according to its Originals; and to these Pope Pius the Fifth added two others††. And this *Code* being at length entirely perfected under Pope Gregory the Thirteenth, was publish'd by him, together with the other Parts of the Body of the *Canon-Law*, in the Year 1580‡‡. So that this Pope now perform'd that in the

* A. D. 1585. † A. D. 1563. ‡ Bapt. Bartolinus & Anton. Timotheys. ** Baluz. Pref. ad Ant. August. Sect. 29. †† Ant. Aug. de emend. Gratian. ‡‡ Vid. Gregor. Bull Corp. Jur. Canon. prefix.

the Church, which *Justinian* had effected in the *Roman* Empire. The *Decretals* being corrected, were restor'd to their ancient Purity from the former Collections, and from the Registers of divers Popes *. Therefore we may from hence conclude, That the modern Editions do excel the ancient; and, among the modern Ones, that of *Pitbon* is the best. Out of these Registers there were afterwards compil'd these several *Bullariums* †, which do exhibit to us the Papal Constitutions at full Length.

Towards the end of the sixteenth Century *Pet. Matthæus*, a Lawyer at *Lyons*, did by his own private Authority collect a seventh Book of the *Decretals*, which he inscrib'd and dedicated to Cardinal *Cajetan*. This Book is a Collection of the Papal Constitutions, that were made and publish'd after the *Sixth Book* of the *Decretals*, the *Clementines*, and the *Extravagants*; and it consists of the same Number of Books and Order of Titles, as is found in the *Gregorian Decretals*. But tho' this Book or Collection was never approv'd of by any Papal Authority, it has been added to some of the modern Editions of the *Canon-Law*. But this seventh Book being publish'd without any publick Authority, Pope *Gregory* the Thirteenth design'd a new Book of *Decretals*, and committed the Task of it to *Flavio Ursini*, *Fran. Alciatti*, and *Anton. Caraffa*, three Cardinals. But on Pope *Gregory* the Thirteenth's Death, Pope *Sixtus* the Fifth, his Successor, committed the finishing of this Work to the following Cardinals, viz. to *Pinelli*, *Aldobrandini* and *Colonna*; and *Aldobrandini* on the Death of *Sixtus* being chosen Pope himself, he took Care to have this Work brought to Perfection. And it becoming a Doubt whether the Canons of the Councils of *Florence* and *Trent*, relating to Faith, should be insert'd or not, they adjudg'd them to be insert'd in this Collection. And thus this Volume, containing the Constitutions of several Popes, and the Decrees of several Councils for almost Three hundred Years, was finish'd on the 25th of *July*, A. D. 1598. being divided into five Books, and distinguish'd under proper Titles: But it being printed and publish'd under the Name of the *Seventh Book* of the *Decretals* of Pope *Clement* the Eighth, it became a Question, Whether the Lawyers should make Glosses and Comments on the Decrees of the Council of *Trent*, which were insert'd in this Book, as they had done on other Collections of the *Canon-Law*; because as the Doctrine and Discipline of the *Romish* Church was establish'd by this Council, they were unwilling to have the same explain'd by Lawyers, who intended no great Good to the Power of the Clergy: And Pope *Pius* the Fourth having forbidden it under the severest Censures of the Church, the Publication of this Volume is now entirely suppress'd **; the Clergy of the *Romish* Communion themselves being almost asham'd of the Exorbitant Power which this Collection gave them over Mens Purfes and Consciences, since the Reformation of Religion has enlighten'd so great a Part of Mankind.

I next come to the Authority of the *Canon-Law*, as it has been receiv'd here in *England*, and in other Countries, which enlarg'd itself, as the Papal Power increas'd and got Ground in the World: And that it might proceed with the better Success, several Persons were first employ'd to interpret the *Civil-Law* as much as possible in Favour of the Clergy; and wherever that could not be done with a tollerable Gloss or Colour,

* Mastricht. N. 396.
Introduct. ad Jus Can.

† Vid. Cherub. Bull. Rom. 1588.

‡ Mastricht. N. 427.

** Plettenb.

Colour, the Pope and his Cardinals endeavour'd not only to corrupt and deprave the Text itself, by Pensions given to Transcribers, and their own *Amanuenses*, but have likewise introduc'd several Titles into the Body of the *Canon-Law*, which are entirely of a Secular Nature, and can have no Relation to Church Matters: All which Titles in the *Canon-Law*, with the several Corruptions and false Expositions of the Text in the *Civil-Law*, and (particularly) in the *Justinian Code*, are so numerous, that it would swell this Introduction beyond its intended Length to relate them at large. Therefore whoever will take the Pains to compare the several Editions of the *Pandects* with that printed at *Florence* in the Year 1553. (which is the best Edition, as printed from the *Florentine Exemplar*) will soon find how the Pope's Creatures have mangled this Sacred Volume, as they have done the Holy Scripture itself, to serve their wicked Purposes, whenever they had an Opportunity of so doing. I have likewise taken upon me, with much Labour and Pains, to examine and collate the several Editions of the *Justinian Code*, as I have done those of the *Pandects*; and in the first Book of this *Code* alone, which principally treats of *Religion, and the Rites and Ceremonies thereunto belonging, of holy Church, and her Privileges, which either concern Ecclesiastical Men's Persons themselves or their Estates*, and the like, I find no less than One hundred and seven very manifest Errors, or private Interpolations of the Clergy in favour of themselves. For tho' the first Christian Emperors were weak enough to grant vast Privileges and Immunities to the Clergy, and to assemble themselves together in General Councils; yet these Men were not satisfy'd with these Princely Concessions, but in after Ages of the Church, when they lock'd up all Learning from the profane Laity, and had blinded the Minds of the People with an unaccountable Zeal and Devotion for the Priesthood, they began to enlarge their Rights and Privileges by frequent Interpolations and various Readings of the Text; and, having subjugated the Laity to a strange Obedience of themselves, they proceeded Step by Step to establish an Independent Power in the Church, and to call Kings and Princes before them for a pretended Salvation of their Souls; though Pride, Avarice, and Spiritual Tyranny was at the Bottom of all their boasted Designs of Piety.

The next Attempt made to establish the Authority of the *Canon-Law*, was, That all the Pope's *Decretal* Epistles should be reckon'd among the Canonical Books of Holy Scripture*; tho' this Place of *Gratian* has been corrupted and depriv'd by some of the Papists themselves, who, through a Sense of Shame for such an Impiety, do acknowledge, That this must be understood of St. *Paul's* Epistles, and in no wise of the Pope's *Decretals*: And therefore, they have wisely, since the Reformation of Religion among the Protestants, alter'd this Text of *Gratian's* in several Editions of his *Decretum*, and the Gloss thereon. But whilst the Papal Authority was by Degrees grown great in several Kingdoms of *Europe*, the *Canon-Law* was almost entirely receiv'd in many of those Kingdoms and States†, and all Judicial Proceedings were govern'd thereby; the *Decretists* and the *Ghibelins*, which were the Pope's *Spabi*, every where promoting the same in a particular manner‡.

But in *Germany* the *Canon-Law* did not begin to have a full Power till the thirteenth Century; and tho' it was then confirm'd by the Pub-

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* 19 Dist. cap. 6. † Duck, de Auth. Jur. Civ. lib. 1. cap. ‡ Pet. de Marc. de Concord. Sac. & Imp. lib. 3. cap. 6. N. 4.

lick Laws of the Empire, yet the Authority of this Law has very sensibly decreas'd in *Germany* ever since the Reign of *Lewis the Bavarian*, from the several Writers that have asserted the Laws and Rights of the Empire to be above the Pope ; and do sufficiently condemn the Iniquity of this Law, and the wicked tho' ingenious Precepts of its Avarice*. And hence it is, that several Princes and Cities of the Empire have made divers Laws and Statutes plainly repugnant to the *Canon-Law*. But (notwithstanding these Laws and Statutes) this Law continu'd in some Force till the Time of the Council of *Constance*, when this Thesis or Position first prevail'd, *viz. That a General Council was and is above the Pope* : Which Doctrine was afterwards confirm'd in the Council of *Basil*. But the *Canon-Law* suffer'd its greatest Declension in the *German* Empire at the Time of the aforesaid Reformation, when *Luther* in a great Assembly of Doctors and Students, burnt the Books of this Law, as in no wise agreeable to the Holy Scriptures, and the Word of God : And that he might the better suppress the Pope's Authority, he did in a wonderful manner extol and commend the Majesty, Justice and Equity of the *Roman Civil-Law*. For through a Resolution of entirely abolishing the *Canon-Law*, he held various Disputes with the Lawyers at *Wittenburg* : But, by the Help of *Henning. Gadenius*, *Ferome Schurt*, *Eccerard a Weyte*, and some Lawyers of other Universities, this Law has been still preserv'd in some Measure in the Empire. For as long as Persons well versed in this Law continued their Lectures thereon, they did by this Means preserve its Authority in some Degree ; yea, some Men wrote particular Apologies in its Behalf. But lest its Authority should be entirely destroy'd, it has been since approv'd of by some Princes, who in their respective Universities have lately founded Professorships in the *Canon-Law*. But tho' the States of the Empire, that stile themselves *Catholic*, as being devoted Bigots to Popery, do still preserve the Use of the *Canon-Law*, it being establish'd and confirm'd by the Civil Laws of the Empire ; yet Diocesan Constitutions and Provincial Canons are in Force among them. And in those Territories of the Empire belonging to Protestant Princes, that have freed themselves from the Papal and Episcopal Yoke of Bondage by Religious Pacts and Conventions, another sort of Law obtains ; this Exemption or Freedom being confirm'd to them by Capitulations made between Protestants and Papists. So that they have obtain'd a Power of making Laws for themselves in Church-Matters, without having any Dependency on the *Romish* Church. Therefore, among these Princes, the *Canon-Law* only so far prevails in their Territories, as it has been anciently receiv'd, and is not contrary to the Protestant Religion ; and in no wise Derogatory to their own Ecclesiastical Constitutions, and the Stile and Usage of their Consistories. For tho' *Luther* by an over-heated Zeal burnt the Books, as aforesaid, in Opposition to the See of *Rome* ; yet the People of *Brunswick*, *Saxony* and other Protestant Countries Abroad have continu'd the Use of the *Canon-Law* ever since that Time, without admitting any Change thereof, according to an Agreement made in the *Augsburg* Confession : And the same is now read and taught at *Wittenberg* and in other Protestant Universities beyond Sea, with some Alterations made and allow'd, so far as they concern Articles of Faith and Doctrinal Points of Religion ; which, being founded on the Holy Scriptures as a Rule of Faith and of pure Religion, we ought not to deviate from them.

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* Scard. de Auth. & Jurisd. Imp. Goldast. Collect. de Mon. Imp. lib. 1. cap. 7. § Dec. 1616, 1520.

The *Spaniards*, in the like manner as the Papists in *Germany*, have Recourse to the *Canon-Law*, where the *Jus Regium* is silent; and by this Law Causes are Judicially decided in their Courts in all Ecclesiastical Cases. The *Hungarians*, *Danes*, and many other Nations do acknowledge, that several of their Laws were borrow'd from the *Canon-Law*: But in *France* this Law does not entirely prevail, for the Reason already given, the *French* being in many respects govern'd by the Rules of the *Gallican Church*, which disavows the Pope's Jurisdiction in many Particulars. It likewise sufficiently appears that the *Canon-Law* was receiv'd here in *England*, tho' under certain Limitations and Restrictions from the Common Law of the Realm, since the greatest Part of the *Decretal Constitutions* in the *Canon-Law* have been found to have been sent hither by several Popes upon Controversies here among us in Ecclesiastical Causes. And thus all Christian States and Princes have admitted the *Canon-Law* more or less, without Distinction of Religion, and do still retain some Part of it. Among the *Jews* alone, indeed, there is a Disparity of Reason: For such of them as live in a Christian State are Subject to the Civil Law only, and in no wise bound by the *Canon-Law*; because as they are not of the Pale of the Church, and out of all Communion with Christians, the Church has not the Care of their Souls Salvation.

But before I proceed any farther in my Design, I shall consider how the *Canon-Law* advanced itself after its first Rise and Beginning in the Church, by the Subtlety of the *Romish* Clergy, soon after the Seat of the *Roman Empire* was remov'd to *Constantinople*, and *Barbarism* had invaded the politer Nations of *Europe*; which I promis'd as my first principal Enquiry in this Introduction to the following Work. And then I shall shew how and by what Steps it came into *England*, so far as the same has been receiv'd here among us in ancient Times. For the Imperial Residence of the *Roman Empire* being remov'd to *Constantinople*, it so weaken'd the Western Parts of the Empire, and expos'd it not only to the foreign Invasions of the *Goths*, *Vandals*, *Herules*, *Lombards*, and other Flotes of People, that by Secret Instinct, about these Times were weary of their own Dwellings, but likewise to the Rising Power of the Bishop of *Rome*; who by Patience, and for his own Advancement, out-rode the Storms of Foreign Force; and, taking the Advantage of the Publick Calamities of those Times, he began to insinuate himself the deeper into the Consciences of a Distressed People, that knew no other Consolation in a plunder'd State, but from God and the Bishop, who was the Chief amongst them in Account at that Time. And the Beauty and Splendor of the Bishop of *Rome* thus growing in the West by the Indulgence and Supineness of the *Roman* or Eastern Emperors, it made him to outreach not only his own Diocess and Province, but likewise to aim at a Kind of Ecclesiastical Empire, and a Title according thereunto; which at length he attain'd from an Emperor weak and well fit enough for his Purpose, (for he was now called the Universal Bishop): And that was sufficient to make him pass so for current in the Empire.

But *Britain* was forsaken by the *Roman Empire* above One hundred fifty three Years before this Time. So that tho' the Emperor could prefer the Power and Honour of the *Roman* Beast his Chaplain as far as his own, which was to the *French* Shoar; yet *Britain* was reputed to be in another World under the Power of the *Saxons*, and not worth looking after, till the Havock and Plunder, which was then made, was over; and the *Saxon* Affairs well settled in Peace, in such a manner as some
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Good might accrue to the Clergy. Then an Instrument was sought after for this Work, and none was found so fitly qualified to wind up the *Saxon* to the *Roman* Bent as a Monk, that was then deem'd an humble and holy Man in the Opinion of all, but those who were so in Truth, and knew him to be otherwise. Thus was *Austin* sent by Pope *Gregory* to do a Work that was not then publicly owned: For it was pretended to bring in Religion to the *Saxons* in *England*, tho' the true Design was nothing else but introducing the Papal Power, and a Church-Policy, with a kind of Worship that render'd the *Latria* to God, and the *Dulia* to *Rome*. And, therefore, they gave *Austin* the Title of the *Saxon* Apostle. The *Saxons* were not wholly destitute of Religion, and that *Gregory* himself, in his Letter to *Brunchilda* the *French* Queen, plainly confesses: *Indicamus*, says he, *ad nos pervenisse Ecclesiam Anglicanam esse feri Christianam*. So that there was a good Disposition to Religion before ever *Austin* came into *England*; and such an one as rang loud, and reach'd the Bishop of *Rome*. But this is far more evident from the *Saxons* keeping of *Easter more Asiatico*; which Custom also continu'd sore against *Austin's* Will for fifty Years after his coming hither; as we may learn from the Dispute between *Colman* and *Wilfred*, that witnesses hereunto. And it had been a miraculous Ignorance or Hardness of Heart, had the *Saxons* (a People ordain'd for Mercy) convers'd with the Christian *Picts* and *Britains* above an Hundred and fifty Years without the least Sense of their Religion. Therefore, if we take *Austin* in his best Colours, he might be said to bring Religion to the South *Saxons*, but then it was after the *Roman* Garb; and his warmest Disputes about *Easter*, the *Roman* Supremacy, his own *Legatine* Power, and his worthy Queries to the Pope, do all plainly testify, That he regarded the Fashion more than the Thing itself, and the Fashion of his Person more than the Work he pretended to. For he loved State and Grandeur, and desired to be somewhat like the Legate of an Universal Bishop: And, therefore, from a Monk he soon became a Bishop in *Germany*, before he ever had a Diocese, or had seen *England*. And perceiving his Work was like to thrive, upon his Return he was made Archbishop of the *Saxons*, before any other Bishop was amongst them: And, after three Years, had the Pall, with the Title of Supremacy over the *British* Bishops, that never submitted to him. And thus Church-Policy first came into *England* by *Austin's* Means; and then in Process of Time the Papal *Canon-Law* succeeded, which did in a great Measure give the first Entrance unto all that Bondage and Misery that has follow'd since.

For upon *Austin's* first coming into *Kent*, the farthest Corner of all the Island from the *Picts* and *Britains*, and consequently less prejudic'd by his Church-Policy, he so far insinuated himself into the Affections of the South *Saxons*, that they readily swallow'd all that bitter Portion of the *Roman* Hierarchy from the Pope down to the Apparitor, with a *Quicquid Imponitur & imponetur*; which was of such a lasting Efficacy, that it does not cease to work to this Day in many Respects, tho' it was slow in its first Operations. For the *Saxons* having then a Government founded on the Liberty of the People, it was a Master-piece of Cunning for *Austin* and his Clergy so to work the Matter, as to remain Members of the Commonwealth, and yet to retain their Affections for the See of *Rome*; which was now grown to a high Pitch of Grandeur. For Reason must tell them, That the *Saxon* Principles would not suffer them to be in all Respects for *Rome*, nor the *Roman* Canon allow them to be wholly *Saxon*. And perceiving likewise, that the Times were too
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tender to endure a Declaration on either Part, they chose therefore a third way, which was to preserve the Municipal Laws in some Moderation towards the Canon; and to that end they endeavour'd such a Temper upon the State as must admit the *Canon-Law* to be in some Reputation, such as without which the Commonwealth could not well subsist, no more than a Body without a Soul. And to this Temper the *Saxons* were sufficiently prepar'd and inclinable: For it was no new Thing for them to admit the Heathen Priesthood into their General Meetings, and to allow them much Power therein. And then it was but changing the Person, and they might do as much for their Bishops, when they became Christian. The *Saxon* Kings were hereupon oblig'd to make a Virtue of Necessity; and, upon the Entrance of Prelacy into this Kingdom, to advance Bishops to be common Favourites both of *Rome* and themselves; and, to maintain a good Correspondence between both Swords, they were to countenance the Power of the Temporal Magistrate in all Cases of Dispute between him and his Subjects. And upon this Condition the Prince was to give way to the Bishop of *Rome*, and the Spiritual Power of the Clergy, who became Lovers of Lordship, and Disturbers of States and Kingdoms; and if they serv'd their Country in any Thing, they serv'd *Rome* much more. Their Merchandize was made of the Policies and Councils of Kingdoms and States; and such Returns proceeded as were still subservient to the *Roman* interest. They at length prevail'd on the Weakness of Princes to live by Laws of their own making: And thus, in Course of Time, they did by Degrees introduce into all Christian Nations first the Canons of the Church made by General and Provincial Councils, and then what we here call the Papal *Canon-Law*, as already observ'd.

In the Year 680. at the Command of *Ethelred* and three other *Saxon* Kings, *viz.* *Egfrid* of *Northumberland*, *Aldwulf* of the *East Angles*, and *Lothar* of *Kent*, Archbishop *Theodore* summon'd a Synod at *Hatfield* in *Hertfordshire*, in which we received the Canons of five General Councils; as that of *Nice*, *Constantinople*, *Ephesus*, *Chalcedon*, and another in *Constantinople*, with those Constitutions made at *Rome* by the Synod held under Pope *Martin* *, which Pope *Agatho* this Year sent into *England*. But there are several Canonical Decrees in the Body of the *Canon-Law*, which were never receiv'd and observ'd here in *England* by the Church even in the Times of Popery itself; As that a Woman should not be admitted to be a Witness against a *Presbyter* †; That no Sentence of Condemnation should be pronounc'd against a Bishop, unless it was founded on the Evidence of Seventy two Witnesses ‡; and several Decrees of the same Leaven and Impression **: The Repetition of which would almost fill a large Volume. Indeed many Attempts were made by the Clergy to establish the whole Body of the *Canon-Law* here in *England*, but our Kings would never suffer it. King *Henry* the First rejected several whole Titles of this Law, and insisted on the ancient Laws of the Realm, commanding, *First*, That all Controversies between the Laity and the Clergy should be try'd in the King's Court. *Secondly*, That no Bishop or Clerk should go out of the Kingdom without the King's Licence; and at their going out should swear to procure no Damage to the King or the Realm. *Thirdly*, That no Appeals should be made to the Pope, but all Pleas in the Consistory shall be made and remov'd, 1st, To the Archdeacon's Court. 2^{dly}, From thence to the Bishop's Court.

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* A.D. 648. † 15. Q. 3. 3. ‡ 3. Q. 5. 3. ** 43. Dist. c. 2.

3dly, From thence to the Archbishop's ; and, *lastly*, To the King's. *Fourthly*, That *Peter-Pence* be paid to the King. *Fifthly*, That Clerks guilty of Treason be hang'd, drawn and quarter'd; and such as are guilty of Felony be hang'd. *Sixthly*, That all Persons who are found bringing any Excommunications or Interdicts from *Rome* into *England*, be dealt with as Traitors, with many of the like Nature. But King *Henry* the Second endeavouring to establish these Laws by the Name of *Avita Leges*, or his Grandfather's Laws, met with powerful Opposition from that turbulent Prelate Archbishop *Becket* in the settling of them.

In the Forty second Year of King *Henry* the Third's Reign *, *Boniface* the younger Son of *Thomas* Earl of *Saxony*, and Archbishop of *Canterbury*, made several Canons and divers Provincial Constitutions, directly against the Laws of the Realm, which Canons begun thus. *viz. Universis Christi Fidelibus, ad quos præsens Pagina pervenerit. Bonifacius Misericordie Divinæ Cant. Archiepiscopus, totius Angliæ Primas, &c. in verbo salutari salutem*; and ending thus, *viz. Actum apud Westm. sexto Iduum Junii, Anno Domini 1258. In quorum omnium Robur & Testimonium, &c.* which being exceeding long, I cannot here insert. But the effect of them was to usurp and encroach upon several Matters which did apparently belong to the Common Law. "As among many other Things the Tryal of the Bounds and Limits of Parishes, and the Right of Patronage; against Tryals of Tithes by *Indicavit*; against Writs to the Bishop upon a Recovery in a *Quare Impedit*, &c. in the King's Court; that none of the Possessions or Liberties, which any of the Clergy had in Right of their Church, should be try'd before any Secular Judge (so as that they would not only have Cognisance of Things Spiritual, but of Things Temporal also) and concerning Distresses and Attachments within their Fees." And in effect that no *Quo Warranto* should be brought against them, having been long in Possession of Charters, &c. granted to them, with an Invektive against the perverse Interpretation made thereof by the Judges of the Realm, (for so they term'd it). And a Commandment was given to the Bishops and their Officers to admonish the King, to interdict his Lands and Revenues, and to thunder out an Excommunication against the Judges and others, if they violated or did not obey the said Canons and Constitutions†. And this was the principal Ground of the Controversies between the Judges of the Realm and the Bishops, who by their Ecclesiastical Judges did usurp and incroach on the Common Law.

And such was the audacious Pride and Arrogance of this Archbishop, that he, by a Provincial Constitution in *Lindwood*‡, forbid all Prelates and others to appear in the King's Courts upon Summons or Process of Law touching Causes meerly Spiritual: But yet he was so modest and humble, in this respect, that he would permit them to apply to the King either *Ore tenus*, or by Writing; and to signify to him, That they could not yield Obedience to his Commands in this Behalf without manifest Danger to their Order; and were likewise either by themselves or their Com-Prelates to shew, that the Cause did not belong to him. And then if the King upon Admonition did not desist from such Process, they were commanded to proceed against his Under-Sheriffs, and other Officers, according to the Ecclesiastical Law, and to forbid them all Church-Communion **: Such was the Power and Lordliness of the Clergy here in *England* in those tempestuous Times of Government.

The

* A.D. 1260. † Lib. 5. Tit. 15. cap. 1. ‡ Vid. Lindw. l. 3. Tit. 28. c. 2 & 3. ** Vid. Lind. ut supra.

By an Act of Parliament in the 35 of *Henry* the Eighth, Chap. 16. the King was authorized during his Life-time to name Thirty two Persons, *viz.* Sixteen Temporal and Sixteen Spiritual Men to examine all Canons, Constitutions and Ordinances Principal and Synodal, and to establish such Ecclesiastical Laws as he and they should think meet and convenient to be used in all Spiritual Courts. And in pursuance hereof they compiled a Body of Laws under the Stile and Title of *Reformatio legum Ecclesiasticarum*: Which for want of a due and proper Confirmation are left to Posterity without any Force or Authority belonging to them. But note, this Act is since expir'd **. In the second Year of King *James* the First's Reign, it was resolv'd by all the Judges, the Lord Chancellor *Ellesmere*, the Archbishop of *Canterbury*, the Bishop of *London*, and a great Number of the Nobility, then assembled at the King's Palace, That the King without a Parliament might make Orders and Constitutions for the Government of the Clergy; and might deprive them if they disobey'd such Orders: For the Supream Ecclesiastical Power is vested in the King ††. But tho' all Papal Decrees, Canons, Constitutions not anciently receiv'd here, and such as are contrary to the known Laws and Customs of the Realm were abolish'd in *England* by

* Vaug. Rep. p. 132. † 10 E. 3. 1. 5. E. 3. 9. 19. E. 3. ‡ Hetl. Rep. p. 101. Palch. 1657.
* 25 1st S. ch. 19. SS. 7. †† Crok. Rep. p. 37.

by the 25 of *Henry* the Eighth, Chap. 19. and by that abolishing, the Clergy promis'd in *Verbo Sacerdotis*, not to make, ordain or execute any Canon or Ecclesiastical Constitution without the Royal Assent first had thereunto; yet the Body or Book of Canons made in a Synod begun at *London* in the Year 1603. commonly called King *James's* Canons, are certainly in Force, tho' not particularly confirm'd by Parliament; because they were made in Pursuance of the Authority given by Parliament, and confirm'd by Royal Assent. For tho' indeed no Canons of *England* stand confirm'd by Parliament, yet they are the Laws which bind and govern in Ecclesiastical Affairs. For the Convocation may with the King's License and Assent had under the Great Seal, make Canons for the Regulation of the Church, and that as well concerning *Laicks* as *Ecclesiasticks*: And so is *Lyndwood*. Indeed, they cannot alter or infringe the *Common Law*, *Statute Law*, or the King's Prerogative, as aforesaid: But they may make Alterations in Ecclesiastical Matters, or else they could not make any new Canons. All that is requir'd of them in making new Canons, is, that they do confine themselves to Church-Matters*. For as no Human Law can be made, which is contrary to the Divine Law; (and 'tis only binding in those Things which are permitted by the Divine Law:) So no Canon can be made, which is repugnant to the Law of the Land. In the Case of *Grove* and Dr. *Elliott* Chancellor of *Sarum* †, Justice *Tyrrel* was of an Opinion, That the King and Convocation without the Parliament cannot make any Canons, that shall bind the Laity, tho' they may the Clergy: But surely that Judge had never read or (at least) consider'd well the Act of Parliament ‡. Indeed, the Ecclesiastical Canons and Constitutions treated on by the two Archbishops of *Canterbury* and *York*, and the rest of the Bishops and Clergy of those Provinces, and agreed upon with the King's License in their several Synods begun at *London* and *York* **, in the sixteenth Year of King *Charles* the First's Reign were complain'd of and much insisted on by the House of Commons, as a palpable Invasion made by the whole Body of the Clergy upon the Laws and Liberties of the People: But I shall give the Reader some Account hercof from the Words of the Earl of *Clarendon* in his History of the late Civil War ††, who there says as follows, *ciz.*

“ That after the Dissolution of the former short Parliament, the
 “ Convocation was continued by special Warrant from the King; and
 “ by his Majesty in a solemn Message sent to them by Sir *Harry Vane*,
 “ then Principal Secretary, requir'd to proceed in the making of Canons,
 “ for the better Peace and Quiet of the Church. Notwithstanding this
 “ Command ‡, the Chief of the Clergy, well knowing the Spirit of Bitterness
 “ contracted against them; and many obsolete Pamphlets against
 “ their Jurisdiction and Power, being, since the Commotions in *Scotland*,
 “ revived and publish'd with more Freedom; desir'd his Majesty, *That the*
 “ *Opinions of the Judges might be known and declared, whether they*
 “ *might then lawfully sit, the Parliament being dissolv'd, and proceed in*
 “ *the making of Canons; as likewise, upon other Particulars in their*
 “ *Jurisdiction, which had been most incroach'd against?* All the Judges
 “ of *England*, upon a mature Debate, in the Presence of the King's
 “ Coun-

* Vent. Rep. pr. 2d. p. 44. † Vent. Rep. pr. 2d. p. 43. ‡ 25 H. 8. ch. 19. ** A. D. 1640.
 †† Pag. 204. &c 205. Svo. Edit. Vol. 1st. †† This Command was at the Instance of Archbishop *Land*,
 or (as others say) Sir *Harry Vane*, on Purpose to ruin the Church.

“ Council, under their Hands asserted the *Power of the Convocation in*
 “ *making Canons, and those other Parts of Jurisdiction, which had been*
 “ *so enviously question'd.* Hereupon they proceeded; and having com-
 “ posed a Body of Canons, presented the same to his Majesty, for his
 “ Royal Approbation. They were then debated at the Council-Board,
 “ not without notable Opposition: For upon some lessening the Power
 “ and Authority of their Chancellors *, and their Commissaries, by those
 “ Canons, the Professors of that Law took themselves to be disoblig'd;
 “ and Sir *Henry Martin*, (*who was not likely to oversee any Advantages*)
 “ upon several Days of Hearing at the Council-Table, with his utmost
 “ Skill objected against them: But in the End, by the *entire and*
 “ *unanimous* † Advice of the Privy-Council, the Canons were confirm'd
 “ by the King under the Great Seal of *England*; and there enjoin'd to
 “ be observ'd. So that whatsoever they were, the Judges were at least
 “ as guilty of the first Presumption in framing them, and the Lords
 “ of the Council in publishing and executing them, as the Bishops or
 “ the rest of the Clergy, in either. Yet the Stern fell wholly on the
 “ Church; and the Matter of those Canons, and the manner of making
 “ them, was insisted on as a pregnant Testimony of a malignant Spirit in
 “ the very Function of the Bishops. The Truth is, the Season in which
 “ that Synod continued to sit was in so ill a Conjunction of Time (upon
 “ the Dissolution of a Parliament, and almost in an Invasion from *Scot-*
 “ *land*) that nothing could have been transacted there of a Popular and
 “ prevailing Influence. And then some sharp Canons against Sectaries‡;
 “ and some Additionals in Point of Ceremonies **, countenancing, tho'
 “ not enjoining what had not been long practis'd, infinitely inflamed
 “ some, and troubled others: who jointly took Advantage of what was
 “ strictly amiss, as the making an Oath ††, the Matter of which was
 “ conceived incongruous; and enjoining it to many of the Laity, as well
 “ as the Clergy ††; and likewise the granting of Subsidies. So that the
 “ House of Commons (that is, the major Part) made no Scruple, in that
 “ Heat, to declare, *That the Convocation-House had no Power at all of*
 “ *making Canons*: Notwithstanding it was apparent by the Law, and
 “ the uncontradicted Practice of the Church, that Canons had never
 “ been otherwise: And *that those Canons contain'd in them Matter of*
 “ *Sedition and Reproach to the Regal Power; prejudicial to the Liberty*
 “ *and Property of the Subject; and to the Privileges of Parliament.*”
 But as these Canons were then censur'd, and seem to have in them several Matters contrary to the Rights of the People, and the Laws of the Realm, they have never been in use since, tho' they contain some wholesome Doctrines and Institutions in some of them, as I shall hereafter more largely observe.

We likewise read of a certain Book of Articles or Canons which were made, consented and subscrib'd to by a Provincial Synod begun at St. *Paul's Church in London* the third Day of *April*, 1571. by *Mat. Parker* Archbishop of *Canterbury*, and by all the rest of the Bishops of this Province, attending either in their own Persons, or else by their Proxies: But it is not said, this Book of Canons was confirm'd by the Royal Authority. But, in the 27th Year of the Reign of *Queen Elizabeth*, there were certain Articles or Canons made by the Archbishop of *Canterbury*, and the rest of the Bishops and Clergy of this Province in a
 I Synod

* Can. 11. 12. & 14. vid. † These Words in the Text mark'd or printed in the *Italic Letter* are suppos'd to be an *Oxford Interpolation*. ‡ Vid. Can. 5. ** Can. 7. †† Can. 6. †† Can. 6.

Synod begun at *London*, *November* the 24th, 1584; and these were approv'd and confirm'd by Royal Authority. On the 25th of *October*, in the Thirty fourth Year of the said Queen's Reign, another Provincial Synod was begun and held by the Archbishop, Bishops, and the rest of the Clergy of the Province of *Canterbury* at *London*, wherein divers Canons and Ecclesiastical Constitutions were treated of by the said Synod, and being afterwards approv'd and confirm'd by the Queen's Majesty, were by her Royal Authority under the Great Seal of *England* transmitted to the two Provinces of *Canterbury* and *York*, and publish'd for the due Observation of them.

The Council of *Melfa* enjoins, That the Decrees of the Canons be observed by all Persons, and that in Ecclesiastical Acts or Matters of Judicature; and that no one does presume to govern himself by his own Sense and Opinion of Things: But let him give Judgment (says that Council) according to the *Civil* and *Canon-Law*; that is to say, according to the *Civil-Law* in Matters of a Temporal Nature, and according to the *Canon-Law* in Spiritual Matters. But tho' the Canons of this Council were never receiv'd here in *England*, yet all Ecclesiastical Matters of Judicature ought to be regulated and govern'd among us according to the Rules and Practice of the *Canon-Law*, and not by the *Civil-Law*, unless it be in some particular Cases wherein that Part of the *Canon-Law* was never admitted here. Yea, according to the *Canonists*, if a Dispute shall happen to be about an Ecclesiastical Matter, tho' it before a Secular Judge, yet it ought to be *decided* according to the *Canon*, and not by the *Civil* or any *Secular* Law. Observe, that I say *decided*, and not handled or treated of, because in respect of Matters *Preparatory* to Judgment; the Law of the Court ought always to be observ'd, where the Suit or Matter is Judicially try'd*. And thus even *Justinian* himself would have all Judgments made and directed by the *Canon-Law*, in all Causes relating to Ecclesiastical Matters; commanding the sacred Canons herein to be kept and observ'd in their full Force and Vigour, no less than the *Civil-Law*. For *Justinian* profess'd himself to follow the first four General Councils in all Things that are ordain'd and confirm'd by them; enacting, That the *Dogma's* and Opinions of these Councils should be observ'd as Holy Writings†. And, *lastly*, not only the Advantage, but even the Necessity of the *Canon-Law* is acknowledg'd by all Christian Nations.

For, *First*, if you take away this Law, we have no just Method and Form of Proceeding in Judicial Causes of an Ecclesiastical Cognifance; since this Form is only compriz'd and set down in the second Book of the *Decretals*. And, *Secondly*, We shall be without the Decisions of several important and considerable Controversies; which, being taken from the Laws of Nature and of Nations, are not be met with in any other Books but in those of the *Civil* and *Canon-Law*. And *Thirdly*, The Lawyers themselves will be without the united Knowledge of both these Laws to their great Disadvantage: For as the Interpreters of the *Canon-Law* are deem'd but very unskilful Instructors without the Knowledge of the *Roman Civil-Law*; so are the Interpreters of the *Civil-Law* reckon'd but mean Lawyers with a due and proper Understanding of the *Canon-Law*. And both these Laws are at this Day so link'd together, that no one can be said to be a Lawyer beyond Sea, without understanding both of them: And he is entirely

* 11 Q. 1. 1. † Nov. 1. 51 cap. 1.

ly ignorant of both of these Laws, who contents himself with the Knowledge of one of these alone.

I shall conclude this Introduction with some proper Observations on the *Canon-Law* in general. And, *First*, It is to be observ'd, That there is this Difference between a *Canon*, a *Decree*, a *Decretal Epistle*, a *Dogma*, *Sanction*, *Interdict*, and a *Mandate*, viz. A *Canon* is said to be that Law which is made and ordained in a General Council or Provincial Synod of the Church. A *Decree* is an Ordinance, which is enacted by the Pope himself, by and with the Advice of his Cardinals in Council assembled, without being consulted by any one thereon *. A *Decretal Epistle* is that which the Pope decrees either by himself, or else by the Advice of his Cardinals: And this must be on his being consulted by some particular Person or Persons thereon. A *Dogma* is that Determination, which consists in and has a Relation to some Casuistical Point of Doctrine, or some Doctrinal Part of the Christian Faith. And a *Precept* or *Commandment*, in *Latin* called *Mandatum*, is that which consists in and has a respect to some moral Point of Doctrine, viz. such as concerns our Manners, and our inward and outward good Behaviour as Men in this Life. But strictly speaking, a Law made in a Provincial Synod is properly term'd a *Provincial Constitution*. But then,

Secondly, It is to be noted, That by the *Canon-Law* under the Name and Appellation of a *Canon* is included every Ecclesiastical Constitution; therefore if we take the Word *Canon* in a large Sense, it is the same Thing as an Ecclesiastical Constitution; but, taken strictly, it is a Constitution made in some General Council, as aforesaid. Moreover, 'tis to be observ'd, That every Canon or Ecclesiastical Constitution may be called a Law; because a Law is a written Constitution: And as the Constitutions of the *Civil-Law* are stiled Secular Laws, even so in like manner are the Canons of the Church often called *Ecclesiastical Laws*. And,

Thirdly, It is to be remark'd, That as the Pope's *Decrees* properly so called, are, according to the *Papal-Law*, of equal Authority with the Canons of General Councils; so the Pope's *Decretals* are of the same Authority with the *Decrees* themselves, being a Part of the *Canon-Law*, as they are distributed among the Canons of the Church. Yet sometimes a *Decretal Epistle* is only *local* (as already remember'd) and is not drawn *ad Consequentiam*; that is to say, it has no Effect or Operation in any other Place than that which it expressly concerns. And 'tis the same Thing if such *Decretal Epistle* be *Personal*, viz. when it respects only some particular Person.

Fourthly, A Penal Canon or Constitution ought not to be extended by a Declaratory Sentence of Things therein not express'd, tho' there be a perfect Parity and Similitude of Reason assign'd for the same; because such an Extension would be made by a Man, that has no such Legislative Power vested in him: But a loose and unconfin'd Extension ought not to be made in Penal Canons and Constitutions; and such are the Provincial Constitutions of Archbishop Boniface in *Lyndwood's Code*; yet where there is the same Reason entirely subsisting, there the same Law ought to be observ'd in a Case not express'd therein. And, moreover, 'tis a Rule in Law, That an Ecclesiastical Canon or Constitution, speaking *de Personâ cerâ*, ought not to be extended *ad Personam representatam*;

* Vid. Gloss. & Doct. in 10 Dist. cap. 4. verb. *Canones & Decretals*.

sentatam; especially if it be a Penal Canon or Constitution, as the greater Part of the Provincial Constitutions of Archbishop *Beniface* are, Penal, tho' little regarded among us.

Fifthly, 'Tis to be known, That an Ecclesiastical Canon or Constitution has only a Respect to Things future, and not to Things past*: And thus is every Law only extended to such Things as shall happen hereafter; unless there be an express Provision made therein, that it may have a Retrospect and be extended to Things past. And, moreover, 'tis a general Rule in Law, That no one shall be punish'd *sine Culpâ*: But he that is punish'd by a Law *ex post facto*, that is to say, without any Fault committed against any Law in Being, is punish'd without a Fault: *Ergo*. Again, if a Law or Canon speaks in Words only of the *Present Tense* it ought not to be extended to Things future, lest it should afford Matter of Offence, and administer much Mischief. Thus if it be provided by a Law or Statute, That every banish'd Man, on the Payment of Ten Pounds, should be discharg'd from his Banishment: This, I say, does not proceed in Favour of him, who shall be banish'd hereafter; because it would encourage Offenders: But 'tis otherwise, if this Reason should cease; because then, tho' such Law or Statute does speak in Words of the *Present* or *Præterperfect Tense*, yet 'tis extended to Things future; because the Law speaks in Special.

Sixthly, A Law or Canon according to the Ecclesiastical Law, does not begin to bind and oblige, till two Montht after, or from the Time of its Publication. For after the lapse of these two Months, a Knowledge thereof is presum'd to reach all Persons concern'd therein; and this Presumption of Knowledge is not a Presumption of *Law*, but a Presumption by *Law*, since it admits of Proof to the contrary from any Man that can prove himself to be ignorant of the Publication of such Law or Canonical Constitution. And thus a Law or Canon shall not affect Persons truly ignorant, tho' some Law or Canon should precede the Fact †.

Seventhly, 'Tis to be observ'd from the Nature and Reason of a Law, Canon or Constitution, that the same may be extended by the Law or Canon itself, or by any other Constitution; and this in several Causes. *First*, When the Words of such Law, Canon or Constitution may be drawn to a Case, wherein a Majority or Parity of Reason concludes the same Thing, even according to the largest Signification of a Word. For Example sake: The Words of a Law or Statute do permit a Man to kill or put another to Death: Therefore, from a strong Majority of Reason they do permit him to wound; because the Person wounding may be said to kill or put to Death, in respect of the Intent of the Person wounding‡. The like Example also appears in a Statute, which forbids a Daughter to succeed to the Inheritance, as long as any Male Heir or Issue is living: For by a Majority of Reason this Prohibition also is extended to a Niece or Grand-daughter **. An Extension by a Parity of Reason may be made from the strict Signification of a Word to the large and extended Sense thereof according to *John Andreas* †† on the *Canon-Law* quoted in the Margin; where he observes, that the Word *Election* is extended to a *Presentation*.

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* X. 1. 2. 2. † Idem ut supr. X. 1. 2. 13. ‡ D. 9. 2. 32. ** D. 50. 16. 220. †† In cap. 47. vi. 1. 6.

By the *Canon-Law* a Bishop may make a Canon, Decree, or Statute, which shall oblige all Persons, that are Subject to his Jurisdiction, and such a Decree or Statute is called an Episcopal Canon: But 'tis to be observed, that a Bishop cannot enact any Thing contrary to the General Canons or Constitutions of the Church.

There has been a great Doubt among some of the *Canonists* indeed, *First*, Whether a Bishop can make Laws without the Pope's Consent and Approbation, and what Rule they ought to observe herein, *viz.* Whether a Bishop may do every Thing which he is not forbidden to do, or whether he may only do that, which he is allow'd to do? Wherein it is to be consider'd, *First*, That according to the *Canon-Law*, Bishops cannot make Laws in such Matters as are specially reserv'd unto the Pope himself; if they are any wise repugnant to such reserv'd Cases: And this appears from that pretended Subordination, which is due from Bishops to the Pope *. *2dly*, They cannot make any Decrees or Statutes, which are contrary to the Common Law of the Church, because they would be *eo ipso* contrary to the Will of the pretended Sovereign Power thereof, our Lord the Pope †. *3dly*, 'Tis to be noted, That they cannot make any Statute or Decree in Matters of high Importance, and of an arduous Nature, because they are by a general Rule in the Papal *Canon-Law* reserv'd to the Apostolick See ‡. And those Things are said to be of a high Importance which concern the State of the Universal Church, or are repugnant to the Privileges and universal Customs of the Church **. Again, a Bishop cannot subject one Church to another, nor can he unite two Bishopricks, or divide one into two, or make any Law for the Alteration of the Time of Lent, and the like.

The *Second* Doubt is, Whether a Bishop can make Statutes without the Advice or Consent of his Chapter or Clergy? Some Persons according to the Gloss on the *Canon-Law* hold the Affirmative: But that Gloss (I think) does not warrant it; for it only says, that Bishops may make Constitutions. And hence the Abbot †† absolutely denies this Doctrine to be true on the Authority of *Joh. Andreas*. And this is also inferred from those two Chapters in the Law, touching those Things which a Prelate may do without his Chapter's Consent; which Laws do not speak of Statutes, but only of exposing the Goods of the Church, and the like; which ought not to be done by a Bishop without his Chapter. But more of this hereafter, under their proper Titles.

We have several Rules laid down and quoted to shew, in what Causes the *Canon-Law* still prevails, and is made use of in the Courts of Law, and Dominions of the Protestant Princes in *Germany* and other Places: And, among these there are three principally settled and agreed upon, as being most remarkable. The *First* is, That as often as any Matter is doubtful according to the *Civil-Law*, and may be decided by the *Canon-Law*, it ought to be determin'd by the *Canon-Law*; and so *vice versa*: But in *England* this Rule can have little or no Place, because the *Common Law* so much prevails over the *Civil* and *Canon-Law*. The *Second* is, That whenever the *Civil* and *Canon* do clash and interfere with each other, so often ought each of these Laws to be observed in their respective and proper Courts; unless it be in a Cause or Matter of Sin, Conscience and Equity, wherein the *Canon-Law* shall prevail: But with us in Matters of Equity and Conscience in all Civil Causes, the good

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* X. 1. 7. 1. X. 3. 4. 1 & 2. † X. 3. 18. 2. ‡ Gloss. in cap. 2. x. 1. 32. Gloss. in cap. 2. Dist. 3. Sect. Porro. ** X. 1. 4. 8. Gloss. in v. Constitutus. †† X. 1. 30. 10.

Conscience and Equitable Opinion of the Court of *Chancery* prevails. The *Third* is, When there is no Difference laid down between these two Laws: For then in *Germany* the *Canon-Law* prevails in all Matrimonial Causes, in Pacts, and in the Business of an *Emphyteusis*, in Usury, and in an *Anticresis* or a *Mutual Use*, viz. When one borrows one Thing and leaves another as a Pawn for the Lender to use in the mean while, or Land mortgaged, which the Creditor makes use of till he be paid or satisfied in Point of his Debt; in all Matters relating to Church-Estates; Tithes, Pious Uses, Testaments, *Fidei-Commissa*, Prescriptions, Oaths and the Method of proceeding in Ecclesiastical Judicature. But to speak Truth, these General Rules do still admit of several Limitations and Exceptions: So that there is but very little use of the *Canon-Law* in several Protestant Countries; unless it be in Matters relating to Church Estates, Tithes, Oaths, Matrimonial Causes, Last Wills and Testaments, and the like; since all other Matters are for the most Part govern'd by the Civil and Municipal Laws of the Countries, and by Provincial and Ecclesiastical Constitutions therein enacted and ordained; as happens here in *England*.

Tho' several Titles of the *Canon-Law* are out of use with us here in *England*, by Reason of the gross Idolatry they contain in them: As the Title of the Authority and Use of the Pall, the Title of the Mass, the Title of Relicks, and the Worship of Saints, the Title of Monks and Regular Canons, the Title of keeping of the Eucharist and Chrism, and such other of the like Quality: Yet these are retain'd in the general. For instead of them, we have substituted in their Places other holy Worshipings tending to the like end of Godliness, as those did pretend to, but void of those superstitious Means the others thought to please God by: And instead of the Mass we have the Holy Communion; and in the Place of worshipping Saints, we have a Godly Remembrance, and a Glorifying in his Saints; and so of the rest which we make a use of in the Church. But there are some out of use as well among the *Civil* as *Criminal* Titles of the Law; because the Matter therein treated of is notoriously known to belong to the Cognizance of the *Common Law* at this time. As the Titles of Buying and Selling, of Leasing or Letting and Taking to Farm, of Mortgaging and Pledging, of Giving by Deed of Gift, of Detecting Collusion and Cosenage, of Murder, Theft and Receiving of Thieves, and such like.

For I make no doubt, but even these Matters both *Civil* and *Criminal*, or most of them among Clerks, were anciently handled and allow'd of in Bishop's Courts within this Realm, in order to aggrandize the Priesthood. And this I am induc'd to believe for three Reasons. *First*, Because I find not only foreign Authors of the *Decretals*, but even our own Authors of the *Legatine* Constitutions to have enacted and inserted these several Constitutions, not only in the Body of the *Canon-Law*, but also in the Body of the Ecclesiastical Laws of this Realm; and some learned Men, divers Years after their Ages, have wrote Comments upon the same, as Things expedient and profitable for the use of the Church, and the Government of the Clergy in those Days: Neither of which, I presume, they would have done, if in those Times there had not been a free Practice of them. *Secondly*, I find in the *Justinian Code* by sundry Laws, some of his own making and of some other Emperors before his Time; That Bishops in their Episcopal Audience had the Practice of some of these Matters both *Civil* and *Criminal*, if we may believe these Laws to be Genuine, and not of the Clergies own Forging. And to this end they had their Officials or Chancellors, Men train'd up in the *Civil* and *Canon-*

Canon-Law to direct them in Matters of Judgment, as well in Ecclesiastical *Criminal* Matters, as in Ecclesiastical *Civil* Causes, tho' at present thro' the Idleness and Corruption of the Times, and thro' the small Regard that some of our Bishops have shewn to their own Courts, we have had but few Chancellors that understand either the *Civil* or *Canon-Law*, tho' the Canon of our Church requires a good Proficiency in the Knowledge of both these Laws in Ecclesiastical Courts *. The *Third* Reason that induces me to believe, That these Titles were sometimes exercis'd here among us, is, that I find *Glanvil* †, who liv'd under *Henry* the Second's Reign, and was Lord Chief Justice of *England*, refers to the Ecclesiastical Courts the Plea of Tenements, where the Suit was between two Clerks, or between a Clerk or a Layman; and the Plea was, *De liberâ Eleemosynâ Feodi Ecclesiastici & non petitur inde recognitio*; whether the *Frank-Fee* was Lay or Ecclesiastical ‡. And he further adds, That if it be found by the Verdict of legal and sufficient Men to be an Ecclesiastical Fee it shall not hereafter be drawn to a Lay Fee, no, tho' it be held of the Church by Services thereunto due and accustom'd. Again, by ancient Practice of the *Canon-Law* among us, whenever Land was demanded in Marriage by the Husband or Wife, or their Heir, and the Demand was against the Giver or his Heir, it was then at the Demandants Choice, whether he would sue for the same in the Court Christian or in the Secular Court: For, says *Glanvil*, it belongs to the Ecclesiastical Courts to hold Plea of Dowries, which he calls *Maritagia*; if the Plaintiff does thus make Choice of those Courts upon the Score of that mutual Affiance which is there made between a Man and his Wife. For if a Marriage be had between them, and there is a Dowry promis'd to the Man by the Woman's Friends, this Plea was not to be carry'd to the Temporal Courts, tho' the Lands were of a Lay-Fee; provided, the Suit was certainly for a Dowry: But if the Suit was against a Stranger, then it was otherwise **. *Thirdly*, The King's Prohibition forbidding the Clergy to deal in several Things which are of Lay-Fee, forbids them no one Thing that is of Ecclesiastical Fee; and to shew the Prince's meaning precisely therein, viz. That it was not his Intent by that Prohibition to restrain the Ecclesiastical Judges from proceeding in Matters of this Kind, he does in express Terms use these Words (*Recognizances touching Lay-Fees*) as though he would signify to all Men, that he would not touch upon Matters of Ecclesiastical Fee, which did then wholly belong to the Tryal of Court Christian, as has been cited already out of *Glanvil*: Who, by the Place he then held, may be thought to have known the Laws of *England*, as they then stood, and the right Interpretation thereof, as well as any Man then or now living. And yet because there were some Things of Lay-Fee, which the Clergy then had Cognifance of, and have still in some Measure; as Causes and Matters of Money, Chattels and Legacies arising out of Testaments, &c: And because he would have the Rights of the Clergy to be undisputed, he excepts them from such Things as did belong to the Common Law; and leaves them to the Direction of the Courts Christian.

To what has been said, we may add the Provincial Constitution of Archbishop *Boniface*, recorded in *Lindwood* ††, and made in the Days of *Henry* the Third by the Exorbitant Power of the Clergy, which plainly shews

* Vid. Can. Jacob. 127.

† Lib. 12. cap. 15. de Leg. Angliæ.

‡ Idem lib. 13. cap. 25.

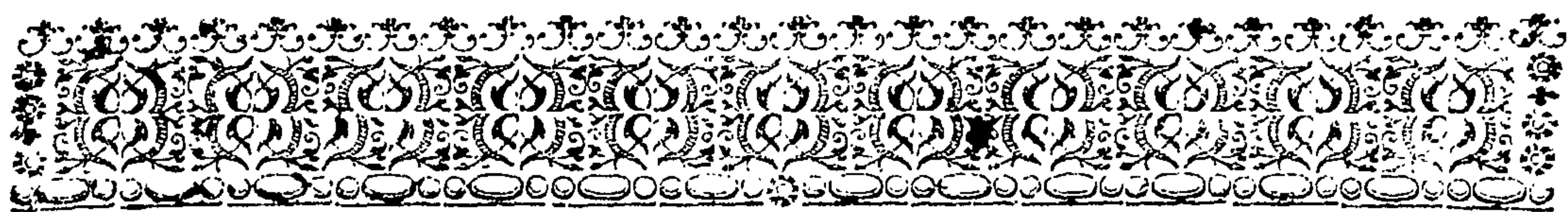
** Ann. 24. Ewd. 1.

†† 25 H. S. chap. 19.

shews, That in those Days all Personal Suits either between Clerk and Clerk, or between Laymen Plaintiffs and Clerks Defendants were try'd by the Ecclesiastical, and not by the Temporal Law : Which Practice because it agrees with *Glanvil*, *Bracton* and *Britton*, and with the Prohibition itself, which there only restrains the calling of Laymen to make Recognizances of Matters belonging to Lay-Fees, it may be strongly inferr'd, That these Matters were Things of Ecclesiastical Right in those Days ; from which the Ecclesiastical Courts are now fallen either by the Statute of *Henry* the Eighth, which (perhaps) has taken away the same, as being hurtful to the Royal Prerogative, and repugnant to the Laws, Statutes and Customs of this Realm, &c. or else suppress'd by the reigning Power of the Common Law, which I shall not take upon me to determine, but leave it to Men of better Judgment and Experience than my self. But this I find true by Experience, That where there are two different Jurisdictions in one and the same Kingdom, unless they be carefully bounded by the Prince, and an equal Regard had to both, so far as the necessary Use of them in the State requires, as the Advancement of the one increases, so does the Practice of the other decrease, especially if one has got the Countenance of the State more than the other. For,

In respect of other Matters belonging to the Ecclesiastical Courts, some are acknowleg'd to be absolutely in use, and others are excepted against only in some Measure. Those are in absolute Use, which never had any Opposition made against them, which are almost those alone that belong to the Bishop's Degree or Order : For all Things which come within the Compass of the Ecclesiastical Law, do either belong to his Degree, or his Jurisdiction. To the first belong the Ordination of Ministers, the Confirmation of Children, the Dedication of Churches, and the like. The second Sort is of such Matters as do belong to the Bishop's Jurisdiction, which is partly *Voluntary* and partly *Contentious* ; of this latter there have been divers Things in sundry Ages called into Question, but restored again by the wise and grave Judges themselves, who have found the Exception against them to be unjust. But what belongs to either of them in private, or what Causes do belong to the whole Jurisdiction, because I have hereafter described them in particular, I will not here give the Reader a Catalogue of them, but send him to the ensuing Work for the Knowledge thereof, whereunto I shall next proceed, after a long Introduction ended.





AN EXPLANATION of the Marginal Quotations from the Books of the *Civil* and *Canon-Law*.

And First of the *Civil-Law*.



THE Institutes of Justinian, Book the First, Title the Second, Section, or Paragraph, the third and fourth. L. 1. 1. 2. 3 & 4.

Digest, Book the First, Title the Second, Law the Third, and Paragraph, or Section, the Fourth. D. 1. 2. 3. 4.

Digest, Book the First, Title the Second, Law the Third. Pr. in principio, and fin. in fine ejusdem legis. D. 1. 2. 3. Pr. Fin.

Digest, Book the First, Title the Second, and Laws the Third and Fourth. D. 1. 2. 2 & 4.

Meaning, Law the First, Section, or Paragraph, beginning with the Word Furtum ff. signifies the Digest, and the Words de Furtis denote the Title thereof. L. 1. 33. Furtum, ff. de Furtis.

That is to say, Bartolus on the first Law of the Digests, Book the Second, and Title the Fourth. Bart. in l. 1. D. 2. 4.

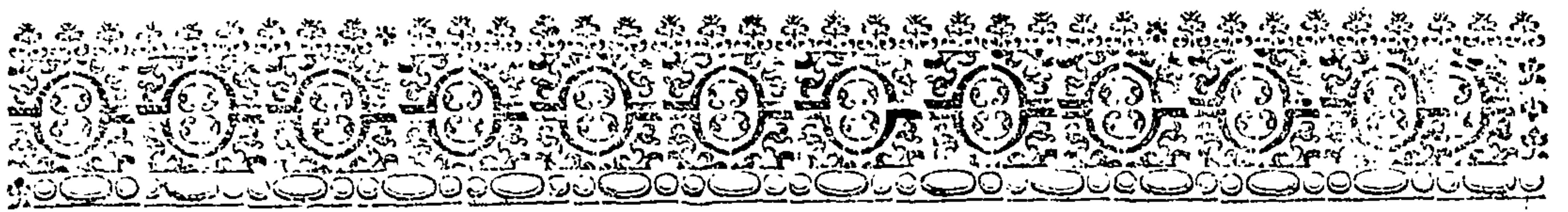
Code, Book the First, Title the Twelfth, Law the Eighth, and Section or Paragraph the Second. C. 1. 12. 8. 2.

That is to say, Baldus on the Fourth Law of the Code. Book the Sixth, and Title the Tenth. Bald. in l. 4. C. 6. 10.

The Novels, Constitution the Eighty Ninth, and Chapter the Ninth. Nov. 89. c. 9.

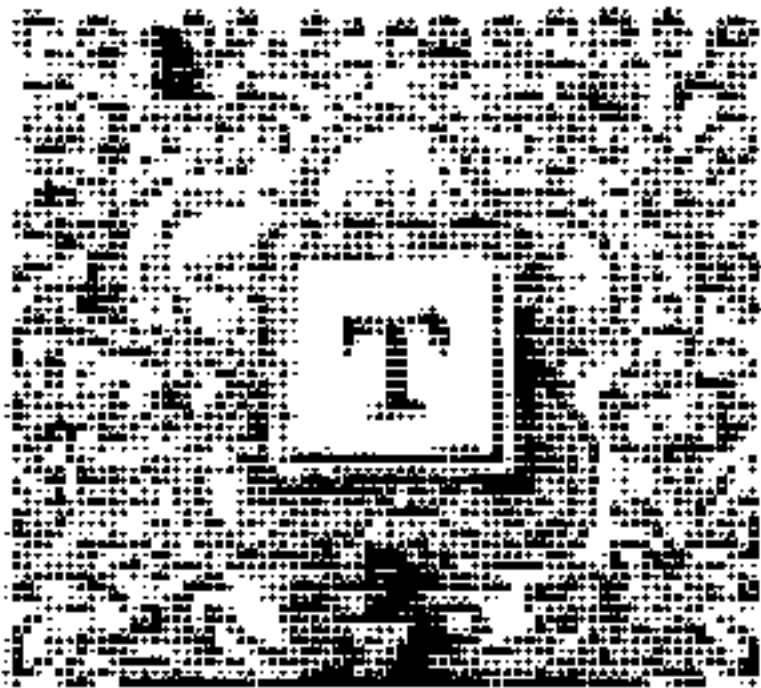
Authentick, Collation the Ninth, Title the Ninth, and Novel Twenty. Auth. 9. 9. 20.

All these Books of the *Civil-Law* are sometimes quoted by the initial Words of the Law it self; and by the Words of the Title: As, *Qui totam Hereditatem*, ff. *De acquir. vel omit. Hered.* That is to say, *The First Law of the Digest, Book 29, and Title the Second.*



Marginal Quotations from the Books of the *Canon-Law* explain'd.

X. 1 9. 6. 4.



HAT is to say, *Book the First, Title the Ninth, Chapter the Sixth, and Paragraph the Fourth, of the Decretals of Pope Gregory the Ninth. The Letter (X) denoting the Decretals of that Pope.*

VI. 3. 4. 23.

Book the Third, Title the Fourth, and Chapter the Twenty Third, of the Sixth Book of the Decretals, by Pope Boniface the Eighth.

Cl. 2. 5. 2.

Book the Second, Title the Fifth, and Chapter the Second of the Clementines.

Extra. 14. 3.

That is to say, Title the Fourteenth, and Chapter the Third of the Extravagants of Pope John the Twenty Second.

Com. 3. 2.

That is to say, Book the Third, and Chapter the Second of the Communes.

Dist. 76. c. 2.

Distinction the Seventy Sixth, and Chapter the Second of the first Part of the Decrees: And if a V Consonant, or this Note be added, viz. §. it denotes the Verse or Paragraph of that Chapter, as Dist. 16. c. 2. v. 3 or §. 3.

16 Q. 7. 3.

That is to say, Cause the Sixteenth, Question the Seventh, and Chapter the Third, of the Second Part of the Decrees.

Con. 1. 2.

Distinction the First, and Chapter the Second of the third Part of the Decrees.

All these Books of the *Canon-Law* are likewise sometimes quoted by the initial Words of the Law, or Chapter itself; and by the Words of the Title: As thus, *Ex specialis, extra de Judais*. That is to say. *Cap. 17. Tit. 6.* of the Fifth Book of *Gregories Decretals*. For the Word *Extra* imports these *Decretals* as well as the *Extravagants*.



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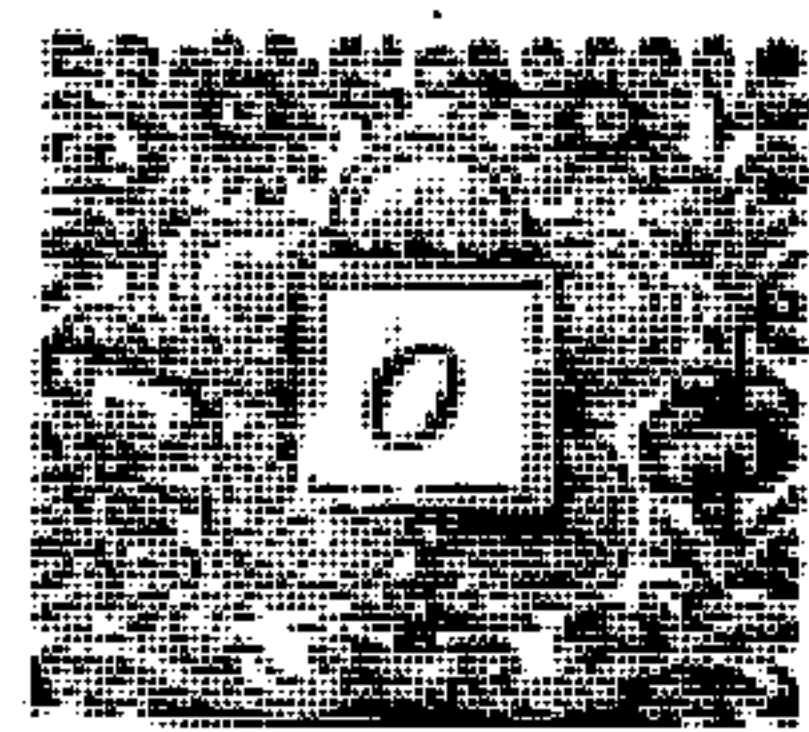
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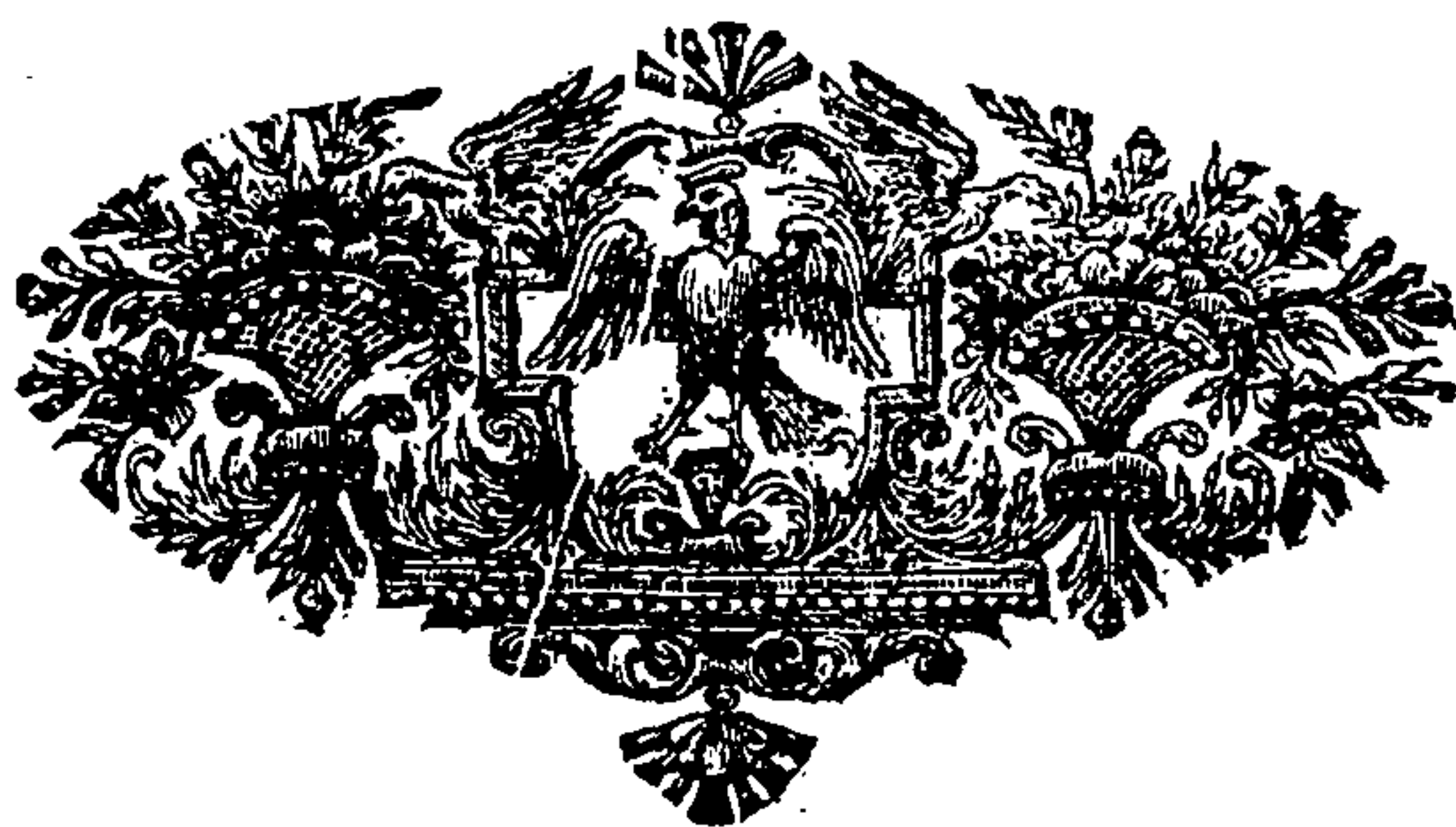


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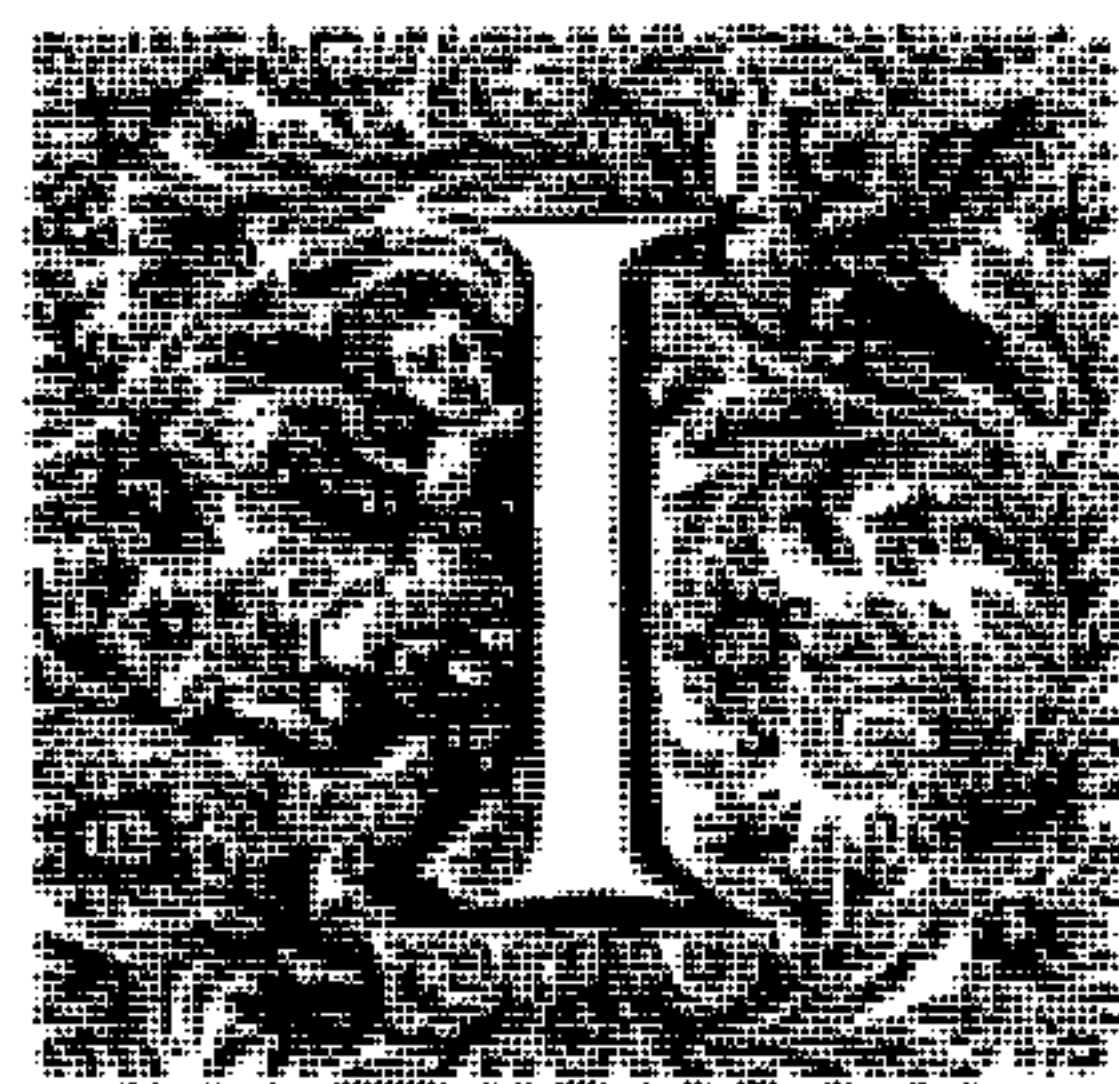


P A R E R G O N

JURIS CANONICI ANGLICANI.



Of Abbots, Priors, Abbies, Priories, &c.



IT being the peculiar Happiness of the *British* Nation in general, to be (in a great measure) govern'd by Laws of its own Growth and Production, and likewise to be freed from the Tyranny of *Romish* Superstition and Papal Power, it may (perhaps) at first sight, seem altogether unnecessary to introduce or mention this Title of *Abbots, Priors, &c.* because all Abbies, Priories, and other Religious Houses of Monks and Fryars, are now abolish'd and dissolv'd in *Great-Britain*, and their Lands and Possessions given to the Crown; and the very Order of Abbots themselves is entirely extinguish'd among us. But since the Ecclesiastical Law and State of *England*, as it now subsists, may be much better known by informing the Reader how it stood before the Reformation of Religion here among us; I have thought it no-wise improper to the present Undertaking, to give a short History of the Rise and Origine of this lazy and devouring Herd of People, commonly called *Abbots, Priors, Monks*, and the like; and also to give some Account of the Foundation and the Endowment of their Abbies and other Religious Houses, and the Means whereby they afterwards acquired great Riches and Power, lording it over Mens Persons, Estates, and Consciences: and lastly, I thought it not amiss, by way of Incident, to treat of some other Matters relating to this Subject till the time of their Dissolution. For I shall only, in the following Sheets, mention so much of the Papal *Canon-Law*, as may serve to illustrate and explain the *Canon-Law*, as receiv'd and practis'd here in *England*; saving some few Digressions, which I shall make in order to expose the Pride and Subtilty of the *Popish Clergy*, according to my Design already declared in the Introduction to this Work: and, there-

B
fore,

fore, I begin the same, *first*, with the Title of *Abbots, Priors*, and other Persons, in the several Orders of the *Romish* Communion.

Now an Abbot is so called from the Word *Abba*, which in *English* signifies a *Father*; and, in its Original, is, according to some a *Hebrew*, and according to others, a *Syriack*, and not a *Hebrew* Word: for an Abbot is, or (at least) ought to be the Father of his Monks, and in propriety of Speech, has the same Relation to the House or Family over which he presides and governs, as a natural Father has over his Children. For, according to *Albericus, Alciatus*, and others, and in the Sense of all Nations and Languages, this Word imports the same as a Father, in respect of Age, Honour, and Care; and strictly speaking, is not a Term of Order: and for this Reason (say they) *Abbots* are stiled *Fathers* in the vernacular Tongue of all Nations. And, as the *Latin* Word *Abbas*, is the same as the *Hebrew* or *Syriack* Word *Abba*, Father; so, according to *Felinus*, an Abbacy is the Dignity itself, since an *Abbot* is a Term or Word of Dignity, and not of Office: and, therefore, even a secular Person, who has the Care of Souls, is sometimes, in the *Canon-Law*, also stiled an *Abbot*. And though, among the *Greeks*, that Person only is called *Papas* or *Pater*, who is a Father in point of Reverence; yet an *Abbot* may in Law, even be called a *Monk*, and, in an indifferent Matter, he comes under that Appellation: for though he be made an *Abbot*, &c. he does not cease to be a *Monk*, as 'tis said of the Rector of Scholars in an University, who does not cease to be a Scholar because he is a Rector. Not only Bishops, and Archbishops, come under the Name of *Prelates*, but even *Abbots* themselves: and hence it is, that *Abbots* are stiled *dignify'd Clerks*, as having some Dignity in the Church; and as such (it seems) they ought to be preferr'd unto all other private Clerks. And though an Abbot does not take place of the Canons of a Cathedral Church within the said Church; yet out of the said Church, he shall have a Precedency. 'Tis said in the Books of the *Canon-Law*, that a *Conventual Prior* is in the Place of an *Abbot*: but then (I think) this ought only to be thus understood, when a Church has not an *Abbot*, but is wont to be governed by a *Prior*: Which leads me next to speak of *Priors*.

Priors are said to be such Persons, as do in some Churches preside over others of the same Churches; and the Churches which are given to them in *Titulum*, or by way of *Title*, are called *Priories*. Some of these

*Clem. 1. 2. 2. *Priors* are *Claustal*, others are *Conventual**, and a third Sort are *Secular*. *Claustal Priors* are such, as preside over Monasteries next to the Abbot or some other chief Governour in such Religious Houses; and are like to a Sub-Dean in a Cathedral Church, or a Sub-Warden in one of our Colleges; performing the Office, and executing the Power of Vicars to the said Abbot within the Claustres of the said Monastery †. Those are call'd *Conventual Priors*, that have the chief ruling Power over a Monastery, and wherein no Abbot or other Person is of greater Dignity than they themselves are ||: And Priories of this kind cannot be obtain'd or purchased by other Persons than those that are expressly of that Order which they profess; and according to Law, they are elected and chosen by their own Chapters, and do receive Institution from them. And these *Priors* are so *perpetual*, that such Men as are set over these Priories, cannot be remov'd from thence, unless they waste the Estate, and dilapidate the Goods of the Monastery, or lead lewd and incontinent Lives*, as most of them do; or are, lastly, translated to some other Monastery. A *Conventual Priory*, is a Dignity in the Church, but a *Claustal Priory* is not †. Those are term'd *secular Priors*, that have Priories, or (at least)

† X. 3. 35. 6.

‡ Clem. 3. 10. 1.

* X. 3. 35. 2.

† Gloss. in cap. 2. Clem. 1. 2. verb. *Conventualem*.

least) the Benefice of a Priory, which is usually govern'd and administered by secular Clerks or Clergy-men : and tho' sometimes the Priory be *Regular*, yet the Cure thereof ought to be perform'd and manag'd by *secular Clerks**; because it is contrary to the Intention of the Law, for ^{* Clem. 3. 10. 33. ff. de} the Cure of Souls to be granted to *Regulars* †. Therefore, the Per- ^{sonum.} son that is chosen and set over the same for the sake of good Government, † X. 3. 37. 1. shall either be stiled a *Rector* or a *Perpetual Vicar* ; the Priory remaining with some other Person, or else in the Hands of the Monastery or some Chapter || : and thus he, who allows or gives him a Portion, shall be the ^{|| X. 3. 5. 30. 2.} Prior.

In the *Romish Church*, all Persons are said to be *Regulars*, that do profess and follow a certain Rule of Life in *Latin* stiled *Regula*, and do likewise observe the three substantial and approv'd Vows of Religion, *viz. Poverty, Chastity and Obedience**; three glorious Points of Reli- ^{* X. 3. 35. 6.} gion to advance the Power and Riches of the Clergy : for according to *Goffredus*, *Regulars* are such Persons as do oblige themselves to live Regularly, *viz.* under some certain Rule of Life, as *Monks, Fryars, Canons, Regulars* properly so called, and the like ; and all Religious *Regulars* do agree in Essentials, tho' they differ according to a greater or a lesser Degree of Perfection in respect of their several Orders. For some *Regulars* may, according to their respective Rights, become Rectors, and preside over Parochial Churches, since the same Laws are not observ'd in every Respect of a Religious Order. For *Monks* do in some respect agree with *Regulars*, as in the substantial Vows of Religion ; and hence, under the Appellation of *Monks*, we may, in this respect, sometimes include all *Regulars* : but in other respects, *Monks* and *Regulars* differ ; for that *Regulars*, in respect of all other Matters (Vows excepted) are not ty'd up to so close and strict a Rule of Life as *Monks* are †. A *Regular* is (it seems) in the Place of a *Genus* ; but a *Monk*, † X. 3. 35. 5. is as a *Species* to that *Genus* : And hence 'tis, that though all *Monks* are *Regulars* ; yet, on the contrary, all *Regulars* are not *Monks*. Tho' *secular Clerks* do promise some certain Things ; yet they cannot be properly called *Monks* or *Regulars*, because they are not said to follow or profess any certain Rule of Life, but rather a certain Method of living, tho' this Method be approv'd of by the Apostolick See. But to return to the Subject of *Abbots* and *Priors*, and their several Foundations and Endowments ; which were certainly made in the Beginning for Religious Purposes, and were Places where Holy Men retired from the busy Affairs of the World, and there spent their Time in Solitude and Devotion : tho' they have been long since made the common Receptacles of Lewdness, Atheism, and all manner of Wickedness ; Nurseries for raising Factions in the State, and Councils for advancing the Power of the Priesthood in the Church. And, at first, such was the wonderful Esteem, that both the Prince and People had of the Piety of those Men, that it procur'd them very large Privileges and Exemptions from the one, and immoderate Charity and Riches from the other. For tho' by the ancient * common-Law of *England*, a Man could not alienate Lands, ^{* Glanvil, lib. 7. cap. 1. fol. 44.} which came to him by Descent, without the Concurrence of his Heir ; yet he was allow'd to give part of them to God ; that is to say, in the Phrase of the Clergy, to such Persons as were separated and devoted to his Service, as *Abbots*, and their whole Convents were in those dark times held to be : And besides, it was a settled and customary thing in those Days, for every Man in the Parish, or within such a District, to give to the Church a certain Measure of Wheat every Year on St. *Martin's* Day ; and this in our ancient Books is called *Church-Seed*, from whence came

came the Rise of our *Seed-Cakes*. But as these Abbies increased in Riches, so the State became Poor thereby ; for the Lands which these *Regulars* possessed, were in, *Mortuâ manu*, not to be alienated, and consequently, could never come into Lay-Hands again. They could never revert or escheat to the Lord who gave them. And such was the Blindness of that Age, that they were exempted from Knights-Service, and from all other Temporal Services used for the Defence of the Kingdom. And,

† Mag. Char-
ta. cap. 36.

It was for this Reason, that † Laws were afterwards made to prohibit Gifts to these *Religious* Houses, and my Lord Ch. Just. *Coke* tells us, that several Lords at the Creation of the Seigniorie had a Clause inserted in the very Grant itself, that the Donor might give or sell his Lands to whom he pleased, *Exceptis viris Religiosis & Judeis* : so that these *Religious* Men were put under the same Incapacity with the *Jews*, who were then Enemies to the *Christian* Religion ; and well they might, for they were degenerated from that Strictness and Severity of Life, for which their Predecessors were so much admired. And as if the Consequence of large Riches and ample Endowments was not sufficient to support them in a luxurious Course of Life they were always contriving, by the help of the most cunning and learned Men in the Law, to get more ; and to evade those Laws which stood in their way, as I shall observe under the Title of *Mortmain*. But I only mention these Things, to shew that those Orders of Men did not spend their Time altogether in Devotion, and in the Service of God ; but in consulting with the most skilful Lawyers how to evade those Laws, which were made against their Temporal Interest and Grandeur ; and by this means, they got the greatest part of the Lands of *England* into their Possession.

And now their Houses, which were built *in Laudem & Honorem Dei*, were converted into Nurseries of licentious People, who, by Cheats, Impostures, and other miraculous Whimsies, had drawn all sorts of unthinking People thither in Pilgrimages and the like ; from whom they got all their Wealth in this World, to secure a safe and quiet Passage for themselves into the next. And thus this devouring Locust continued for many Ages here in *England*, till the Reign of King *Henry VIII.* who (it's probable) only intended at first to reform these Abuses, and not totally to dissolve the Houses themselves : but they rather chose to rebel, than reform, as many of the Clergy have done since upon very wicked Principles ; for about two Years before this King appointed any Visitation of these *Regulars*, there were two Rebellions ; one in *Lincolnshire*, headed by a Churchman, but disguised in the Habit of a Cocker, and directed by a Monk ; the other in *Yorkshire*, where one *Ask* was their Captain, and this was called, The *Pilgrimage of Grace* : for some Priests marched before the Rebels with Crosses in their Hands, and Crucifixes in their Banners. But these Rebellions being suppress'd, that King did, about the 28th Year of his Reign, appoint Visitors to inspect all the Abbies, and to examine every thing which related either to their Conversation, or Superstitions, and to report the same to the Lord Vice-gerent *Cromwell*.

But if the King did always design a Dissolution of these Bodies of Men, it was now to be effected with less Difficulty ; for some of the Abbots had been guilty of comforting and assisting the Rebels, and others were convicted of great Disorders by the Visitors. And thus most of them perceiving their time of Dissolution drawing near, they committed great waste on their Estates ; so that by these Motives they were induced to resign and surrender their Houses to the King, that they might

might have a better Title to Pensions during their Lives. And it was by these Resignations, that the Houses and Lands of the Abbots became vested in that King, which were afterwards granted by him to the People; from whence they had been by Fraud and Superstition acquired to the Church; and under these Grants they are enjoy'd to this Day. Indeed some Writers in the late Reign of King *James* the Second, and some bold Praters in the four or five last Years of Queen *Anne's* Reign, gave the present Possessors a very large Assurance of their Titles; insomuch, as that they would not be in any danger of losing their Lands, if Popery should have been establish'd here; because the Pope himself had in King *James's* Reign granted a Dispensation in this Case with a *Non-Obstante* to the *Canon-Law*. However, this was not much regarded in King *James's* Reign, tho' High-Church came into it in the Queen's Time, for the sake of more Power and Riches; and so they have done since his Majesty's Accession to the Crown: for all honest *Protestants* know, that the Plenitude of the Pope's Favour is so extensive, that it may be a Question, (where that prevails) whether it can be bound by any Acts of his Predecessors. 'Tis true, we were then told, that what was done by any former Pope, could not well be revoked at *that Time*, which is as much as to affirm, that it might be done when Opportunity served. But the present Possessors have a better Title to those Lands than the Pope's Dispensation can give them; for, as I have already mentioned, most of them were surrendred to the King by the Abbots and Convents themselves; and these Surrenders were all confirm'd by Act of Parliament.

The Pensions of those Abbots that surrender'd, were proportioned to their Crimes or Innocence; but the Monks had an Allowance not exceeding eight Pounds *per Ann.* during their Lives, or till such time as they should be provided with Livings, which they were certain to have upon every Vacancy; because those, who purchased the Abbey-Lands of the King, were to pay these Pensions to the Monks out of the Rents of the suppressed Monasteries; and to ease themselves of the Charge, the Purchasers were very industrious to provide Livings for them. But this was a wrong Step to the Reformation; because the greatest part of the Clergy were (by this Means) such as had been formerly ignorant Monks and Fryars: which Sett of Men were not work'd out till the Reign of Queen *Elizabeth*; and then those of better Education were placed in the Churches. Indeed, it has been often insinuated as a Reproach to that Reign, in which these Monasteries were surrender'd; That it was a robbing of God, and that it was a covetous Desire of their Riches, which made the King so intent upon the Reformation. But hereunto I answer, That tho' it must be admitted, that Churchmen ought to have such a Subsistence as may secure them from secular Cares, and from that Contempt which is always incident to Poverty; and likewise have sufficient for Charitable Uses, and to support Hospitality, (for by these means they engage the Affections of the People): yet this was not the Case of the secular Clergy in those Times of Popery; for, by Appropriations and other Church Robberies, the labouring Clergy suffered much, and *Religious* Houses rioted on that Wealth, which should have maintain'd the secular Priesthood. And, therefore, when it evidently appeared, that those *Religious* Drones grasped after great Riches, upon no other View, but only to support their Pride, Luxury, and Power over Mens Consciences; when by pious Cheats they had fraudulently obtain'd from an ignorant and unthinking Laity the greatest Part of their Possessions and Estates; and when those Riches were seldom or never applied to any religious Purposes; then it became the Interest of the Nation in general, and of the Government itself,

to re-assume those Lands, which had so long continued useless to the Support of the one, and the Defence of the other.

The Histories of those Times, as well as the Books of the *Canon-Law* itself, inform us, That the Abbots became Rich, in the Sense and Understanding of Persons truly Religious, by false Opinions and Notions of Purgatory impos'd on the People, by Masses, Reliques of Saints, and other Superstitious Solemnities; and what is worst of all, by the Spoil of the Church itself, as before hinted: for both the great and small Tythes, which belong'd to the secular Clergy, (that is, to *Parsons*) were in many Places taken from them, and by the Pope's Authority given to, and vested in the Monasteries, under the Name of *Appropriations*; and the Abbots allowed those who served the Cure but small Stipends, and where they were most liberal, it was only to permit the poor Vicar to have the small Tythes. But 'tis natural to Mankind to be always in Extremes; for when these Abbies were dissolv'd, and all the old Monks dead, or provided with Livings, so that their Pensions ceased: those who purchased their Lands of the Crown, had them charged with no other Incumbrance but with that poor Stipend which the Abbot had given to those who officiated at the Altar, and which, (as Bishop *Burnet* observes in his Preface to the second Volume of his History of the Reformation) is not a competent Maintenance for a Clergyman now. For it would scarce support a single Man then, without the additional Helps of Fees for *Obits*, *Exequies*, Masses for poor Mens Souls, (for the Abbots themselves had the Profits from those that died Rich) and such other Perquisites: all which are now gone by the Reformation of Religion, and nothing left in the room of them. So that the Clergy in many Places have a very narrow Subsistence, which certainly makes them subject to Want, and (by Consequence) to Contempt; and this, he tells us, was the only Mischief which happened to the Church at the Reformation, that there was not a better Provision then made for the inferior Clergy. 'Tis true, this was not only a great, but a very unequal Change, for Men who lived in the greatest Ease and Plenty, to subsist upon a Pension of eight Pounds *per Ann.* for none of the Monks had more, and all of them could not be provided with Livings: for Men, who to distinguish themselves from the rest of the Ecclesiasticks, were called *Regulars*, because they did or should (at least) live under certain Rules of Government in their Houses; I say, for these Men to be blended amongst the Prophane Laity, and to spend the Remainder of their Days in a poor and neglected manner; for these Men who had the Honour to see the Heads of their Houses *Mitred*, and exempt from the Bishops Jurisdiction by particular Grants from Kings, as *Abingdon* was by King *Kenulph*, *Battle* by *William* the First, &c. and not only so, but to exercise Episcopal Authority within their own Limits, and who were Lords of Parliament themselves; and likewise to see the very same Persons stript of all those Privileges and Preferments, and to live many Years afterwards less regarded than the Porters of their Abbies before the Dissolution, was thought a very unequal Change of Fortune.

Tho' there was no fixed Number of those Abbots that were Lords of Parliament, yet there were always some: for in the 43d Year of King *Henry* the Third's Reign, we find there were 102 Abbots and Priors summon'd to Parliament; in the Reigns of King *Edward* the First, and King *Edward* the Second, there were 50, and sometimes 80 and more; to the end that the Number of *Regulars* might come nearer to the Number of *Seculars*. Not that they esteem'd it any great Honour to be summoned by a Layman, tho' a King, for their Obedience was only due

due to the Pope : and, therefore, we have Instances, when they refus'd to attend the Parliament upon the King's Summons. But it has been a Question, when they did sit there, whether it was as a Part of the Ecclesiastical State, or as they held their Lands of the King *per Baroniam*. In Answer to which, 'tis said, That under all the *English Saxon* Kings, they held their Lands in *Frank-Almoigne*; and then they sat there in their spiritual Capacity. But *William* the First, to keep them a little closer to his Service, alter'd that Tenure; and appointed, that they should hold of him *per Baroniam*: And my Lord *Coke* tells us *, That of those *Abbies*, * 2 Inst. 3, which were of the King's Foundation, and which were held of him *per Baroniam*, the Abbots, by virtue of that Tenure, had a Right to be summon'd to Parliament, and were Lords of Parliament. And this is confirm'd by the Charter of Exemption † of the Abbot of *St. Augustin* † *Prynn* on in *Bristol*: for the Writ sets forth, That the Abbot complain'd, that he 4. Inst. 335, was summon'd to Parliament, *licet ipse non tenet per Baroniam seu aliquo alio modo in Capite*; not that his House was of any Royal Foundation, *per quod deveniendo ad Parliamentum de Jure summoneri debeat*. So where the Abbot of *Fairplace* in *Hampshire* complain'd of the like Summons, when he held all his Lands in *purâ & perpetuâ Eleemosyna*, & non *per Baroniam aut alias in Capite, per quod ad Parliamentum summoneri non debeat*; that is to say, in pure and perpetual *Frank-Almoigne* (a), and not *per Baroniam* or any other Tenure *in Capite*: and, therefore, he ought not to be summon'd to Parliament. And Mr. *Selden* is of Opinion, That where it appear'd, that the Abbot held nothing from the King, it was a sufficient Reason why he should not be thus summon'd. 'Tis true, several Abbots, who did not hold *per Baroniam*, were summon'd to Parliament upon extraordinary Occasions, in several Reigns after the Conqueror; but this was not *de Jure*, it was only for their Advice and Assistance upon pressing Occasions and Circumstances: But those who held *per Baroniam*, were Lords of Parliament; and had a Right to be summon'd, and to sit with the rest of the Peers. Of these, some think, there were twenty six; my Lord *Coke* tells us, they were twenty seven in Number; and Bishop *Burnet* mentions twenty eight of them at the Time of the Dissolution; and they were called *Mitred Abbots*. See hereafter the *Appendix* to this Work, *Numb. 1.*

But before I conclude this Title, it may not be improper to shew what Difference the Law made, in some particular Matters, relating to Abbots and other religious and secular Persons, before the Dissolution of Religious Houses, and how the Papal *Canon-Law* stands at this Day with respect to them. The Property of the Goods and Estate of the Abby was in the Abbot during Life, but after his Death, it was then in the House: and this was the Reason, that, at Common Law, if such Goods were taken away in the Abbot's Life-time, his Successor * could not have an Action of * 9 H. 6. 25. Trespass; for by the Taking, the Property was divested. But this was

(a) *Frank-Almoigne*, is the same which we in Latin call *Libera Eleemosyna* or *Free Alms* in English: whence that Tenure is commonly known among our English Lawyers by the Name of a Tenure in *Aumone* or *Frank-Almoigne*; which, according to Britton, is a Tenure by divine Service †. For it is a certain Tenure or † Britton. Title of Lands at the Common-Law: as when Lands or Tenements are freely given in the way of Alms to some Church or Religious House on this Condition or Consideration, viz. That Divine Service shall be offer'd, and Prayers pro bono Animæ Donantis, or the like: So that according to the old Popish Law here in England, this *Frank-Almoigne* was no other than a Tenure or Title of Lands or Tenements bestow'd on God, by giving them to such as devoted themselves to the Service of God, for pure and perpetual Alms: whence the Feoffors or Donors could not demand any terrestrial Service from the Feoffees, so long as the said Lands or Tenements remain'd in their Hands ||. With this agrees the Grand Customary of Normandy, cap. 23. and whereof || Britton. *Bracon* writes at large. But Britton makes another Kind of this Land which is given in Alms, but not in cap. 66. n. 5. free Alms; because the Tenants in this are oblig'd to certain Services to the Feoffor *. See Fitz. * Britton. iii Herb. Nat. Brev. and the new Book of Entries, verb. *Frank-Almoigne*. ^{supr.}

remedy'd

remedy'd by the Statute of *Marlebridge* : by which it was provided, That the Successor might declare, *Quare Bona & Catalla Domus & Ecclesie Tempore R. Prædecessoris sui cepit*, &c. which the Successor of the Bishop, Dean, or *Secular* Ecclesiastick cannot ; because there is an Alteration made in the Church by the Death of those Persons, but there was none made by the Death of an Abbot, for the House continu'd still the same : and, therefore, the Abbot might have an *Affize* for a Disseisin, or an Action of Waste, for any Waste done in the Life-time of his Predecessor ; which a succeeding Bishop or Dean cannot now have, for the Reason above-mention'd. But the Abbot was only capable of taking a Feoffment : for it could not be made to him and his Convent ; since they were reckon'd dead Persons in Law.

The *Abbot*, or the chief Head of *Abbies*, being, together with the Monks of the House, a *Convent*, made a Corporation ; and was not, by the *Common-Law*, further charg'd with his Predecessor's Acts, than for such Things as were for the Use of the House, or such Acts as were done under the Common Seal thereof*. And though a Creditor had a Specialty against a Monk ; yet not the Abbot, but the Monks Executors were chargeable for his Debt contracted before his Entry into such *Religious* Order ; unless it were for some such Thing as came to the Use of the House†. Of these Abbots some were *Elective*, and others *Presentative* : and under this Title were comprehended other spiritual Corporations, as a *Prior* and his *Convent*, *Fryars*, *Canons*, and such like. And as there were Lord-Abbots as aforesaid ; so likewise there were Lord-Priors, who had exempt Jurisdictions, and were Lords of Parliament||. 'Tis to be suppos'd, that the Abbot of *St. Austin's* in *Canterbury*, was the most antient of any in this Kingdom, as being founded by King *Ethelbert**.

And next to him, in point of Antiquity, was the Abbot of *Westminster*, founded by *Sebert* King of the *Saxons*†. Authors differ touching their Number in this Realm, as I have already hinted ; but a very modern Writer, Mr. *Blount*, in his *Nomo-Lexicon*, gives us a Catalogue of no less than thirty three Abbots and Priors : whereof some were Priors-Aliens born in *France*, and were Governors of Religious Houses erected for Foreigners here in *England*, with a View of keeping our Kings in subjection to foreign Princes. But these being suppress'd by King *Henry* the Fifth, after his Conquests in *France*, their Revenues were afterwards given by King *Henry* the Sixth, to other Monasteries and Houses of Learning ; especially for the Erecting and Endowing of *King's* College in *Cambridge*, and *Eaton* College near *Windsor*, according to *Stow's* Annals||, and other Authors.

In latter Ages, thro' the Favour of Princes, and rather thro' their Fear of the Power of the Clergy, than any Respect to the Church itself ; Abbots have been reputed as Peers and Secular Lords, to whom they granted the Revenues of *Abbacies* in proportion to such Dignity, for the Support thereof : and thus many of the Peers of *France* were antiently and frequently Abbots, as appears by *Paradine*, who wrote the Annals of *Burgundy* near 700 Years ago ; and then affirm'd*, That he had seen very antient Records, wherein the Peers of *France* used these Titles and Distinctions, *viz.* Duke and Abbot, Earl and Abbot, &c. The venerable *Bede* speaks of an Island in *Ireland*, which ever had an Abbot vested with such Power and Authority, that every Province, yea, and the Bishops themselves, were under his Government, and subject to his Jurisdiction†. *Mitred* Abbots among us, were those that were exempt from the Diocesan's Jurisdiction, as having within their own Precincts Episcopal Authority in themselves ; and being Lords in Parliament, were called

* Terms of Law. verb. Abbot.

† Ibid. ut supra.

|| Coke de Jur. Eccle. fol. 28. a.

* A. D. 602.

† A. D. 604.

|| Pag. 582.

* Lib. 2. sub A. D. 1103.

† Lib. 3. de Gestis, cap. 3. Spelm. de Prim. Ecclef. Anglo-Sax. A. D. 603.

called *Abbots* Sovereign * : but those, that were not *mitred*, were subject to the Diocesan in all spiritual Government †. The Emperor *Justinian* † 18 Q. 2. 17, has, in the first Book of his *Code*, and in the *Novels*, expressly ordain'd and prescrib'd the Manner and Form of the Election, and Confirmation of an Abbot; and what Persons they ought to be, and how they ought to be qualify'd that would be accounted worthy of that Ecclesiastical Dignity ||, tho' these Qualifications are little regarded. What Consecration is to a Bishop, that Benediction is to an Abbot ; but in a different way : For a Bishop is not properly such till Consecration ; but an Abbot being elected and confirm'd, is properly such before Benediction*. Before the Reign of King *John* here in *England*, the King, and other Founders and Patrons of Abbies and Priories with us, were wont to present *Abbots* and *Priors* thereunto : but by King *John* there was a free Election granted unto them ||. An *Abbot* might be presented to a Church ; for he was capable of an Appropriation, whereby he was perpetual Parson *Imparsonce* ; and had the Cure of Souls committed to him * : But Monks, tho' they might, by the antient Canons of the Church, be ordain'd Priests for the Government and Cure of Parish-Churches, upon which they might exercise the Office of Preaching in the Church, and become Ministers therein † ; yet now they cannot be admitted to be Rectors of such Churches not belonging to them *pleno Jure*, but a Chaplain ought to be appointed by the Bishop, on the Advice and Consent of the Monks, for the Government of such Churches, where Monks do dwell and inhabit. So that the Ordination and Appointment of such Chaplain, shall solely depend upon the Bishop's good Will and Pleasure, as his Deposition and Removal from thence shall likewise ||.

The whole Power of the Monastery is lodged in the Hands and Possession of the Abbot, who may demand and recover his Monk, that is commorant and residing in another Monastery : for a Monk ought not to have a Place in divers Monasteries * ; nor ought a Monk to desert and forsake his House without the leave of his Abbot, and go to another Monastery †. An Abbot has a coercive Power over his Monks, and so has a Prior too for their Disobedience ||, and are not obliged to require the Advice and Consent of their Chapter herein ; and if they are incorrigible, they ought to be expell'd the Fraternity. But an *Abbot* cannot, without the Knowledge and Advice of his Convent, subject an exempt Monastery to any Person, from whose Jurisdiction such Monastery was exempted : nor can he, with the Consent of his Chapter or Convent, unite a Church which is subject to himself *pleno Jure*, because Union being a *Species* of Alienation, the Bishop's Authority, and all other due Solemnities, are necessary hereunto ; since, according to *Calderinus*, such an Union gives a Title *ad Prescribendum*, unto a Prescription. Nor can an *Abbot* subject his Monastery to the Ordinary, it being not subject, without the leave of the Ordinary ; because this is a *Species* of Alienation. And as in alienating the Goods and Estate of the Church, according to the *Canon-Law*, the Bishop's Consent is necessary ; so likewise is the Abbot's Consent required in alienating the Estate and Goods of a Church, which is subject to his Jurisdiction.

An *Abbot* ought not to intermeddle in the Execution of such things as are matters of Episcopal Dignity, as the Cognizance of Matrimonial Causes ; the Enjoining of publick Penance ; the Granting of Letters of Indulgence and the like ; unless he has a special Right and Privilege granted him to meddle herein * : nor ought an Abbot, that is in immediate Subjection to the Pope, to surrender or resign his *Abbacy* without his leave † : nor can he be admitted into another *Abbacy*, nor enter into any other

* X. 1. 4. 7. other Religious Order without the Pope's Licence or Dispensation * ; nor
 † 18 Q. 2. 8. can an *Abbot* do this, that is subject to a Bishop †. *Cistercian* Abbots
 ought to yield all due Reverence and Obedience to their Bishop according
 to the Form in the *Canon-Law*, that is to say, according to the Rule of
 ‖ X. 5. 3. 43. the *Benedictine* Order ‖ : but an *Abbot* is not oblig'd to such Obedience
 to his Bishop, contrary to the Liberty and Privilege granted to his *Reli-*
 * X. 5. 31. 5. *gious* Order *. An *Abbot* is not put in by the Bishop of the Diocese, tho'
 generally speaking, he is under the Jurisdiction and Power of the Bishop
 in point of Correction for Excesses committed ; but he is elected by a
 Congregation of Monks belonging to the *Abby*, over which he presides.
 And a Hermit may be chosen to be an *Abbot*, provided he be qualify'd in
 respect of Morals, and other Acts relating to a Monastick Discipline, as
 every *Abbot* ought to be ; that is to say, he ought to be cautious in his
 Government, chaste, humble, discreet, sober in his Conversation, and
 merciful in his Dealings ; which seldom happens in these lordly Men †.
 † 18. Q. 23.
 8, 9, 10, &
 15. And thus I have done with *Abbots* and *Priors* for the present, till I come
 to speak of *Monks* under the Title of *Monasteries* hereafter, in the Sequel
 of this Work.



Of Abjuration.

A Bjuration, is where a Man had committed Felony, and, for the
 Safety of his Life, did fly to some Church or Church-yard ; and
 there, before the Coroner, within forty Days, did confess the Fact ; and
 take an Oath to be banish'd perpetually from his Native Country, but
 not to a Country of Infidels. It was founded upon the Privilege of
 Sanctuary ; for whoever was not capable of this Sanctuary, could not
 have the Benefit of Abjuration : and, therefore, he that committed Sa-
 crilege, could not Abjure ; because he could not take the Privilege of
 Sanctuary ‖. For the Church-men in those Days had so little regard to
 the Properties of Men, that if Goods were stolen, & *Reus ad Ecclesiam*
confugisset, vitam habeat. But tho' this was the Doctrine of those Times,
 when Abjuration obtain'd in *England*, yet the Clergy were very careful
 of their own Goods : for if a Man had committed Sacrilege (and every
 Violence offered either to their Persons or Goods, was deem'd such) he
 could not have any Privilege of Sanctuary ; and, therefore, cou'd not
 abjure, but was hang'd.

‖ Edw. 2.
 cor. 420.

But this Abjuration, founded upon the Privilege of Sanctuary, is now
 wholly abrogated and taken away by a Statute made in the first Year of
 King *James* the First * ; whereby it was enacted, That no Sanctuary, or
 Privilege of Sanctuary, should be admitted or allow'd in any Case.
 But here it is to be noted, that this kind of Abjuration has no Relation
 to that of *Recusants* by Force of the Statute of the 35th of Queen *Eli-*
zabeth, cap. 1. for not coming to Church within three Months after
 Conviction, which Act was lately in Force till the Penalty was likewise
 taken off by a late Act of Parliament in King *William's* Reign †, upon
 taking the new Oaths, and subscribing the Declaration therein mention'd ;
 because such Abjuration had no Dependency upon any Sanctuary. But to
 the other Abjuration in relation to Felony, Sacrilege excepted (no Abjura-
 tion or Sanctuary being allow'd in Cases of Treason or Petit Treason) the
 Law was so favourable for the Preservation of Sanctuary in the Church or
 Church-yard, that if a Prisoner for Felony had, before his Attainder or Con-
 viction,

* 1 Jac. 1.
 cap. 25. ff,
 54.

† 1 W. & M.
 cap. 1.

viction, escaped and taken Sanctuary ; and, being pursu'd by his Keepers or others, was brought back again to the Prison, he might upon his Arraignment have pleaded the same ; and should have been restor'd again to the Sanctuary of the Church, or Church-yard. See *the Book of Entries**, and *Atwel's Case*. *Coke's Inst.* Part 3. Cap. 101. And here it is to be further observ'd ; That an Abjuration, which is a Deportation for ever into a foreign Land, was antiently, with us, a civil Death : and, therefore, the Wife might then bring an Action, or might be impleaded during the natural Life of her Husband ; and in the 8th of *Edward II.* an Abjuration is a Divorce between Husband and Wife †.

* 532. b. Sanc.
2. Hil. 43
E. 3. Rot. 115.

† Coke on
Lit. fol. 133.
a.

But there are some other Abjurations still in Force among us here in *England* ; and those which relate to Clergymen : as, by the Statute of the 25th of King *Charles II.* all Persons that are admitted into any Office, *Civil* or *Military*, must take the Test ; which is an Abjuration of some Doctrines of the Church of *Rome*. But Ecclesiastical Offices are distinguish'd from the Civil ; and as such, cannot properly be call'd *Military* : and, therefore, Parsons and Vicars are not within that Act ; and, by consequence, not bound to take that Oath. But the Case is not the same with Bishops and dignify'd Clergymen : for they are within that Act, because they have a civil Jurisdiction and Authority annex'd to their Offices, by keeping Temporal Courts, by licensing Physicians, and Probates of Wills. There is likewise another Oath of Abjuration, which Laymen and Clergymen are both oblig'd to take ; and that is, to abjure the Pretender, commonly call'd, amongst *Jacobites*, by the Title and Name of King *James* the Third ; and this is to be done within three Months after they are instituted or inducted to any Ecclesiastical Benefice, or promoted to any Dignity in the Church : and this may be done either in the Courts at *Westminster*, or else at the Quarter Sessions, where they reside.



Of Absence and Presence.

A Person is said to be absent or present, according to the common way of Speech, who is absent from the usual Place of his Dwelling ; and sometimes he is said to be absent, though he has a Dwelling in the Place : for, according to *Castrensis* ||, Absence is sometimes said to be in respect of a Man's Person, and sometimes in respect of his Dwelling. And thus Persons are said to be absent from a Corporation, who are in the City or Corporation, and who do not live in the Place, where they ought to give their Attendance and Service* : and he is said to be absent, who is in another Territory or Jurisdiction, according to *Bartolus* † and *Baldus* || : and so likewise is that Person said to be absent, who is absent with his Family, though he does sometimes in his own Person return to the City ; because as he is not said to be resident in a Place, who comes thither with a Purpose of retiring immediately from thence, so also he is said to be absent, who is absent in such a Case with his Family*. But a Person, that has left his Family and Children in the City or any other Place, is not said to be absent from thence in respect of his Dwelling. As a Person is said to be absent from Court, when he has been cited thereunto ; so a Person

|| Conf. 94.
lib. 1.

* C. 10. 63. 6.
† In l. 3. ff.
r. d. 45. 2.
|| In l. 33.
l. 46. 1.

* Ang. Conf.
270.

Person may be said to be absent, who is in a Place, but cannot easily be convened. A Person that is out of the Kingdom, or not in his own proper Diocese or Province, is said to be absent: and so likewise is a Person, that cannot be found in his own House upon a Summons; for he that absconds and conceals himself from the Beadle or Apparitor, so that he cannot be summon'd, may be said to be absent, tho' present in some respects.

Now Absence is of a fourfold Kind or Species. The first is called a *necessary* Absence, as in banish'd Persons; and this is *entirely necessary*.

† D. 4. 6. 35. A second Kind of Absence is said to be *necessary* and *voluntary*; as upon the Account of the State or Common-wealth †, or in the Service of the Church, and the like, according to the *Canon-Law*. The third Kind is what the *Civilians* call a *probable* Absence, as that of Students on the Score of Study. And the fourth, is an Absence *entirely voluntary*; as on

|| Felin. in
cap. 10.
X. 1. 29.

the Account of Buying and Selling, Trade, Merchandize, and the like ||. And some add a fifth Kind of Absence, which is committed *cum dolo & culpa*, by a Man's Non-appearance on a Citation; as in a contumacious Person, who, in hatred to his Contumacy, is by the Law, in some respects, reputed as a Person present*.

* Gloss. in
l. 13. C. 3. 1.

A *necessary* Absence is always pre-judicial to banish'd or outlaw'd Persons, and never helps them; because

† Conf. 74.
n. 3. 5.

a banish'd Person, that is absent out of Necessity, according to *Romanus* † and others, retains all Things onerous to himself, as a Punishment for his Crime: and, therefore, in Matters of Damage, he is accounted as a Per-

|| Bald. conf.
54. lib. 5.

son present to discharge and pay Incumbrances, and other Duties ||; but in other Matters of Damage he is deemed as a Pilgrim and an absent

* Conf. 75.
n. 10. lib. 1.

Person, according to *Alexander**, in Hatred and Detestation of him. *Necessary* and *voluntary* Absence, which is said to be on the Score of the

State or Common-wealth, ought not to prejudice the absent Person, or any other by his Means, but in all favourable Cases he ought to be reckon'd as a Person present: And, according to the *Canon Law*, he is

said to be absent on a necessary Account, that is, absent on the Score of Religion, or (as *Castrensis* † words it) in Favour of Religion.

† In l. 8. D. 3.
3.

Absence *entirely voluntary* is sometimes prejudicial, and induces a Punishment: for thus a Scholar, that is absent from the University for five

Years together, is struck or rased out of the *Matriculation* Book; and upon his coming *de novo* to the University, ought to be again matricula-

|| Alex. conf.
54. n. 5. l. 4.

ted ||: But this is not practis'd with us here in *England*. And a Person who goes out of his own Country, in order to travel abroad after he has

contracted a Dwelling, or gain'd a Settlement in such a Place, is presum'd to have left his Dwelling-Place of Settlement in his own Country, ac-

* Alex. conf.
ut supra.

cording to the *Civil-Law**, if, on his departure from thence, he is absent for five Years together; and so he is said to have left such Place of

Settlement in a foreign Country upon his return home again. Sometimes Absence is an Excuse to a Person in such a manner, that a Person *vo-*

† Conf. 3.
313. n. 7.

luntarily absent, is said to have a just Plea of Ignorance: And, therefore, in Matters of Damage, he is excused, according to *Oldradus* †.

According to the *Canon-Law*, absent Persons ought to be summon'd in four particular Cases; *viz.* *First*, in Elections. *Secondly*, in collating to Prebends and the like, when such Collation belongs to the Chapter. *Thirdly*, in the Admission of Canons. And *Fourthly*, in all Cessations from divine Service. But in the three first Cases, that is not null and void which is done without citing these Persons; but it may be appeal'd, and an Action likewise lies for the Contempt: But, in the fourth Case, when a Law or Canon is made against such Persons as refrain or keep from divine Service, all Persons ought to be cited; otherwise, according to

Ol-

Oldradus ||, such Absence makes it a Nullity. For in those Things || Conf. 259. which are done out of Necessity, as Elections and the like, a Nullity^{n. 3.} does not arise thro' want of citing the absent Persons, because they may appeal and prosecute the Contempt : But in such Matters as are done out of Will and Choice, and wherein an Action lies for those Things which concern every one, a Nullity arises from not citing the absent Persons*, * D. conf. as aforesaid, because absent Persons are not of Necessity to be summon'd^{n. 9.} but in the foregoing Cases ; and, especially, if two Parts in three of the Canons or Chapter are present : but if these two Parts in three of the Canons or Chapter are not present, then, according to *Calderinus* †, † Conf. 3. an^{due Partes.} the absent Persons ought to be cited.

Absence is always presum'd to be Malicious and Blameable, when a Man that is obliged to perform or do a Thing, does absent himself thereupon. Thus when a Person is obliged to pay a Debt or Legacy in some certain Place and Time, if he then absents himself, he seems to be maliciously or fraudulently absent ; because he is obliged to be present to pay the said Debt or Legacy, and, according to the *Civil-Law*, such a Person absent, may be proceeded against even to a Sequestration. A Clergyman is obliged to reside at his Church, and a Husband to live with his Wife : and, therefore, if either of these Persons absent themselves, their Absence is presum'd to be *Blameable* and *Malicious* ; and if they are absent without a just Cause, they may be proceeded against by a Citation made *ad Domum*. But this ought to be only in a particular Case, as when a Wife impleads or sues her Husband upon the Account of his Absence, or to render her due Benevolence ; or the Church impleads a Non-Resident Clerk. But 'tis otherwise, if another Person will bring either a *Real* or *Personal* Action against them, or will proceed against them by way of Accusation or Inquisition : for then a Citation made *ad Domum*, is not sufficient in a Process, where the Party may be greatly prejudiced thereby, if it does not otherwise appear, that his Absence was either *Blameable* or *Malicious*. Absence is also said to be *Blameable* and *Malicious*, when a Man goes away and leaves his Jurisdiction on the Receipt of a Citation, with a Purpose of avoiding Justice, and such a Person shall be punish'd for his Contumacy ; and in some Cases, according to the *Canon-Law*, it may be proceeded even to a definitive Sentence. For though an absent Person cannot be punish'd according to the *Civil-Law*, unless he evidently flies from Justice : yet 'tis otherwise by the *Canon-Law* ; because, according to *Oldradus* ||, 'tis well enough, if there be a suffi- || Conf. 65. cient *Liquet* of the Cause, and Suit has been contested thereupon. For a Bishop may, in order to extirpate Vice out of his Diocese, and when the Process is *de periculo Animæ*, proceed against an absent Person according to that Law : and so he may do in every Case relating to Benefices ; and in a Cause that is summary of its own Nature, wherein Contestation of Suit is not necessary.



Of Absolution.

THE Word *Absolution*, is a Term made use of both in the *Civil* and *Canon-Law*, and likewise by Divines, tho' to different Ends and Purposes in each of these Laws : for in the *Civil-Law*, it not only im-
E ports

ports a full and entire Acquittal of a Person by some final Sentence of Law, upon hearing the Merits of a Cause, and also a temporary Discharge of his farther Attendance on the Court, upon a Mesne Process, through a failure or defect of Pleading, as it does likewise in the *Canon-Law*; but it has also many other Significations, as the Reader may meet with in the Books of the *Civil-Law*. But, in the *Canon-Law*, and among Divines, it is not only used to denote an Acquittal or Discharge of a Man, as aforesaid; but it likewise signifies a Relaxation of him from the Obligation of some Sentence pronounced either in a Court of Law, or else in *Foro Pœnitentiali*. And thus there is in this Law one kind of Absolution, which is term'd *Judicial*; and another, which is stiled a *Declaratory* or *Extra-judicial* Absolution.

A *Judicial* Absolution is that, which respects the Concern and Advantage of a Person, that has been already condemn'd in a Court of Law; and it commonly arises from an Excommunication pronounced in such Court, which in the like manner, requires an Absolution. A *Declaratory* or *Extra-judicial* Absolution is that, which is conferr'd in *Foro Pœnitentiali*, and does not respect the Concern or Advantage of a third

* vi. 5. 10. 2. Person that has been already condemn'd in a Court of Law*. And as every *Judicial* Absolution is not valid, tho' it be in a Court of Judicature, if it be made by an incompetent Judge: so 'tis the same thing of a *Penitential* or *Extra-judicial* Absolution, according to the *Papists*, if it be made by a Person that has not Authority or Jurisdiction to administer the same; nor is a Custom contrary hereunto valid in Law. I shall, under this Title, first treat of a *Judicial*; and then of an *Extra-judicial* Absolution. In respect of the first, it is a known Rule in Law, That he may absolve a Person from a Sentence, who may condemn him thereby; because, in Matters of a Criminal Nature, the Power of Binding and Loosing is the same †: and, therefore, in this Case, the *Negative* as well as the *Affirmative* Argument is good and valid, viz. that he, who cannot condemn a Man, cannot, generally speaking, absolve him from a Sentence ‥; because, according to the *Canon-Law*, he, who cannot bind a Man, cannot absolve or loose him, tho' the Person being of an exempt Jurisdiction, should subject himself to the Power of him, who would absolve him: provided the Person, who would absolve him, be entirely a foreign and incompetent Judge: but it is otherwise if he be not a foreign and incompetent Judge. But yet this Rule (notwithstanding the Premises) admits of a Limitation in Law. For it only proceeds and takes place, when a Person cannot of *common Right* condemn or bind another by his Sentence; for then (I say) he cannot absolve him. But it is otherwise by a Specialty of Law, in virtue of some Privilege or particular Custom; because, tho' Bishops cannot bind by an Excommunication such Persons as are exempt from their Jurisdiction, yet they may by Specialty of Law absolve them upon their Request in such Cases, wherein they might of *common Right*, and by the general Law of the Church absolve other Subjects*. And thus we read, that the *Prior* of an Hospital may absolve his Prelate or Governor, whom yet he cannot bind ‡.

Secondly, It is also a Rule in Law, That a Bishop or Prelate ought to be more prone and ready to Absolution, than to Excommunication and the like ‥; which they very seldom are in *Popish* Countries, where the Power of the Clergy runs higher than it does here in *England*, and where Excommunication is more formidable to the poor Laity than among us: but a Bishop or Prelate that is under an Excommunication himself, can neither bind nor loose in the Phrase of the Church*. An Archbishop may, in virtue of an Appeal, absolve a Person from a Sentence

† Pœn. 1.
Dist. 5. X. 1.
33. 16.

‥ D. 50. 17.
D. 42. 1. 3.

* Fed. de
sen. conf. 14.
n. 4.

‡ X. 5. 39.
50.

‥ 26 Q. 7. 12.

* 24 Q. 1. 1.

tence of Excommunication or Suspension, that has been excommunicated or suspended by a Bishop†; because an Archbishop, as superior to a Bishop, has the cognizance of the Cause by an Appeal after him. But a Bishop may absolve Persons from any Excommunication inflicted on them by Law, unless the Case and Matter thereof be reserv'd to the Pope alone: but as the Papal Power does not prevail in *England*, many of those Cases, which were reserv'd to the Pope by the *Papal* Law, are now given to the Archbishop, by an Act of Parliament in *Henry* the Eighth's Time*. And, in the Vacancy of an Episcopal See, the Chapter, or him to whom Episcopal Jurisdiction is known to belong for that Time, may absolve all those Persons from a Sentence of Excommunication (whether it be a Sentence of Law or Man) which the Bishop might have absolv'd, in Case he had been alive||. By the *Papal Canon-Law*, a Person that dies under a Sentence of Excommunication, ought not to be absolv'd from thence after his Death, if he did not repent in his Life-time: but in *Protestant* Countries, Absolution after Death is not practis'd, as being an idle and vain Thing.

Thirdly, As to the Bond of an Ecclesiastical Censure, (which was only at first invented as a Medicine for Sin and Disobedience to the Laws of the Church, and not as a mortal Punishment,) as it ought to be publicly notify'd to the World; so in the like manner ought the Benefit of Absolution, which is conferr'd on a Person under this heavy Bond, to be equally known unto all Men, lest that a Person who ought not to be avoided after he is loosed from this Bond of Excommunication, should be shunn'd by some Men as a Contumely or Scandal to himself. And, therefore, whenever it shall happen, that any one is releas'd or absolv'd from any Sentence of Excommunication, Interdict, or Suspension, it is provided by a *Legatine* Constitution*, that some one shall publish such Absolution at all proper Times, and in all convenient Places, viz. Such Person was publicly denounc'd as an excommunicated Person and the like. But as Excommunication is not greatly regarded here in *England* as now fulminated, so this Constitution is out of use among us in a great measure, Persons excommunicated being frequently absolv'd in the private House of the Judge, and sometimes in open Court. And thus I have done with a Judicial Absolution of Criminals and Offenders, according to the Laws of Holy Church

And, therefore, I come in the next Place, to consider what we call an *Extra-judicial* or a *Declaratory* Absolution. For 'tis certain, that our Saviour left a Power in his Church to absolve Men from their Sins; but this was not an absolute and unconditional Power vested in any of his Ministers, but it was founded upon Repentance, and on the Penitent's Belief in him alone. And these are the Conditions of Absolution, which is not a Pardon as proceeding from the Lips of the Priest: for what is done by him, is only Declaratory of a Pardon from God, to him who truly repents and believes; and where God does not absolve, the Priest cannot. Therefore, 'tis a senseless Insinuation, which some Men make against the Clergy in a *Protestant* Country, as if they were so vain and foolish, as to think they had Power in themselves to absolve Men from their Sins, when they have no manner of Power in such a Case, but what proceeds from Faith and Repentance.

'Tis true, the Words, by which this is done, are Words of Authority, viz. *I absolve thee, &c.* but this Form of Absolution in the *Indicative* Way, and in the First Person, is not of more than 500 Years standing, as Bishop *Fell* has very justly observ'd in his Notes on St. *Cyprian's* Works: And this is directly prov'd in the second † and third || Chapters of the

† 2 Q. 1. 11.

* 25 H. 8. chap. 21.

|| vi. 1. 17. cap. un.

* Othob. Tit. 28.

† Sect. 3. || Sect. 4.

Pe-

Penitential Discipline, Part the first. The ordinary Method of absolving, during the first 1000 Years, and upwards, after Christ, was, for the Bishop and Church to intercede with God in Prayer for the Penitent's Pardon, after he had gone through the course assign'd him for *Penitential* Mortifications. And because lest the natural Import of such a positive Sentence, introduc'd, according to the new Method, under those Authoritative Words, should lead Men into an Opinion, That the Clergy assumed a Power of pardoning Sins; it was therefore always temper'd with some softer Expressions, as, *I absolve thee, so far as it is granted to me*, and the like. Though if Absolution be consider'd as a *Judicial* Act, restoring a Man only to the Peace of the Church, and supposing him already pardon'd by God, the *Indicative* or *Authoritative* Way may then (perhaps) be thought not improper. And *Tertullian* (as Bishop *Fell* has remark'd) seems to have alluded to somewhat like it, where he represents Pope *Zepherinus*, saying, *I remit the Sins of Adultery and Fornication to those, who have done Penance for them*. Tho', by the way, this should rather be consider'd as *Tertullian's* Improvement of *Zepherinus's* Management, than as a Consequence drawn by him, to ridicule a Practice, which he did not like in the Church, than as a set Form of Words used by *Zepherinus* upon that Occasion. Bishop *Fell* likewise takes further Notice of *St. Paul's* Manner of releasing the Incestuous *Corinthian* from his Ecclesiastical Bond, that it seem'd to proceed in the *Authoritative* Way, viz. *To whom you forgive any Thing, I forgive also*. But then, with Submission, it does not from hence appear, that this was the very Form wherein the Apostle absolv'd him, since the Words next following shew, that the Offender had really been absolv'd before, the Apostle immediately subjoining, viz. *For if I forgave any Thing, to whom I forgave it, I forgave it for your sakes, in the Person of Christ**. So that, I say, he had forgiven him before; and it does not from hence appear, in what Form this was done. The Confessors indeed say, in a very different Strain to *St. Cyprian*, in his 33d Epistle, *Know that we have given Peace to the Persons, in whose Behaviour, since their Crime, you are satisfy'd*. But be this ever so peremptory, it was not precisely the Absolution of those Persons which was thus given, but only a Recommendation of them to the Bishop for it; or at most, a Notification to the Bishop of their past Action on the behalf of the Lapsed: yet still he was the Person to absolve them, in whose Power alone it was to relax the Discipline they had deserv'd to lie under. And besides; *Confessors*, we know, were very apt to overstrain their Privileges, in which *St. Cyprian* made a notable Stand against them.

About the beginning of the 12th Century, the Pope alone assumed this Power of Absolving, &c. which *Wickliffe* afterwards oppos'd here in *England*, by alledging, that it was in every Priest; and one of the Articles which the Pope sent to our King *Richard* the Second, complaining against that good Man, was, That he had asserted, *Hoc debet credi Catholicè, quod quilibet Sacerdos ritè ordinatus habet potestatem sufficientem quemlibet Contritum à peccato quolibet absolvendi*: where the Word *Contritum* seems to be the Foundation of Absolution; for without Repentance there can be no Pardon. And therefore, those Ministers, who in April 1696, absolv'd Sir *John Friend*, and Sir *William Perkins*, at the Place of Execution, were justly censured by the Governours of the Church, to be both insolent and irregular in that Act; because the dying Persons were not moved by them to make any Confession of their Sins, or (at least) of that Sin of High-Treason, for which they were to suffer. For they were so far from believing it to be a Sin, that they express'd a

Satisf-

* 2 Cor. 2.
v. 10.

Satisfaction to die for it: and, therefore, they could not repent or desire Absolution in such a Case. So that Absolving them was not only a Justification of that Crime, for which they were condemn'd; but an impudent Affront both to the Laws of the Church and State.

Absolution ought not to be deny'd to any one at the Point of Death upon his Repentance*; and it may be perform'd by any one that has the Power and Exercise of the Keys†, and according to some of the *Canons*, even by a Layman *in articulo Mortis*: and this is true *in Foro Conscientioso*, but not in *Foro Pœnitentiæ*; since in this last Case it only belongs to the Priest to absolve Excommunicated Persons ||.

* X. 5. 39.
† X. 1. 31. 11.
|| Bern. in D. cap. 11. X. v. *Mortis articulo.*



Of Accessory and Principal.

AN *Accessory* is said to be that, which does accede unto some *Principal* Fact or Thing in Law; and as such, generally speaking, it follows the Reason and Nature of its *Principal*†: for in *Accessories*, those Things ought to be perform'd, which ought to be perform'd in their *Principals*. And, therefore, when one Thing draws a Consequence from another, if the first thing be valid or ought to be done, that which ensues from thence is likewise valid, and ought to be done. And according hereunto, a Church, which is united unto another, follows the Nature of that Church, unto which such Union is made||: and that, which is ordain'd and decreed in relation to the *Principal*, seems also to be ordain'd and decreed in respect of its *Accessory*; and the same Determination, generally speaking, ought to affect them both*. Thus if a Man sells a Cow big with a Calf, he also seems to have sold the Calf, which follows the Cow as an *Accessory*. And if a Man sells a House, the Glass-Windows thereunto belonging are said to be sold as an *Accessory*†: for an *Accessory* (as aforesaid) follows the Essence and Nature of the Thing unto which it is an *Accessory*. But an *Accessory* does not follow its *Principal*, when there is not the same Reason or Nature in the *Accessory* as in its *Principal*.

An *Accessory* is said to be threefold: for there are some *Accessories* which are so by *Necessity*; some, which are so by way of *Equity*; and some which are so by way of *Inheritance*; according to *Baldus*||. A *Principal* Obligation extinguishes an *Accessory* Obligation, if they do both concur in one and the same Person; as when a Man makes his Debtor his universal Heir or Legatary, and the like: But it is otherwise, if it be in two Obligations of equal Power. A Quality is said to be an *Accessory* unto a Fact or Crime, which is the *Principal*; and if the Fact or Crime be taken away and extinguish'd, the Quality is also thereby taken away and extinguish'd, as being an *Accessory*, according to this Rule in Law, *viz. That if the Principal be extinguish'd and taken away, the Accessory is also extinguish'd and taken away**. And a Man, that gives Aid, Counsel, or Assistance unto any Crime, is said to be liable, and oblig'd as an *Accessory* thereunto; because *Factum accedit facto*. When an *Accessory* comes as a necessary Consequence of the *Principal*, then if the *Principal* be granted and allow'd of, the *Accessory*, and all other

|| In cap. 1. X. 2. 28.

* D. 50. 17. 178.

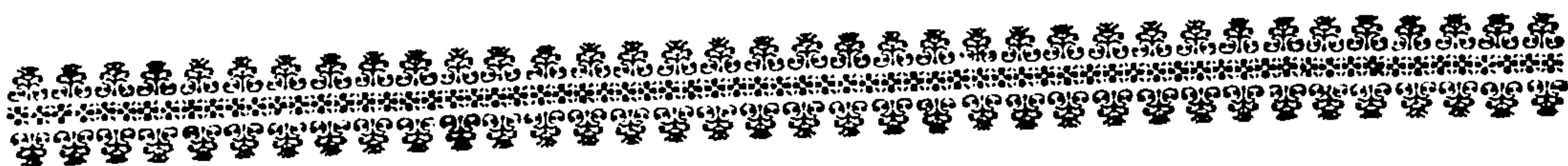
other things, without which it cannot subsist, are deem'd to be granted and allow'd of *, according to *Federicus de Senis* †. Thus when a Privilege or Exemption is granted to poor and indigent Persons, that they should not be oblig'd to pay Tithes for the Rents of the Houses they live in, all those Things are also included, which they expend upon other necessary Things, without which they cannot subsist: and if they make Proof of the *Principal*, the *Accessory* is also (according to *Mascard*) said to be prov'd ‖. But *Accessories* are not deem'd to be granted and allow'd of, upon Granting and Allowing of the *Principal*, when that which is called an *Accessory*, is of an arduous and difficult Nature, and probably was not thought of by the Person, that makes such Grant of the *Principal*, according to the said *Federicus* *: nor is it, when there is a different Reason militant in the *Accessory*, than in the *Principal*, according to *Alexander* in his *Consilia Juris* †.

* D. 2. 1. 2.
† Conf. 163.
& 186.

‖ Conel. 14.
& 15.

* Conf. 191.
n. 3.

† Conf. 4.
n. 5. lib. 1.



Of Accusation, and the Course of it.

SINCE the Good of Mother Church, as well as that of Civil Society, renders a Judicial Practice in criminal Cases entirely necessary, lest Crimes should go unpunish'd; and this Judicial Proceeding being commenc'd and form'd either by way of *Accusation*, *Denunciation* or *Inquisition*; I will here, in the following Work, beg leave to speak of these three several Ways of proceeding against Criminals, which the Ecclesiastical ‖, as well as the *Civil* Law has introduc'd in Courts of Judicature. And first of *Accusation* in point of Order.

‖ X. 5. 39.
35. X. 5. 1.
24.

Now *Accusation*, according to *Hostiensis*, is a Complaint or Declaration of some Crime committed by a Man, and preferr'd before a competent Judge, by the Intervention of an Inscription lawfully made, in order to inflict some publick Punishment or Censure on the guilty Person: And from hence, to accuse a Man, is nothing else but to detect or impeach a Person guilty of some Crime by way of Libel or Articles, in order to have a publick Punishment or Censure inflicted on him * as aforesaid; for 'tis necessary, that such *Accusation* should be made by way of Libel or Articles. For by the *Common Law*, or of *Common Right*, there are five things necessary to *Accusation*. *First*, that it be made in Writing, or even by Words of Mouth; provided, that the Notary does immediately reduce it into Writing. The *Second* thing necessary, is, that the Name of the Accuser, and the Party accused, be expressly mention'd in the Libel or *Accusation*. *Thirdly*, 'Tis necessary, that the *Species* of the Crime or Offence be well describ'd and set forth in the Libel or Articles, which our *English* Lawyers call an *Indictment* or *Information*. *Fourthly*, The Time and Place, that is to say, the Year and Month, when and where the Crime was done, ought to be mention'd therein. And the *Fifth* Thing necessary, is, that it be made before a competent Judge.

* X. 5. 1. 16.

The efficient Cause of an *Accusation* is some publick Law, which permits and allows of an *Accusation* to be made on the Account of some publick Crime committed; and it ought to be preferr'd before some ordinary or competent Judge, against him, who is not by a Prohibition exempted from an *Accusation*: and hereunto is added the Will of him who

has

has the Right and Power of accusing*. The Matter of an *Accusation** D. 47. 15.
is every enormous Crime committed either against Religion and the pub- 3 & 4.
lick Laws of the Church, or else against the Peace and Tranquillity of the D. 48. 1. 1.
State: in Defence of which, publick Laws are enacted, and for the
Breach of these Laws publick Punishments are enjoined and inflicted.
And every Person within the Church or Commonwealth may prefer an
Accusation, to the end that the Delinquent may suffer condign Punish-
ment; provided, such Accuser does observe the Order and Method pre-
scribed him by Law; and provided such Crime be not manifest, be-
cause Crimes that are manifest, do not stand in need of an *Accusation*†: † 2 Q. 1. 1.
and of these Things publick Judicature consists. 2 & 3.

According to *Paulus*, in his 15th Book *ad Edictum Prætoris*, there
are some judicial Pleas of a criminal Nature, which are *Capital*; and
others which are not *Capital*. Those are *Capital*, wherein the Punish-
ment of Natural or Civil Death is inflicted on the Offender; and those
are *Non-capital*, which are punish'd with some pecuniary Mulct or
Fine, or else with some corporal Punishment ||: but I have nothing to do || D. 48. 1. 2.
with either of these in this Work; and, therefore, I shall here more pro-
perly proceed to speak of such judicial Proceedings as are stiled *Ordinary*
and *Extra-ordinary*. Those are stiled *Ordinary*, when the Punishments
of Offences therein prosecuted are specially and expressly declar'd in Law by
name, which the Judge cannot increase or diminish without Cognizance,
when the Question is a Matter of Fact: as in the Case of Treason, Parri-
cide, Murder, Adultery, Forgery, Rape, Publick Force, Plagiary, and
the like, which are reckon'd up in the 48th Book of the *Digests*. And
those are called *Extra-ordinary*, touching the Punishment of which,
there is no special Provision made either by the *Civil* or *Canon-Law*, but
the same is left to the Discretion and Will of the Judge to decree and ap-
point a Punishment according to the Nature and Quality of the Offence,
and the Condition of the Person delinquent*: as Concussion, Burning of* X. 5. 1. 16.
Houses, Prevarication, the Crime of *Stellionatus*, and the like; touching X. 1. 29. 4. 4.
which, the Reader may consult the whole Title in the *Digests* quoted
here in the Margin †. † D. 47. 11.

The Form of commencing and founding an *Accusation*, according to
the *Canon-Law*, is deliver'd by Pope *Eutychianus*, in his second Epistle
to the Bishops of *Sicily*, in these Words; viz. *Whoever designs to bring a*
Crime into Judgment, let him come thither and notify the Defendant's
Name, and take a Bond of Inscription, and suffer the like Punishment
(yet with a Regard had to his Dignity); and let him know the liberty
he takes in Falsifying, shall not go unpunish'd, since a similitude of Pu-
nishment ought to be inflicted on Persons guilty of Calumny, by way of
Vengeance ||. And as Pope *Calixtus* commanded, let the *Accuser* offer || 2 Q. 8. 5.
his *Accusation* to the Judge in Writing, in the Presence of the Person
whom he accuses, and let him read his Letters of *Accusation propria*
voce, in his own proper Person*. And the Lawyer *Paulus* shews us, in* 2 Q. 8. 5.
the 48th Book of the *Digests* †, what the Form of an *Accusation* is, and † Tit. 2. 1. 3.
what is the Method of drawing a Libel or Articles thereon: saying, That
we ought to inscribe the Name of the Consul, and also the Day whereon
such Libel is exhibited, and before what Judge it is done, viz. *LUCIUS*
TITIUS, professus SEIAM lege JULIA de ADULTERIIS ream deferre: quod
dicat eam cum CAIO et SEMPRONIO in civitate illâ, in domo illius, in
mense illo, consulibus illis commississe Adulterium. For as the Place
ought to be pointed out where the Adultery was committed, so ought also
the Person with whom it was committed, and likewise the Month when || D. 48. 2. 3.
There are several Things both according to the *Civil* and *Canon-Law* to 2 Q. 8. 5. 2.
be

be consider'd as necessary in an *Accusation*. *First*, The Accuser ought to be such a Person as has the Right of Accusing. *Secondly*, The Person accused, ought to be such as may be accused. *Thirdly*, There ought to be an Inscription solemnly made. *Fourthly*, There ought to be Caution or Security given by the Accuser for the Prosecution of the Suit. And *Fifthly*, a due Process of Law ought to be strictly observ'd. And, *First*, We may easily understand who may be Accusers, if we know who may not be such: And, therefore, I shall here observe, that there are some Persons forbidden to be Accusers on the Score of their Sex, as Women; others on the Score of their Age, as Pupils and Infants; others upon the Account of some Crimes committed by them; and others on the Score of some filthy Lucre they propose to gain thereby, or if the Person has already receiv'd Money to that End and Purpose; others on the Score of their Conditions, as *Libertines* against their Patrons*; and others thro' a suspicion of Calumny †, as having once already, by the Means of Subornation, given false Evidence; and, lastly, others on the Account of their Poverty, as not being worth more than 50 *Aurei* ||. Yet all these Persons, if they prosecute either an Injury done to themselves, or else impeach the Death of their near Relation, are not excluded from *Accusation* *. And moreover it is to be observed, that both the *Canon* and *Civil-Law* do each of them agree in this Prohibition of *Accusation*. So that whatever Persons the *Civil-Law* forbids to be Accusers, the *Canon-Law* does the self-same †; as Homicides, Thieves, Robbers, Sacrilegious and Incestuous Persons, Adulterers, Ravishers of Virgins, Persons guilty of Perjury ||, and all other criminous Persons suspected of evil Conversation *, Aliens and Persons unknown; and such as do publickly keep Concubines. And by the Papal *Canon-Law*, for the Good of the Church, or rather to conceal the Shame of the Clergy, a Layman cannot in a criminal Cause accuse a Clerk or Clergyman †, nor can a Heretick, Infidel, Jew, or Schismatick do this ||: But this Part of the *Canon-Law* was never receiv'd here in *England*.

No one can be accused, who cannot otherwise be summon'd into a Court of Judicature, as a superior Magistrate, the President or Lieutenant of a Province*; nor can the Emperor or Pope be accused in the proper Sense of *Accusation*, because they are free and exempt from all coercive Laws †: but, according to the *Canon-Law*, the Emperor may be accused of Heresy, Perjury, or Sacrilege; and the Pope may for the same Reason be accused of Heresy only ||, and may be judg'd by a Synod or by the Emperor *. Nor can a Bondman or Servant be accused of a Canonical or Ecclesiastical Crime, for which a Pecuniary Punishment is inflicted; because he has no Property of his own †.

Inscription is an Obligation made in Writing, whereby the Accuser binds himself to undergo the same Punishment, if he shall not prove the Crime which he objects to the Party accused in his accusatory Libel, (and as he pretends) was committed by him, as the Defendant himself ought to suffer, if the same be prov'd. But tho' such Libel ought to contain the Name of the Judge, before whom such *Accusation* or Information is brought, the Name of the Accuser and of the Accused, the Time and Place when and where such Crime was committed, and likewise the Quality of the Crime, and the Person with whom it was committed: yet it is not necessary that the Day or Hour should be inserted. It must contain the Subscription of him who exhibits the Articles, or else of some other Person in his Behalf, if the Accuser cannot write; whereby the Accuser binds himself to prosecute the Suit, and professes withal, that if he does not prove the Crime which he lays against the Party accused, he will then en-
dure

duce the same Punishment, that such Crime deserves, when it is in truth committed: And if such Articles are not legally inscrib'd, as aforesaid, then the Name of the Defendant shall be ras'd out, and the Defendant shall be restor'd to his former state of Innocence*. But tho' Criminal Pleas are usually commenced in *Accusation* by such previous solemn Inscription; yet this Inscription is not necessary in all Cases, as in the Crime of Apostacy and some others, wherein Apparitors do lay Complaints before the Judges. * D. 48. 2. 3.

He that objects any Crime by way of *Accusation*, ought to give Caution by the Means of Sureties, that he will persevere in the Prosecution of such Crime even till Sentence pronounced in the Cause. And if he shall not, after such Caution given, appear in Court to follow the Suit, he ought first to be cited to exhibit his Presence, and plead his own Cause; and if he shall not then appear, he shall not only be punish'd according to the Discretion of the Judge *pœnâ extraordinariâ*, but shall likewise be compelled to pay all the Expences that the Court has been at in citing him †. The same Process is observ'd in a criminal Cause by way of *Accusation*, as in all Causes: for there is a Contestation of Suit enjoyn'd, and Exceptions, Replications, &c. are admitted; a Term Probatory, and a Conclusion in the Cause necessary, and the like. † C. 9. 1. 3. D. 48. 2. 7.

We read of an *internal* and an *external* Accusation. An *internal* Accusation is that of a Man's own Conscience; as the Accusation mention'd by Solomon. *He that is first in his own Cause, is just* ||; or, as the vulgar Translation renders it, *The just Man is the first Accuser of himself*. || Prov. c. 18. v. 17. *External* Accusation is either *Private* or *Publick*. *Private* is that which is betwixt Enemies or Friends: And that *Private* Accusation, which is among Enemies, is of three Sorts, *viz.* *First*, That which is Spiteful and Upbraiding, and by the *Grecians* called by the general Name of *κατηγορία* *, a Word also fitting every Accusation: *2dly*, That which we term *Reproach* or *Reviling*: and *3dly*, That which we call *Calumniation*, and is a Malicious and False Representation of an Enemy's Words or Actions to an offensive Purpose. * Plutarch in vitâ Publicol. *Private Accusation* of one Friend touching another, is nothing else but a *friendly Expostulation* with him, that is suppos'd not to have dealt *singly* or *considerately* in the Course of good Friendship; by the *Grecians* call'd *ἄντις*. That Accusation which is call'd *Publick*, is either *Civilly* commenc'd for the private Satisfaction of the Party injur'd; or else *Criminally*, that is to say, for some publick Punishment: And it is this last kind of *Accusation* which I here particularly treat of. But some (perhaps) will wonder how this Prosecution of Crimes, by way of *Accusation*, could be so usual as it was (in former Times) in the Commonwealths of *Athens*, *Rome*, and the like, insomuch that it became (there) to be the most ordinary Way of Proceeding of all others, in order to bring Crimes and Offences into Judgment: especially considering the Trouble and Danger that did, by Law, often attend the Accusers on the account of Retaliation, if they did not prove the Crime objected. To this I answer, That few or no Accusers would deal so rashly as to undertake an *Accusation*, till they thought themselves furnish'd with Witnesses, and other Proofs, enabling them to convict the Persons whom they accused. Besides, it must be remembred, that the Use of *Accusation* was the greatest in Popular Governments, where the quickest Step unto high Offices and Dignities in the State (next unto Service in the Wars) was an Ability of speaking and delivering their Minds before the whole People †, who were the Sovereign Judges (in most of those Causes) either by way of *Accusation*, or else in Defence of such, as were, by *Accusation*, called in question for their Lives, Limbs, † Quintil lib. 12. c. 7.

* Lib. 5.
Ethic.

† Arist. Top.
pic. lib. 2.
|| Ch. 5. v. 43.
& 44.

* Cicer. pro
Cæl.

† Lib. 2. Off.

* Jul. Clar.
lib. 5. Sect.
fin. Q. 11.

† Decianus.

Honour, Liberty, Country, and the like. *Thirdly*, That when *Accusation* was in most frequent Use, the People were Heathens, and not instructed in the true Knowledge of God; so that they thought, the putting up of an Injury done either to themselves, or their Friends, was a great Act of Pusillanimity, and a Token of a base-minded Man; and was (according to *Aristotle's* Morality*) a Vice very discommendable, even as the contrary Vice thereunto is, *viz.* the doing an Injury. In which Respect, all Danger to themselves was the less regarded by them. *Lastly*, They thought themselves bound in strict Terms of Duty, no less to persecute and plague their Enemies by all Means, than they were to do Good, and shew Kindness to their Friends. Wherefore the same Philosopher makes this to be a good consequential Argument †, *We must do good to our Friends: therefore we must hurt and annoy our Enemies.* But *Christ* refutes this Heathenish Opinion in the Gospel of *St. Matthew* ||.

For the Evidence of what I have here asserted, we are furnish'd with many Proofs out of the gravest Writers among the *Greeks* and *Latins*. *Plutarch*, in the Life of *Lucullus*, observes, That *publick Accusations* were antiently ordain'd, to the end, that young Men might be bred up in the study of *Eloquence*, and be thereby excited to the Valour of a brave Mind; for they delighted to see young Men as eagerly pursuing evil Members in the State by *Accusations*, as good Dogs do wild Beasts by natural Instinct. And *Tully* assigns three several Motives, whereby, without any Discommendation in those Times, a Man might be drawn to become an Accuser of others*. *A Man may be well induced* (says he) *to be an Accuser, either out of a dutiful Care, or else out of Necessity; or, lastly, by reason of his Years. If he willingly enters into it, I attribute it to his Piety: if he be commanded, then I impute it to Necessity: if in hopes of attaining Glory and Renown, then I ascribe it to his Youth. But to do it upon any other Occasion, rather deserves Resistance than Pardon.* And in another Place he tells us, for what End we may enter into the Accusation of others: Of *accusing* (says he) † *we are not to make it an usual Trade and Profession; neither are we at any time to do it, unless it be either in the Behalf of the Commonwealth, as the two LUCULLI; or else for our nearest Friends and Relations under Tyranny and Oppression, having receiv'd them into our Patronage, as CNEIUS DOMITIUS, and others did; or else but once only, as in our Youth for attaining Honour thereby.* But it seems the chiefest End was the procuring of a Reputation for *Eloquence* among the People unto themselves. But this Custom, which was heretofore permitted to young Beginners, to shew the forwardness and sharpness of their Wits, has been long since grown into Disuse*, and is, in most Places, forbidden at this day.

For how usual soever this solemn Manner of *Accusation*, mention'd in the *Roman* Civil Law, was in those Popular States of *Rome* and *Athens* heretofore; yet 'tis certain, it has not been exercised for a long time; nor is it now practis'd in most Civil Governments or Kingdoms, as I read of, not only thro' the Danger and Trouble thereof, but because it is and has been so odious and abhor'd of Men in all Ages. But in the place thereof, we may either reckon a Proceeding of *meer Office*, or else some other *mix'd* way; as partly of that proceeding of a Prosecution at the Instance of a Party, who is not properly term'd an Accuser. In *Flanders* all *Accusation* is entirely inhibited: And, in the Kingdom of *Naples*, it is only permitted to such, as will in this Manner prosecute some Injury or Enormity done to them or theirs. In the *Venetian* Commonwealth, 'tis wholly forbidden to private Persons †: so that the Care of prosecuting Offences and Crimes, by way of solemn Impeachment (there) at this Day,

Day, is entirely left to the publick Magistrate. In *France* none but the King's *General Attorneys* (whereof there are three) may take upon them to be Accusers: And yet these are not properly so call'd. And a learned Writer * on the Law of that Nation, assigns a good Reason for this Prohibition, *viz. Lest too great an opportunity of Calumniating and Oppressing the Weak by the Power of the Mighty should be thereby given, and for preserving publick Tranquillity in the Kingdom.* In *England* we rarely find *Appeals*, which nearest resemble the *Accusation* practis'd by the old *Romans*, brought and prosecuted against any suppos'd Offenders, except in Murders. I remember but one *Appeal* of Robbery brought for these 200 Years past; which was that by *Bennet Smith* against *Giles Rufford*, in the beginning of Queen *Mary's* Reign, as appears by the Preamble of a Statute quoted in the Margin †.

If an Accuser be found to Calumniate, he shall, according to the *Canon-Law*, receive the Punishment due to the Crime imputed ||: and he that does not prove his Accusation, shall suffer the same Punishment, in Danger of which he would have brought another Man. And to the very same effect did *Sixtus**, an antient Bishop of *Rome*, write to the Bishops of the *Eastern* Parts. Yea, besides the like Penalty, it was decreed in the second Council of *Bracara* †, That the *Accuser failing in his Proof, should be excommunicated* ||: and by the antient Canons, such an Accuser was (moreover) pronounc'd an *Infamous* Person *. So that even by the *Canon-Law*, this odious Way of proceeding against Offenders by *Accusation* was allow'd and permitted; and sometimes encouraged by the Bishops of those Times against Laymen, if they were rich enough to *commute* and *redeem* their Sins by the means of Money. But this way of proceeding by *Accusation* being now grown much out of Fashion in our Ecclesiastical Courts, I will here take leave of this Subject, and pass to another Title.

* Gul. Bened. in c. Ranutius. n. 200. de Testam.

† 2 & 3 Phil. & Mar. chap. 17. || 2 Q. 3. 3.

* *Sixtus*, c. 4. in 1 vol. concil.

† A. D. 610.

|| Can. 8.

* *Gelasius*, ibid. cap. Siquis.



Of Acts Judicial and Extra-judicial.

JUDICIAL Acts, are said to be all those Writings and Matters, which relate to *Judicial* Proceedings, and are sped in open Court at the Instance of one or both of the Parties *Litigant*; and, being reduced into Writing by a Publick Notary assumed and deputed for that end, are recorded by the Authority of the Judge, at the Motion of one or both of the aforesaid Parties †. For *Judicial* Acts ought to be reduced into Writing as well in an *ordinary* as an *extraordinary* Cause, or *Judicial* Proceeding, unless the Cause be of a very light Nature and Importance ||: For then no Writing is required, either in respect of the Sentence, or of the Process itself; but entire Credit is given to the simple and naked Information of the Judge. And 'tis a Rule laid down in Law, That credit ought to be given to the Writings and Records of *Judicial* Acts, tho' such Writings and Records have not the Subscription and Attestation of Witnesses. Because more credit ought to be given to a *Judicial* Act, than to the Instrument of a Notary Publick; for that these Acts are not only written by such a Notary hereunto

† Bald. in Auth. *Qua supplicatio*. || Bart. in c. 1. 2. 10. n. 1.

hereunto especially sworn and deputed; but they have also afterwards, the Approbation and Confirmation of the Judge added to them: who likewise gives an Authority either by signing the same under his Hand-writing, or else by affixing the Seal of his Office, and without whose Order and Directions, such Acts cannot be made. And, therefore, surely a Notary Publick, together with the Judge, ought to have more credit given him than another Notary, who stands single by himself.

I have just now said, that *Judicial* Acts are publick written Acts of Court, being reduced into Writing by a Notary Publick, through the Order and Direction of the Judge: and they are call'd publick Acts on a threefold Account. *First*, Because they are reduced into Writing by a Notary Publick, who is a publick Person deriving his Power from publick Authority, and deputed hereunto by the Judge*. *Secondly*, Because they are executed before some Judge or other. And, *Thirdly*, Because they are sped and executed in some publick Place, as in a Court of Judicature. *Judicial* Acts, which do necessarily require Writing, are a Libel, Contestation of Suit, Exceptions, Depositions of Witnesses and the like†: And, moreover, 'tis to be noted, That the Assignment or giving of a *Term in Law* is a *Judicial* Act. Acts and other *Judicial* Proceedings, if they are recent and fresh in Memory, may be prov'd by Writing or *viva voce*: but if they are not, then they ought to be prov'd by other legal Evidence‡. *Judicial* Acts may also be prov'd by the Confession of the Party: and Acts made and had in a *civil* Cause, shall be good Evidence in a *criminal* Proceeding. But *Judicial* Acts are never presum'd, but ought to be prov'd; and, therefore, what is not found written in the Acts of Court, is not presum'd to be done. Tho' *Judicial* Acts written by a Notary Publick in open Court, do not require the Presence and Evidence of Witnesses, unless it be in definitive and interlocutory Sentences*; yet such Acts may be proved by Witnesses, if the Writings made thereon be lost and destroy'd: but if such Acts have never been reduced into Writing, they do not admit of Proof, tho' proved by Witnesses then present at the making of them†. *Judicial* Acts may be proved by the special Depositions of Witnesses deposing in a particular Manner, *viz. That it was thus acted and thus written* (and the like) *in their Presence, and to their Knowledge*. If a Judge shall omit or neglect to have such Matters inserted in the Acts of Court as the Party *litigant* shall afterwards be necessarily oblig'd to prove, and the Party is herein put to Expences; then the Judge thus wilfully omitting or neglecting the same, shall be liable, and oblig'd to refund such Expences to the said Party.

But Acts of Judicature may be cancelled and circumducted by the Will and Direction of the Judge, and also by the Consent of the Parties *litigant*, before the Judge has pronounced and given Sentence; but afterwards they cannot, tho' the Judge and Parties should entirely consent thereunto, because the Suit or Matter is entirely ended and determin'd: and Acts made and done in the Presence of the Judge, may be said to be done by the Judge himself by Reason of his Authority. Whatever Acts of Court or *Judicial* Proceedings have been once publish'd, do perpetuate an Evidence; and all manner of credit is to be given them, even tho' the Judge that took Cognizance thereof, or that publish'd them, should be dead; or if he should be remov'd from his Office. The Words of all *Judicial* Acts are written *Narratively*, unless it be in Sentences wherein *dispositive* and *enacting* Terms are made Use of: And, therefore, credit ought to be given to these Acts, tho' the Words in them be *Narrative*.

* Roman. Conf. 281.

† Felin. in cap. 11. X. 2. 19.

‡ Cyn. in l. 11. c. 4. 21.

* Lap. Alleg. 82. n. 3.

† Tusch. concl. 772. n. 5. &c.

As a *Preparatory* Act is said to be that Act, which is previous to the *Principal* Act in Judgment; so an *Accessory* Act is said to be that, which is subsequent to the *Principal* Act: And all Acts done in Judgment from the Date of the Citation to the time of Contestation of Suit, are said to be done in *Principio Judicii*. Publick Acts both in *Civil* and *Criminal* Causes ought to be given by the Judge, Notary, or some other publick Officer, that has the Custody thereof, unto every one that desires the same: but he, against whom they are made in a *criminal* Cause, cannot demand the same to be given him, tho' they may rightly be given in a *civil* Cause. Suppose the Judge should say, That he would have the keeping of the Acts of Court remain with him, and the Notary will have the Custody of them with himself. Certainly in this Case the Actuary or Writer of them ought to be preferr'd; because if he should doubt of his own Acts, he may be under some imminent Danger of Falshood: And, therefore, 'tis his Interest and Business to keep the Acts.

The Assertion of the Judge alone does not prove the Existence of *Judicial* Acts, unless there be some other *Constat* of their Being*: But if two Judges do give Evidence or Testimony touching those Acts, which are done in Judgment, they do then (according to the Opinion of some Men) make full Proof, *sed Quare*: because they may be both concern'd as Parties; as in a Cause of Appeal and the like. And the Reason, why the Assertion of a single Judge does not prove the Existence of *Judicial* Acts, is, because his Office is to pronounce Judgment, and not to become an Evidence or Witness†. But (I pray) why may not the same be said of two Judges? Therefore, in this Respect the *Glossators* Opinion must be false and erroneous in Point of Law. *Probatory* Acts made in a summary Cause, or judicial Proceeding, are no Evidence in a plenary Cause or judicial Proceeding. But Acts *principally* deduced in any Cause, are of more efficacious Proof, than such Acts, as are deduced by way of *Incident*: and if an Act be *incidently* deduced in judicial Proceedings, lesser Proofs are sufficient, which otherwise would not be sufficient, if they were deduced *principally*||. An Act done in the Judges Presence, is presum'd to be done *Sponte Purâ*: And as *Judicial* Acts make a Presumption against a third Person*; so do they speak and make a Notoriety of themselves. Tho' the Instruments themselves produced in Judgment are not reckon'd among the *Judicial* Acts; yet the Production of those Instruments ought to be reckon'd among the Acts of Court. *Judicial* Acts, that do not require *Strepitum Judicii*, may well enough be sped and done by a secular Judge in the Church: and the Party *litigant*, seems to consent to all such Acts as are done by any Judge; unless he contradicts and opposes the same.

It has been already observed, That the Assertion of the Judge does not prove the Existence of *Judicial* Acts without some other *Constat* of their Being: But this can only be understood in Causes of Weight and great Importance. For in Causes, where the Judge has the Power of proceeding *sine scriptis*, credit is given to the Report and Information of the Judge in respect of the Acts of such a Proceeding: for credit is given to the relation of a Messenger or an Apparitor; and thus *à fortiori*, it ought to be given to the simple Assertion and Report of the Judge, especially in such light Causes as these. In foreign Countries it is not usual to have Witnesses to Definitive or Interlocutory Sentences as it is with us, but the Acts of Court are sufficient to prove the same: and wheresoever there is a Judge, the Acts of Court are not only suppos'd to be of publick credit by reason of his Authority, but because they are made in a publick Manner, as aforesaid. For that Rule of Law is true in this Respect,

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viz.

* Gram.
conf. 130.
n. 1.

† Anch.
conf. 451.
n. 2.

|| D. 42. 1.
15.

* Gloss. &
Dd. in lib.
13. D. 12. 2.

viz. That all *judicial* Acts ought to be dispatched in publick Court of their own Nature, and in the Judge's Presence.

Extra-judicial Acts, are said to be those which are made and done *extra judicium*, or out of Court, without any Opposition given thereunto, and may rather be called *Facta* than *Acta* in Propriety of Speech; because they are such Matters, as are done out of a Court of Judicature without any dispute or controversy arising from thence*. Thus the Confirmation of an Election, though it be done by a previous Citation or Proclamation of all Persons concerned therein, may (notwithstanding) be said to be done *Extra-judicially*, when no Contradiction or Opposition intervenes or ensues thereupon†. And the Union of Church-Benefices is an *Extra-judicial* Act for the like Reason; because all *Extra-judicial* Acts, are said to be done *ex Officio*, and not in a contentious Manner; since they may be done in the Absence of the Party. And thus in this Sense, an Appeal is not a *Judicial* Act, because it may be interposed in any Place, and at every Season, out of Court, according to *Joh. de Anan* ||.

* Guid. Pap.
Dec. 616.
n. 5.

† Gemin.
conf. 87.
col. 1.

|| Conf. 93.



Of Administration, and the Possession of Intestate Goods.

* J. 3. 1. 1. **A**N *Administrator*, in the *Civil* and *Canon-Law* styled *Herēs ab intestato**, is so called in the common Law of *England*, *ab Administrando*; because he is the Person to whom the Ordinary commits the Administration of the Goods of a Person that dies Intestate for default of an Executor, and an Action shall lie for and against him, as for an Executor. And he shall be accountable for such Goods, and be obliged to answer all Debts and Legacies, as Executors are, to the Value of the Goods of the Party deceased, and no further; unless it be by his own false Plea, or by wasting the Goods of the deceased: and if such Administrator dies, his Executors are not Administrators, it behoves the Ordinary to commit a new Administration. And if no Person will administer, the Ordinary may grant Letters *ad colligendum bona defuncti*, and thereby take the Goods of the Intestate into his own Hands: where-with he is to pay all Debts and Legacies so far as the Goods will extend; and thereby he becomes liable, in Law, as Executors or Administrators are. But he that has Letters from the Ordinary *ad colligendum bona defuncti*, is not Administrator, but the Action lies against the Ordinary equally as if he had taken the Goods into his own Hands.

This Title of the *Possession* and *Administration* of Goods was not of the Growth of the *civil* Law, strictly so called, (which only establishes Heirs, and gives a Right of Succession) but it arose out of the *Prætorian* Law, which in Equity, calls sundry Persons to the Succession of other Mens Goods by Administration, where there is no Will; and in some Cases, where there is a Will, as where the Will is conceal'd, or the Executor renounces the Probate of the Will: but if the Will once appears, then the Administration forthwith ceases. In Cases where Administrations are to be granted, the Children of the deceas'd (according to the *Civil* Law) have liberty to take it within a Year after the Death of the

the Party deceased, and if they be of more remote Kindred, then they have only a hundred Days to take it in, unless those which are to take it are Infants, Madmen, Deaf, Dumb, or Blind; in which Cases a longer time is assign'd: But this part of the *Civil Law*, in respect of the Time of obtaining Letters of Administration, is not regarded with us here in *England*, and is grown into disuse in several Countries. A Person, who is not yet conceiv'd in the Womb of his Mother at the Death of that Person to whose Estate the Succession is in Controversy, ought not to be an Administrator or an Heir *ab Intestato* to him; nor can he, either by the *Civil* or *Prætorian Law*, come to the Succession of such a Person's Estate*; for he that is not conceiv'd in the Womb till after the Death of the Person deceas'd, can never, according to the *Civil Law*, be said to be related or of kin to him. ^{* D. 28. 2. 6.}

The granting of Administrations, was originally a temporal Act, for above 300 Years after Christianity came into the World; and came to the Church by the Indulgence of Princes: and, therefore, it must, in some measure, be govern'd by the Temporal Laws. Among the *Romans*, the Judge or *Prætor* granted Administration, not only according to the Tables of the Testament, but many times, even contrary to those Tables †: as where a Child was not disinherited by his Father's Will in plain Terms, but only pass'd over with Silence as not remember'd; or that the Child was not born at the time of his Death, and so not known whether any such Child was living, or to be hoped for or not: in which Case, if it does afterwards appear, the Mother is then put in Possession of that which is the Child's Part. An Administrator has the Office and Quality of an Executor ‖, and may distrain for Rent in Arrear in the Life-time of the Party Intestate, or bring an Action of Debt for the same: and as an Administrator may sue, so likewise he may be charged by any Creditor in an Action of Debt on the Intestate's account; and an Administrator is chargeable, though not named in an Obligation, because he represents the Person of the Intestate*. Though an Administrator is not liable to a Debt upon a simple Contract of the Intestate's: yet if an Administrator, after the Intestate's Demise, promises to pay such a Debt, if there be a Consideration to ground the Action on, such Promise is binding. As thus: The Husband was indebted to another Man upon a Contract for Beer, and dy'd Intestate; the Wife took Administration, and afterwards assum'd upon herself to the Creditor, That if he would deliver her six Barrels of Beer, she would not only pay for them, but for her Husband's Debt also. In this Case it was adjudg'd, That Judgment should be entered *de Bonis propriis* generally: for it became a Charge by her own Act; and by her Promise, as Administratrix, she has made it her own Debt. *Wheeler and Collier's Case* ‖. ^{* Dyer Rep. 23. Pl. 142.}

There is a wide Difference between an Administration that was once Lawful, and an Administration that was never Lawful. And there is likewise a great Difference between a Sentence declaratory, by which Letters of Administration are declared to be void; and a Sentence of Repeal, which allows them to be good till they are repealed, according to my Lord, Ch. J. *Coke**. If an Inferior Ordinary grants Letters of Administration, whilst the Prerogative Administration granted by the Archbishop is in force, such Administration is Null and Void; for two Administrations cannot consist and stand together, according to Sir *John Needham's Case* in *Coke's Reports* †. If Administration be unduly granted by the Ordinary of an Inferior Diocese, the Party griev'd cannot have a Prohibition at the Common Law; but he must appeal to the Metropolitan or Arch-bishop of the Province, and from thence to the Court of Delegates. ^{* S Rep. 143.}
By ^{† S Rep. 135.}

‖ Crok. Rep. pt. 1.

By the *Civil* Law, a Man may be said to die Intestate four ways, as I shall hereafter more largely observe under the Title of *Intestates*. *First*, When a Man has made no Will at all. *2dly*, If he has not made it according to due Form of Law; for then tho' he has made a Will, yet it is the same thing as if he had made none. *3dly*, When the Will which he has made, is rupted and made void by the Birth of a Posthumous Issue, which he has passed by in silence and not remembered therein, or else by the Adoption of a Child. And *4thly*, When no Heir is named and appointed therein, or no one will take the Heirship on himself*. If no Will appears, the *Administration* or what the *Civil* Law calls the *Intestate Succession*, is committed according to that Law in this Order. *First*, The *Children* of the Deceased are admitted. *2dly*, Those that are *next of Kin in the Male Line*. *3dly*, Those that are *next of Kin in the Female Line*: but this Difference (notwithstanding) between *Male* and *Female*, is, at this day, taken away, and they that are next of Kin are equally admitted to this Succession. *Lastly*, We may reckon those which have a Right thereunto, either in that they are Man or Wife.

* J. 3. 1. 1.

Now touching the Succession of Husbands and Wives, there are various Laws and Customs, according to the diversities of Countries and Nations. By the ancient Law of *Romulus*, the Wife was by *Confarreatio* so closely join'd to the Husband in Wedlock, that the Marriage could never be dissolv'd. And as the Woman was to be modest and obedient to her Husband, so she was not only to have an equal share of Government in the House with him, but was likewise, upon his Decease, to succeed as Heir to his Goods and Estate, in the same manner as a Daughter succeeded to the Goods and Estate of her *Intestate* Parent: and she succeeded to the whole Estate if the Husband dy'd *Intestate* and without Children; but if he had Issue, she succeeded *ex æquo* with the Children, as we may read in the *Roman* Antiquities of *Dionysius Halicarnassus* †. But in Process of Time, this Law became antiquated at *Rome*; and as the Husband was barr'd from succeeding to the Goods and Estate of the Wife dying *Intestate*, so was the Wife excluded and set aside from succeeding to the Goods and Estate of her *Intestate* Husband. But afterwards, by a Decree of the Judge or *Prætor*, upon failure of Descendants, Ascendants and Collaterals even to the tenth Degree and further, in *Feudal* Estates, the Succession to an *Intestate's* Estate was given to the Husband and Wife, if they survived each other ||; viz. when their Marriage was Just and Lawful, and was not dissolved till the Time of their Death: And this Decree was afterwards approv'd, and confirm'd by the

† Lib. 2.

|| D. 38. 15. 1.

* D. 38. 11.

1. C. 6. 18. 1.

† X. 4. 19.

4 & 5.

C. 5. 17. 8.

|| X. 4. 20. 4.

D. 24. 3. 39.

* X. 3. 32.

4 & 7.

Imperial Civil Law*; and (I think) the same is true even at this Day according to the *Canon-Law*, if the Marriage be not separated on the Score of Fornication or Adultery †. And as the Wife forfeits her Dower or Jointure (by the *Civilians* called *Donatio propter Nuptias*) upon this Account, as a Punishment for her Adultery, and the same falls to the Benefit of her innocent Husband ||; so shall she surely *à fortiori* stand depriv'd of the Advantage of succeeding to the Estate of her *Intestate* Husband, from whose Bed she has thus separated herself by her own Crime and Lewdness. But if this Separation *à Thoro*, happens by the Consent of Parties, as on the Score of going into a Religious House*, or the like; I think this shall not prejudice her in the Point of *Intestate Succession*, provided she does not, within the Year of Mourning for her Husband deceas'd, betake herself to a second Marriage. By the Statute-Law of *England*, it was first enacted, That the Ordinary should commit the Administration of the *Intestate's* Goods to the next of Kin, and such Person might sue and be sued; and was accountable to the Ordinary, as

no Executors were*. But afterwards by a Statute, in the Reign of* ^{31 E. 3.} Henry VIII. the said Administration was order'd to be granted to the In- ^{ch. 11.} testate's Widow, or next of his Blood, or to both at the Discretion of the Ordinary. But where divers Persons, that are next of Blood, and are in an equality of Degree with the Intestate, do claim Administration; or where only one claims it as next of the Blood, (when in truth divers are of equal Kindred) the Ordinary shall have his choice to accept of one or more at their Request. And where but one or more, and not all (being in an equality of Kindred) do make Request, the Ordinary shall, in such a Case, be at Liberty to admit the Widow, and him, or those only making Request, or any one of them, at his Pleasure. And, according to this Statute, and the Rule aforesaid, the Ordinary must commit Administration under the Pain of ten Pounds forfeiture †. But we have another † ^{21 H. 8.} Statute in the 23d Year of King Charles II. chap. 10. directing whom ^{chap. 5.} the Ordinary shall appoint to be Administrators, and who shall have the Benefit thereof, and be accountable as Executors, and take Bond for performance thereof, and order Distribution of the Goods: which see at large ||. But this Act of Charles II. does not so extend to Feme-coverts || ^{23 Car. 2.} Estates, as that their Husbands may not have the Administration of their ^{chap. 10.} Personal Estates*: so that the Husband may have the Administration of* ^{29 Car. 2.} the Personal Estate of the Wife dying Intestate by the *Statute-Law*, as ^{chap. 3.} well as by the *Civil-Law*.

But by a Law in the *Justinian Code*, as the next of Blood did bar and exclude a Wife from succeeding to the Intestate's Estate †; so did the † ^{C. 8. 2. 3.} Wife exclude and bar the Exchequer from such a Succession ||: and, more- || ^{C. 6. 18. 1.} over, tho' the Lawyer *Azo* has made it a Doubt, whether a Corporation or Body Politick, of which the Husband was a Member in his Lifetime, shall not be preferr'd in point of such Succession to the Wife; yet he thinks the better Opinion to be, that such Corporation or Body shall not be preferr'd to the Wife, unless it be in such Goods and Estate as the deceased had acquired, through the Means and Occasion of such Corporation or Body Politick. But there is a Law in the *Novels**, which intro- * ^{Nov. 117.} duces another Reason or Consideration for the Wife to succeed to the ^{cap. 5.} Estate of her Intestate Husband, *viz.* That if the Husband shall die in wealthy Circumstances with Children, and leave behind him a surviving Wife, who had no Dower or Jointure, she shall have out of his Goods and Estate a fourth Part, if there are not more than three Children left behind him; but if there are more than three, she shall then succeed with them *pro virili* in the Usufruct, and leave the Property of such Estate to the Children: which seems the more equitable Doctrine.

Among Descendants, which are first entitled unto the Benefit of *Intestate Succession*; we may reckon natural and lawful Children to be in the first Degree, as well by the Law of God, as by the *Civil-Law*: For it is therein written, *A Son, and therefore an Heir* †. Now for the clearer † ^{Gal. c. 4.} understanding of this Matter, I shall here Historically consider the *Series* ^{v. 7.} and order of *Filial* Succession, and the several Changes made thereof according to the antient, middle, and latest Law of the *Romans*; and hereunto I shall subjoin the Laws of some other Nations touching this Subject. By the Law of the twelve Tables, only those were called unto the *Legal* or *Intestate Succession* of their Parents, that were in the Parent's power at the time of his Death, excluding all emancipated Children, who were only call'd thereunto *secundo ordine*. They did not stand in need of the Help of Man to give them the Administration of their Father's Estate, but were, by the Law itself, immediately made Heirs and Administrators thereof, and became *necessary* Heirs or Ad-
I administrators

ministrators whether they would or not: But what I here mention, only obtain'd in respect of the Father's Goods and Estate, and not in regard of the Mother's, because they had not their Children in their Power; and by the Law of the twelve Tables, Children did not succeed unto their

* J. 3. 3. 1. Mothers*. But afterwards by a Decree of the Senate called *Senatus-consultum Orficiannum*, made under the Emperor *M. Antoninus* the Philosopher, and his Son *Commodus*, A. D. 181. Lawful Children were admitted to succeed unto their Mother's Estate; and the Son or the Daughter, were preferr'd unto all other Kindred of the Mother deceas'd, even to the Father or Mother of the Mother deceas'd, who did not succeed if

† J. 3. 4. 1. there were any Grandchildren living †. And thus the Sons, if there were several at the Time of the Mother's Death, succeeded the Mother

|| C. 6. 57. 4. *in partes viriles* ||. And if they died before they were admitted to the Administration, they transmitted their Right of Administration to

* C. 6. 52. 1. theirs, if they had not repudiated and set them aside*.

It was, generally speaking, the common Custom of all Nations, That Sons and Daughters should equally succeed their Parents, dying Intestate, without any distinction of Sex: which thing was afterwards establish'd by the Laws of the *Visigoths*; among whom, Children of the first Degree or Order were first call'd to this Succession, as it happened among the *Romans*: After these came the Grandchildren, and then the Great

† Lib. 4. Granchildren; for which, see the Laws of the *Visigoths* †; and then came the next in Degree of Kindred: for the Law of their Tables made

& 5. no distinction of Sex in this *Intestate Succession* ||. The *Voconian* Law admitted only Daughters, and other Women, to a certain Part of the Estate. And the *Lombard* Law, by a Constitution of *Luitprandus*,

* Leg. Long. only admitted them to a third Part*: But the more noble Provinces, which consider'd each Sex, and the Nature thereof with greater accuracy, preferr'd the Males. And God, the wisest Lawgiver of all, has enacted a Law in the following Words, *viz. If a Man dies and has no*

Son, ye shall then cause his Inheritance to pass unto his Daughter.

And if he has no Daughter, ye shall then give his Inheritance unto his Brethren.

And if he has no Brethren, ye shall then give his Inheritance unto his Father's Brethren.

And if his Father has no Brethren, ye shall then give his Inheritance unto his Kinsman or next of Blood, and he shall possess it; and it shall be unto the Children of Israel

† Num. c. 27. *a perpetual Statute of Judgment* †. By an antient Law of the *Armenians*, Women did not succeed their Parents, nor their Brethren, till such time as the Emperor *Justinian* corrected this Law by a Novel Consti-

|| Nov. 21. tution ||. By the Laws of *Burgundy*, if any one dies Intestate without a Son, the Daughter shall succeed to the Father's and Mother's Estate in the Place of a Son; and if he shall happen to die without leaving Son or

* Leg. Burg. Daughter, the Estate shall come to the Sisters, or next of Kin*. And the like Law is among the *Saxons* and the *English*.

Tit 14.

The Estate and Inheritance of a Person dying Intestate, is, by Right of Devolution, according to the *Civil-Law*, given to such as are ally'd to him *ex Latere*, commonly stiled *Collaterals*, if there be no Ascendants or Descendants surviving at the time of his Death. But the Order of this Succession is various and different, as the Order of Ascendants and Descendants was: And, according to that Order, this Succession of *Collaterals* obtains and takes place. For by the Law of the twelve Tables (as already hinted) it was given first to the Intestate's Children, then to his Kindred by Consanguinity on the Father's side; and, lastly, to such as

† D. 38. 16. were nearest of Kin to him on the Mother's side †. And according to this Law, Brothers and Sisters were admitted to the Succession of a Brother

1. & 2.

ther deceas'd in an equal manner, tho' they were not all descended from the same Father or Mother ||. But, by a more modern Law among the *Romans*, touching the Succession of *Collaterals*, Brothers of the whole Blood are preferr'd to Brothers of the half Blood only: And thus the Brother and Sister of a Brother already dead, did not come in for the Estate with the Children surviving and descending from the other Brother already dead; nor did Nephews come in with their Uncles on the Father's side for the Estate of their said Uncle *. Nor is it any Objection to say, That Brothers *ex uno latere* are ally'd to the Person deceas'd even in the second Degree; and, therefore, are *in pari gradu*: because Persons ally'd by the whole Blood do not only depend on the same Degree, but are knit together by a twofold Right or Bond of Alliance, *viz.* by that of the same Father and Mother: and thus as two Bonds bind stronger than one, so do two Reasons avail more than one. And this is true in Succession to *Allodial* Estates; but 'tis otherwise in Succession to *Feudal* Inheritances; for then the Brother of the whole Blood shall not, by any means, exclude the Brother by the half Blood; because, in *Feudal* Estates, the Bond is not consider'd on the Mother's side. || C. 6. 58. 1.

According to the Common Law of *England* in Administrations, the whole Blood ought to be preferr'd to the half Blood: for next of Kin shall be intended to be meant, according to the Statute, of such as the Common-Law adjudges to be so; and so it was held in *Brown's Case*, before the Delegates, in the 8th of King *Charles I.* But according to *Stiles's Report* †, one of the half Blood is in as equal a Degree of Kin-† Fol. 74. dred to have the Letters of Administration committed to him, as one of & 75. the whole Blood is. A Man dying, left Issue by two several Venters, *viz.* by the first three Sons, and by the second two Daughters: one of the Sons, and the older of the two surviving Brothers, takes out Letters of Administration. And Sir *Lyonel Jenkins*, Judge of the Prerogative Court, would compel the Administrator to make Distribution to the Sisters of the half Blood. Whereupon a Prohibition was pray'd, but upon Advice by all the Judges, it was deny'd; for that the Sisters of the half Blood, being of Kin to the Intestate, and not in a remoter Degree than the Brother of the whole Blood, they must be accounted in equal Degree ||: || Mod. Rep. and this is true as to the Distribution of the Estate, but not as to granting 206. of Letters of Administration, according to the Statute. *Smith's Case.*

Administration was granted to the Sister of the half Blood of the Intestate, and her Husband by the Prerogative Court, and the Brother of the whole Blood sued to have the Letters of Administration repeal'd: And upon a Motion made for a Prohibition on this Suggestion, it was agreed by the Court, That the Sister of the half Blood, is in equal Degree of Kindred with the Brother of the whole Blood, according to the Statute. And so it was resolv'd in the first of *K. Charles I.* between *Glascock* and *Wingate*, known by the Name of *Telverton's Man's Case*. And if the Ordinary has once executed his Power according to the Statute, he cannot repeal the Letters upon a Citation without Cause shewn. But it was resolv'd, That the Statute was not observ'd in granting Letters in this Case; because the Husband who is not of Kin to the Intestate, is join'd with the Wife: and if she should die before him, he would continue Administrator against the meaning of the Statute. And for this Cause, a Prohibition was deny'd. But it was said, That if it had been granted to them during Coverture alone, perhaps it might have been good; because the Husband might have administr'd during the Coverture, though it had been granted to the Wife only *. *Brown* ver. * Select Cas. Wood. p. 36.

Letters of Administration of the Goods of Sir *John Lamb* Intestate, were granted by the Prerogative-Court, to the Wife of one *Hill*, being near of Kin to the Intestate: and, upon a Suggestion of Suit there by others of equal Degree, for a Distribution of the Intestate's Goods, according to an Agreement made by the Administrator (as pretended) a Prohibition was pray'd and granted. For the Statute requires, That Administration be granted to the next of Kin for their Advantage; and when the Ordinary has once executed his Power (as aforesaid) according to the Statute, he cannot alter it, nor has he any Power to compel the Administrator to make Distribution according to the Agreement: And 'twas said, That the Court threatened to repeal the Letters granted, unless she would exhibit a true Inventory, and pass an Account: But if it appears, that they go about to repeal the Letters for not doing it, a Prohibition will lie; which was not deny'd by the Court*. *Hill & Uxor*, vers. *Bird*, and others.

* Select. cas.
p. 56.

† Hob. Rep.
p. 250.

|| Levin.
Rep. Part 2.
p. 240.

* Lib. 5.
Fol. 29.

† Dyer's
Rep. p. 372.

|| Coke's
3. Rep. 37.

* Nov. 118.
cap. 1. § 2.

In *Goddard* and *Brier's* Case, the Court was of Opinion, That this kind of Administration, during the Minority of an Executor, was not within the Statute of 21 H. 8. to be granted of Necessity to the Testator's Widow, because there is an Executor all the while: But it had been otherwise (perhaps) if the Executor had been made from a Time to come †. And where one of the Executors is an Infant, and may not prove the Will, Administration *during his Minority* may be granted to the other, who may bring an Action *sole*. And it is not inconsistent, that he shall have the Administration in such a Case: for it is not granted as upon one dying Intestate, but only to enable him to sue alone; because the other is not capable of proving the Testament, and so cannot join with him, and he may not sue alone ||.

By the Common Law of *England*, an Administration, granted *durante minori Ætate*, ceases to have any Effect in Law, as soon as the Person arrives at the Age of seventeen Years: And, therefore, if a Person brings an Action as Administrator *durante minori Ætate*, he ought to aver the Person, for whose Interest he brings the Action, to be a Minor within the Age of Seventeen; otherwise he shall be barr'd of his Action. See *Piggot's* Case in *Coke's Rep.** Thus if an Infant be made Executor (as aforesaid) Administration may be granted to the Mother or any other Friend of such Infant *durante minori Ætate*, which shall cease and be void, when the Infant comes to seventeen Years of Age: And such an Administrator may not sell any Goods of the Person deceased, unless it be for the Necessity of Payment of Debts and the like; for he has his Administrator *pro bono & commodo Minoris*, and not for his Prejudice. Nor can he assent to pay Legacies, unless there be Assets to pay Debts, &c. And if such Minor be a Woman under the Age of Seventeen Years, and marries a Husband being of full Age, the Administration then shall cease and determine. Where an Executor dies Intestate, the Residuary Legatee shall have the Administration granted to him, and not the next of Kin; because that is more suitable to the Interest of the Testator's Meaning †.

It has been often resolv'd against 5 Ed. 6. That the Father or Mother are next of Kin, to whom Administration ought to be granted in respect of Children dying Intestate ||. By the *Civil* Law, if a Son dies Intestate without a Will, and leaves behind him neither Mother nor Brothers to inherit his Estate, the Father shall succeed as Heir thereunto*: and this Assertion is so well establish'd by that Law, that it would be almost a Crime to dispute the same. But if a Son dies Intestate, and leaves a Father and Mother behind him, they are both at this Day, by a novel Con-

Constitution, equally admitted to the Succession of the Intestate's Estate, tho' by a Law in the *Digests* and *Code**, the Father is preferr'd unto the Mother in Point of Succession to his Intestate Son. But touching this Law in the *Novels*, there has been a great Dispute among the Doctors, viz. Whether only those Goods shall be given to the Father, which came to the Son from the Father, or by the Father's means; and those to the Mother, which came from the Mother, or by her means. *Bartolus* thinks, that the Ascendant by the Father's Line, ought to have the Goods of an Intestate Son, which the deceas'd had from the Father, or by his means; and likewise the Ascendant by the Mother's Line, should have those Goods, which the Son deceas'd acquired from his Mother, or by her means: and for this Opinion, he quotes two Laws in the Margin much to this Purpose; and hereunto *Imola*, *Romanus* and *Fason*, have subscribed themselves in their Comment on the first of these Laws †. But this Opinion of *Bartolus*, and others, does in no wise please some Persons; because, say they, the Father and Mother shall equally succeed to their Intestate Son: But the Opinion of *Bartolus* is chiefly follow'd where the *Civil* Law is practis'd.

Although, according to *Rolls* ||, the Archbishop shall grant Letters of Administration of the Goods of one dying Intestate beyond Sea; yet if a Man dies Intestate, having Goods in *England* and *Ireland*, several Administrations ought to be granted. And 'tis the same thing if he dies Intestate, having Goods, in the several Provinces of *York* and *Canterbury*. *Dyer's Rep.* 305. Pl. 58.* Where Administration is granted by the Inferior Diocesan, where there are *Bona notabilia*, and afterwards it is granted by the Archbishop; or *è contra*, how they shall operate together. See *Needham's Case* in *Coke's Rep.* †. It was held by *Twisden* and *Wyndham*, Justices, that where a Man dies Intestate, having Goods in several *Peculiars*, the granting of Administration does belong to the Metropolitan of the Province, and not to the Ordinary of the Diocess, for they are exempt from the ordinary Jurisdiction ||, upon an Exception taken to a Declaration, that it was not Good, because he declared as Administrator upon Letters granted by the Archdeacon, and did not say by the Ordinary of that Place, nor *cui de Jure* it did belong to grant it. The Court held, that it was good in Case of the Archdeacon, as well as in Case of the Bishop, for the Archdeacon is *Oculus Episcopi*; and by *Twisden*, the Declaration was good without saying *per loci illius Ordinarium*, because he produc'd his Letters of Administration*.

It was agreed by all the four Judges in the *King's-Bench*, That where the Ordinary has once granted Letters of Administration according to the Statute, he may not revoke or repeal the same without Cause shewn; because the Grantee has an Interest in the Goods by the Statute, which the Ordinary cannot take from him without good Cause shewn: But for a good Cause, they all thought that he might; as when the Administrator becomes a Lunatick, and the like. And it was said, That the granting of Administration, whilst a *Caveat* was depending, was a sufficient Cause to revoke the same. And they said, that the Judges delegated are the proper Judges of what validity the *Caveat* shall be according to their Law: And it seem'd to them, that it was a *Supersedeas* at the Common Law, and that as Judgment given after it, according to the Common Law is erroneous, so it is according to the *Civil* Law after a *Caveat*. But be it so or not, it is to be judged by the Delegates, who are the proper Judges of this manner of Proceeding in their Courts touching a Matter Ecclesiastical, which belongs to their Courts, and not to the Common Law, which is not acquainted with their manner of Proceeding †.

* C. 6. 56. 2.
J. 3. 3. 3.

† Alex. conf.
150. vol. 2.

|| Pag. 903.

* Levin.
Rep. Part 2.
p. 86.

† Rep. 8.
135.

|| Levin.
Rep. Pt. 1.
p. 78.

* Levin.
Rep. Pt. 1.
p. 163.

† Levin.
Rep. p. 186.

If an Ordinary grants Letters of Administration where there is a Will and Executors named therein, though it be conceal'd; yet the same is void, and not made good by the subsequent Renunciation of the Executors ||.

|| Levin.
Rep. Pt. 2:
173.

Where an Appeal is made, and the first Administration is confirm'd, it is usual then to send back the Cause to the Court from whence it came by Appeal: But when the first Sentence is revers'd, then the first Court is vested of its Jurisdiction; and the Court that reverses it, shall commit the Administration *de novo*; because according to this Maxim in the Civil Law, a Judge that has once aggrieved a Man, is always presum'd to be willing to aggrieve him*.

* Bald. in
l. 16. C. 7.
62.

† Coke
Rep. 3.
fol. 78.

Letters of Administration obtain'd by Fraud and Collusion are void, and shall not repeal a former Administration †. If an Administrator dies, his Executors are not Administrators, but it behoves the Ordinary to commit a new Administration. And if a Stranger, that is not Administrator or Executor, takes the Goods of the Person deceas'd, and administers of his own wrong, he shall be charg'd and su'd as an Executor in his own wrong in any Action brought

|| Term. del.
ley.

against him ||. If the Metropolitan, pretending the Party deceas'd had *Bona notabilia* in divers Diocesses, grants Letters of Administration, such Administration is not void, but voidable, by a Sentence. But if the Ordinary of a Diocess commits the Administration of Goods, when the Party deceas'd has *Bona notabilia* in divers Diocesses, such Administration is meerly void, as well in respect to the Goods in his own Diocess, as to all others*.

* Coke
5 Rep.
fol. 29, 30.

† Coke
3 Inst. p. 148.

If the Ordinary takes any Reward or Fee for preferring of any one Person before another to the Administration, it is Bribery in the Ordinary, and he may be punish'd with Fine and Imprisonment at the King's Pleasure, and frequently with the Loss of his Place †. As the Probate of every Bishop's Last Will and Testament belongs to the Archbishop of the Province, though he has no Goods but within his own Diocess; so does the granting of Letters of Administration, touching his Goods, belong to the said Archbishop.

Tho' the Ordinary may call the Administrator to an Account, yet he cannot force him to make a Disposition of the Surplusage of the Intestate's Goods after Debts paid, by the true meaning of the 21 H. 8. c. 5. But what remains shall go to the Administrator, in case there be any more Debts to pay, which as yet are not come to his Knowledge; and if the Ordinary will meddle in causing a Disposition to be made, a Prohibition will be granted against him, if the Administrator requests it.

|| Crok. Rep.
Pt. 3.

Levan's Case ||. An Administrator accounted before the Ordinary, and prov'd Payment by one Witness; and because the Ordinary would not allow of Proof by one Witness, but excommunicated the Party for want of Proof, a Prohibition was thereupon granted: and the Book says there, That the Jurisdiction of the spiritual Court is not taken away by the Prohibition, but their Proceedings only regulated*.

* Latch. Rep.
fol. 117.

In the South part of *Holland*, in respect of Succession to an Intestate's Estate, the *Dutch* do not make use of the *Roman* Civil-Law, but have a particular Ordinance of their own, publish'd April the first, 1580. And in North *Holland*, commonly called *West-Friesland*, they have also, since that Time, receiv'd a special Law from their States Provincial, which governs them in this respect: Nor are we here in *England* directed by the *Civil* Law in this Point of Administration or Intestate Succession, but are in a great Measure govern'd by the Municipal Laws of the Realm.



Of Admission to Ecclesiastical Benefices: And of the Causes of Refusal.

Admission is, when the Patron presents a Clerk to a Church that is vacant, and the Bishop upon Examination admits and allows of such Clerk to be fitly qualify'd, by saying, *Admitto te habilem, &c.* * And the Writ *de admittendo Clerico*, is a Writ granted to him, that has recover'd his Right of Presentation against the Bishop in the Common-Pleas. See the Form of this Writ in *Fitzherb. Natur. Brevium* †. A Person that desires Admission to a vacant Benefice in the Church, ought, in his Presentation, according to the *Canon-Law*, to express the Way and Manner how it became void: for, according to that Law, it is of great moment to consider, whether it became vacant *de Jure* & *de Facto*, or *de Jure* only. For an Ecclesiastical Benefice is sometimes void *de Jure* & *Facto*, and then it ought to be conferr'd on an Idoneous Person *; and sometimes *de Facto* and not *de Jure*, as when a Man suffers a Spoliation by his own Act †. And sometimes it is vacant neither *de Facto* nor *de Jure*; and in this Case, and in that immediately foregoing, it ought not to be conferr'd on any one. So that he who is admitted unto such a Benefice, stands depriv'd thereof *ipso Jure* ‖.

* Coke on Lit. fol. 344.

† Fol. 38. & Reg. Orig. fol. 33. a.

‖ Dd. in cap. 6. vi. 1. 3.

* X. 3. 5. 29. 30 & 35.

† X. 40. 2 &

‖ X. 3. 8. 1. 2. & 13.

By the *Canon-Law*, Admission and Institution unto Ecclesiastical Benefices, does not only belong to the Bishop of the Diocese, but even to any other Ecclesiastical Person, provided this Person has such Right first derived to him from the Bishop, and can by such precedent and original Title legally prescribe unto such a Right of Admission and Institution *. And 'tis likewise said in our Law-Books, That Persons may have the Right of Admission to Ecclesiastical Benefices *Jure proprio*, if they have this Right and Power by special Privilege: So that the Chapter of a Cathedral Church, may do this *Jure proprio*, when the Episcopal See is vacant; but a Vicar-General, in the Bishop's Life, only acts herein *Jure alieno*.

* X. 3. 7. 6.

A Bishop, in the Business of Admission or Institution, is not to be look'd upon as a mere Minister or Instrument, but as a Judge †: And, therefore, in many Cases, he may refuse to admit the Clerk presented to him; and justify his Refusal. And the Causes of a Refusal, may arise either from the Person of the Clerk, the Presentation he brings with him; or, *thirdly*, from the Condition of the Church, to which he is presented, &c. *First*, They may arise from his Person. For every one, that is presented to a Church, ought to be duly qualify'd to perform the Duties of the Incumbent thereof; and this the Law of Reason renders sufficiently evident: and, therefore, he ought to be ordain'd or made a Minister, according to the Direction of the Laws ‖. For whatever the Law has been heretofore as to Laymen in respect of Deaneries, Prebends, and other Ecclesiastical Benefices without Cure of Souls, and to Deacons in respect of Benefices with Cure; yet as the Law now stands by a Statute in King *Charles* the Second's Reign, neither Laymen nor Deacons, but only a Priest according to the Form and Manner prescrib'd by the Book of Common-Prayer, can have an Ecclesiastical Benefice or Dignity, upon Pain to forfeit for every Offence one hundred Pounds, except the King's Professor of the *Civil* Law within the University of *Oxford*, who may hold

† 15 H. 7. 8. a.

‖ Dyer. Rep. p. 292.

* 14 Car. 2.
ch. 4.

† Leon. Rep.
pt. 1. 230.
Crok. Rep.
241.

|| Rolls Abr.
354 & 355.

* 14 H. 7.
21. Dyer's
Rep. Leon
Rep. pt. 3.
46.
† Stat. de
Arc. Cler.
cap. 13.

hold the Prebend of *Shipton* in the Cathedral Church of *Salisbury*, though he be a Layman*. But tho' no other than a Priest duly ordain'd is capable of being admitted to an Ecclesiastical Preferment; yet if a Clerk goes to the Bishop with a Presentation for an Admission and Institution, not having with him Letters of Orders to testify that he is a Priest duly ordain'd, nor making any Proof thereof; and the Bishop, at the Clerk's Request, gives him a Week's time to bring them, and the Clerk does not return till the Patron's six Months are elapsed: In this Case it was held, That the Cause of the Bishop's refusal to admit was not sufficient, and that he should not have the Turn by Lapse, because the Clerk is not bound to shew his Letters of Orders. But it was urged, That the Clerk, who is presented, ought to prove to the Bishop that he is a Deacon, and that he has Orders, otherwise by the Statute of the 13th of *Eliz.* the Bishop is not bound to admit him: for as the Law then stood, a Deacon was admittable. To which it was said, That the Statute does not compel the Clerk to shew his Orders; for (perhaps) he has lost them. But then it was a Question, how the Clerk should prove himself to be in Orders, because it seems to be granted that he ought to do this: To which it was said, That the Bishop might examine him upon Oath touching his Orders. However Judgment was given against the Bishop†: which seems to be a hard Case, unless the Bishop has not only Authority to examine him upon Oath, but be also bound to do it *ex Officio*, on the Clerk's refusal to shew his Orders. And in this Case it was also said, that though a Clerk does not exhibit to the Bishop Letters Missive or Testimonial, testifying his Ability and good Behaviour; yet the Bishop ought not to refuse the Clerk, or defer the Admission of him; because the Bishop is, by Examination, to try the Clerk's Ability, and may also make enquiry touching his Behaviour, since the Law allows him time convenient. But though a Clerk does bring to the Bishop Letters Testimonial reporting his Sufficiency to serve the Cure, yet the Bishop may proceed to the Examination of him in respect of his Ability, and may take Time to make enquiry touching his Behaviour: And *Rolls* says||, 28 Days are allow'd by the Law for that Purpose. And should the Bishop be satisfy'd as to the Clerk's Ability and good Behaviour; yet he is not bound instantly to admit him: And if a Clerk, coming to the Bishop for Admission, be order'd to come to him again afterwards to be examin'd, because he has other Business, this is no Refusal of the Clerk. So that if the Clerk returns not again for the Admission, and the six Months expire, and the Bishop do thereupon collate by Lapse, this will be a good Plea for the Bishop upon a *Quare Impedit**.

If the Bishop, upon Examination, finds the Clerk presented insufficient to serve the Cure that is committed to him by the Patron, he may then refuse to admit him†. And tho' the Clerk be otherwise learned, yet if he be presented to a Church in *Wales*, where the Parishioners are to have divine Service in the *Welch* Tongue (for that they understand not *English*) and the Clerk is not able to speak *Welch*, the Ordinary may refuse him as uncapable of the Cure. And the Reason why the want of *Welch*, in such Case, is, at this day, a justifiable Cause of Refusal, is because of a private Act of Parliament made in the 5th of *Eliz.* entitled, *An Act made for the Translating of the Bible, and of the Divine Service, into the Welch Tongue*. And now it may be further said, I conceive, by Reason of a Clause in the Statute of the 14th of *Charles II.* by which it is enacted, That the now Common-Prayers shall be translated into the *Welch* Tongue; and, being so translated, shall be used by all Ministers and Curates in *Wales*. For at the Common Law, before it was thus enacted, Ignorance of

of the *Welsh* Tongue was not a Cause of Refusal of any Person presented to such Church in *Wales*. And because the Act of the 5th of *Eliz.* that makes this Alteration in the Common-Prayer, was but a private Act; according to *Anderson*, the said Act not being pleaded by the Bishop, they could not take notice of it, but would adjudge according to the Common-Law; and therefore, it concerns the Bishop in the like Case to plead it specially*. Or if a Person be presented to a Church in *Eng-* * *Leon. Rep.*
land, who does not understand the *English* Tongue, the Bishop may re- pt. 1. p. 31.
fuse to admit him for such Incapacity †: But if he understands our Lan- † *Hob. Rep.*
guage, though he be an *Alien* born, yet he is not to be refused. See p. 147.
Statute the 7th *H.* 4. Chap. 12. and the 14th *H.* 6. Chap. 6. Tho' by the Statute of the 13th of *Rich.* 2. and the first of *Henry* the 5th, Chap. 7. *Frenchmen* be disabled to have Benefices in *England*. But it is thought that these Statutes are not in force at this Day ||; yet *Coke* said, that if || *Rolls Abr.*
the King will present a *Frenchman* or *Spaniard*, they shall not hold the 2. p. 348.
Benefice within this Realm*. And *Coke* says also generally, That if an * *Godb. Rep.*
Alien or Stranger be presented to a Benefice, the Bishop ought not to admit him, but may lawfully refuse so to do. And this Opinion of *Coke's* is given on Consideration had of all the Statutes.

When a Bishop refuses a Clerk for Insufficiency, and the Patron thereupon presents another, such Bishop shall be deemed a Disturber, if he afterwards within the six Months admits the first Clerk presented to him; because, having once refused to admit him on the account of Insufficiency, he cannot afterwards accept him. See the Bishop of *Hereford's* Case in || *Pasch. 26*
Croke's Reports ||. But there are other good Causes for the Bishop to deny Eliz. p. 27.
Admission to a Clerk presented to him, besides that of Insufficiency in point of Learning: for whatever are held to be good Causes of Deprivation, are likewise said to be sufficient Causes to deny Admission to a Benefice, as Incontinency, Perjury*, Heresy†, Bastardy || not dispensed with, * *Pasch. 6*
Drunkennes, Simony, Outlawry, Irreligion, and the like: All which the † *Eliz.*
Reader may see more at large under the Title of *Deprivation*. As a † 15 *H.* 7. 20.
Clerk presented may be refused Admission, if he has been guilty of Perjury || 7 *H.* 6.
before a lawful Judge in a Court of Judicature*; so he may likewise be * 38 *E.* 3.
refused Admission, if it appears by his own Confession that he is guilty f. 2.
thereof, tho' there be no Conviction of it † For it is said, that the Ordinary † *Dyer. Rep.*
may refuse a Clerk upon his own Knowledge of an Offence committed by 293. b.
him (provided such Offence be a good Cause of Refusal) tho' he be not convicted thereof by the Law; and this shall be try'd by Issue, whether it be true or not ||. But tho' a Clerk be a Haunter of Taverns, and a Player at unlawful || 38 *E.* 3. 2.
Games, yet the Bishop may not refuse him Admission, unless he has been b.
guilty of frequent and scandalous Acts of Drunkennes; because these Faults of haunting Taverns, and playing at unlawful Games, are not evil in their own Nature, but only so by a Prohibition of Law*. But in the * *Dyer Rep.*
15th Year of *Charles* the First, this Case was denied to be Law after much 154.
Debate by Justice *Berkley*, and so agreed by *Jones*. Nor is it safe for the Ordinary to refuse a Clerk, because he is the Son of the last Incumbent of the Church, tho' he should not bring any Dispensation along with him, on the account of the *Canon* Law, which says that the *Son cannot succeed the Father in an Ecclesiastical Benefice* †; because, as it has been held, † x. 1. 17. 3.
the *Canon* Law in this Case does not obtain in the Church of *England*. &c. 4.
Sed Quære; because the Archbishop of *Canterbury* usually grants Dispensations at the Request of such Clerks: but if the Ordinary refuses for such Cause, and the Patron presents another, who is instituted and inducted, the first Clerk is without any Remedy at Law; and if he sues the second

† Noy. Rep.
p. 91.

Clerk in the Spiritual Court, he may be stopped by a Prohibition from proceeding in such Suit †.

† Cases adj.
in Parl.

In a very late Case, the Bishop of *Exeter* refus'd to admit a Parson to a Living, because he was Insufficient in point of Literature, and for that Reason *inhabilis & minimè idoneus ad habendam Ecclesiam cum curâ animarum*; which was the Bishop's Plea, upon a *Quare Impedit*. 'Tis true, the Courts in *Westminster-Hall* held this to be too uncertain a Plea, and a loose way of Pleading; and therefore gave Judgment for the Plaintiff in the *Quare Impedit*, which was affirm'd upon a Writ of Error in the *King's-Bench*; but the Judgment was afterwards revers'd in the House of Lords †. So that all these Causes above-mentioned are now good Causes of refusal to admit a Clerk to a Benefice; and they are such as relate to his Person: But if there be no Incapacity in the Presentee, yet he may refuse to admit him for some Causes relating to the Patron, as I shall hereafter observe under the Titles of *Patron* and *Presentation*.

* Lib. 3. Tit.
6. c. 3.

It is enacted by a provincial Constitution in *Lindwood* *, that every Bishop shall grant to the Clerk whom he has admitted unto an Ecclesiastical Benefice, Letters Patents touching his Admission and Institution thereunto, containing and setting forth (among other things) in what Orders the Person admitted was at the time of his Admission, *viz.* whether he was a Priest or Deacon, and also by what Title he was admitted to such Ecclesiastical Benefice. For these Letters Patents in Matters of Benefices are in the place of a Title †: and therefore it seems according to *Bernard of Compostella*, that if those Letters are defective, the Title is naught and vicious; but I am of a contrary Opinion, because a good Title to a Benefice may be proved otherwise than by such Letters Patents; and so may Admission likewise. It has been held by some Persons, that if in the Letters of Institution there be no mention made of the Person admitted to an Ecclesiastical Benefice, that he was a Clerk in Holy Orders at the time of his Admission; this Defect shall vitiate his Institution, and render his Title naught, because there is no Evidence of a Quality necessary unto such Admission, *viz.* that of Orders or Clerkship; and thus an extrinſick Quality is omitted, which is not easily presum'd, but ought to be prov'd. But I think that such a Defect shall not prejudice the Person admitted, if it may otherwise appear, that the Person admitted was in necessary Orders at the time of his Admission, because the Truth of Things done shall not be vitiated by the Subtleties of Law, or by any Errors of Man †. But if he was not in some Orders at that time, then it sufficiently appears, that his Title is vicious in respect of his Incapacity.

† Bern. in c.
20. X. 1. 3.

* D. 1. 17. 6. 1.



Of Adultery, and the several Punishments thereof.

† D. 48. 5. 1.
* D. 48. 5. 12.
& 58.

THE *Julian* Law touching Adultery, which was made by *Augustus Caesar* †, is a Law which punishes not only Adultery, but likewise Whoredom, Incest, and what the *Civilians* in *Latin* stile *Lenocinium* *, and we in *English* call *Bawdry*, which is a wicked Practice of procuring and bringing Whores and Rogues together. The *Latin* Words *Stuprum* and

and *Adulterium*, which we call *Whoredom* and *Adultery*, are in the Books of the Civil Law promiscuously made use of, tho' properly speaking Adultery is committed in a married Woman, and *Stuprum* in a Virgin, Widow, or Boy, as may appear from the Laws quoted here in the Margin *. I shall here treat of Adultery, and afterwards of Incest and Whoredom under their proper Titles.

* D. 48.5.6.1.
D. 48.5.34.1.
D. 48.5.101.
in prin.

Now Adultery is defined to be the Violation and Defilement of another Person's Bed †; and it may be committed on another Man's Wife, tho' she be what the Civil Law calls *Uxor Injusta*: For it is enough if she be a Wife, tho' she does not come into her Husband's Power by *Coemptio*; and according to the Civil and Canon Law, it may be committed on a *Sponsa* or Woman betroth'd, since the Law does not permit us to violate the Matrimonial Bed, of what Quality soever it be, nor the very Hope of Matrimony ‖. But yet Adultery is not committed on a married Prostitute, tho' she may commit Adultery herself, and the Husband may punish this Crime in her: And the Reason which the Law assigns, is, because where there is *nullius Thoris Pudor*, but a promiscuous and vulgar Turpitude by the Husband's Connivance, the Husband's Bed does not seem to be injured and violated thereby. *Isidore* in his Book of *Etymologies*, says, that Adultery is so called, *quasi ad alterius Thorum*; because the Person committing the same, does approach the Bed of another Person. In the extended Sense of the Word, according to the Canonists, who are not displeas'd with Distinctions, Adultery is two-fold, *viz. General* and *Special*: that being stiled *General* Adultery with them, which does not only comprehend the Violation of another's Bed, but even that which includes and takes in all unlawful Fornication; though in the proper Sense of the Word, Adultery is only committed on the Body of a married Woman, as aforesaid.

† 36 Q. 1.

‖ D. 48.5.13.
3.

Adultery may be committed three several ways. *First*, Between a married Man and a married Woman; and this is call'd *Double* or *Two-fold* Adultery: For each of these Persons offending, not only violates his own Bed, but also defiles the Bed of another Person. *Secondly*, It may, according to the Opinion of some Men, be committed between a married Man and a single Woman: but according to others, this is not strictly Adultery; for this last Act is only Adultery according to the Canon Law *, and by the Civil Law is not deem'd Adultery either on the Man's side, or on the Woman's †. And *Thirdly*, it may be committed between a single Man and a married Woman; and thus Adultery may be in the Man, when he defiles and violates another's Bed, tho' he be not a married Man himself; and in the Woman, when she defiles her own Bed, tho' the Adulterer be a married Man. Tho' Adultery be an Ecclesiastical Crime, whenever a Suit is commenced in an Ecclesiastical Court *ad separationem Thoris Matrimonialis*; yet this is not a Crime *merely* Ecclesiastical, since the Secular Judge may intromit himself and punish this as a Crime of a mix'd Nature: and in respect of Lay-Men, the Secular as well as the Ecclesiastical Judge may take Cognizance thereof; nor is the Ordinary in this Point restrained only to Clergymen, but has a Power also of punishing Lay-men in Matters of Adultery.

* 32 Q. 5. 19.

† C. 9.9.1.

The Crime of Adultery may be impeach'd and brought into Judgment several ways. For sometimes the Husband may impeach or accuse his Wife of Adultery; as in the Case, wherein *Baldus* was consulted. And on the other hand, the Wife may sometimes accuse the Husband of Adultery, because he has committed this Crime with some Woman or other; as in the Case, wherein *Romanus* was consulted: And in both these Cases *ad separationem Thoris*. And sometimes the Husband may accuse both

both the Wife and the Adulterer of this Crime ; as in the Case, wherein *Baldus* and *Joh. de Ananias* were consulted. But by the *Civil* Law, no Person under Twenty-five Years of Age can impeach or prefer an Accusation of Adultery against any one, unless it be in his own Case, where he prosecutes the Injury of his own Marriage-Bed *, tho' he be not barr'd and hindred from preferring other capital Accusations. And the Right of the Husband is of such a Nature, according to the antient *Civil* Law, that if he accus'd his Wife of Adultery, he was not oblig'd to inscribe himself to the Libel, but he might abolish and discharge the Accusation at his own Pleasure ; and tho' he sued and impleaded his Wife upon naked Suspicions alone, yet he was not liable to an Action of Calumny, unless such Calumny was plain and evident against him †. The Husband might, within sixty Days, to be computed from the Divorce, in the Right of a Husband, accuse his Wife of Adultery ; and after a Lapse of that Time, the Father of the Woman might do it ‡, and all other extraneous Persons were admitted to do the like ; but extraneous Persons were oblig'd to inscribe themselves according to the usual way of Accusation *, and that within four Months. Therefore it appears from each of these Times, viz. from the sixty Days and the four Months join'd together, that the Woman could only be accus'd within six Months from the Time of the Divorce : And these six Months, in a marry'd Woman, were reckon'd from the Day of the Divorce, and in a Widow, from the Day of the Crime committed †. And as the Term of half a Year was prescrib'd for commencing the Accusation against her ; so was the Term of five Years limited for a Determination of the Cause, unless the same was eluded by some Prevarication, or other legal Impediment ‡. If the Woman marry'd again during the Time that the Adulterer was under an Accusation, she could not be accus'd by any one during her Marriage, if the Adulterer was acquitted, tho' he was acquitted by Collusion *. All Persons may be accused of Adultery, of what Condition or Dignity soever they were †, provided they knew the Woman with whom they play'd the Whore to be another Man's Wife. And not only those who commit Adultery, may be accus'd ; but also those, who do any wise make a Gain by this Crime, may be impeach'd, as Pimps, Panders, and the like : and this Accusation ought to be commenc'd in the Place or Diocess, where the Offence is committed.

The Husband may bring his Action either *Civilly* or *Criminally*. *Criminally*, when the Action is brought by way of Punishment : and *Civilly*, when the Husband sues in an Action of Injury for Damage ; or *ad separationem Thori*. The Defendant cannot regularly be defended by a Proctor ‡ ; for the Presence of the Defendant, as well as of the Accuser, is necessary. An Ecclesiastical Judge may proceed against Laymen committing Adultery (as aforesaid) though he cannot principally proceed against them *ad separationem Thori*, but only *ad Vindictam publicam* ; and the Reason of this is, because according to the *Canon* Law, Adulterers are said to be sacrilegious Persons *. But *Joh. de Ananias* says, That Adultery is only of Ecclesiastical Cognizance, when the Process is *ad separationem Thori* †.

Adultery is very hard and difficult to be prov'd, and so likewise is Fornication, being both of them Acts of Darknes and great Secrecy : and, therefore, they can hardly be prov'd by any direct Means. Because, though one should see a Man upon the very Body of a Woman, with her Coats up above her Middle, yet it does not necessarily follow from thence, that carnal Copulation did intervene or ensue between them : for the Man himself might be then rigid or impotent on some Account or other ; or even the Woman herself may be *nimis arcta*, so that he could not enter

* D. 48. 5.
15.

† D. 48. 5.
30. C. 49.
6. & 14.
ubi Dd.

‡ D. 48. 5. 3.
4. 14. 30.

* D. 48. 5.
14. 2.

† D. 48. 5.
29. 5.

‡ D. 48. 5.
31.

* D. 48. 5.
18.
D. 48. 5. 19.
† D. 48. 5.
38.

‡ D. 48. 5.
11. 1.

* C. 9. 10.
50.

† vi. 2. 2.

enter her Body. Therefore, in relation to the Proof of Fornication and Adultery, by Reason of such difficulty, it happens, that presumptive Evidence alone, is sufficient Proof||. And this presumptive Proof is collected and inferr'd *ex actibus propinquis*; that is to say, from the proximity and nearness of the Acts; as the Man's lying on the Woman's Body with her Coats up as aforesaid, and her *Pudenda* nakedly expos'd as in the usual Act and Manner of Copulation, or else from seeing them both together naked and undress'd in some secret Place, (for this is a sufficient presumptive Proof): or else from seeing them in Bed together * and the like; the Beginning and Foundation of such Indications being enough to ground a presumptive Evidence thereon. For the finding of a Man and a Woman together by themselves naked in a suspected Place, kissing and embracing each other, and in a very immodest Posture, and they being both suspected before of Incontinency; this, I say, will raise a vehement Suspicion, and make a presumptive Proof of their Guilt, these Things being the Preludes of Debauchery, and of a libidinous Conversation. 'Tis also a sufficient Presumption of this Crime, if a Man and a Woman are found lying together in some secret or suspected Place, tho' they do nothing else in Sight. If Witnesses should depose, That they saw such a Man and Woman join'd together in venereal Embraces †; or that they found a young Man open-breasted and with his Breeches down, his Shoes off, and the Door shut, in Company with a Woman alone, tho' this does not necessarily prove the Act of Fornication or Adultery committed, yet it is a violent and strong Presumption thereof. And, therefore, since Fornication and Adultery committed in secret are Matters of such difficult Proof; Witnesses, that are in other Respects improper, are herein admitted and allow'd of as good Witnesses in Law. And thus Adultery may be prov'd by such Conjectures as are receiv'd and approv'd of either by Law or Nature; and in order to punish Adultery, these Conjectures ought to be rightly and truly prov'd. That Woman is presum'd, according to the Opinion of some Men, to have committed Adultery, or (at least) to have willingly committed the same, that is found in Brothel-Houses, or where Adulteries are usually committed; and the same Thing is presum'd from Preparatories proximate hereunto, (as aforesaid) as in finding a Man and a Woman *solus cum solâ* and *nudus cum nudâ* in a Bed-Chamber together||. Suspicion and Presumption of Fornication and Adultery arises, when young Men, especially Scholars, do haunt and frequent the House of a marry'd Woman, or other young Damself, both night and day, without any apparent and good Reason for so doing; but then such a Presumption is only sufficient to put the Person to the Rack or Question, according to the *Civil* Law, and not to bring him to Condemnation.

No one can sufficiently conceive or declare, how grievous and crying a Sin this Crime of Adultery is; nor can any one enough abhor and detest it as an impious and execrable Vice: since it destroys the Honour of Matrimony, and ruins the good Fame and Reputation of Children; wherein (as the *Civil* Law observes) consists the *Decus Gentium*, or the Glory of a Family. Hence it is, that *Moses* has pronounced many severe and bitter Curses against adulterous Women*; Adultery being a more filthy and heinous Crime than *simple* Fornication committed with a single Woman, that is not ally'd or of kin to us by Blood; because a Child begotten and born in Adultery, is born and begotten by one Person to inherit another Person's Estate. *Bartolus* looks upon it to be the greatest and worst of all Crimes under High-Treason; and *Thales* the *Milesian*, held it to be a greater Sin than even Perjury itself; and *Euphron* in *Sto-*

|| X. 2. 23. 12.

* Ut supra.

† Dd. in c. 12. X. 2. 23. & in c. 7. 2. 21. Dd. in. c. 1 & 5. X. 5. 16.

|| Dam. Prax. Civ. C. 178. n. 14.

* Num. ch. 5. Deut. ch. 27.

baus affirms, there is no greater Sin or Evil among Men than Adultery: *Sybilla Erytbrea*, in *Lactantius's* Book touching the Anger of God, reckons it amongst those Impieties, wherewith God is greatly provok'd and incens'd. The *Spartans* prosecuted it with so much Hatred and Severity, that the Crime of Adultery was scarce ever known to be committed in that State. But why do I mention Laws relating to Men, since there are some brute Beasts, that avoid this Crime as a most detestable Act. For *Pliny* tells us, That Elephants know no such Things as carnal Copulation with any other than their own proper Mate*; and that Doves do not violate the Faith of Wedlock, as he phrases it †: And if we may believe him, Lyons do in a very severe manner punish the Adulteries of the Lyoness ‖. And *Ælian* in his History of Animals informs us, That the Stork sometimes kills the Adulterer and the Adulteress*. But if neither the Laws of God, the Detestations of the antient Philosophers, the Execrations of the Holy Fathers, nor the Examples of Brutes, can restrain the unruly Lust of Men; yet there are so many kinds of Punishments, according to the Laws of this or that Country, that are wont to be inflicted on Adulterers, that surely these would do the Business and keep them from this Desire of the Flesh. For, we read in several credible Authors, that some Adulterous Men were condemn'd to Death, some burnt alive, others had their Bodies chop'd asunder with an Ax, and others whipp'd; that a Woman found in or convicted of Adultery, had her Nose slit, her privy Parts cut off, both Eyes pluck'd out, and then drawn asunder by Horses. But I shall not here insist on these Punishments, they being not much to my present Purpose.

The Punishment of Adultery, according to the *Roman Civil* Law, was sometimes made by capital Punishments, sometimes by a Thorat Separation, and sometimes by pecuniary Punishments, as Loss of Dower, and the like. As long as the Punishment of Adultery was Capital, it was lawful, by the *Civil* Law, for the Father to kill and put his Daughter to death, and likewise for the Husband to kill his Wife, being taken in the Act of Adultery; and also for the Husband to slay the Adulterer, if he found him in his House after three Admonitions or open Denunciations to the contrary: and this they might do with Impunity. But tho' the ordinary Punishment of Adultery, according to the *Julian* and *Roman Civil* Law, was always Death †; yet the extraordinary Punishment thereof, ‖ D. 48. 18. 5. was Deportation ‖ or Relegation*. But the *Justinian Code* and the *Novels* * C. 9. 9. 30. have remitted the Punishment of Death unto the Woman; and in lieu thereof, introduced the *Bastinado*, and the thrusting of her into a Monastery, which yet is not observ'd at this Day. *Socrates Scholasticus*, in his Church History, informs us †, that, in *Theodosius* his Time, if a Woman was taken in Adultery, the *Romans* punish'd the Delinquent, not with such a sort of Punishment as might make her better, but in such a manner rather, as should aggravate her Offence. For, says he, they shut her up in a narrow Brothel-House, and forced her to play the Whore in a most impudent Manner. And, during the Time of her performing that most unclean Act, they caus'd little Bells to be rung, to the end that what was done within, might not be conceal'd from those that pass'd by, but that this ignominious Punishment might be known to all People. But I can scarce believe, that the *Romans* inflicted this sort of Punishment upon Adulteresses. For, after *Constantine's* Time, they always punish'd Adultery in a capital manner, as may be seen from the *Imperial* Laws now extant in both the Codes. Moreover, we may conjecture that little Bells were not found out to punish Adulteresses, but were commonly made use of by all Whores; who, prostituting themselves

* Lib. 3.
cap. 5.
† Lib. 10.
cap. 34.
‖ Lib. 10.
cap. 3.
* Lib. 15.

† D. 24. 2. 8. Law, was always Death †; yet the extraordinary Punishment thereof, ‖ D. 48. 18. 5. was Deportation ‖ or Relegation*. But the *Justinian Code* and the *Novels* * C. 9. 9. 30. have remitted the Punishment of Death unto the Woman; and in lieu thereof, introduced the *Bastinado*, and the thrusting of her into a Monastery, which yet is not observ'd at this Day. *Socrates Scholasticus*, in his Church History, informs us †, that, in *Theodosius* his Time, if a Woman was taken in Adultery, the *Romans* punish'd the Delinquent, not with such a sort of Punishment as might make her better, but in such a manner rather, as should aggravate her Offence. For, says he, they shut her up in a narrow Brothel-House, and forced her to play the Whore in a most impudent Manner. And, during the Time of her performing that most unclean Act, they caus'd little Bells to be rung, to the end that what was done within, might not be conceal'd from those that pass'd by, but that this ignominious Punishment might be known to all People. But I can scarce believe, that the *Romans* inflicted this sort of Punishment upon Adulteresses. For, after *Constantine's* Time, they always punish'd Adultery in a capital manner, as may be seen from the *Imperial* Laws now extant in both the Codes. Moreover, we may conjecture that little Bells were not found out to punish Adulteresses, but were commonly made use of by all Whores; who, prostituting themselves

† Lib. 5.
cap. 18.

selves in their Cells, did, by this Sign, call Travellers to them, according to *Dion Cassius* II.

II Lib 79.

But neither the *Canon* Law, nor the present Usage of the *Civil* Law, do admit of this rigour of Death for this Crime, since the Punishment of Adultery, is not capital, at this Day, by either of these Laws, but only pecuniary according to the *Civil* Law: But, according to the *Canon* Law, the Punishment of Adultery in a Layman is Excommunication * ; * 27 Q. 1. 6. and Deposition in a Clergyman. And *Lindwood* in his *Provincials* says, That such Clerks as are guilty of Adultery or any other Incontinency, shall be, *ipso Jure*, depriv'd of their spiritual Preferments: but yet he thinks that the declaratory Sentence of the Ecclesiastical Judge is necessary for the Execution of this Punishment. Since the Reformation, we have had some Instances of Clergymen being depriv'd for Adultery in our Law Books, *viz.* one in the 12th of Queen *Elizabeth*, another in the 16th of *Elizabeth*, and a third in the 27th Year of her Reign. And these Cases are enough to shew, that the Ecclesiastical Law in this Point is allow'd, by the Judges of our Common Law, to continue in sufficient Force among us, for Deprivation on the score of this Crime. In the *Romish* Church, a certain Term of Pennance is enjoyn'd both unto Laymen and Clergymen, *viz.* a Term of seven Years Pennance unto a Layman, and ten Years Pennance unto a Clergyman committing Adultery †: † 82 Dist. But this Pennance is often bought and redeem'd by Money. For though, ^{cap. 5.} according to the Apostolical Canons, a Presbyter, who committed Fornication or Adultery, ought to be depos'd; yet Pope *Sylvester*, to gain Money to the Apostolical Chamber, dispensing with these Canons, decreed, That if he did not continue in this Sin, but confessed the same of his own Accord, he should rise again, and only undergo ten Years Pennance in the following manner, *viz.* For the first three Months, he was to be shut up in some private Place, remote from all Conversation, with an Allowance only of Bread and Water: But on *Sundays*, and particular Holidays, he might refresh himself a little with Wine, and eat Fish and Pulse; tho' no Flesh, Eggs, or Cheese. And being clad in Sack-cloth, he was to lie on the Ground, and constantly, day and night, to implore God's Mercy for the Sin he had committed. And at three Months end, he might come out of Prison, but not appear in publick, lest he should offend the Faithful herein. For a Priest ought not to do publick Pennance (according to the *Canon* Law) as a Layman does. Afterwards, on resuming a little Strength, he ought to live on Bread and Water for a Year and a half (*Sundays* and particular Holidays excepted; on which he may drink Wine, and eat Pulse, Eggs, and Cheese, according to the limited Measure of the Canon). And at the end of the first Year and half, he may eat of the Sacrament of Bread and Wine, (lest he should grow hardned,) and be restored to the Peace of the Church; and standing the last in the Choir, he may sing Psalms with his Brethren, bear the lesser Offices in the Church, but not approach the Horn of the Altar. Then, at the end of the seventh Year, he was every Week, during the whole Time, to fast three Days on Bread and Water, the *Easter* Holidays excepted. And then if his Brethren, with whom he did Pennance, did approve of such his Pennance, the Bishop might restore him, according to the Decree of Pope *Calixtus*, to his former Honour. Then, after the expiration of seven Years, to the end of the tenth Year, he was to live every *Friday* on Bread and Water, unless he thought to redeem and buy off the same with Money: so that Commutation for Pennance came very early into the Church. And a Priest, according to this Canon or Decree, shall also undergo the same Pennance for all other Crimes which bring Deposition

sition on him. And no Priest was to think this burthensome to him, if after such a Lapse he was restor'd to his antient Honours on doing a proper Pennance. But this Pennance was soon thought by the Clergy to be too severe, after they were forbidden Matrimony, and could not contain themselves from the Lusts of the Flesh; and, therefore, a moderate Pennance was afterwards enjoyn'd them on the Score of Fornication and Adultery, as I shall observe hereafter in its proper Place. How happy had it been in these days, if the Severity of this Pennance had still continued in the Church, since so many (especially) of the *Romish* Clergy, are so fond of other Mens Wives!

Plato, in the second Book of his Laws, order'd the Adulterer and the Adulteress to be punish'd after the same manner; and so likewise did the antient *Canon Law* *: But by the Papal Law, Men are more grievously punish'd for Adultery than Women are; by which Law an Adulterous Husband cannot punish a Wife, nor proceed against her by way of Accusation; nor can he do this, if he has, by his ill Behaviour towards her, given occasion for his Wife to commit Adultery †. Both the *Civil* and *Canon Law*, forbids a Man to marry a Woman that has been condemn'd for Adultery †; but this it does upon different Accounts: for the *Canon Law* will have the Adulteress to remain all her Life-time, even after her Husband's Death, without the Hopes of a future Marriage, that she may perform the Sorrows of a severe Pennance all the Days of her Life *. But the *Civil Law* adjudges him to commit the Crime of Bawdry, and to incur the Penalty of it, that marries a Woman convicted or condemn'd for Adultery. But neither of these Reasons (I think) is sufficient. For as to the *Canon Law*, it is repugnant to the Command of the Apostle, who excludes no one from contracting Marriage out of the *Levitical* Degrees, but says, *For the sake of avoiding Fornication, let every Woman have her own Husband, and if she cannot contain, he commands her to marry, since 'tis better to marry than to burn* †.

The second Punishment of Adultery above-mention'd, is a Thorat Separation or a Dissolution of Matrimony, commonly called a Divorce à *vinculo Matrimonii*: For the Bond of Matrimony may be dissolv'd by Adultery, unless a Reconciliation intervenes between the Husband and Wife afterwards. For a Divorce is not commanded, but only permitted to the innocent Person, who may recede from his Right, and renounce a Favour introduced in his own Behalf †. And if there has been a Reconciliation between a Man and his Wife after Adultery is known to be committed by her, it is not lawful for him to bring his Action for a Divorce. The Scripture says, *Whosoever shall put away his Wife, unless it be for Fornication, and shall marry another, commits Adultery* *. This Place in *St. Matthew's Gospel* is hard to be understood. *St. Austin* says, That it does not appear, whether he that puts away an Adulterous Wife (as he might lawfully do) shall be deem'd an Adulterer if he marries another. Touching the meaning of this Text in the Holy Scripture, all Persons, even in the primitive Church, were not so well agreed. *Maldonat*, among other modern Divines, says, That the Bond of Matrimony is not dissolv'd by Adultery: and, therefore, in the last Council of *Trent*, it was decreed to be unlawful for a Man, thus putting away his Wife, to marry another. And this Opinion the *Papists* follow, because they make Marriage to be a Sacrament: but even those, or some of them (at least) who profess the Reform'd Religion, tho' they reject the Decrees of that Council, yet they do not entirely disallow of this Opinion, saying, That wheresoever Decrees of this Nature are extant, and in force, as being received,

* 32 Q. 6.
23.

† 32 Q. 6. 4.
32 Q. 7.
22. C. 9. 9. 9.

* 32 Q. 7.
22.

† 1 Cor. ch.
7. v. 2 & 9.

* Mat. ch. 5.
v. 32. &
ch. 19. v. 9.

receiv'd, they ought to be observ'd as well as the Civil or Temporal Laws. But yet they affirm, That the Bond of Matrimony may be dissolv'd on the Score of Adultery: and, therefore say, That the innocent Man may marry again (according to the Permission of God's Law) during the Life-time of his Adulterous Wife. And thus it is practis'd in *England, Holland, Friesland, Zealand*, and other *Protestant* Countries, unless the marry'd Couple have been once reconcil'd after the Wife committed Adultery. But the greater Difficulty is, Whether the Person, guilty of Adultery, ought to be admitted to a second Marriage, viz. after the innocent Person has betaken himself to a second Marriage, and so by this Means has cut off all Hopes of a Reconciliation? Touching this Question, even the Professors of the Reform'd Religion are not well agreed among themselves. *Beza* †, *Melancton* ‖, *Amesius* *, *Ritterbusius* †, and *Buchanan*, hold the affirmative Side of the Question: and *Luther*, *Wesembeck* ‖, and *Carpzovius* **, three eminent and learned *Germans*, are of the same Opinion with *Beza*, and the others just now quoted.

But it is said, That an innocent Person may, by Law, reclaim and recover an Adulterous Wife, even against her own Consent, after a Sentence of Divorce has been pronounced against her, if he pleases to forgive the Offence, and take her to himself again †: And this is true even according to the *Canon* Law, if the Guilty has repented and perform'd Pennance for her Crime ‖. And the Emperor *Justinian* seems to approve hereof in his *Novel* Constitutions*, where he gives the Husband a Power, within the Space of two Years, to recover his Adulterous Wife, which has been shut up in a Nunnery, and undergone a competent Pennance for her Crime of Adultery. But if any one retains a Wife that has been caught and taken in the Act of Adultery, and not barely suspected thereof, still as his Wife, and connives at her Wickedness, he becomes a Patron of his Wife's Turpitude and Iniquity †; and hereby incurs the Guilt of the Crime of Bawdry. But because Repentance does for the most part consist in the Mind, and since Christian Charity, as well as Marital Affection, easily induces a Belief thereof; this Law is therefore not observ'd at this day, lest it should give some Trouble and Disturbance to Marriages, which are otherwise of a quiet and concordant Nature.

The third Punishment of Adultery abovemention'd, is, That if a Wife commits Adultery, she shall lose her Dower; which the Law adjudges to the Husband on a *Declaratory* Sentence of the Judge, tho' the Wife be only a *Putative* and not a *true* and *real* Wife: And this is the common Opinion of the Doctors, as *Bartolus* proves in his Comment on the Law quoted here in the Margin. *2dly*, An Adulterous Wife loses her Earnest and her *Paraphernalia*. And, according to *Baldus*, a Wife does not only lose her Dower, and is deprived of all conjugal Society on the Score of Adultery, but she also loses the same, if she be seen to kiss any other Man than her own Husband; nay, a *Feudatary* shall, according to the *Feudal* Law, forfeit his Fief or Benefice, if he shall thro' *Lasciviousness* attempt to kiss his Lord's Wife. Again, the Adultery of the Wife has been adjudg'd a sufficient Cause of Enmity for a Donor or Testator to have been thought to have revok'd a Gift or Legacy *Mortis causa*. For a Gift made by the Husband, is presum'd to be lost on his Wife's committing Adultery: And 'tis the same thing, *si turpiter luserit*, if she shall wantonly sport and play with a Man, or kiss and embrace him in an amorous manner, or suffer herself to be kiss'd and embraced by him.

By the *Civil* Law, Adultery is adjudg'd and inferr'd from the Woman's side, and not from the Man's, as already hinted: For if a marry'd Man or a Batchelor has carnal Knowledge, or lies with another Man's

Wife,

† De Divor.
‖ In Mat.
ch. 5.

* De Cas.
conf. lib. 5.
cap. 38.

† De Diff.
Jur. l. 2.
cap. 9.

‖ Parat. D.
de Diver.

N. 11.

** Pract.
crim. Q. 63.

N. 40.

† Sanch. de
Marrim.

‖ 32 Q. 1.

4 & 5.

* Nov. 134.
cap. 10.

† 32 Q. 1. 1.

48. 5. 29.

C. 9. 9. 9.

Wife, he commits Adultery ; but on the contrary, he that has a Wife, and has carnal Knowledge, or lies with a single Woman, does not commit Adultery, nor shall he be punish'd as an Adulterer : but yet he shall be punish'd as a Fornicator. Because he that lies with another Man's Wife, begets and propagates Children in another's Family for him to keep and maintain ; and contaminates the Honour thereof, as much as in him lies : But he that lies with a single Woman, does not bring a Child into another's Family ; nor does he blemish or stain the Reputation thereof. But by the *Canon* Law, a Man that has a Wife, and lies with a single Woman, commits Adultery ; because the conjugal Faith of Wedlock, which is a Sacrament in the *Romish* Church, and the Unity of two in one Flesh, is hereby broken and dissolv'd. At this day a marry'd Woman may sue to be divorced from an Adulterous Husband upon a complaint of the Violation of Matrimony by Adultery, since modern Usage and Custom do allow hereof promiscuously not only to the Husband, but even to the Wife.

Before a Person proceeds to the Proof of Adultery, 'tis necessary in the first Place to prove a Marriage, and that the Adulteress was and is a Wife ; because Adultery is only properly committed with a marry'd Woman*. Therefore, if a Person impeach'd or accused of committing Adultery with *Seia* the Wife of *Titius* shall (by way of Answer) to such Accusation acknowledge, That he has lain with *Seia*, and say nothing more in respect of the Woman's being a Man's Wife, he shall not be punish'd for Adultery, but ought to be acquitted, if the Matter be not prov'd in respect of her being a marry'd Woman†. But it is not necessary for a Stranger to prove, that she was his true Wife, but only that she was accounted and taken as such, as other Wives are usually held and accounted : But 'tis otherwise, if the Husband impleads his Wife of Adultery, *Jure Mariti* ; for then he ought to prove her to be his true Wife‖. And the same thing also holds good when the Wife impleads her Husband of the said Crime ; because she ought to prove, that he was her Husband at the time of the Adultery committed*. In a Charge of Adultery, the Accuser ought to set forth in the accusatory Libel or Inquisition, which succeeds in the Place of Accusation, some certain and definite time, *viz.* the Year and Month†, wherein the Crime of Adultery is said to be committed, otherwise the Libel or Inquisition shall not be deem'd valid in Law ; nor shall the Court proceed in the Cause, if such certain and definite Time be not express'd therein, even tho' the Party accus'd should not oppose such Proceeding‖. And hence I infer ; That if, in such Accusation or Inquisition of Adultery, a stated time of the Year, Month, or Day be inserted, the Proof of such Time is of the Substance of the Proof, and entirely necessary thereunto ; insomuch, that tho' the Crime of Adultery should be prov'd, yet if the Quality of the Time be not proved, the Person accused thereof ought to be acquitted*.

It has been said, that Adultery is sufficiently prov'd by a strong and violent Presumption thereof, from the Deposition of Witnesses, saying, That they saw such a Man and a marry'd Woman join'd together in veneral Embraces† : From whence I infer, that if Witnesses only depose, That they saw such a Man, and such a marry'd Woman lying together in secret, or the Man lying upon the Woman, and do not say in *veneral Acts* or *Embraces*, they do not prove Adultery ; since this (perhaps) may happen without the Man's having any carnal Knowledge of the Woman's Body‖. But if the Witnesses do by way of Evidence depose, That they saw a marry'd Woman lying naked in Bed with a Man, they do hereby prove Adultery*. But in a criminal Cause of Adultery, it is not

* D. 48. 5.
13. 4. D. 48.
5. 6. & 34.

† Bart. conf.
33. N. 16.
vol. 2.

‖ Bart. in
1. 13. D. 48.
5. 31. 4.

* Roman.
conf. 167.

† Bart. &
Dd. in l. 3.
D. 48. 2.

‖ D. 48. 2. 3.

* D. 48. 5.
17. 3.

† Vid. Pag.
ant. 45.

‖ Dd. in c. 7.
X. 2. 21.

* Felin. in
dict. cap.

not sufficient Proof to dissolve the Marriage *à vinculo Matrimonii*, tho' the Witnesses should depose, that they found a Man and a married Woman *solus cum solâ* locked up in a Bed-chamber together with the Man's Breeches down, and the Woman refusing to open the Door; yet this is otherwise in a Civil Cause, when the Action is only commenced for a Loss or Forfeiture of Dower, according to *Baldus* *, *Menochius* †, and the rest of the Doctors. Nor is Adultery presumed to be committed by such Persons, who can defend the Action of being alone together in a Bed-chamber, either upon the Account of Nearness of Kin, ardent Affection, or the Custom of the Country, and the like; for the Violence of the Presumption is destroy'd by the Nearness of their Kindred ||: and 'tis the same thing if they are naked together, thro' want of Cloaths, provided they be not lock'd up in private together, and refuse to open the Door upon demand. But yet even in these Cases, the Doctors say they ought to purge their Innocence *. But tho' an *Absolatory* Sentence should be pronounced in Favour of the Persons upon the Account of Nearness of Blood; yet if Adultery shall afterwards be truly proved, or such Presumption which arises from Nearness of Blood shall cease, *viz.* because he afterwards married the said Woman; he may be again proceeded against as an Adulterer, and condemned thereon, notwithstanding the said Sentence †. But if the Adulterer be acquitted, the Adulterers shall also be acquitted: For though the Condemnation of the Man does not affect the Woman; yet his Absolution or Acquittal shall be for her Advantage ‡.

If Witnesses shall depose that they saw a Man and a married Woman *solus cum solâ* embracing and kissing each other, in some secret Place, it is a sufficient Proof of Adultery in respect of depriving her of her Jointure ||; but it is not good Proof in a Criminal Cause to dissolve the Marriage: But even this admits of a Limitation in a Clergyman embracing a Woman, because (says the *Canon* Law) he is not presum'd to do it on the account of Adultery, but rather on the score of giving his Benediction or exhorting her to Penance *. And this is more especially true in respect of a Clergyman, if the Woman be sixty Years of Age (at the least) or ugly and deformed in Person in such a manner, as it may destroy all suspicion of Adultery in such a Man. But this filthy Doctrine, tho' it be well enough approv'd by some of the *Canonists*, and countenanced by the *Romish* Clergy, yet it is condemned and rejected by some of the more modest *Canonists* †. Tho' one Witness should depose that the Adultery was committed on such a Day and in such a Place, and another should say, that it was committed on another Day, and in another Place, and by this means become single in their Depositions: Yet the Proof of Adultery does not hereby vanish on that Account, because the Law supplies the concurrence of their Testimony ||, but this Doctrine (I think) only holds good in respect of the Loss of Dower, and not in the Case of a Divorce *à vinculo Matrimonii*. And so likewise are Witnesses said to be *Con- testes*, or agree in their Depositions in order to prove Adultery, who do by Turns one after another peep through a Chink or Hole, and see a Man and a married Woman in the usual Act or Posture of carnal Copulation *. Adultery is even proved by Fame alone, but then this is only thus prov'd, in order to hinder and prevent a Solemnization of Matrimony: As when a Man is willing to contract or solemnize Wedlock, and it is objected to him that he has already defiled himself by committing Adultery with his Kinswoman; for then if there be a Fame or Rumour thereof, it shall (according to *Baldus*) be an Impediment to the Marriage, till he has purged his Innocence ‡. A Woman incurs such a suspicion of Adultery by her Departure from her Husband alone, that (according to *Felinus*) Adultery is

* Conf. 6.
Lib. 5.
† Conf. 31.
N. 25.

|| Jacob. de
Belv. Prax.
Crim. Tit.
de Len. N.
45. & 46.

* Di& Belv.
cod. Tit. n.
48.

† C. 9.9.
34.

‡ Hipp.
Marf. in l. 5.
D. 48. 18.

|| Decii conf.
D. 77. N. 12.
Hipp. conf.
1. N. 45. vol.
1.

* Gloss. in
c. 14.
Q. 3. 11.

† Abb. in
c. 1. X. 3. 4.
Felin. in l. 7.
X. 2. 21.

|| Jason conf.
11. vol. 1.
Crav. conf.
73. N. 3.

* Abb. in
c. 7. X. 2. 21.
In cap. 7.
X. 2. 23.

‡ In cap. 7.
X. 2. 21.

prov'd

prov'd from her lying all Night out of her Husband's House without any just or probable Cause for so doing, or against her Husband's Will and Consent; and so says the *Civil Law* *: But then this is only in respect to the Forfeiture of her Dower or Jointure, and not in any other Respect.

Adultery is generally esteemed to be a spiritual Offence, not from its own Nature (for 'tis no more a spiritual Crime than Murder, since they are both Offences against the second Table) but from the Quality of the Persons that are made Judges of it; and those are Bishops, who obtain'd this Jurisdiction after the following manner, *viz.* when the *Roman Emperors* became Christians, those Bishops, who were instrumental in their Conversion from *Paganism*, were in so great Reverence with them, that they granted them a Power of Judicature in certain Cases, whereof Marriage was one; because that was always solemnized in the Face of the Church, where the Bishop or his Ministers presided. And because Matrimonial Causes were subject to their Jurisdiction, it seemed reasonable, that the Violation of Marriage should be so too. But the Bishops for a long time did not govern themselves in this Matter according to the Canons of the Church, but in Pursuance to the Rules of the *Imperial Laws*: And this appears from the Punishment of this Offence, which has been changed according to the different Laws and Customs of each particular Nation.

By the *Levitical Law*, both the Man and the Woman were stoned to death, and so heinous a Crime was the Sin of Adultery here in *England* formerly, that our *Saxon* Ancestors compelled the Adulteress to strangle herself; and he who debauched her, was to be hanged over her Grave. By an Ordinance of King *Canutus*, the Man was to make the injured Party such Satisfaction as the Bishop should enjoin; and then he was to be banish'd; but if it was a Woman that had offended, her Nose and Ears were to be cut off: tho' I never read that any Woman was thus punish'd. By the Laws of *William* the Conqueror *, the Adulteress was to be put to death. And *Bracton*, an old Writer of the Law, tells us, That since the Woman was to undergo the Punishment above-mentioned, it was but reasonable that the Man should be punish'd, not with Death, but *in eo Membro quo deliquet*. And accordingly *John Britton* in the Reign of *Henry* the Third †, punished one *Jeffery Miller* of *Norfolk* for debauching his married Daughter: but the King was angry and banish'd *Britton*; and issued out a Proclamation, that no Man should presume to do the like, unless it was in the case of his Wife.

The aforesaid *William* not only alter'd the Punishment of this Crime, but took away this Jurisdiction from the Bishops Courts, especially in Cases where either his Servants or Tenants *in Capite* were concerned: For he prohibited the Bishops without his Leave to implead, excommunicate, *vel ullâ aliâ Ecclesiastici rigoris pœnâ constringere Barones vel Ministros suos Adulterio denotatos*. And the Offenders were afterwards try'd in the *Leet* ‡, which is a Temporal Court, and on Conviction were fined; which was always paid into the *Exchequer*, unless the Crime was committed in *Kent*, the Archbishop's Residence; and then he had a share of the Fines, that is to say, if the Man was the Offender, the King had the Fine; but if a Woman, then it was paid to the Archbishop. But in many Places the Lords of Mannors had a Privilege to punish their own Servants offending in this Nature within particular Limits, and the Fines were paid to them *: And this may be the Reason why both the Temporal and Spiritual Courts took Cognizance of this Crime by Tunes, tho' I find no struggling between these Courts as long as the Offence was Capital, but only since *Commutation* came in Play.

Of

* C.5.17.S.3

* Seld. in
ead. 185. l. 37.

† Selden.
Jan. 55.

‡ Spelm.
Gloss. v.
Lairnile.

* Spelm. ut
supra.



Of Advocates, their Office and Qualifications.

AN *Advocate*, in the general Import of the Word, is said to be that Person, who has any wise to do in the Pleading and Management of a *Judicial* Cause or Controversy. And in this Sense some (perhaps) will say, that even *Proctors* are called *Advocates*: But, in a strict way of speaking, only that Person is stiled an *Advocate*, who is the Patron of the Cause, and is often in *Latin* termed *Togatus**, and in *English*,* C. 2. 7. 5. a Person of the *Long Robe*. For tho' *Proctors* are Assistants to Causes & 14. in some measure, yet they are not properly *Advocates*; because those Things do not concur in *Proctors*, which are necessarily required in *Advocates*, viz. That they should have been Students in the Law for five Years, well skilled and versed in the Knowledge thereof, and approved as such by some Doctor or other †. And for that *Advocates* ought to be † C. 2. 7. 11. present at *Informations* in Law, either in the principal Cause, or that of an Appeal, or in both, or one only; so that in the general Acceptation of the Word, an *Advocate* signifies a *Patron*: And hence *Advocates*, *Patrons* and *Pleading* Lawyers, do at this day signify the self-same Thing; their Duty and Office being to speak to the Merits of a Cause, after the *Proctor* has prepared and instructed the same for a Hearing before the Judge.

In the Books of the *Civil* Law, *Advocates* are sometimes stiled *Orators*, sometimes *Rhetoricians*, and sometimes *Men of the Gown* or *Long Robe*, as aforesaid. But, in Propriety of Speech, an *Advocate* differs from a *Patron*, a *Patron* being the Person that pleads the Cause, whereas an *Advocate* is only called thereunto for his Advice and Counsel: for both *Gothofred* and *Asconius* define him to be a *Patron*, who speaks to the Merits of a Cause; but this Distinction is little now regarded. I have said, that *Advocates* ought to be well skilled in the Knowledge of the Laws, because it is their Business to assist the *Litigants* with safe and wholesome Advice: And tho' *Proctors* have seldom much Skill in the Laws, yet they ought to be perfectly well acquainted with the Practice thereof. *Advocates* are, as it were, the *Guardians* and *Tutors* of a Cause; but *Proctors* are only in the Place of *Curators* in that respect. Wherefore a Person is said to be a *Client* to his *Advocate*, but a Master and a *Mandator* to his *Proctor*; and, consequently, an *Advocate's* Office may be perform'd out of Court, or the Place of Judicature, which a *Proctor's* cannot be. The Office of the former is difficult and honourable*; but the Duty of the latter is easy, and of no honour at all †. * C. 2. S. 4. † C. 10. 31. 34.

Every Person may exercise the Office of an *Advocate*, provided he be able, and well qualify'd to execute the same, and be a Person, whom the Law has not condemn'd, and set aside from the Exercise of this noble Office: For the Act of a *Patron* or *Advocate* is a free Act; and, therefore, every Man may undertake and execute the same, unless as before excepted. And, according to the *Civil* Law, a necessary Qualification hereunto, is, That the Person exercising the same, ought to prove by sufficient Testimony, that he has spent five Years in the Study of the *Imperial* Laws, and has undergone a strict Examination therein; but, by C. 2. 7. 11. the

the Usage and Practice of *England, Holland*, and other Countries at this day, a Person may be admitted to this Office, on his taking of a Doctor of Law's Degree; which, in our *English* Universities, too often happens without the least Knowledge in the *Civil* Law, as appears from some that have taken that Degree, without being able to translate the shortest Law in the *Digest* or *Code* into their Mother Tongue. But tho' the Emperor *Justinian* has, in the Proem to the *Digests*, and also in his *Code*, only prefix'd the Term of five Years for studying the Laws, as aforesaid; so that a Man might, after that time, sue for the Degree of a *Licentiate* or *Master* in this Faculty: yet whoever rightly and truly contemplates the vast extent and compass of the *Civil* and *Canon* Law, will acknowledge a longer space of Time to be necessary, than is therein prescrib'd. Indeed, *Nerva* and *Celsus* are said to have made such a Progress in the Knowledge of the *Civil* Law, that each of them became publick Professors, and expounded the same at eighteen Years of Age; but then it is to be observ'd, that the *Civil* Law then was their only Study, and lay within less compass: And, moreover, this was then suffer'd, because the *Prætor* or Judge thought this Age to be sufficient for a Person to obtain and proceed in publick Employments, and to assume the *Toga virilis*, on laying aside the *Prætexta Puerilis*, or the Child's Gown*. And thus, by the *Civil* Law, a Minor that was seventeen Years of Age compleat, might be an *Advocate*†; and a Person above eighteen Years of Age, might be a Judge or Umpire, and pronounce Sentence in a Cause by consent of Parties; and if such Person became a Magistrate, his Jurisdiction was not rejected and disallow'd of||.

* D. 3. 1. 1.

prin. D. 45.

1. 91. 3.

† D. 3. 1. 1. 3.

|| D. 42. 1.

51.

* Lib. 1.

Tit. 17.

cap. 2.

By a Provincial Constitution of *Peckham* Archbishop of *Canterbury*, in *Lindwood**, it is ordain'd; That for the future, no one should be allow'd to practise as an *Advocate* in any publick Court of Law, without his being first a diligent Hearer of the *Civil* and *Canon* Law for three Years, at least; which he was to prove by his own corporal Oath, if the same did not appear either by a Testimonial from the Professor, under whom he had study'd the same; or else *per facti evidentiam*, viz. by his undergoing an Examination: For if a Person on his Examination shall not be found qualify'd, in respect of his Knowledge in the Law, he shall not be admitted to be an *Advocate*, tho' he has study'd the same for three Years. But, I think, the number of Years ought not to be much regarded; but the Knowledge of the Law, and the Industry of the Person, ought only to recommend him, and give him the Name of a Lawyer. Letters Testimonial from the Chancellor of the University where he has study'd the Law, shall also be sufficient in this Case, if it be doubted whether he has study'd the Laws, or taken a Doctor's Degree therein. And the Person may also prove the same by Witnesses; and it shall be well enough. When I say a Hearer of the *Civil* and *Canon* Law, I mean, that he ought to hear the same as a Scholar or Student, under some Doctor or Master thereof. But it matters not whether he has heard the same read in an University or elsewhere; provided he has apply'd his Mind to the Study and Knowledge thereof with due Industry, because the Constitution here, speaks *generally* without the Specification of any Place. But the present Practice is, that he ought to hear the Laws read under some Doctor or Professor thereof, in some Place where these Laws are publicly read and taught†. But to return to the aforesaid Constitution: I cannot see what should move the Person that made it, to limit and appoint a less time for the Study of the Laws, than the *Civil* Law has done, unless this Constitution may be understood only to relate to Advocates in *Curiiis Pedaneis & Inferioribus*, where Causes of Weight and

† C. 2. 7. 11.

and Moment are not heard and discussed, but only Causes of light Importance. For in light Causes, it seems sufficient, if the Person be well versed in the Business of Causes, and has acquainted himself with the Theory and Practice of the Law for three Years. But in Courts of greater Power and Dignity, wherein Causes of a more arduous Nature are handled, the *Advocates* are required to have more Knowledge and Learning in the Law.

The Office of an *Advocate* is of a necessary publick Nature*, and therefore, since the Law permits and allows thereof, Audience ought not to be deny'd him in defending the Causes of private Men, unless it be an atrocious Offence, or when he acts against the Interest of the State or Commonwealth wherein he bears this Office and Honour. But by the Canon Law, and a Provincial Constitution in *Lindwood*†, an *Advocate* shall, *eo ipso*, be depriv'd of his Office of an *Advocate* for one Year, if he shall oppose a Sentence pronounc'd in favour of Matrimony, unless the Judge shall, in exprefs Terms, excuse him by reason of some just Error in the Sentence, or else on the Account of some probable Ignorance. The Office of an Advocate is not to put the Seal of the Office to any thing, but to take care of his Client in such Matters as are Matters of Law, to propound his Client's Request in Judgment, and to plead his Cause in a publick manner*. An *Advocate* subscribing himself to the Advice and Opinion of another *Advocate*, seems to approve of such Opinion and Advice.

A Person under the Age of Seventeen, and likewise a Person that is so deaf by Nature, that he cannot hear the Command of the Magistrate, or the Decree of the Judge, cannot be an *Advocate* either for himself, or for other Persons ||; nor can a Clergyman, in the Cause of Blood*: because these Persons are barr'd by a Prohibition of Law. But though a Woman cannot be an *Advocate* in the Causes of others, lest she should offend against that Modesty which is so agreeable to her Sex; yet she may be an Advocate in her own Cause†: and so may also Persons, that are blind of both Eyes, become Advocates in respect of their own Causes. But Persons that are Infamous, or branded with any Note of Infamy, or condemn'd of Calumny in any publick Court of Judicature, and Persons convicted of any capital Crime, are *ipso Jure* forbidden to be *Advocates* either for themselves or others*. An *Advocate* may incur the Censure of the Court, and be punish'd for Prevarication, Sauciness to the Judge, reproachful Language in respect of the Parties in Suit, for agreeing with his Client for any part of the thing in Dispute during the Suit, and for being a Brawler in Court on purpose to lengthen out the Cause: But if such Agreement is made after the Suit is ended, it is not unlawful, provided, it does not exceed a lawful Sum, which, according to the Civil Law, was an Hundred *Aurei*, or Crowns, for each Cause he pleaded, or was engaged in†.

It belongs to the Office of the Judge, yea even of a delegated Judge, to decree and provide an *Advocate* for the Benefit of a Person, who cannot, by his own means, procure such *Advocate* for himself*; and a Judge may, by virtue of his Office, compel an *Advocate* to undertake the Defence and Patronage of an indigent Person for a competent Reward or Salary, unless his Cause be bad; nay, oblige an *Advocate* to plead the Cause of a *Pauper*, without any Fee or Gratuity at all†: for if the Party has not an *Advocate*, he cannot be compell'd to give a personal Answer: and if *Advocates* and *Proctors* shall refuse to plead the Causes of such Persons *gratis*, they may be depriv'd of their Office||. When there is any Dispute about this Salary, the Judge ought to appoint the Sum according to the Eloquence and Ability of the *Advocate* in the first Place; 2dly, In Proportion

tion to the Import of the Cause ; 3^{dly}, According to the Estate and Circumstances of the Client ; and, lastly, According to the Stile and Practice of the Court † : And this I mean by a *competent Salary*. An *Advocate* may even *ex nudo Pacto*, demand and sue for his Salary : But in demanding and suing for it, that which is demanded for the Payment of it, ought to be certainly stated and adjudg'd by a Computation of what is due, lest either Party should exceed a lawful Sum. And thus 'tis practis'd in the *Imperial Chamber*, whenever the Labours of *Advocates* and *Proctors* come to be rated and tax'd by an *Interlocutory Decree* : it being decreed, that that should first of all be deducted, which was given before by way of Payment. And *Advocates* and *Proctors* in the said Chamber, take an Oath at their Admission, that they will not demand or exact any thing beyond the Sum tax'd by the Judge, as appears from the Form of the Oath. Though *Advocates* and *Proctors* regularly ought not to make any Pact, Contract, or Agreement with their Clients *de Quotâ litis* * ; because some Clients would give the greatest part of their Estates thro' fear of losing their Suit or Cause, as a weak or sick Man would do to his Physician thro' fear of Death : yet, according to some Men's Opinion, a Pact or an Agreement made *ratione Palmarii*, is a good and valid Stipulation, if such Advocate gets the Victory in the Cause † ; and the Party may recover the same either by a *Personal Action*, by an *Action ex stipulatu*, or else by imploring the Judge's Office. But this is not practis'd in *England*, by reason of the Statutes of *Maintenance* and *Champerty* ‡. Modesty in *Advocates* is a very laudable Thing : and, therefore, they ought not only to be cloath'd with Decency and Comeliness, but even in giving their Counsel and Advice, it is much more Modest as well as safe, for them to speak by the Word *Credo*, or *this it seems to me*, and the like, than to aver any Thing *positively*. They ought to be brief, and not too verbose in their way of speaking, and to propound the matter of their Argument in a mild and gentle manner, and not with a tumultuous or contemptuous Voice ; nor ought they to make great Gain, and filthy Lucre, but Justice their chief Design ; and in their Business they ought to give a quick Dispatch to such Matters as come before them. An *Advocate* is said to retain so great an Affection for a Cause, wherein he has been concern'd as an *Advocate*, that he cannot be a Witness therein if it should happen to be appealed. Those Persons are said to be cavillous and unfaithful *Advocates*, by whose Fraud and Iniquity, Justice is destroy'd ; and, therefore, they ought to be severely punish'd, as aforesaid. The *Papists* say, That *Advocates* ought not to propound any thing of Scripture for an Argument in their Pleading, according to their own sense of the Matter, but according to the Judgment of the Church *, that is to say, the Clergy : but this gainful Doctrine to the Clergy, we *Protestants* deny to be Law.

I shall here, in the last Place, consider for what Reasons an *Advocate* may be said to contract *Infamy* in Respect of the Parties *litigant*. And First when an *Advocate* does or shall, on the Judge's command to attend the Cause of any Person, deny his Patronage to the Party, through some lame or bald Excuse or other ; and such as the Law and Custom does not warrant him in : for tho' regularly no one may be compell'd against his Will to be a *Proctor* to any one †, yet the Judge may oblige every excellent *Advocate* to give his Patronage and Assistance unto a Litigant in Distress for want of an *Advocate* ‡. For the Office of an *Advocate*, being in some measure a publick Office (and this being his Profession) he may be compell'd to do that which belongs to his Office and Profession, under the Penalty of being depriv'd of his Office by the Judge of the Court * :

And

† D. 50. 13. 1.
10.

* C. 2. 6. 6. 2.
C. 2. 6. 5.

† C. 2. 6. 6.
2.

‡ Westm. 1.
3. E. 1. 28.
20. E. 3. ch.
4. 7. R. 2. ch.
15. 32. H. 8.
9.

* 57 Dist.

† D. 3. 3.
8. 1.

‡ D. 3. 1. 1.

* Dd. in
J. 156. D. 50.
17.

And this is constantly practis'd in the *Imperial* Chamber, especially in the Causes of *Paupers* *. And if he shall disobey the Judge's Order herein, or elude the same by any Subterfuge or Tergiversation, he shall be for ever turn'd out of Court, and interdicted Pleading in such a manner as never to be restor'd again †. The second Cause of *Infamy* in an *Advocate* (as aforesaid) is Avarice, *viz.* when not being contented with a competent Fee or Salary, he bargains with his Client *de Quotâ litis* in case of Victory, which is not lawful for him to do, according to the *Civil* Law ||, in any Sum exceeding a Hundred *Aurei*, though he might receive some moderate Present *nomine Palmarii*, if he obtain'd Victory in the Cause : For to make an Agreement with his Client for any part of the Sum or Thing in demand, was look'd upon as Rapine and Depredation committed on his Client. The third Cause of *Infamy* (as aforesaid) is, when an *Advocate* on one side reproaches the adverse Party with foul Language, beyond what the Necessity of the Cause requires, and injuriously inveighs against him under a Pretence of serving his Client's Cause, supporting the same rather by Ribaldry than sound Reason and Arguments in Law : which is expressly forbidden by a Law in the *Code* *, since there is nothing more indecent than for those who would assist some, to annoy and offend others. *Cicero*, the Prince of the *Roman* Orators, was too much guilty of this Fault, and is highly condemn'd by all sober Writers. But a Lawyer or Advocate shall be much more liable, if he shall, through want of Modesty and due Reverence, attack the Person or Character of the Judge himself with injurious and bitter Language †. The fourth Cause of *Infamy* in an *Advocate* (as aforesaid) is *Prevarication*, *viz.* when he gives his Advice and Assistance to each of the Parties *litigant* : But as I have already hinted at these Matters, I shall here proceed no further in the Consideration of them; but only note, that they deserve the Censure of the Court in respect of Infamy and Deprivation, as the Law directs, as well as the just Displeasure of all honest Men.

The *Canon* Law forbids a *Clergyman*, even in the lesser Orders, to become an *Advocate*, and plead Causes in a secular Court before a Temporal Judge ; unless he either prosecutes his own Cause or that of the Church, or be employ'd in the Causes of such miserable Persons as cannot pay for pleading their own Cause ||. Nor ought Monks and regular Canons to engage themselves as *Advocates*, unless it be for the Advantage of their Church or Monastery ; and by the Order and Command of their Abbot *. But no one can be an *Advocate* against the Church, wherein he has a Benefice, because it favours of Ingratitude : And if he shall act as an Advocate against such Church, he shall be deprived thereof as an ungrateful Wretch †. *Advocates* and *Proctors* ought to take an Oath at the time of their Admission, That they will not undertake or cherish an unjust Cause ; or receive more than the usual and lawful Fees commonly given, which ought to be consider'd according to the Custom of this or that Country, and the Importance of the Cause. And if an *Advocate* shall act contrary hereunto, he shall not only be compelled to make Restitution, but shall likewise suffer a three Years Suspension : And a *Proctor*, that offends herein, shall be punish'd by a perpetual Deprivation *ab Officio*. And thus 'tis also enacted by a *legatine* Constitution of *Otho* in *Lindwood* ||, that *Advocates* shall, at their Admission to this Office, take an Oath before the Diocesan, of the Place of their Birth or Dwelling, ' That they ' will, in all Causes they undertake, behave themselves as faithful Patrons, without taking away or delaying Justice to either of the Parties, ' but will defend their Clients Causes according to the Laws, and support ' them with proper Arguments.'

* Myns. cent. 4., obs. 32.

† C. 2. 7. 7.

|| D. 2. 14. 53.

* C. 2. 7. 6. 1.

† D. 32. 1. 78. 6.

|| X. 1. 37. 1.

* X. 1. 37. 2.

† X. 1. 37. 3.

|| Tit. 28.



Of Alimony, and the Nature of it.

THE Word *Alimony*, in the *Latin* Tongue call'd *Alimenta*, in a strict and proper Signification thereof, imports the same as *Victuals* or *Nourishment* in the *English* Tongue: But these Words *Alimony* and *Victuals* are used in a larger Acceptation, and denote all kind of Maintenance whatever, without which, the Life and Body of Man cannot subsist, as Meat, Drink, Cloathes, Lodging, and the like *. And the *Latin* Word *Alimenta* differs from that of *Cibaria*, as a *Genus* differs from its *Species*: for all those Things are comprized under the former Term, which relate to the Necessaries of human Life in general; but under the latter, we only mean those things which bear a Relation to Food. But, in the Sense I shall here use the Word *Alimony*, it signifies that legal Proportion of the Husband's Estate, which, by the Sentence of the Ecclesiastical Court, is allow'd to the Wife for her Maintenance; upon the Account of any Separation from him; provided, it be not caus'd by her *Elopement* or *Adultery*. Blount in his *Nomo-Lexicon*, or *Law-Dictionary*, mentions an antient Record, wherein *Alimony* is termed *Rationabile Estoverium*.

By *Elopement*, I here mean that *voluntary* Departure of a Wife from her Husband to live with an Adulterer, and with whom she lives in breach of the matrimonial Vow; whereby she does, by the *Civil* Law, as well as by the Law of *England* †, incur the Forfeiture of her Dower or Jointure; unless her Husband, on her *free* and *voluntary* Submission, shall think fit, by way of Reconciliation, to receive her again, and readmit her into her former conjugal Relation. And, a Woman being in this Sense said to *elope* from her Husband, the Law will not, in this Case, compel him to allow her *Alimony*: For a Wife, that *elopes* or departs from her Husband in this manner (though it be with her Husband's consent) shall, according to that remarkable Case of Sir *John de Camois* ‖, lose not only her Dower or Jointure, but her *Alimony* too. This *Alimony*, in strictness of Law, being a Duty properly due from the Husband to the Wife, during her Cohabitation with him, the *Canon* Law says, That if she does, without any Default of his, (of her Accord,) depart from him, he shall not be oblig'd to allow her *Alimony* during such her wilful Desertion of him, tho' she be not charged with *Adultery* *; and tho' he had a considerable Dowry with her: it being a Rule in Law, *viz. Qui non facit quod debet, non recipit quod oportet* †. But if she departs from her Husband through any Default of his, as on the Account of Cruelty and the like, then he shall in that Case be compelled to allow her *Alimony*, though he had no Dowry with her: For the Law deems her to be a dutiful Wife, as long as the Fault lies at his door and she is in no wise imputable; she being constrain'd to appear otherwise ‖, according to the Opinion of *Cynus*, and all the Doctors on the Law quoted here in the Margin *. And if it be doubtful, thro' whose Fault it is that they live asunder, the Law, in that Case, concludes the Party that was last in Fault to be least blameable †. And, therefore, if the Wife, who did by her Default wilfully leave her Husband, shall afterwards on Repentance submit herself

* D. 34. 1. 6.

† Westm.
Stat. 2. cap.
34.

‖ Cok. Inst.
pt. 2d.
p. 475.

* 33 Q. 5.
13.

† C. 6. 46. 3.

‖ D. 35. 1.
24.
* C. 2. 19.
13.

† D. 18. 6.
17.

self to him, and desire a Reconciliation, and to be admitted to a Cohabitation with him, he shall, on his refusal of her, be oblig'd to allow her *Alimony*, except in the Cases aforesaid ||. See *Hostiensis* in cap. eod. v. || Gloss. in *Restitui*; And all the Doctors in common thereon. On the other hand, if the Wife shall by reason of the Husband's Cruelty, without any Fault of her own, go from him, and the Husband shall offer sufficient Caution or Security for his future good Behaviour to her, and for her Peace and Safety with him; and the Cruelty or ill Usage is not such, but that the Wife's Peace and Safety may be undoubtedly secur'd by such Caution; and yet the Wife refuses to return: I say, that in such a Case, the Law will not compel him to allow her *Alimony**; *Quia ultima ea culpa uxori nocet*, according to *Barbosa*, in his Comment on the *Digests*, Tit. *Divorce*, N. 44. But notwithstanding the Premises, a Husband regularly speaking, is bound to allow his Wife *Alimony*, pending Suit, whatever the Cause be †; and afterwards, in most cases of Separation, not occasion'd by *Elopement* or *Adultery*, as aforesaid; nor in Case of a total Divorce, by reason of some legal Impediment, whereby the Marriage was null and void *ab initio* ||.

|| Gloss. in c. 4. X. 4. 19.

* Ferrer. conf. 34. N. 18.

† D. 25. 3. 7.

|| Sanch. Tom. 2. lib. 7. Disp. 93. N. 22.

* C. 5. 12. 20.

† Barbosa. in D. Tir. 3. lib. 24. n. 71.

|| D. 49. 1. 14.

* D. 25. 3. 7.

† Mor. Rep. 874.

|| Rolls Rep. pr. 1. p. 110. Crok. Rep. pr. 3. p. 220.

By the *Civil* Law, if a Dowry or Marriage Portion with a Wife be promised and not paid to the Husband, he is not obliged to allow her *Alimony*; and the Reason is, because such Portion is given as a Price or Means to discharge the Incumbrances of Matrimony*. But if her Parents, or such as undertook for the Payment thereof, do after become insolvent by reason of some Misfortune, she shall have *Alimony* (notwithstanding) even by that Law (which in other respects seems somewhat severe): And this is true, unless you can affect them with Fraud, in promising what they knew they were not able to perform †. Or in case two Persons lay claim to the same Woman, each pretending she is his Wife by Marriage, and one of them moves to have her kept under *Sequestration* till the Case be decided: in this Case she shall have *Alimony*, pending Suit, of that Person at whose Motion she is so sequestred ||. But if the Controversy be only between a Man and a Woman, touching the Validity of a Marriage, as whether a Marriage or not; in such a Case no *Alimony* is due, till some matrimonial Proof appears, or there be some *Constat* of a Marriage; but wherever Marriage appears, there *Alimony* shall be due *pendente Lite**. A Feme-covert shall not sue for *Alimony* as long as she cohabits and lives with her Husband †.

The Ordinary has the proper Cognizance of *Alimony*, and no other Court ||: 'Tis true, there lies an Appeal, but still it is to the Ecclesiastical Judge; and if the Person condemn'd will not obey the Sentence of that Judge, he may be excommunicated. The Form of proceeding in such Case is thus, *viz.* The Proctor, by a Libel, alledges the Marriage of the Parties; and prays, that the Husband may be condemn'd in Expences of Suit and in *Alimony*; and, upon Proof or Confession of the Libel, the Judge condemns him in Pursuance of such Petition. And then the Proctor gives him a Bill of Costs; and at the Bottom writes thus, *viz. Petit Pars dicta D. sumptum Alimoniae*, from the Citation issued forth, *durante lite juxta Ratam* of so much *per Week* (leaving a Blank for the Judge to insert it) *usque ad finem litis*. Then he taxes a Bill of Expences of Suit; and, being certify'd of the Ability of the Man, he taxes so much for *Alimony* Weekly, &c. *Nisi aliter per nos decretum fuerit*: And the usual Sum is the third, or (at least) the fourth Part of the yearly Value of the personal Estate of the Husband. But this is not very Beneficial, because it is not a final Sentence, and by the Form of it, is absolutely in the Judges

Judge's power to alter it : For it is *nisi aliter per nos decretum fuerit* ; whereas the Judgment (I think) ought to be, *nisi causa fuerit ostensa in contrarium*.

Hiat pray'd a Prohibition to the Consistory Court of *London*, because he was sued there by his Wife to be separated from her *propter Sævitiā*, and Sentence was there given against him, *viz.* That his Wife should live from him, and that he should allow her five Shillings and Sixpence *per Week* for *Alimony*, tho' the Husband offer'd Reconciliation, desired Cohabitation, and proffer'd Caution to use her fitly. But the Court deny'd the Prohibition, because the Ecclesiastical Court is the proper Court for the allowance of *Alimony*, and may decree a Separation or Divorce *à Mensa & Thoro*, if the Wife be used with Cruelty*. In an Action of Trespass brought by *Plowden* against *Plowden*, for taking the Plaintiff's Wife *cum Bonis viri*, &c. the Case was, That the Plaintiff did eject and reject his Wife without any Allowance of *Alimony* ; for which she had a Sentence in the High-Commission Court ; and the Defendant took those Goods for the *Alimony* and *Maintenance* of his Wife. And Judge *Berkley* said, That the Defendant might plead *not guilty* : For where a Man puts away his Wife from him, the Ecclesiastical Court may compel him to allow her *Alimony*†. And thus it plainly appears by the Concession of the Temporal Courts, that the Ordinary has the proper Cognizance of *Alimony*, as aforesaid.

* Crok.
Jac. p. 364.

† March.
Rep. p. 22.



Of Altarage, and what is understood thereby.

THE next Thing which occurs to the Reader's View, according to the Method of Things proposed in this Undertaking, is the Title of *Altarage*, which is in *Latin* stiled *Altaragium*, taking it's Denomination from the word *Altar* ; because *ex vi termini*, according to a *Legatine* Constitution of *Otho**, commented on by *John de Athon*, *Altarage* is an Emolument arising to the Priest from Oblations *ratione Altaris*, thro' the Means of the *Altar*. For when the Mother-Church was appropriated to a Religious House, the Oblations made in the Chapel of Ease did not belong to the Convent, but to the Priest who officiated at the Altar ; and from thence it had its Name. And it is a Word that was generally inserted in the Endowment of a Vicaridge† : For we read, that a Parsonage was appropriated *salva vicariā quæ consistit in Altaragio & in minutis Decimis totius Parochiæ*. And in a larger Sense, it is a Word that comprehends all the small Tithes, which the Vicars had for their Maintenance. But then there must be either some Custom or Usage to make it so extensive.

* Tit. 4. v.
Proventus.

† Crok. Rep.
pt. 1st.
p. 578.

Now touching this *Altarage*, there is an antient Record in King *Henry the III*d's Reign, about the Year 1234, in the Chronicle of *William Thorn*, an *Austin* Monk of *Canterbury*, whereof (among other Things) we have mention made in a certain Composition between *Edmund* Archbishop of *Cant.* and the Abbot of *St. Austin's* in *Canterbury*, as to whom it may be paid, and to what Value it might extend. The Composition runs thus, *viz. Noverint universi presens scriptum inspecturi vel audituri,*

turi, quod cum inter Dominum Edmundum Dei gratiâ † Cantuariensem Archiepiscopum totius Angliæ Primatem, Magistrum S. de Langeton ex unâ parte, & Dominum Robertum Abbatem & Conventum S. Augustini Cantuariæ ex alterâ; controversia diutius mota fuisset super Ecclesiâ de Chistlet & Jurisdictione, &c. Item pro Bono pacis concedant Abbas & Conventus, quod Archidiaconus quando visitationis exercet officium in Ecclesiis eorum sicut in aliis Ecclesiis Diocesis Cantuariensis recipiat Procuracionem consuetam, exceptis, &c. In capellis verò de Mentre, scil. Sanct. P. & Johannis & Laurentii præsentabunt domino Archiepiscopo idoneos Capellanos ad Altaragia, ita tamen quod singula Altaragia valeant decem Marcas, qui hac portione tantum erunt contenti sub pœnâ amissionis dictæ portionis, si coram Judice quocunq; ex certâ plus aliquando petierint, præsertim cum vicarius Matricis Ecclesiæ de Mentre, &c. ||. Whereby it appears, that these *Altarages* issued out of the Offerings made to the Altar, and were anciently payable to the Priesthood, as well as Tithes and other Oblations. 'Tis very probable, that the greatest Annual Revenue by *Altars* in *Popish* Times here in *England*, if not by *Altarages* in any one Church within this Realm was in that of *St. Paul's London*. For it seems, that when Chauntries were granted to *K. Henry VIII.* whereof there were forty seven belonging to *St. Paul's*, there were in the said Church, at that time, no less then fourteen several Altars*: And tho' they were but Chantry-Priests that officiated at them, and had their Annual Salaries on that Account, distinct from *Altarages* in the Sense of Oblations; yet because the Annual Profits accrued by their Service at the Altar, they may not improperly be term'd *Pension-Altarages*, tho' not *Oblation-Altarages*.

|| Vid. Hist. Angl. script. ant. col. 1882. & 1883.

* Full. Ch. Hist. lib. 6. p. 352.

Tho' the Word *Altarage* be now grown somewhat obsolete among us, as being a Relique of *Popery*; yet its signification is of Ecclesiastical Cognizance, and according to the Intent thereof, practicable at this Day. Mr. *Blount* † takes notice of it as a Word, which comprehends not only the Offerings made on the *Altar*, but likewise all other Profits which accrue to the Priest by Reason of the *Altar*, and styles it an *Obvention of the Altar*. And for a further Proof and Illustration of this Matter, he there quotes a Precedent out of the Orders and Decrees of the Exchequer in Queen *Elizabeth's* Reign to this Effect, viz. That, upon hearing the Matter between *R. T. Vicar of West-Haddon*, and *E. Andrews*, it was order'd, That the said Vicar should have, by reason of the words (*Altaragium cum manso competenti* ||) contain'd in the Composition of the Profits assign'd for the Vicar's Maintenance, all such Things as he ought to have, by these Words, according to the Definition of them given by *John Bishop of London*, on a Conference had with the *Civilians*, being all Doctors of Law, viz. That by *Altaragium*, are included Tithes of Lamb, Wool, Colts, Calves, Pigs, Goslings, Chickens, Butter, Cheese, Hemp, Flax, Honey, Fruit, Herbs, and such other Tithes, with Offerings that shall be due within the Parish of *West-Haddon**. The like Case was for *Norton* in *Northamptonshire*, heard of late Years in the said Court; and, upon hearing the Cause, order'd in the like manner, as aforesaid. Thus all Oblations, whether in Money or Bread, given to such or such an Altar, either out of Devotion or meer Custom, made either by the Parishioners or by Strangers, were deem'd to be offer'd *nomine Altaragii*.

† In Nommo-Lexic.

|| Vid. Nommo-Lex. ut supr. v. *Altaragium*.

* Mich. 21. Eliz. in Stat. int. Turner & Edwards.

† Note, Such was the Pride of Bishops and Archbishops in those days, that they compar'd and equall'd themselves unto Kings and Princes; writing themselves in the Style of their Office, by the Grace of God, Bishop or Archbishop of such a Place: But happy had it been for Religion, if they had conducted themselves in their Office by the Grace of God, instead of pursuing Power and Riches in the Church.

† Tit. 4. v.
Proventus.

‡ Can. 42.

* Tit. 4.

* Tit. 7.

† Tit. 7. v.
Ecclesiast.

‡ Herl. Rep.
p. 135.

Under which we may reckon Oblations, Obventions, and Offerings, which in effect seem to be but one and the same thing; and that, which may become merely spiritual: Oblations being such Things Real or Personal as are offer'd to God and his Church, which seem to be included under *Obventions*; the other Profits consisting in Tithes *Prædial* and *Personal*, as also in the Glebe. *John de Athon*, in his Gloss on *Otho's* Constitutions, describing the *Proventus ex Altari* † says, That they are Offerings either in Bread or Money, or else consisting in other minute Oblations, vulgarly called *Altaragium*. Which Word extends itself likewise to all Things appertaining to the Altar, and to the Ornaments thereof, which were by King *Edgar's* Canons and Constitutions to be *Mundissima & apprime concinnata* ‡, according to an ancient Manuscript *Saxon* Code in *Bennet College, Cambridge*. But this cannot properly refer to the Word *Altaragium*, otherwise than in a large Sense of the Word, for by the genuine Signification thereof we mean only the Obventions, Oblations and Profits of the Altar, and not the Ornaments of it.

In Cardinal *Otho's* Days this Revenue of *Altarage* was so grossly abus'd by many of the Clergy, that he made a severe Canon or Constitution* against the Offenders in that kind. For in those Days (as the Constitution observes) these wretched Priests (for so he calls them) to advance the Profits of their Vicaridges out of a ravenous Covetousness, by the excessive Gain of their *Altarages*, would admit none to their Penitential Confessions, unless they first deposited some Money in Pursuance of a precedent Compact (as the Gloss has it) by way of Simoniack Extortion, far exceeding the allow'd and accusom'd Oblations: And, therefore, first declaring them not only unworthy of the Kingdom of God, but also unworthy of all Ecclesiastical Benefices, he decreed; That the Bishops in their respective Diocesses should make a most exact enquiry touching this horrid Abuse, and that all such as were found guilty thereof, should be remov'd from and depriv'd of the Benefices they possess'd; and for the future be rendred incapable of all Ecclesiastical Preferments, and wholly suspended from their Function. But, notwithstanding this Law, there being then another kind of Simoniack Artifice practis'd by the Clergy to advance the Excess of *Altarages*, by letting them and other Ecclesiastical Revenues to Farm, another Constitution was then made by him, forbidding all Farms of *Altarages* in any kind for the future*. Where *John de Athon* in his Gloss thereon says, That it was ordain'd for the prevention of Simony: and then occasionally puts a Question, Whether it be lawful to allow a Parochial Chaplain (for his Stipend) the Annual Obventions of *Altarage* in whole, or in part? Tho' the Negative seems to be inferr'd from the Text of the Canon; yet he, in his own Opinion, is of another Judgment, because it matters not whether his Salary be paid in Money, or in any other Ecclesiastical Thing. And he concludes, that an Assignment of such *Altarages* may be safely tolerated; and the Priest, to whom *Altarages* are due, may appoint his Proctor to collect the same; and, being so collected, they may be lawfully assign'd him for his Stipend. And tho' the Constitution forbids the letting to Farm the *Altarages*, and other Profits of the Church; yet the Gloss holds †, that the Temporal Revenues of an Ecclesiastical Jurisdiction may be sold or let to Farm, but not the spiritual Right of the Jurisdiction itself.

There was a Composition, That the Parson should have the Tithe of Grain and Hay, and the Vicar should have *Altarage*: And, in the Case of *Wood* against *Greenwood*, the Question was, whether the Vicar should have the Tithe of Underwood, by virtue of that Word. And it was held, that if ever such Tithe had been paid him, it should be still paid ‡. 'Tis true,

true, that Wood is not due to the Vicar of *common Right*, but by Prescription or Usage only; because 'tis a great Tithe, and therefore will not pass by the Word *Altarage* strictly taken, this being only what is offered at the *Altar*: but when Tithe-wood has been paid to the Vicar by Custom or Usage, it shall be construed to pass by that Word *Altaragium*; and by Custom or Usage, it will likewise pass Tithe-wood to the Vicar*.

* Winch.
Rep. Bret.
v. Ward.



Of Annats or First-Fruits.

ANNATS in *Latin* called *Annates*, are all one with *First-Fruits* in the *English* Tongue: And the Reason of this Name, is, because the Rate for First-Fruits, paid from Ecclesiastical Livings, was after the Value of one Year's Profit of the Benefice, when the *Liber Valorum* was first made. *Annates more suo appellabant primos fructus unius anni sacerdotii vacantis aut dimidiam eorundem partem*, says *Polyd. Virgil* ||: And my Lord *Coke*, in his *Reports*, observes, that *Primitiae* and *Annates* are all one. As for these *Annats* or *First-Fruits*, it is Historically reported to us, that they were first introduced into *England* by Pope *Clement* the Vth, who succeeded Pope *Benedict* the XIth. For this Pope, after the Death of *Benedict*, was no sooner elected and enthron'd in *France*, (for so Bishops would be said to be) but that he began to exercise his new Rapines here in *England* by a compliance with the said King *Edward*, in granting him a two years Disme from the Clergy for his own Use, tho' pretended for the Aid of the *Holy-Land*, that he himself might with the more ease exact the *First-Fruits* of vacant Ecclesiastical Benefices, to augment his own Revenues, tho' not within his own Territories. This is said to be the first Precedent of any Pope's reserving or exacting *Annats* or *First-Fruits* of all Ecclesiastical Dignities and Benefices throughout *England*, extant in our Histories: which tho' reserved but for two Years by the Pope at first; yet afterwards grew into a Custom by degrees, both here in *England* and elsewhere. And thus they remain'd in the Pope, till the Act of Parliament entitled the Crown thereunto in King *Henry* the VIIIth's time †, which Queen *Mary* afterwards restored again to the Pope: But in the first Year of Queen *Elizabeth*, an Act pass'd, for restoring the *Tenths* and *First-Fruits* to the Crown. But (notwithstanding the Report of some Historians touching the first Introduction of *First-Fruits* into *England*, as aforesaid;) yet 'tis evident, they were paid here in *England* some hundred Years before that Time, as appears by the Laws of *Ina*, King of the *West-Saxons*, who began his Reign, A. D. 712. And by the Laws of King *Edgar*, who began his Reign 959, it is ordain'd in these Words, *viz. Ex omni quidem ingeniorum terrâ ipsæ seminum primitiæ primariæ penduntur Ecclesiæ*. The like you have in the Laws of King *Canute*, who began his Reign 1016, *seminum Primitiæ ad Festum divi Martini pendentur: Siquis dare distulerit, eas Episcopo undecies præstato, ac regi Ducenos & viginti solidos persolvito* ||. 'Tis suppos'd, that *Boniface* Archbishop of *Canterbury*, in King *Edward* the IIIrd's Reign, was the first that made way for Popes to appropriate *Annats* and *First-Fruits* in this Kingdom to themselves: for this Archbishop, on a feign'd Pretence*, that his Church of *Canterbury* was involv'd in very great Debts by his Predecessor,

|| Lib. 8.
c. 2. de rer.
Inv.

† 26 H. 8.
ch. 3.

|| Vid. Lamb.
Leg. Sex.

* A. D. 1240.

cessor, but in truth by himself, to carry on foreign Wars, and gratify the Pope, procured from Pope *Innocent*, a Grant of the first Year's Fruits of all Benefices that should become void within his Diocese for the space of seven Years, till he should raise from thence the Sum of 10000 Marks yearly out of the Bishoprick. So that this Grant of *First-Fruits* to the said *Boniface*, soon after made way for the Pope to appropriate them unto himself. But in Process of Time the Parliament having settled them (as aforesaid) on King *Henry* the VIIIth, there was an Office thereof establish'd in *London*†; whereby the King's Revenue increas'd exceedingly from this Office on the Receipt of *First-Fruits* and *Tenths*. For now the Pope being dead, in *England*, the King was found his Heir at Common Law, as to most of the Power and Profit he had usurp'd; and the Rents which the Clergy paid, were now changed together with their Landlord: for Commissioners (whereof the Bishop of the Diocese was always one) were appointed to estimate their Annual Revenues, that so their *First-Fruits* and *Tenths* might be proportion'd accordingly.

† A.D. 1538.

And thus this Revenue stood to the Crown, till Queen *Anne* taking into Consideration the insufficient Maintenance of the poor Clergy, sent a Message to the House of Commons by one of her Principal Secretaries of State, signifying her Intention to grant the *First-Fruits* and *Tenths* for the better Support of the Clergy; and that they shou'd find out some Means to make her Intentions more effectual. Whereupon an Act passed the Parliament by which the Queen was to incorporate Persons, and to settle on them and their Successors the Revenue of the *First-Fruits*; but with a *Proviso*, that the Statutes before-mention'd should continue in Force for such Intents and Purposes as should be directed in her Grant: and that this new Act should not extend to impeach or make void any former Grant made of this Revenue. And in Pursuance of this Law, the Queen did, in the third Year of her Reign, incorporate several of the Nobility, Bishops, Judges, and others, by the Name of the Governors of the Bounty of Queen *Anne*, for the Augmentation of the Maintenance of the poor Clergy, to whom she gave the *First-Fruits*, &c. and appointed the Governors to meet at the Prince's Chamber in *Westminster*, or in any other Place in *London* or *Westminster*, to be appointed by any seven of them, whereof a Privy Counsellor, Bishop, Judge or Counsellor at Law to be of the *Quorum*; there to consult about the Distribution of this Bounty.

‡ In Repet.
Jur. Can.
Tom. 6. p. 2.
fol. 54.

Gammaus the Canonist‡, in Favour of the Apostolick See, asserts, That *Annats* were very justly required by the Pope *pro conservando decemni Statu*; and compares it to *Aaron* the High-Priest's receiving the Tithe of Tithes, the Tithes of such Tithes as were given to the other Priests: adding withal, that *Annats* are of very great Antiquity. For this Revenue was long since granted to the Pope, when he had not such large Possessions as he now has, but was at a vast Charge and Expence in maintaining his spiritual Pride and Dignity: and, therefore, *Annats* were at first only impos'd on such vacant Benefices as he himself conferr'd, and afterwards on all others by degrees; which, *Hostiensis* says, was often complain'd of as a very great Grievance. And it is an Observation of no less Truth than Antiquity, That there never was any Invention that ever brought more to the Pope's Treasure than this of *Annats*.

At a Parliament held at *Carlisle*, great complaint was made of the Oppression of Churches, &c. by *William Testa* (call'd *Mala Testa*) the Pope's Legate, in which Parliament the King, with his Barons assent, deny'd Payment of *First-Fruits*, and to this effect he wrote to the Pope: whereupon the Pope relinquisht his demand, and the *First-Fruits* were for two Years, by that Parliament, given to the King.



Of Personal Answers in Judgment.

AFTER Contestation of Suit, and the Oath of Calumny taken by both the *Litigants*, which I shall treat of under their proper Titles, the next Thing which follows in Course of Practice, if the Suit proceeds, is the Demanding and Giving in of what the *Civilians* call *Personal Answers*, which are made in Writing to the several Articles or Positions of a Libel, or to any other *Judicial* Matter exhibited in Court: And these Answers ought to be made in very clear and certain Terms; and upon the Oath too of the Person that exhibits them*, unless it be in a *Criminal* Cause, wherein no one is bound to accuse himself. For *Personal Answers* are therefore provided in Law, that by the Help of them the Adverse Party may be reliev'd *ab onere probandi*†: Therefore they ought to be made *pure & simpliciter* by the Words of *Credo* or *non Credo*, or the like‡. And this ought to be done, that the Adverse Party may certainly know what he ought to prove, tho' these Answers are sometimes given in contrary to good Practice (I think) after Publication of the Depositions of Witnesses, even till a Conclusion of the Cause, in order to get the Truth from the Person himself; and if these Answers are not clear, full and certain, they are deem'd and taken in Law as not given at all, and upon a Motion made the Judge ought by an *Interlocution* to enjoin new Answers, it being the same Thing to give no Answer at all, as to give a general and insufficient Answer*.

* Gail. lib. i. obs. 79. n. 10.

† Gail. lib. i. obs. 79. n. 5.
‡ C. 2. 59. 2. 2. Gloss. ibi in v. *exiſtimat*.

* D. 11. 1. 11. 7.

A *Personal Answer*, therefore, ought to have three Qualities in it, *viz.* First, It ought to be *pertinent* to the Matter in Hand. Secondly, It ought to be *absolute* and *unconditional*. And, Thirdly, It ought to be *clear* and *certain*. That Answer is said to be made *absolutely* and *simply*, which is made without Shiftings and Doublings; and to which nothing is or can be added. And hence 'tis, that in the *Imperial* Chamber this vulgar Answer is not admitted, *viz.* *I do not believe it as the Matter is propounded and alledg'd*, or in *Latin* thus, *non credo ut ponatur*. And the Reason of this Non-admission is, because of its great Uncertainty†. Nor is such an Answer as this sufficient, *viz.* *That such Position concerns the Fact of another Man*: And, therefore, no Answer ought to be given thereunto. But such an Answer is good and valid, according to the common Rules of Practice‡, tho' it be not so in the *Imperial* Chamber: Because of another's Fact we may probably be ignorant; and a Person ought rightly to article and propound touching his own Act, and not touching that of another Man. But when he is ignorant of another's Act, he may deny the Position without incurring the Danger of Perjury: And this is practis'd in the *Imperial* Chamber as well as in other Courts, to avoid and put an end to the *Ambages* of Law-Suits. And for the same Reason in the said Chamber, and other Courts of Law, other Answers that are sufficient of *Common Right*, are not admitted there. As when they are made to a Position too general, negative, obscure, doubtful, impossible, captious, criminal, manifold, and the like§. Tho' the Parties are by such sort of Answers usually wont, thro' Fraud and Malice to protract Law-Suits; yet the Judge ought to be circumspect, that the Party be not injur'd by a prejudicial Answer; in which Case Recourse

† Gail. lib. i. obs. 82. n. 7.

‡ Gloss. in c. 2. vi. 2. 9.

§ Gloss. in c. 2. vi. 2. 9. v. *rationabili*.

ought to be had to the Common Law and Rules of Practice; and the Party shall not be compelled to answer, if the Position be so captious, that Perjury would probably ensue by such an Answer*.

* Specul. Tit. de pos. Sect. 7. n. 20. 27. &c. 34.

But, in the *Imperial* Chamber, regularly a Position of Law wants no Answer; nor is an Answer given thereunto: Whereupon if the Position be founded on the Common Law, it is a valid Answer to say, *That it is a Position of Law*: Because since the Law is certain, there is no need of Proof, and consequently no occasion of giving an Answer to it†.

† D. 34. 2. 37. Bald. in l. 7. C. 9. 2. n. 15.

But 'tis otherwise in a Position founded on a Custom: For tho' it be the *Municipal* Law of that Place, where such Custom prevails, yet this Custom consisting in Facts‡, and, Facts being never presum'd, the said Custom ought to be prov'd: And, consequently, the Party ought to an-

‡ vi. 1. 4. 1.

* Bart. in S. 2. C. 59. 2.

† Specul. de pos. Sect. 7.

swer to such a Position*. If the Position contains several Heads, a distinct Answer to each particular Head ought to be admitted; and the Party may confess in Part, and deny in Part†: But the whole Position being partly true, and partly false, cannot be deny'd *in solidum* without Perjury. As for Example, if any one in an Allegation propounds and says, that Twenty Pounds are due to him, the *Narrata* of the Position as narrated, according to the common way of Pleading, ought to be deny'd, if only Ten Pounds are due: So that such an Answer ought not to be had and taken for a *simple* Answer‡.

‡ D. 34. 5. 13. Gloss. in c. 2. vi. 2. 10. v. Sigillatim.

But we ought do distinguish, whether a Position contains the Sum or Quantity, or the Quality only of some Matter in Demand. In the first Case a Position partly false and partly true cannot *simply* be deny'd without Fear of Perjury; because in Judicature an Interrogation *de toto* is understood to be made touching every Part thereof: And after the same manner an Answer *de toto* is deem'd to be made touching every Part thereof; because a Part is in the Whole*: Wherefore if a Man denies a Thing to be his, he also seems to deny it to be in common due to him†.

* D. 44. 2. 7.

† D. 31. 1. 78.

Skilful Advocates, to take away all Difficulties, are wont to add a Clause to Positions, that contain a certain Quantity, *viz.* "If the Defendant does not believe the Sum *Articulate*, let him answer *de quantâ credat*; that is to say, how much he does believe to be true:" For otherwise by a *simple* Negative Answer, he shall not be excused from the Guilt of Perjury.

In the second Case the whole Position is rightly deny'd. As for Example: If it be propounded and alledg'd, That *Titius* has made a *pure* and *absolute* Promise, whereas in Truth the Promise is *sub Conditione vel in diem*: Because properly speaking a conditional Debtor is not a Debtor: And by this Means another Thing and a different Fact is

‡ Covar. Ref. lib. 1. c. 2. n. 5.

propounded‡; so the whole may be deny'd. Again, I remember, it has been a Doubt, whether the following Answer be a *certain* and *simple* Answer, *viz.* *I do not believe the Position or Article to be true, unless it be proved*. But, according to *Baldus*, it has been held by a Majority of Voices, That this kind of Answer is not only sufficient, but it is very Prejudicial to the Respondent: For by such a kind of Answer, if the Article be afterwards proved, there is a kind of *geminata Probatio* induced, *viz.* an Answer by Confession, and an Answer by Testimony of Witnesses. And the Effect of such a *geminata Probatio* is, that the Person cast in the Suit cannot appeal, because he that confesses a

* C. 7. 65. 2.

Matter in Judgment, cannot appeal the Cause*. And this Conclusion is founded on the Force of the Word *nisi*, or *unless*, in the Answer; which always avers or affirms something, if a Negative Sentence goes before it. Hence Matrimony *de presenti* is contracted by such Words as these, tho' the Words do import a Habit, and not an Act of the Future Tense;

Tense ; for this Word *nisi* in a negative Sentence or way of Speech has the Force of an Affirmative.

It is also a receiv'd Opinion among the Doctors, That this is a sufficient Answer, *viz.* *I believe it to be contain'd in such an Instrument or Writing*, when the Position of the Libel mentions a certain Instrument or Writing ; otherwise it is not : And such a kind of Answer shall be deem'd either *Affirmative* or *Negative*, according to the Tenor of the Deed or Instrument referr'd to *. For the Thing referr'd to with all its Qualities is deem'd to be inherent to the Thing referring ; and that, which is inferr'd from a Relation, is said to be truly and properly so. For to declare a Thing *expressly* as by a Relation had to another, is the self-same Thing, when it appears from the Thing referr'd ; otherwise the Thing referring is null and void. But such an Answer as this is reprobated and disallow'd of in Law, *viz.* " I do not believe it, unless the Deed or Instrument appears ; " because such an Answer does not relieve the Adverse Party from the Obligation of proving the same, according to *Bartolus* †.

* Guid. Decis. 334. per tot.

† in l. 11. D. 11. 1. 7.

Answers ought to be made before the same Judge, before whom the Positions were produc'd and exhibited, or else before Commissioners nam'd by him, lest the *Continence of the Cause* should be divided ; or, in other Terms, lest there should be a discontinuance of the Cause. In preparing and giving an Answer it is necessary, That the Party Respondent should be present in Court, and be Personally admonish'd by the Judge to answer such Positions on the Judge's Examination or Interrogation of him ; otherwise he shall not be reputed Contumacious for not giving an Answer ; nor shall those Positions be held and taken as confess'd. It is a good Caution, before a Man makes or gives an Answer, for him to premise some Exceptions and Protestations at the Head of his Answer, lest he should prejudice himself in his Right by *simply* answering thereunto : And let himself also take Care, that the Judge makes an *Interlocutory* Decree thereon. A Person making a *simple* Answer to the Positions of the Adverse Party, seems to confess all the Qualities and Coherences thereof according to the foregoing Interrogation made ‡.

‡ D. 11. 1. 9. 3.



Of Apparitors and their Offices.

APPARITORS are such Persons as are always ready at Hand to execute the proper Orders and Decrees of the Magistrate or Judge of any Court of Judicature ; and they constantly wait in Court to make a due Return or Report of what they have done in Pursuance of such Orders and Decrees, and to receive such other Commands as the Judge shall please to issue forth * : For, without the Decree and Order of the Judge, no one ought to be arrested, summon'd or punish'd in any wise ; and such an *Apparitor*, as shall attach any Man's Person or Goods without the *Mandatory* Letters of the Court, may with Impunity be resisted with Force † ; but if he has the Mandate or Order of the Court for so doing, he ought not to be resisted with Force, tho' he does exceed the Bounds of his Commission,

* C. 1. 3. 33. 5.

† C. 13. 1. 5.

mission, but such an exorbitant Execution thereof ought to be punish'd by the Court*, as in *Holland* and other Places.

*Groenew. de
Leg. ab. og.
C. 7. 65. 5.

‡ C. 3. 2. 1.

† L. 4. 6. 24.

* C. 3. 2. 2.

‡ C. 9. 2. 7.

* C. 3. 2. 3.

C. 9. 49. 9.

† X. 1. 29. 21.

X. 2. 28. 19.

There was heretofore among the *Romans* a College or Body Politick of those Men commonly called *Executors*, over which there presided a Dean and a Sub-Adjutor, in *Latin* stiled *Primi-Scrinius*‡, whose Business it was to assign and appoint *Apparitors*; and out of this College or Body Politick *Apparitors* were always taken and made Choice of: And over these the Judges had formerly so great an Authority, that if they trespass'd or offended in their Office, they could punish and even remove them from thence, and substitute others in their Room. These *Apparitors* were anciently in *Latin* term'd *Viatores*†, *Liētores*, *Accensi*, and also *Stratores*: But in Proceſs of Time they were stiled *Executors** and *Officials*‡; and might be remov'd at the Pleasure and Discretion of the Judge. And having different Titles and Appellations according to the respective Magistrate, unto whom they gave Attendance: They were in this manner called *Cæsariani*, *Catholici*, *Præfectoriani**, *Præfectorii*, *Magisteriani*, *Augustani*, *Præsidiales*, *Rationales*, and the like. But in latter Ages they have been in *Latin* term'd *Bajuli*, *Massarii*, *Bedelli*, *Biruarii*, *Ostuarii*, *Nuncii*†, *Servientes*, and the like; their Office being to wait on the Magistrates, and to attend on Judges and Rectors of Provinces. At this Day Ecclesiastical Judges chuse their own *Apparitors*, which by the Statute of 21 *H. 8. ch. 5.* and by 138th of King *James's* Canons are therein called *Summoners* or *Somners*; and these they may remove at Pleasure if they misbehave themselves in their Office; and (according to some Mens Opinions) they are oblig'd so to do.

‡ Lib. 3. Tit.
22. Cap. 3.

* VI. 1. 16. 6.

† X. 1. 29.
43. 3.

The proper Business and Employment of an *Apparitor* then is, according to the *Novel* Constitutions, to convene and cite Defendants into Court, to introduce the Proceſs emitted by the Judge, and to admonish or cite the Parties in the Production of Witnesses, and the like; the preparing the Proceſs being now more the Business of the *Actuary* than the *Apparitors*, tho' it was otherwise formerly. And thus do these Persons serve all such Proceſses as do issue out of Spiritual or Ecclesiastical Courts; and, as Messengers, do summon Offenders and others thereunto in order to make their Appearance therein, as Occasion shall require. To prevent all Grievances and Excesses, which may happen by the *Beadles* or *Apparitors* of Deans and Archdeacons, it is provided by a Provincial Constitution in *Lindwood*‡, That when such *Beadles* or *Apparitors* do go to the Houses of Rectors, Vicars, Parish-Priests or others not having a Parochial Cure, on the Execution of such Mandates as are directed to them, or on any other Business touching the Office of a Dean or Archdeacon, they shall not demand any Thing of them on the Account of Procurations or any other Service relating to the Duty and Office of such *Apparitor* in respect of executing their Mandates, since he, that sends them, is bound to reward them for their Service*. But let them content themselves with Thanks; receiving only such Meat and Drink (by way of Hospitality) as shall be set before them by such as receive them. And likewise they ought not to execute those Precepts by *simple* Messengers or Sub-Beadles, but in their own Persons, because such *Apparitors* are sworn to execute all Matters belonging to their Office with Fidelity; and so cannot execute them by others†. But sometimes a Mandate is committed to them, which they may execute either by others, or else in their own Persons: And in this Case 'tis sufficient for them to execute the same by others; provided it be done according to the Rules of Law and Justice, otherwise their Principals have no Plea of Excuse. So likewise it is provided by the aforesaid Canon.

Canon of King *James*, that *Apparitors* shall by themselves faithfully execute their Offices, and shall not by any Colour or Pretence whatever suffer or cause their Mandates to be executed by any Messengers or Substitutes without good Cause, to be first allow'd and approv'd by the Ordinary of the Place: And so the Law stands at present. And moreover by the said Provincial Constitution it is enacted, That such *Beadles* or *Apparitors* as shall act contrary thereunto, and be found Burthenfome and Injurious to Persons under their Masters Jurisdiction, shall be first and principally punish'd by their Masters, the Deans or Archdeacons. And if they shall not punish them, then their Superiours the Bishops or their Officials may do it, not only in Case of Negligence, but (according to the Doctors *) by way of simple *Querela* or Complaint: And, moreover, they shall be obliged *ipso Jure*, or by a Declatory Sentence, to restore Twofold to the Partics. But, by the above-mentioned Canon of King *James*, the Abuses and Grievances pretended to be committed by such *Summoners* or *Apparitors*, are best redress'd, as being most in Use.

* in cap. 11.
X. 1. 31.

And as it is provided by another Provincial Constitution in *Lindwood* †, That no *Suffragan* Bishop shall have more than one riding *Apparitor* in his Diocefs, and that Archdeacons in their Archdeaconries shall not have so much as one riding *Apparitor*, but only a Foot-Messenger; so it is decreed and ordain'd by the aforesaid Canon enacted for restraining the Number and Multitude of *Apparitors*, That no Bishop or Archdeacon, or their Vicars, Officials or their inferiour Ordinaries shall depute or have more *Apparitors* to serve their respective Jurisdctions than either they or their Predecessors had or were accusom'd to have thirty Years before the publishing of these Canons or Ecclesiastical Constitutions. But tho a Bishop could not have more than one riding *Apparitor*, yet he might have severall Foot-Officers, according to the Doctors ‡, especially if there was a Concurrency of Jurisdiction between him and the Archdeacon: But an Archdeacon ought not to exceed his Bishop in the Number of *Apparitors*. Bishops, deputing more *Apparitors* than they ought to have, ought to be first admonish'd by their Superiour to dismiss them; and if they shall then refuse to discharge the exceeding Number, they shall according to this Constitution be suspended *ab Officio & Beneficio*, till they remove the said Number from their Employment. But neither the Number nor the Distinction of riding or walking *Apparitors* is now much regarded, but as the Conveniency of serving the Process requires. By this Constitution these *Apparitors* could not stay longer than one Night and a Day with the Rector or Vicar of any Church in any one Quarter of the Year, at the Charge of such Rector or Vicar, unless they were specially invited thereunto by such Rector or Vicar.

† Lib. 3. Tit. 22. Cap. 7.

‡ Dd. in l. 11.
X. 1. 31.

The *Civilians* have so low an Opinion of a *Beadle* or an *Apparitor*, that they call him *Animal tantum rationale*; by which it may be infer'd that he is of a meaner Capacity than a Sheriffs Officer: And, therefore, since he is such an Incomprehensible, 'tis fit the Court should not be troubled with many of them, which they usually employ'd till the Number was restrain'd by the aforesaid Canon. Nor are the *Beadles* in the two Universities of much superior Character to these Two-legg'd Animals, tho' they are for the sake of large Fees and other Perquisites of their Place usually chosen out of the Students of those two Bodies: For they are generally speaking such idle Persons as have acquir'd an Interest among the Masters of Art by Drinking, and other loose Ways of Conversation; and should they not be chosen hereunto,

being fit for nothing else but to carry a silver Staff before the Vice-Chancellor and others in those Places of Learning; they must live and dye Drones in their Colleges. Therefore, the State of Learning in those Bodies is much to be lamented, when Men are suffer'd to continue in those Societies for no other End and Purpose than for the Exercise of so mean and servile an Employment; and what is more to be detested, is, that these idle and debauch'd Wretches should be permitted to hold their Fellowships with such low Services, and under such Circumstances as scandalize a good Education.

*Lib. 5. Tit.
17. cap. 4.

By a third Constitution in *Lindwood**, all *Beadles* and *Apparitors*, belonging to Deans and Archdeacons, are forbidden under any Pretence of their Office in their own Persons to pronounce any Sentence of Excommunication, Suspension or Interdict *ore proprio*; or to denounce and publish any such Sentence pronounc'd by Deans and Archdeacons without the special Mandate or Letters Denunciatory of their Masters. And if they shall presume to act contrary hereunto, Sentences thus pronounc'd shall be null and void *ipso Jure* in such a manner, that they need no Exception thereunto; nor shall they be observ'd by those against whom they are pronounc'd, since in Truth they do not bind, as being pronounc'd by Persons, that have not the Power of Excommunication, and the like. And such *Beadles* or *Apparitors* as shall offend herein, and be found Injurious and Burthenfome to their Masters Subjects herein shall be greatly punish'd according to the Quality of their Offence, and be oblig'd to restore Two-fold to the Persons aggriev'd hereby.

But tho' an *Apparitor* be an Ecclesiastical Officer, and is, therefore, usually punish'd according to the Laws of the Church; yet he may be punish'd by the Temporal Courts for any Falshood in the Execution of his Office; and of this I shall give some Instances. An *Apparitor* came to the Church, and inform'd the Parson, That he must pay the Tenth to such a Man, and at such a Place, which was four Miles distant from his Church; and the Bishop certify'd the Ecclesiastical Court under his Seal on the Non-payment of them, that he refus'd to pay them according to the Statute of the 26th of *H. 8.* chap. 3. And thereupon another Parson was admitted and instituted into his Living; because by that Statute, where the Tenth is due and demanded by the Bishop, or such as shall be intrusted to collect it; or by his Ministers, Servants or Officers; and, being not paid then, on such Certificate, the Incumbent is *ipso facto* depriv'd. But it was resolv'd, that the Demand was not made according to the Statute, and the Summons to pay them not in Pursuance thereof: For the Demand ought to have been made by one, who has an Authority to receive them, which an *Apparitor* had not; And they held the Demand not good, tho' the Bishop certify'd it to be duly made †. And in the Case between the Queen and *Blanch* it was resolv'd, That the Bishop's Certificate on the Incumbent's Refusal to pay his Tenth, is not Peremptory but Traverfable; and that the Demand of the Tenth must be made at the Incumbent's House, and the Refusal

† Mor. Rep.
p. 541.

‡ Mor. Rep.
p. 1225.

must be there ‡. If a Monition be awarded to an *Apparitor* to summon a Man to pay such Expences of Suit, as are tax'd and assessed by the Court; and he, upon the Return of the Monition, avers, That he had summon'd him, when (in Truth) he had not; and the Defendant be thereupon excommunicated, an Action on the Case at Common Law will lye against such *Apparitor* for the Falshood committed by him in his Office*, besides the Punishment inflicted on him by the Ecclesiastical Court for such Breach of Trust. So if an *Apparitor* does falsly and maliciously *Colore Officii*,

* Rolls Abr.
p. 92. Crok.
2d Rep. 351.

Officii, cite a Man into the Consistory Court upon a Fame of Incontinency; and the Party is discharg'd upon his Answer given to the said Charge: The Person cited shall have the like Action, because it shall be intended, that he did it without a legal Process *. And this Punishment by Action seems more proper than what was inflicted on the Archbishop's *Apparitor* by *Bogo de Clare* in the Eighteenth Year of K. *Edward* the First, who having had a Citation serv'd on him in Parliament Time, some of his Family made the poor *Apparitor* eat both the Citation and the Wax,

* Rolls Abr.
pt. 1 ft. p. 93.
Crok. 3. Rep.
291.

And as the Temporal Courts may punish an *Apparitor*, so they may likewise take Notice of his Fees: For if he should libel in the Spiritual Court for his usual Fees, a Prohibition will lye upon a Suggestion, That the Fees which he claims are not due by Custom or Prescription. And, therefore, the safest way to sue for such Fees in the Ecclesiastical Court is to libel upon the Canon, which establishes those Fees, lest the Temporal Courts should impeach their Proceedings.

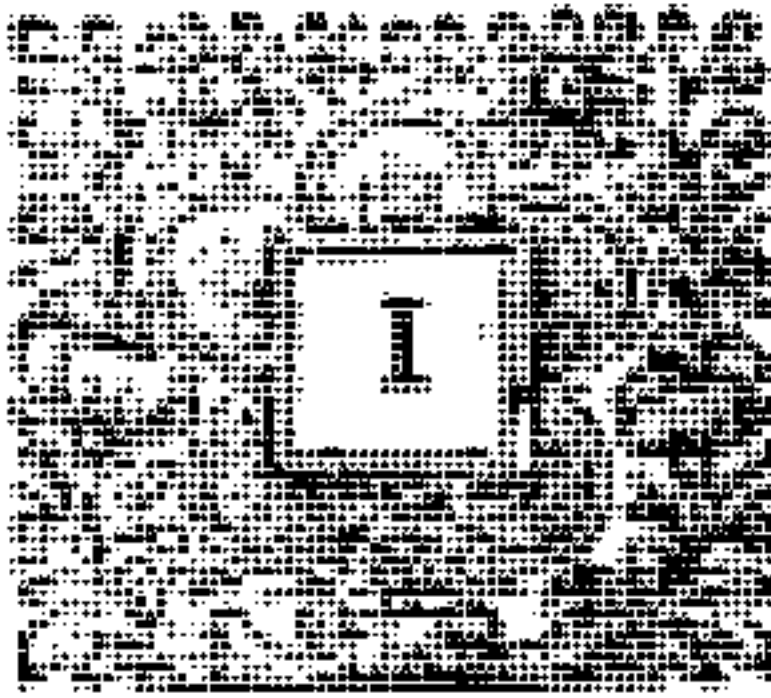
Apparitors are so called, *quia faciunt Reos apparere in conspectu Judicium*: And these Persons are mention'd in several Places of the *Justinian Code*, as may be seen from the Laws quoted here in the Margin †. But tho' an *Apparitor* imports the same Thing as a *Minister*; yet every *Minister* is not an *Apparitor*: So that there is this Difference between an *Apparitor* and a *Minister*, viz. An *Apparitor* is he that administers a Publick Office in the executing *Judicial* Processes: But a *Minister* may be a Private Person sent to execute any Orders; and is often the same as a Private Servant ‡. Tho' the Word *Minister* sometimes denotes an Office, as that of a Priest or Deacon *; and sometimes it is put for a Rector of a Parish †.

† C. 1. 3. 33. 7.
C. 10. 1. 5

‡ VI. 1. 16. 9.
* 24 Dist. c. 3.
† VI. 1. 16. 9.
v. *Minister*.



Of Appeals, their Effects and Incidents belonging to them.

N treating of *Appeals* I shall here in the first Place enquire, what an *Appeals* is; and by what Law it was invented and introduc'd. Secondly, I shall consider the Effects and Force of an *Appeal*; and explain what the Office of the Judge *ad Quem* is. Thirdly, I shall shew, what is to be done, if there be not a *local* Judge of an *Appeal*. Fourthly, I shall consider to whom the Rector of every University, Corporation or Body Politick ought to appeal. Fifthly, I shall enquire, whether the Party aggriev'd may (omitting an *Appeal*) have an Action *ad Interesse* against the Judge, on the Account of the Iniquity of his Sentence; and whether the Judge be oblig'd in *Foro Conscientiæ* to render Satisfaction for the Injury done.

Now in respect of an *Appeal* from a Definitive Sentence, an *Appeal* is commonly defin'd to be a *Judicial* Right, whereby the former Sentence is for a while extinguish'd; and the Cognizance of the Cause devolv'd to the Superiour Judge, in other Terms called a Judge *ad Quem*. But this Definition in my Opinion does not well explain the Nature of a *Judicial*

Judicial Appeal: Wherefore I shall define such an *Appeal* to be a *Provocation* from an Inferiour to a Superiour Judge, whereby the Jurisdiction of the Inferiour Judge is for a while suspended in respect of the Cause, wherein it is appealed; the Cognizance of the Cause being devolv'd to the Superiour Judge †. In this Definition the Term *Provocation* is made use of as a *Genus*, because the Word *Provocation* is a more comprehensive Term than the Word *Appeal*. For a *Provocation* is every Act, whereby the Office of the Judge or his Assistance is ask'd and implor'd: A *Provocation* including both a *Judicial* and an *Extra-judicial Appeal*. But an *Appeal* according to the proper Signification thereof contains only a *Judicial*, and not an *Extra-judicial Appeal* *. So that an *Appeal* (you see) is Two-fold, viz. *Judicial* and *Extra-judicial*. That is stiled a *Judicial Appeal*, which is made from a Sentence pronounc'd in a *Judicial* Manner, or in a Court of Judicature: And that is called an *Extra-judicial Appeal*, which is not made and interpos'd from a *Judicial* Sentence, but from some *Extra-judicial* Acts or Decrees or other †. And it may be defin'd to be a *Provocation* from an Inferiour to a Superiour Judge on the Account of some present or future probable Grievance not inflicted in a Court of Judicature ‡. And this kind of an *Appeal*, as well as the other, if the Grievance be likely and probable, transfers the Cognizance of the Cause to the Superiour Judge: So that (pending the *Appeal*) nothing can be attempted in Prejudice of the *Appellant*: And, therefore, in the foregoing Definition (I think) these Words ought to be added, viz. *In regard of some Grievance already inflicted or likely to be inflicted*; For the immediate Cause of an *Appeal* is some unjust Grievance or the like, which is inflicted on the *Appellant* by the Judge *a Quo*. Therefore, in this Definition, I say, from an *Inferiour* to a *Superiour Judge*; because it is of the Nature of an *Appeal*, that it should be made from an Inferiour to a Superiour Judge †. For it is not reasonable, that an Inferiour Judge should correct the Error and Mistake of a Superiour Judge, but rather on the contrary: And Custom cannot introduce this Method, viz. That an *Appeal* should be made to an Inferiour or Equal Judge from a Superiour *. And, lastly, it rightly follows on this Definition, That an *Appeal* be made in regard and by reason of some Grievance already inflicted or likely to be so: Because a Person may not only appeal from a Grievance, but even from a future Grievance, if such a Grievance will probably accrue †, as I shall shew by and by, when I proceed to declare when such an *Appeal* has Room.

The efficient Cause of an *Appeal* is the Law of Nations ‡; a *Judicial* Process itself being entirely said to have its Original from the Law of Nations: And thus an *Appeal* was invented, and by very ancient Usage introduc'd as a Remedy to relieve Persons from Grievances inflicted on them by *Judicial* Officers, lest that Men should have their Rights injuriously taken from them by an unjust Judgment or Sentence pronounc'd against them either thro' the Malice or Unskilfulness of the Judge *. And by this Means every Person *Judicially* aggriev'd by the Judge, is by the Law of Nations permitted to appeal, and is in no wise prohibited, whether the Party condemn'd be the principal Litigant or not; provided it be his Interest to have such unjust Sentence revers'd †: As a Proctor or any other Person that acts by the Commission or Warrant of another. Hence it appears, That a Tutor, Legatary, *Fidejussor*, and Vendor, who is liable to an Eviotion, are not prohibited the Benefit of an *Appeal* ‡. But it has been a Question, Whether a third Person *pro interesse suo* may appeal from a Sentence pronounc'd *inter alios*? For

† Barr. in l.
25. D. 26. 7.

* Abb. in c.
5. X. 2. 28. &
in cap. 3. X.
2. 17.

† D. 49. 4. 1. 3.

‡ X. 2. 28. 51.

† D. 49. 1. 1. 3.

* Phil. in Rub.
de App.

† Dd. inc. 59.

‡ X. 2. 28. 59.
Dd in l. 5.
D. 1. 1.

* D. 49. 1. 1.

† 2 Q. 6. 30.

‡ D. 1. 4. &
27.

For the Solution of which Question we are to distinguish in these three Cases. *First*, Whether he be willing to prosecute the *Appeal*, which is interpos'd by another; and, if he will, then he shall be admitted to the Prosecution thereof, tho' he has not appealed himself*: Because the *Appeal* of the principal Party before the Execution of Sentence is already suspended, and a Way laid open for all Persons aggriev'd thereby to relieve themselves; so that it is not necessary for them to make another *Appeal* †. In the second Case, if the Party will adhere to the *Appeal* of another Person *pro interesse suo*, he may do it; provided he does within ten Days ratify and approve the *Appeal* thus interpos'd by another Person: For tho' the Party intervening *pro interesse suo* be not oblig'd to appeal within ten Days; yet he is bound to adhere to the *Appeal* of another Party within ten Days, and to ratify the *Appeal* thus interpos'd‡. In the third Case, if the Party intervening *pro interesse suo*, principally appeals from the Sentence pronounc'd against the principal Party in the Cause, he may do it: But here he ought not only to interpose his *Appeal* within ten Days, but he ought also in apt and proper Terms to express the Causes of his *Appeal*, and the Grievances inflicted on him*.

* P. 4. c. 1.
2. X. 1. 1.

† Pald. in 1. 1.
C. 7. 02. 00. 01.
Hod. e.

‡ 2 Q. 6. 30.
vi. 1. 6. 4.

* 2 Q. 6. 30.
x. 1. 29. 23.

† D. 49. 1. 4. 2.

It has been said, That a third Person may appeal *pro interesse suo*, if his Interest be concern'd and injur'd by a Sentence †: And tho' the Sentence shall be confirm'd in respect of the Defendant's being cast thereby, if he does not *docere de suo jure*; yet it shall be revers'd in regard of a third Person making a just and reasonable *Appeal*. In a Cause between the Bishop of *A.* on the one Part, and the Monastery of *B.* on the other Part, divers Sentences were given, touching the State of the Monastery, for the Bishop. It was hereupon appeal'd to the Pope: Whereupon the Bishop of *C.* by his Messengers said, That the Church of *D.* was grievously injur'd and prejudic'd by those Sentences, to which Church the said Monastery did belong; whereupon the said Sentence ought not to be demanded to Execution for the Bishop of *A.* Hereupon several Things were alledg'd before the Pope; but on the Part of the Monastery Reason was shewn why the said Sentence pronounc'd for the Bishop should be annull'd. And, therefore, as to the Monastery the Pope confirm'd the Sentence, with an Order to the Judges, commanding, That if the *Appeal* for the Church of *D.* did appear to be well-grounded, and if the Bishop's Messengers would prosecute the same within a legal Time, they should defer the Execution of the Sentence, that the Church of *D.* might not be injur'd in respect of its Estate. And thus an *Appeal* principally operates two Effects, *viz.* a Suspension of the Sentence, and a Devolution of the Cause †; which brings me to the second Head propos'd here to be treated of, *viz.* To declare the Effects and Force of an *Appeal*.

† Abb. in c. 1.
x. 2. 28. n. 4.

And here I must observe, That the first Effect is threefold, forasmuch as it suspends the *Sentence* and *Jurisdiction* of the Judge as to that Cause wherein it is appeal'd; and likewise tolls the *Presumption*, which was in Favour of the Sentence pronounc'd. Indeed, it has been said, That an *Appeal* extinguishes the Force of a Sentence*; but this can only be understood to be intended for the present Time: Because if it did *simply* extinguish a Sentence, such a Sentence would not re-assume its Strength and Force again by the Appellant's not prosecuting his *Appeal*. For the Law says, that a Sentence shall remain firm and valid, if the Appellant does not prosecute his *Appeal*. But an *Appeal* does not always operate these Effects. As for Example-sake, if an *Appeal* be subsequent to a Sentence of Excommunication, the Excommunication is not suspended †. But then the *Appeal* operates the Effect of a Devolution; because it de-

* D. 48. 16. 1.
Gloss. in C. 19.
x. 2. 24.

† Abb. in cap.
ut supra. n. 5.

volves the Cause to a Superiour Judge, and tolls the Presumption in Favour of a Sentence. And 'tis the same Thing, when it is appeal'd from the Nullity of a Sentence. For such an Appeal does not suspend the Force of the Matter pronounc'd, since it does not subsist *in suis viribus*: But then it only operates the Effect of a Devolution, it devolving the Cause to the Superiour Judge; and in this respect it may be appeal'd from a Sentence, that carries a Nullity along with it.

But an Appeal does not suspend the Jurisdiction of a Judge *a Quo*, unless it be in that Cause, wherein an Appeal has been interpos'd*. For such a Judge may proceed in all other Causes, and I may be conven'd before him in another Cause (notwithstanding my Appeal) unless I recuse him as a suspected Judge: And this especially holds true, if he be an *ordinary* Judge. *Titius* appeal'd in a certain Cause, and (pending the Appeal) he was conven'd and impeach'd of some other Criminal Matter than that on which he appeal'd. And the Question was, Whether he was oblig'd to continue under that Judge (pending the Appeal) from whom he had appeal'd? To which it was answer'd, That unless he recus'd him as a suspected Judge, he ought to remain under his Jurisdiction and Cognizance, especially if he be an *ordinary* Judge, as aforesaid. For, as I have already observ'd, an Appeal only suspends the Jurisdiction of the Judge in that same Cause alone, wherein it is appeal'd; and has no Regard to any other Cause, which is entirely distinct and separate thereunto, even in respect of the same Person. And the true Reason of this Decision, was, that the Grievance was the immediate Cause of the Appeal, which Grievance might not happen in respect of other Causes: And, therefore, it ought not to suspend the Jurisdiction of the Judge in other Causes †.

It has been said, That an Appeal devolves the Cause to the Superiour Judge, and the Judge from whom it is appeal'd, commonly called the Judge *a Quo*, remains as a Private Man in that Cause. For, in respect to the Superiour Magistrate, the Cause is hereby carry'd to him within the Space of ten Days, according to the *Civil-Law*; but by a Statue* of the Realm here in *England*, within fifteen Days after pronouncing the first Sentence, for a second Hearing thereof. So that it appears from hence, That an Appeal is a receding from an Inferiour Judge by the Invocation of a Superiour †, under the Pretence of some Nullity, Injustice or Iniquity in the former Sentence; and hereby Litigants are reliev'd in a Judicial Manner from such unjust Sentence, and the like. And, moreover, it is here to be noted, That an Appeal prevents and hinders the Effect of a *Res Judicata*, since a Sentence passes in *Rem Judicatam*, if it be not appeal'd from thence.

Appeals may happen to be made on various Accounts, and for several good Reasons; because whenever any one is aggriev'd and afflicted by a Judge, or else thinks himself so, there is Room for an Appeal. And a *Judicial* Appeal is sometimes made before a Sentence pronounc'd‡, and sometimes afterwards. If it be made before a Sentence, it is either made from a Grievance or an *Interlocutory* Decree: And if it be appeal'd from a Grievance, it is either appeal'd from a Commination of the Judge, or else from some Nullity and Irregularity in the Proceeding, which cannot be repair'd by a Sentence. Now that a *Judicial* Appeal made before Sentence pronounc'd should be valid; ten Things are requir'd thereunto, *viz.* *First*, The Cause of the Grievance inflicted or threaten'd ought to have a just Being. *Secondly*, The Cause

*Abb. inc. 6.
x. 2. 28. n. 1

†Abb. ut sup.

*14 H. 8. c.
12.

†D. 4. 4. 17.

‡Abb. inc. 6.
12. x. 2. 28.
n. 1.

Cause of the Grievance ought to be a lawful Cause to ground an Appeal on. *Thirdly*, It ought to be a true Cause. *Fourthly*, This Cause ought to be express'd in the Appeal itself. *Fifthly*, It ought to be alledg'd therein, That some Petition or Exception made by the Appellant has not been admitted. *Sixthly*, That it is, therefore, appeal'd, because such Petition or Exception was not admitted. *Seventhly*, The Appeal ought to be in Writing. *Eighthly*, *Apostles* or *Letters Dimissory* ought to be demanded within 30 Days *. *Ninthly*, The Appellant ought to come prepar'd and instructed, if the Party shall demand it. And the *Tenth* Thing requir'd, is, That such an Appeal be made within ten Days according to the *Civil* † and *Canon-Law*, or within fifteen, according to our *Statute-Law* ‡, after the Grievance inflicted or threaten'd. For he, that relies upon the Appeal, ought to prove two Things, *viz.* *First*, That it is appeal'd. And, *Secondly*, That he has appeal'd the Cause within due Time. For when the Appeal is interpos'd *coram Judice*, the Judge does not enquire, whether it was appeal'd within due Time or not, since that Act chiefly concerns and respects the adverse Party, against whom the Appeal is deduc'd: And the Judge, leaving that to be oppos'd and objected to by the Party *Appellate*, does *simply* and *absolutely* admit the Appeal.

An *Appellatory* Libel ought to contain four Things, *viz.* *First*, The Name of the Party *Appellant*. *Secondly*, The Name of the Judge or him from whose Sentence it is appeal'd; and usually the Name or Stile of him to whom it is appeal'd, tho' this be not entirely necessary (as I shall shew by and by.) *Thirdly*, From what Sentence it is appeal'd, and likewise the Day of the Sentence pronounc'd, and of the Appeal interpos'd. And, *Fourthly*, The Name of the Party *Appellant*, or Person against whom the Appeal is lodg'd or interpos'd *, and also the Cause why it is appeal'd, and the Demand or Petition for *Apostles*; and whether the Party appeals in his own, or in the Name of another Person. As to the Substance of an Appeal, it is not necessary to express or use the Word *Appello*, but it is sufficient to say or do any Thing equivalent to this Word; for it is more to express a Thing by some Act or Deed, than by any Word or Term of Art. Thus an Appeal may be made by Equivalent Terms; As *I submit my self to your Protection* †; or *I submit my self and my Cause to the Protection of a Superiour Judge* *, and the like; provided, the other Requisites of an Appeal be observ'd. So that the Word *Appello* is not necessary (as aforesaid) if there be any Word or Words equivalent thereunto ‡. By the *Civil-Law* a general Appeal is valid, but by the *Canon-Law* it is otherwise †: As for Instance, *I do appeal unto a competent Judge* *: This and Appeals of the like Nature being stiled general Appeals.

Altho' a Custom introduc'd against the *Substantials* of an Appeal be not valid: As for Example-sake, That it should not be appeal'd to a Superiour, but to an Equal or an Inferiour Judge; yet a Custom may be introduc'd against the *Accidentals* of an Appeal. And among the *Accidentals* of an Appeal this is one, *viz.* That tho' by the *Civil-Law* an Appeal ought to be made *gradatim* †, yet by Custom it is valid, if it be made *omisso medio*; and so it is by the *Canon-Law*, passing by the next Superiour Judge. An Appeal (*alternatively*) made may be tolerated by the *Civil-Law* as valid, as *I appeal to such a one or such a one*: But such an Appeal is not valid by the *Canon-Law*, since by the *Canon-Law* an Appeal may be made *omisso medio*; and by this Means an *alternative* Appeal would produce an Uncertainty and some Obscurity of Jurisdiction, which it cannot do by the *Civil-Law*, because by the *Civil-Law*

* 2 Q. 6. 31.

† C. 7. 62. 6.
sect. Hodie.
‡ ut supra.

* D. 49. 1. 1.
fin.

† Bald. in l. 1.
C. 7. 62.
* X. 2. 23. 34.

‡ D. 45. 1.
122. 5.
‡ X. 2. 28. 2.
* D. 45. 1.
122. 5.

† D. 49. 1. 2. 1.
X. 2. 28. 66.

Law the Judge is certain, and may or may not be specify'd. An Appeal cannot be made from the Vicar-General to the Bishop himself, because the Consistory and Tribunal of the Bishop and his Vicar-General are the same Seat of Judgment *. And this holds good in Matters where-

* Abb. in c.
14. x. 1. 6. n. 1.

in the Vicar-General has Jurisdiction.

Appeals are Matters which are favour'd in Law, and ought not to be restrain'd; a just Appeal being a Defence of Innocence †: And a Defence is a Matter of Natural Right, which ought not to be deny'd to any Man, provided the same be not made use of for the suppressing of Justice, but only for restraining the Iniquity of an unjust Judge, or for correcting his Ignorance or want of Skill in the Law; or, *lastly*, That a Person overtaken by his own Ignorance in the *first* Instance, might be reliev'd in the *second*. For in all Appeals this vulgar Saying or Maxim has Place,

* C. 7. 63. 4.

viz. Non probatum probabo & non oppositum opponam *. Wherefore, tho' there be no Iniquity or Unskilfulness in the Judge, yet it may be appeal'd on this last Account: And for these three principal Causes or Ends an Appeal was first invented and introduc'd. And thus it may be appeal'd in every Cause, and from every Grievance, unless it be in a such a Case, wherein the Law itself prohibits an Appeal. But tho' this Advantage of an Appeal does of *Common Right* arise unto Men, and every Law and Ordinance that excludes the same is odious and

† X. 1. 17.
cap. 1 & 2.

ought to be restrain'd †: Yet it cannot be deny'd, but that an Appeal, and the Right of appealing may be taken away in some Cases by Human Laws, and by the Prerogative of the Prince. Thus by the *Civil-Law* a Person convict, or confessing his own Crime cannot appeal: Nor can an Appeal according to this Law be interpos'd from an *Interlocutory* Sentence in certain Cases. In *Germany* an Appeal has not any Room in Criminal Causes *, by a particular Ordinance, tho' 'tis of *Common*

* Gail. lib. 1.
obf. 1. n. 28.
† C. 7. 62. 29.

Right †.

Tho' this Clause of *Appellatione remorā* takes away every Appeal which is not expressly indulg'd: Yet if a Person be unjustly aggriev'd, such Grievance may be amended by the Superiour Judge ‡. For the barring and excluding of an Appeal does not in all Cases entirely take away the Power of appealing: And from hence the Superiour Judge may receive an Appeal, and correct a Grievance. Indeed some say, that such a Grievance ought to be corrected *per viam Querela*: But I think the other Explanation and Understanding is more agreeable to the Text.

‡ Abb. in cap.
53. x. 2. 28.

Both by the *Civil* and *Canon-Law* this Clause of *Appellatione remorā* may be inserted in the Emperors or Popes Commission by the one in

* D. 49. 2. 1.

Matters relating to Temporal *, and by the other in Matters relating to Ecclesiastical Jurisdiction. Tho' the Prince or Sovereign Power alone can only bar and exclude the Benefit of an Appeal from a *Definitive* Sentence as being the last Resort; yet in respect of an *Interlocutory*, an Inferiour Judge may do this by delegating or committing the Cause to another: And it may be done by all Persons, who do not *de Jure* or *de Facto*

† In l. 16. C.
7. 45.

acknowledge a Superiour †. But *Bartolus* restrains this to a *Frustratory* Appeal; concluding, That an Inferiour Judge cannot take away a lawful Appeal from an *Interlocutory*, because this would be to take away not only an Appeal from an *Interlocutory*; but this would take away the Power of the Superiour, to whom it is appeal'd. Wherefore when a Law or Statute takes away an Appeal from a Sentence, it is only meant from a *Definitive* and not from an *Interlocutory* Sentence; because an Appeal from a Sentence is only meant of a *Definitive* Sentence ‡. But 'tis otherwise, if it be *simply* provided by a Statute, That

‡ X. 2. 20. 34.
x. 2. 24. 19.

a Man shall not appeal from the Judge or Power set over him : For it is then understood touching every Sentence or Precept *.

* D. 1. 11.

By the *Canon-Law* a *Legate de Latere* cannot bar and take away an Appeal, nor can he use this Clause of *Appellatione remotâ*, which at this Day has many Effects and Operations in Law. For, *First*, When it is proceeded in a Cause (*Appellatione remotâ*) the Judge *a Quo* is not obliged to submit to the Appeal, as in other Cases he is ; and, consequently, such an Appeal does not suspend the Jurisdiction of the Judge *a Quo* : And, therefore, he may demand his Sentence to Execution, before the Superiour Judge has receiv'd the Appeal, but not afterwards †. The *Second* Effect of such a Cause is, That a Judge not submitting to such an Appeal (how probable soever it be) shall not be punish'd ; because it is not expressly indulg'd by Law ; and, doing this *Authoritatively*, he commits no Offence. The *Third* Effect respects the revoking of *Attentates* committed after an Appeal. For in such a Case an *Attentate* shall not be revoked by way of an *Attentate* ; that is to say, by way of a Nullity. For the Jurisdiction of the Judge not being suspended by such an Appeal, what is done in Judgment is valid, tho' it may be revoked by the Superiour Judge rather *per viam Querelæ* than *per viam Nullitatis*.

1. 1.

† X. 1.29.28.
Sect. *præter*.

Tho' an Appeal does not lye in such Cases as are left to the Conscience of any Person ; yet if a Person be unjustly aggriev'd thereby, he may have Recourse to the Prince, not that the Judge *a Quo* is bound to submit to the Appeal, but the Prince or Sovereign Judge may review and examine the same, if he be apply'd to : For when a Cause is delegated (*Appellatione remotâ*) every Superiour Judge may be apply'd to *per viam Querelæ*, who is bound *ex debito Justitiæ* to revoke the Grievance, else it may be appeal'd from him. As for Example, In a Cause of Heresy by the *Canon-Law* every Judge proceeds, *Appellatione remotâ* : But if the Person condemn'd of Heresy may (on a Pretence of an unjust Sentence) appeal from the Sentence of the Bishop, who is the Ordinary in this Case, unto the Archbishop : Such Archbishop may examine the Matter, and see whether the Sentence of Heresy be unjust or not. Yet this Appeal does not suspend the Jurisdiction of the Judge *a Quo*, unless it be from the Time that the Judge *ad Quem* receiv'd the Appeal, and sent his *Inhibition* to the Judge *a Quo*.

As Appeals are much favour'd in Law, and ought to be extended to Penal Positions ; so a Judge ought always, even in a doubtful Case, to receive and admit of an Appeal * : And if he does not, he may be punish'd for his Rashness and Contempt of the Law ; since every Appeal is presum'd to be allow'd, unless it be specially prohibited by some Law. But an Appeal, which cherishes any Injustice or Iniquity, ought not to be admitted ; because an Appeal ought not to have any Operation beyond its own Nature, which is to relieve a Person from a Grievance inflicted on him, and not to pervert Justice. Certain Persons appeal'd in a certain Cause ; and (pending such Appeal) they committed certain grievous Offences ; and being conven'd touching their Offences, they would willingly defend themselves by their Appeal, so that their Excesses should not be punish'd by an Ecclesiastical Censure. Hereupon the Pope being consulted, gave for Answer, That their Appeal ought not to be their Defence and Protection : For that an *Appellant* may be punish'd by the Ordinary himself for an Offence committed by him after such an Appeal, if he be afterwards charg'd with any Crimes.

* Spec. Tit. de
Appell. Sect.
nunc dicamus.
n. 5.

Now an Appeal ought to be admitted by the Judge *a Quo*, that is to say, by the Judge from whom it is appeal'd * ; because the Judge *ad Quem* and not the Judge *a Quo* ought to have Cognizance, whether an Appeal ought to be submitted to or not. And if the Judge *a Quo* has once admitted and yielded Obedience unto an Appeal, he cannot afterwards proceed in that Cause without a Remitter, tho' he admitted the Appeal with this or the like Clause, *viz. Nisi si & in quantum, &c.* And it matters not, whether the Judge *a Quo* admits and grants an Appeal *simply* or *conditionally* : For by the Appeal the Judges Office is at an end in that Cause, unless the same be remitted to him by the Judge *ad Quem*. If a Judge *simply* admits of an Appeal, the Cause of such an Appeal ought to be inserted by the Judge *a Quo* in the *Apostles* or *Letters Dimissory* : And, moreover, 'tis to be noted, That the Judge *a Quo* is bound to cause all Acts of Court relating to the Cause to be given to the *Appellant* by compelling his Actuary to deliver the same †. And in all Appeals there ought to be express'd a true and just Cause thereof ; and if it be appeal'd from a Grievance, such Grievance ought to be specially deduc'd therein. Tho' regularly no Appeal lies from a future Grievance in Judgment, yet if a Grievance *de presenti* be inflicted and express'd thereby, by which Means we fear some further Grievance hereafter, an Appeal lies : Otherwise it is sufficient to appeal on the account of a Grievance only dreaded hereafter upon probable Grounds. If a Grievance be inflicted by a Judge on a Person, he may appeal *incontinently* by expressing such a Grievance, and it is not necessary for the Party to pray a Revocation of such a Grievance. If a Grievance *de presenti* be inflicted on a Person, he may appeal (I say) *incontinently*, that is to say, at the Acts of Court, for fear of a future Grievance which he may probably sustain : Yet something ought to be express'd in the Appeal, whereby the Grievance *de presenti* may appear.

It is to be observ'd, That a Judge sometimes grants and submits himself to an Appeal *ab Reverentiam Superioris* ; and sometimes out of a Necessity of Law ‡ ; and sometimes out of his own Urbanity †. But it is the Duty of the Judge *a Quo* to receive an Appeal with Reverence, and to submit thereunto, if it be interpos'd on a true and lawful account : For an Appeal interpos'd on a false Bottom and Foundation does not so bind up the Judge *a Quo*, but that he may proceed *ad ulteriora* *. And if the Judge *a Quo* shall receive and admit an Appeal any otherwise than as abovementioned, he shall (according to the *Civil-Law*) be punish'd in the Sum of Thirty Pounds of Gold, and so shall his Officers in like manner : † But (according to the *Canon-Law*) he ought to be depos'd from his Office, and sent to the Apostolick See, to be punish'd according to his Demerits ‡. But if an Appeal be of such a Nature as the Judge ought not to admit it, he shall not be hurt or prejudic'd by not admitting the same. By the *Canon-Law*, a Person who rashly appeals, is not to be punish'd with any external Punishment ; but by the *Civil-Law* it is otherwise : For, by the *Civil-Law*, if any one shall make an Appeal thro' Malice or Calumny, he shall be fin'd in fifty Pounds of Silver, or be render'd infamous * : But by the *Canon-Law* he shall be remitted to the Judge *a Quo*, and shall not be punish'd beyond the simple Expence of the Suit or (at least) only in treble Costs, whereas formerly he was condemn'd in Quadruple Expences † : And if the Person guilty of Calumny and the like, be an Insolvent Person, he shall then by the *Civil-Law* receive Corporal Punishment. And this is a wholesome Doctrine in Favour of *Appellates* against rash *Appellants*, who are often wont to make malicious Appeals from any pretended Grievance or *Interlocutory Decree*,

* C. 7. 62. 24.

† C. 7. 62. 15.

‡ C. 7. 62. 24.

† D. 4. 4. 39.

* X. 2. 28.

10. 2.

† C. 7. 62. 21.

‡ X. 2. 28. 31.

* C. 7. 65. 5.

C. 7. 62. 19.

† X. 2. 28. 26.

Decree, with a Design to protract and draw out the Principal Cause *in infinitum*, and to weary *Appellates* with immense Expences. The Judge who admits a vain and frivolous Appeal ought as well as the *Appellant* to be punish'd in Twenty Pounds of Silver. Tho' by admitting an Appeal the Judge *a Quo* abdicates and foregoes his Jurisdiction *; yet in the *Imperial* Chamber an Inhibition is granted on the Parties Motion. * VI. 2. 15. 50.

Where Appeals have been from *Interlocutory* Decrees upon a Pretence of some Grievance inflicted, the Judge may not (according to *Mynsinger* †) proceed in the Principal Cause on the Petition of the Party *Appellate*; and pronounce a Definitive Sentence therein (leaving or omitting the Article of Appeal) if the *Appellant* disallows or contradicts the same. But others say, that the Judge may do so, because the *Appellate* is only favour'd in that which is at first taken Cognizance of *super Articulo Appellationis*: And if he renounces this Favour, the *Appellant* cannot complain; and, consequently, the whole Cause is devolv'd to the Judge of the Appeal. For if the Judge pronounces according to the *Appellant's* Petition, *viz. Bene appellatum & male judicatum*, he does not remit the Cause, but then begins to take Cognizance of the Principal Cause *. * X. 2. 28 59. Therefore if the *Appellate* renounces what is in Favour of him, and the *Appellant* avers his Appeal to be lawfully interpos'd, the Judge shall pronounce in the principal Cause, contrary to the *Appellant's* Will, *omisso Appellationis Articulo*; nor can the *Appellant* alledge Pendency of Suit before the Judge *a Quo*, since by appealing he declines his Jurisdiction†. It † VI. 2. 15. 10. is therefore a good Caution for *Appellates* to renounce the Article of Appeal before the Judge thereof, praying, That the Party *Appellant* may be compelled to proceed in the Principal Cause, *omisso puncto Appellationis*, which was made from the *Interlocutory*. And the Judge *ad Quem* ought to give way to such a Petition, it being according to Law and Equity; especially, if he considers and animadverts on the Tergiversation of the Party *Appellant* ‡.

† Cent. 3. obi. 7.

* X. 2. 28 59.

† VI. 2. 15. 10.

‡ Gail. ut supra n. 3.

It is not lawful for any one to appeal from the Prince's Sentence, because he is the Supream and Sovereign Judge over all, and has the ultimate Jurisdiction vested in him: But the Person condemn'd may pray a Review of the Prince's Sentence, as shall be shewn hereafter *. Nor yet is a Person allow'd to appeal from a Sentence, which he has once approv'd of; as when he accepts of the Time assign'd him for the Payment of the Sum adjudg'd, or in which he is condemn'd. Nor is he admitted to appeal who has once renounc'd the Benefit of an Appeal: But an Appeal may be lodg'd and interpos'd against a Judge, if he offers any contumelious Language or Behaviour towards the Party. Tho' a Person cannot appeal from a Punishment inflicted on him by the Law; yet he may appeal from the Sentence of the Judge, declaring him to have incur'd the Penalty of the Law: Because a Sentence or Declaration of this Kind is the Sentence of Man, and not the Sentence of the Law; and then if he does not appeal, the Judge in Spiritual Causes ought to proceed to a Denunciation of Excommunication, and not before. An Appeal may be made from an *Extra-judicial* Precept or Monition, if the Party be injur'd by such Precept or Monition: And tho' an Appeal made from a null Sentence be valid, yet an Appeal is not presum'd to be made from a Nullity of Process, unless such Nullity be prov'd. * Dd. in c. 4. x. 41.

A Man may appeal from certain Heads of a Sentence; and as to other Heads in the same Sentence he may acquiesce: For there are so many Sentences as there are Heads. And, therefore, 'tis said, That a Party condemn'd or depriv'd may appeal from one Head, and consent to another in the same Sentence. Nor shall such an Appeal thus severally

* Prax. Pap. Tit. 21. Gloss. inter- 3.

interpos'd be any Advantage to the adverse Party in respect to the Heads of a Sentence not contain'd in such Appeal, but only as to the Heads of a Sentence contain'd therein: But he shall reap an Advantage in respect to the Heads of a Sentence connected to an Appeal, so that he may prosecute that Part of the Appeal. For if one of the Litigants has appeal'd from certain Heads of a Sentence, the other Litigant may make Use of and have the Benefit of that Part of his Appeal, propounding a Grievance on the same Heads; but not on other Heads in no wise mention'd and specify'd in such an Appeal. Both Parties may appeal from the same Sentence, if both Parties are thereby aggriev'd: But if each of these Parties do appeal different ways, the one to the Superiour and the other to the Inferiour Judge, that Appeal which is made to a Superiour Judge shall prevail and defeat that which is made to an Inferiour Judge; provided, an Exception be made hereof before the Inferiour Judge, or be otherwise intimated to him. If a Man appeals *ex pluribus Causis copulative deductis*, he shall not be onerated and obliged to prove all the Causes assign'd and deduc'd in his Appeal, but it is enough to prove any one of them (provided the Appeal be lawfully founded thereon) unless one of these Causes accrues as a Quality to the others. A Man that takes an Oath *de prestando & parendo Juri & Mandatis Curie* is not prohibited to appeal, if he has a lawful Cause to do the same: But it is otherwise in a frivolous Cause.

The Term for lodging and interposing an Appeal according to the *Civil* * and *Canon-Law* † is ten Days: But according to an Act of Parliament ‡ here in *England*, fifteen Days are allow'd and indulg'd for this End: Which Term is current, that is to say, it commences from the Day on which the Sentence was pronounc'd, and is reckon'd *a momento ad momentum* *; so that the Day on which the Sentence was pronounc'd is number'd within this Term of ten or fifteen Days. But as to the Introduction of an Appeal, which is a distinct Act and Term from that of interposing an Appeal, this Term is not now in Use. For if the Appeal was not introduc'd within the Term prefix'd and appointed according to the Stile of Courts, and intimated unto the Party *Appellate*, the Judge might formerly demand Sentence to Execution, and the Appeal was deem'd as deserted. But still Restitution was granted against such a Term, if there was any lawful Impediment appearing, why an Appeal could not be introduc'd: But (notwithstanding) 'tis to be observ'd, That in *Criminal* and *Capital* Causes that Term of ten Days, which was granted in *Civil* Causes before the Judge *a Quo* could proceed to execute his Sentence, was not observ'd when the Defendant was *Capitally* condemn'd or adjudg'd to undergo the *Rack* or *Question*, as we call it. And if a Judge *a Quo* will execute his Sentence (pending an Appeal) he may *de facto* be resisted after Application has been made to him by way of Petition, to act contrary hereunto. The Time of Appealing never runs on or is current, when a Grievance is continu'd in Succession: As when a Person is detained in Prison without Intermission *.

* Gail. lib. 1. obs. 139. n. 13.

If the *Appellant* neglects or refuses to prosecute his Appeal within the Time assign'd him by the Judge *a Quo*, or appointed by himself, he is presum'd to have acquiesc'd under the first Sentence from which he has appeal'd; and the Judge *a Quo* re-assuming his Jurisdiction, may compel the *Appellant* to abide by that Sentence or Determination, and may likewise condemn him in Expences to the Party *Appellate* prosecuting the same. But the Party *Appellant* may appoint a shorter Term than that appointed by Law for the Prosecution of his Appeal. But if the *Ap-*
pellant

pellant appoints a Term too prolix or none at all, the Judge may then assign a competent Term, within which he ought to prosecute his Appeal under Pain of having the same declared for deserted. And tho' the Law gives a Year for an *Appellant* to prosecute and finish his Appeal *; yet the *Appellant* may in Prejudice of himself abridge and shorten the Term of Law given for the Prosecution thereof: And tho' the Judge may do the same, yet he is not bound to do it. But tho' the Judge *a Quo* may prefix and assign a shorter Term than the Term prefix'd by Law for the Prosecution of an Appeal, yet he may not abridge the Term prefix'd and assign'd by Law for the Determination of an Appeal, since the Judge *a Quo* cannot appoint and assign a Term to finish an Appeal †. For if he should assign such a Term, he is only understood to assign a Time *ad se presentandum*‡. And the Reason is, because the prefixing of a Term to finish an Appeal will be deem'd an imposing of a Law on his Superiour. Now that shall be adjudg'd a *competent* Term, which is agreeable to the Distance of the Places, the Length and Badness of the Ways, and the Quality of the Cause *.

* X. 2. 28. 5.

† X. 2. 28. 50.

‡ Eod. cap.

* X. 2. 28. 5.

As an Appeal may be deserted by the *Appellant's* lapsing the Term of Law, so it may also be deserted by a Lapse of the Term of Man: For the Term of Man, or the Judge, which is the same Thing, succeeds in the Place of a Term of Law. And after an Appeal is deserted, the Judge *a Quo* may proceed to demand the Sentence pronounc'd by him to Execution without any Citation. On the Desertion of an Appeal the Judge *ad Quem* cannot pronounce touching the Principal Cause, nor take Cognizance of it, yea tho' he should have the Consent of the Parties, because the Jurisdiction does *ipso Jure* revolve to the Judge *a Quo* †. Therefore, when the Jurisdiction ceases, the Office of the Judge ceases also, and the second Sentence is not valid thro' a Defect of Jurisdiction, as being pronounc'd by an incompetent Judge, on the Account of such Desertion. Therefore, the Judge of an Appeal ought by Virtue of his Office to pronounce on a Desertion, if the Party does not oppose it, or object thereunto ‡. But this Observation is particularly limited; so that it does not proceed and take Place, if the Sentence, from whence it is appeal'd, ought to be confirm'd: As when it appears from the Acts of Court, from whence it is appeal'd, (stiled the *former Acts*) that the *Appellant* has made an unjust Appeal, and that no Desertion is alledg'd by the Adverse Party; in which Case the Judge of the Appeal may, if he pleases, pronounce in the Principal Cause, and confirm the Sentence *a Quâ* without any Regard had to the Desertion *. And the Reason is, because that after a Sentence has pass'd in *Rcm Judicatum* on the Account of a Desertion, the Judge *ad Quem* does not do ill by confirming the Sentence now already confirm'd *ipso Jure*, even from the Time of the Desertion. Yea, 'tis expedient and necessary for the *Appellate*, if he will have the Benefit of *Restitution*, that it should be pronounc'd in the Principal Cause. For the *Appellant* after a Desertion may implore the Office of the Judge; and, on the Score of a lawful Impediment, may pray a *Restitution* against the Lapse of the *Fatalia* of an Appeal; and by this Means may prevent and delay the Execution of the Principal Sentence. For tho' the Jurisdiction of the Cause does revert to the Judge *a Quo* † upon the Desertion of an Appeal; yet the Office of the Judge *ad Quem* does remain and continue in Point of granting *Restitution*: For he may take Cognizance and pronounce *de Restitutione Fatalium* ‡. A second Limitation of the former Observation respects the Sentence of Desertion and Condemnation of the Party in Expences; because the Judge *ad Quem* has a Jurisdiction in taking Cognizance, *Whether he has*

† C. 7. 63. 2.
C. 7. 62. 6.
Clem. 2. 12. 6.

‡ Clem. 2.
12. 6.

* Rotæ Decis
14. de Appel.

† Clem. 2.
12. 6.

‡ D. 4. 4. 24

*Cognizance, and whether the Appeal be deserted or not: And it is the same Thing *Super Expensis Frustrationis**, as we in *Latin* call them. Nor is it any Objection to say, That the Instance of the Cause of Appeal is perempted by the Desertion of an Appeal: Because the Office of the Judge continues in respect of condemning the Party in Expences, even after such Instance is perempted †. And the Judge in his Condemnation ought to consider and tax all such Expences as have been made, from the Day of interpoling the Appeal, by the Party *Appellate*; because the *Appellant* does from that Time begin to retard and delay the Procefs. Therefore, upon the Desertion of an Appeal, he ought to be entirely condemn'd in Expences as a contumacious Person, according to an exprefs Text of Law ‡. For the Deserter of an Appeal is said to be a contumacious Person in respect of his Non-appearance to prosecute his Appeal; and a contumacious Person is always to be condemn'd in Expences*. And this Condemnation of Expences may sometimes be made by the Judge *a Quo* when the *Appellant* does not prosecute the Appeal interpos'd †: But after the Appeal is introduc'd before the Judge *ad Quem*, this Condemnation of Expences ought to be made by the Judge *ad Quem*. But if the Judge in a Sentence of Desertion shall omit this same Condemnation, it cannot be made *ex Intercallo* at the Instance of the Adverse Party; because, after Sentence pronounc'd, the Office of the Judge expires even in respect of Expences‡. But some hold the contrary to be true as to the Expences of a Desertion: For they may be demanded a long Time after Sentence pronounc'd, since they do not accrue and come by the Office of the Judge, but by the Right of Action*. The Party *Appellate* is excus'd from the Payment of Expences, when ever the *Appellant* obtains a Sentence from new Matter produc'd in the Appeal, because without such new Matter produc'd the *Appellate* had not a just Cause of Litigating. And thus it is also in the Case of the Party *Appellant*, if he shall from new Acts and Matters produc'd, get the better in the Appeal. Wherefore, if from new Acts and Matters produc'd a Sentence be either confirm'd or revers'd, a Compensation of Expences ought to be made, that is to say in *English*, the Expences ought to be lump'd together and divided.*

An *Appellant* may be heard, even after Ten Years, if he could not prosecute his Appeal before that Time: For the lapse of two Years does not prejudice an *Appellant*, but that he shall be heard (at least) by the Benefit of Restitution *in integrum*. Certain Clerks appeal'd from a Sentence pronounc'd against them; and upon a just Account they did not prosecute this Appeal within two Years: Whereupon the Pope was desired, that they should be still admitted to prosecute their Appeal, since they could not prosecute the same within two Years. The Pope order'd the Judges, That if they found the Prosecution of the Appeal to have been omitted *propter impotentiam*, they should not for this Reason be prejudic'd or aggriev'd thereby‡. Some will have it, that the Time of one or two Years for this Prosecution begins and runs from the Day of the Sentence, but this is wrong: For the Words *a die Sententie* in the Text do not relate to the Word *Biennium*, but to the Interposition of an Appeal*. And, therefore, a Day assign'd for the Prosecution of an Appeal runs from the Day that the Appeal was interpos'd, and not from the Day of the Sentence, according to these Times. In the *Imperial* Chamber the Term for the Prosecution of an Appeal is not circumscrib'd by the Term of one or two Years, as the Law elsewhere requires in the Empire, this being the Dernier Refort and Supream Court of Judicature. But the Possessors of Things in Controversy knowing this, they

* X. 2. 28. 28.

† Dd. in loca sup. allegat.

‡ X. 2. 28. 26.

* C. 3. 1. 13. 2.

† VI. 2. 15. 1.

‡ C. 7. 51. 3.

† Gail. obs. 137. n. 6.

‡ X. 2. 28. 8.

* C. 7. 63. 2.

they do often abuse and pervert the wholesome Remedy of an Appeal, which was invented as a Defence for Men's Properties, and not to serve vile and evil Purposes, by vexing and aggrieving the adverse Party by a multitude of Expences, and with a Procrastination and spinning out of Suits *in infinitum*. But if a Term *Peremptory*, which is too short, be granted and assign'd, when there is no necessity for so short an Assignation, the Party aggriev'd thereby may lawfully appeal from thence. The Judge may assign unto the *Appellant* a Term *ad prosequendum* as well in an Appeal from an *Interlocutory* on the Score of a Grievance, as from a *definitive* Sentence: And tho' the Party *Appellant* himself may prefix this Term, yet the Party *Appellate* cannot do it.

A Person that does any Act incompatible or contrary to his Appeal, does thereby renounce and wave his Appeal. As for Instance, when the *Appellant* after the Interposition of an Appeal still litigates in the same Cause before the Judge *a Quo*: In this Case (I say) he is deem'd to have renounc'd and deserted his Appeal*. But this ought only to be understood, when he litigates after the Interposition of an Appeal, and not before, as within the Time appealing. But if the *Appellant* does any Act before the Judge *a Quo*, tending to a greater Corroboration of his Appeal, as when the *Appellant's* Proctor requests him not to proceed to Execution, and the like, he shall not then be deem'd to have renounc'd his Appeal. The Judge *a Quo* ought in an Appeal to supercede the Proceedings in the whole Cause, tho' the Appeal be only interpos'd on some certain Article alone; which is undoubtedly true, if the Principal Cause be so connected with that Article, that it cannot be decided without it. And, moreover, it is to be noted, That an Appeal in a Cause of Convention does not impeach and hinder the Execution of a Sentence in a Cause of Re-convention, and so *vice versa* †.

* Joh. And. in c. 10. VI. 2. 15.

† Abb. in cap. 5. X. 2. 12.

It is a Maxim in Law, That it is the same Thing not to appeal at all as to make a vain and frivolous Appeal: But an Appeal is well enough justify'd, if the Party appealing offers himself ready to prove and justify his Exception, or the Merits of his Appeal. And the Defendant may lawfully appeal if he be not heard upon an Exception propounded against the Plaintiff's Proctor, who acts without a sufficient Proxy or Mandate in the Cause; or upon an Exception, that he was cited before by such Letters, whereof no mention is in the second Citation*. It has been said before, That an Appeal from an *Interlocutory* ought always to be made in Writing, and with an expressing the Causes of Grievance, otherwise the Appeal is not valid ‡: But an Appeal from a *Definitive* Sentence may be made quite contrary to the foregoing Practice*; because if it be appeal'd immediately at the Time of pronouncing Sentence, it may be appeal'd *viva voce*, and without the Grievances: But if it be afterwards appeal'd, it ought to be appeal'd within ten or fifteen Days in Writing. If a Judge does not admit an Appeal from an *Interlocutory*, but proceeds *ad ulteriora*, he cannot prefix a Term for the *Appellant's* Prosecution of his Appeal. If an *Appellant* be disturb'd or molested in the Possession of that, touching which it has been appeal'd, the Judge *a Quo* may give that Possession to the *Appellant*; the Appeal remaining in its proper State †. And whatsoever Things have not been deduc'd and prov'd in the first Instance, may be deduc'd and prov'd upon an Appeal ‡; and if it be not appeal'd from a Sentence, be it never so unjust and full of Iniquity, such Sentence shall from an unjust Sentence in Point of Law become a just one.

* X. 2. 28. 48.

‡ VI. 2. 12. 5.

* X. 2. 28. 59.

† X. 2. 28. 16.

‡ C. 7. 63. 4.

By the 24th of H. 8. ch. 12. for avoiding all Delays occasion'd by Appeals on Account of Testamentary or Matrimonial Causes, or Causes of

* 16 Rich. 2.
ch. 5

of Tithes, &c. which concern the King or any other Person whatsoever, the same shall be finally determin'd within the King's Jurisdiction notwithstanding any Papal Excommunication whatsoever; and all Spiritual Prelates ought to perform their Duties herein. And whosoever shall procure from the See of *Rome*, or any other Court, any Appeals, Processes, Sentences, and the like, shall incur a *Premunire* provided by the Statute of *Richard* the Second*. Appeals in Cases Ecclesiastical shall be sued from the Archdeacon or his Official to the Bishop of the Diocess: And whenever the Cause is commenc'd before the Bishop or his Chancellor, Commissary, and the like, an Appeal may be made within fifteen Days after Sentence from thence to the respective Archbishop of the Province, to be Definitively adjudg'd. But if a Cause is commenc'd before any Archdeacon of any Archbishop or his Commissary, the Appeal may be made within fifteen Days after Sentence to the Court of Arches or Audience of the same Archbishop; and from the Arches or Audience to the Archbishop himself, to be finally determin'd without further Appeal, unless it be to the King in his Court of *Chancery*. And when the Cause is commenc'd before the Archbishop himself, it shall there be determin'd without any further Appeal, unless it be to the Archbishop and Church of *Canterbury* in Virtue of a Prerogative heretofore used. And the Cause or Suit concerns the King, the Party griev'd may within fifteen Days appeal from any of the said Courts to the Prelates assembled (by the King's Writ) in Convocation then next in being or ensuing in the Province, where the Suit was begun, and there it shall be finally determin'd. See the Act itself. By the Thirtieth Apostolical Canon, and also by the Fifth Canon of the Council of *Nice* Appeals were to be made to a Provincial Synod; that is (says the Council of *Nice*) to the Synod of the Bishops of every Province, to the end that it might be enquir'd, whether any Persons were excommunicated by too great a Severity or Rashness of the Bishop.

An excommunicated Person (pending the Cognizance of an Appeal) may be absolv'd from his Excommunication *ad Cutelam*: And if it has been lawfully appeal'd, he shall not be punish'd for being present at the Celebration of Divine Service, during the Time of his Appeal; for if an excommunicated Person, being a Clergyman, celebrates Divine Service after an Appeal, he shall not thereby incur any Irregularity, nor shall he be punish'd for the same, if his Appeal appears to be lawful.

Altho' it be not necessary to appeal, when the Judge exceeds the Measure of the Punishment inflicted, or the *Modus procedendi* in the Execution of a Sentence, such an Act being null and void *ipso Jure*: Yet 'tis of great Advantage to the Person thus aggriev'd to appeal in order to avoid a *Gravamen Facti*; because an Execution may be made *de Facto*, which the Judge (notwithstanding) omits upon an Appeal. If an Execution of a Sentence be made without observing the Order and Method of Law, as when an *Executor* begins to meddle with the immoveable Estate, before he has seiz'd on the moveable Goods, it may be then appeal'd from the Execution of Sentence: For such *Executor* is said to exceed the Method of Proceeding, if he disturbs and inverts the Order of Execution; every Execution being first made on a Man's moveable Effects. *Secondly*, An Execution is made upon a Man's Lands and Tenements, if the Person has no moveable Goods. And, *Thirdly*, It is made on Rights and Things in Action by the *Civil-Law* called *Nomina Debitorum*: Such as the Debtor's Shop-Book, Book of Accounts, the Writings of his Estate, and other Specialties and Obligations, whereby Persons stand indebted to him; and also Things of the like Nature.

Of

Of Apostacy, and the several Kinds thereof.

THE *Canon-Law* defines *Apostacy* to be a rash and wilful Departure from that State of Faith, Obedience or Religion, which any Person has profess'd himself to hold and maintain in the Christian Church: And, according to this Definition, there is a Threefold *Species* of *Apostacy*, viz. An *Apostacy* of Faith, an *Apostacy* of Disobedience, and an *Apostacy* of Irregularity or Religion. The first is, when any one revolts or departs from the *Christian* Faith; and betakes himself to *Judaism* or any other Sect of Infidelity; after he has been baptiz'd into the *Christian* Religion *. And such a Person is worse than a Heretick, because he departs entirely from the *Christian* Faith; tho' according to the common Opinion of the *Canonists*, he may upon his Return be receiv'd into the Church as a Heretick. But 'tis to be observ'd, that tho' a Person apostatizing from the Faith be deem'd worse than a Heretick, since a Heretick only deviates in some particular Point from the Faith; yet an *Apostate* may be admitted to Penance, and become a *Christian* again after that. The second Kind of *Apostacy* is when any Person does wilfully and of his own accord transgress the Precept and Command of his Superiour in the Church, or does not obey the Rules and Constitutions of the Fathers †: And this, in the Books of the Papal *Canon-Law*, is said particularly to happen, when a *Religious* is render'd a Vagabond by not observing the Rules of his Religious Order, tho' he does retain his Habit. But this is not, even according to that Law, properly called *Apostacy*. And the third Kind is, when any Person in the *Romish* Church foregoes his Orders, or recedes from that Religious Order which he has assum'd in the Church ‡. The two last *Species* have only a Relation to the *Romish* Church, and are rather fram'd to frighten silly People into an Obedience and Subjection to the Clergy than to serve Religion itself. Clergymen that are impeach'd or defam'd of this last Kind of *Apostacy* in the *Romish* Communion, and have laid aside the Habit of Clerks, ought not to be tollerated in a Secular Habit; but ought according to the *Canon-Law* to be imprison'd upon full Proof thereof, till such Time as they repent themselves of the Evil of their Presumption, and re-assume the Habit they have laid aside.

Apostates in Point of Faith, are, according to the *Civil-Law*, subject unto all Punishments ordain'd against Hereticks, they lose all Privileges granted unto *Christians* of *Common Right*, they forfeit their Estates to the Government * (unless they have Children and Kinder'd) † are render'd Infamous themselves, and may be accus'd without any Observation of Judicial Process even after Death; nor shall such Accusation be taken away by any Lapse of Time, till five Years after the Death of such *Apostates*: And according to the Laws and Statutes made against the *Manicheans* ‡, they were exterminated and driven out of the very Borders of the *Roman* Empire. And herein *Apostates* were

* X. 5. 9. 4.
Alciat. conf.
478.

† X. 1. 32. 2
& 5.
2 Q. 7. 23.

‡ X. 5. 9. 1.

* C. 1. 7. 1.

† C. 1. 7. 6.

* C. 1. 7. 3.

† C. 1. 7. 4.

‡ C. 1. 7. 2.

* C. 1. 7. 5.

† Abb. inc. 1.
X. 5. 9.

dealt with more Severity than Hereticks, because their Crime according to the *Civil-Law* was not pardon'd and abolish'd by Penance*, as the Crime of Heresy was by a Decree of the Church. For the Law affords Relief and Compassion to such as fall by way of Error, but lost *Apostates* are not reliev'd by any Remedy of Penance according to the *Civil-Law*. Moreover, an Accusation against *Apostates* is publick and perpetual during their Life-time †, and may be extended and carry'd on (as aforesaid) till five Years after their Death ‡. And from the very Day of their Departure from the *Christian* Faith they become incapable of Succession; and the Succession of the Inheritance is given to the next of Kin, being Orthodox in his Faith. Nor can they make a last Will and Testament; nor pass any Deed of Gift: And if they make a Sale of their Estate in Fraud of this Law, such Sale is not valid. Nor can they become Witnesses, or give Evidence in any Cause. And, besides the loss of their Estates, *Apostates* were punish'd with Death if they seduc'd or perverted others from the *Christian* Faith, or from the Worship of the *Christian* Religion, unto their wicked Sectaries and abominable Opinions*.

The *Canon-Law* not only reckons *Apostates* among infamous Persons, but even commands them to be bound with the Bonds of Excommunication, and inflicts other Punishments: For, according to *Panormitan* the Punishments shall be diversify'd according to the Diversity of the Apostacy committed †.



Of Appropriations and Impropriations.



TH O S E Churches, which the Monasteries and other Religious Houses had procur'd to be annex'd to themselves, were call'd *Appropriations* from the *French* Word *Appropriier*, to fit and accommodate; and in the Law of *England* it signifies a Severing of an Ecclesiastical Benefice, which is Originally and in its own Nature (according to the *Canon-Law*) in the Patrimony of no one, to the perpetual and proper Use of some Religious House, Bishop or College, Dean and Chapter, &c. And the Reason of the Name may be this, *viz.* Because that ordinarily speaking, the Parsons of Parishes are not in Law accounted *Proprietors*, but only *Usufructuaries*, as having no Right of Fee-Simple vested in them: But these *Appropriators*, by reason of their Perpetuities, are accounted Owners of the Fee-Simple; and, therefore, are called *Proprietors*. Before *Richard* the Second's Time it was lawful to appropriate the whole Fruits of a Benefice to any Abbey or Priory whatsoever, the House finding one to serve the Cure. But that King wisely redress'd that horrid Evil by a Law*, ordaining, That in every License of Appropriation made in Chancery, it should be expressly contain'd, That the Diocesan of the Place should allot a convenient Sum of Money to be yearly paid out of the Fruits of such Living, towards the Relief of the Parish-Poor; and that the Vicaridge be well and sufficiently endow'd. And as the Canons of

* 15 Ric. 2.
ch. 6.

of the Church as well as the Papal Decrees do greatly endeavour to prevent the Alienation of Ecclesiastical Estates, it was, therefore, in former Times in Imitation of these Canons and Decrees forbidden unto Bishops by a *Legatine* Constitution * here in *England* to confer or assign any Church, which was subject to them, by Right of Appropriation unto any other Bishop, Monastery or Priory, unless the Person to whom such Church was appropriated, was press'd in such a manner with evident Poverty, that such Appropriation was not deem'd so much contrary to the Common Law, as it was agreeable to Piety; or unless there was some other sufficient Cause for so doing. As when a Bishop for some Cause or other had erected a new Church: For then he might by a Grant add the Rights of the Mother-Church to it, *viz.* Tithes, Obventions, Funerals, and the like †. And if any Appropriation of this Kind was otherwise made, it was invalid *ipso Jure*; and being of no Weight or Moment, it might be entirely revok'd either by the Bishop, who granted it, or else by his Superiour as a Grant made only *de facto*: For where the Law makes an Act to be invalid from the Person of him, that does it, he himself may revoke such Act, tho' it is otherwise when it is done *ratione partis recipientis*. Moreover, it was enacted by this Constitution, That all Persons whatsoever, Exempt or not Exempt, who had Churches *in proprios Usus*, or (as we say) appropriated Churches, if no Vicars were placed therein, were obliged within six Months to present Vicars unto the Diocesan for their Institution; and to allow them a sufficient Portion for their Maintenance which was generally speaking little enough even in those Times: And upon the Neglect or Refusal of such Persons, the Diocesan might do it. And such Persons as had Churches appropriated to them were to build Parsonage-Houses in their Parishes, and to repair such as were already built for the decent Reception of their Visitors: And all these Things even Bishops themselves were to observe.

Touching the first Institution, and other Things worth knowing in relation to Appropriations, see *Plowden's* Comment in *Grendon's* Case *. To an Appropriation, after the King's License obtain'd in *Chancery*, the Consent of the Diocesan, Patron and Incumbent were necessary, if the Church was full; but if it was void, then the Patron and Diocesan might conclude it †. To dissolve an Appropriation it was enough for the Religious House to present a Clerk to the Bishop, and for the Bishop to give him Institution, and the Archdeacon to give him Induction: For, that once done, the Benefice did return to its former State and Nature, see *Kennet's* Parochial Antiquities ‡. Where he treats of the Method of Appropriation, and the Abuse of robbing the Church and Clergy by this Means.

But how these Annexations of Benefices first came into the Church, whether by the Prince's Authority, or the Pope's Licence, is a very great Dispute, and there are Reasons on both sides to shew the same. For *Ingulphus* Abbot of *Crowland* reports, That there were eight Churches, besides the Patronage of some others, annexed and appropriated to the said Abbey by sundry *Saxon* Kings. But it does not appear, by ought I can find, whether they were thus appropriated by the Sovereign Authority of the Kings alone, in Imitation of what was done by *Martel*, who made all *Christian* Kings to err in this Point, or whether it was done by any other Ecclesiastical Authority, since there is nothing extant for the Allowance hereof, except the several Charters of those ancient Kings only: And that I am the more induc'd to believe that it was done by the Authority of those ancient Kings alone; because

* Orthob. Tit. 22.

† 12 Q. 2. 74. Inn. & Host. in c. 1. x. 3. 13.

* Plowd. com. 49. b. & sequent.

† Plowd. ut supra.

‡ Pag. 433. Fitch. N. B. Fol. 35. Col. 7. Rep.

because I find *William the Conqueror*, immediately on the great Victory he got over this Kingdom to have appropriated three Parish Churches to *Battle-Abbey* in *Suffex*, which he built in Memory of his Conquest. And whereas his Son *William* had ruin'd and destroy'd several Churches in the new Forest, *Henry* his Brother, by Letters Patents gave the Tithes thereof to the Cathedral Church of *Sarum*, and annex'd thereunto twenty other Churches in one Day, if the Copy of that Record, which concerns Appropriations, be true. Yea, the Matter went so far in those Days, that even Noble Persons, and other meaner Men, order'd Corrodies and Pensions to their Chaplains and Servants out of Churches; and this could not be redress'd till such Time as a Statute was made to reform the Abuse hereof *.

* 1 Edw. 3.
ch. 10.

But tho' Appropriations here in *England* were usually made by the King's Licence and Authority, yet I take them to be a cunning Device of the Pope; because I find, that every one of the Religious Orders of Men was confirm'd by one Pope or other; and as they confirm'd them 'tis likely they made an especial Provision for them this way, and that, chiefly after the Laws of Amortifation were devised and put in Use by Princes †. And hence it is that we find divers Sorts of Annexations made by Popes, and Bishops under them, every one in their respective Dioceses: And as some were made only so far as it concern'd the Patronage of the Church, in which case the Monks had only the Presentation thereunto; so others were made *pleno Jure*, and then the Monks might both give Institution, and cause Deprivation without the Bishop, and turn all the Profits thereof to their own Use, reserving only a Portion to him that should serve the Cure therein. Some other Churches they granted *simply* to them, without any Addition of *full Right*, or otherwise: And then if the Church was of their own Foundation, they might chuse (the Incumbent being once dead) whether they would put any other therein or not, unless (perhaps) the said Church had People belonging to it; for then they must of Necessity still maintain a Curate there. And of this Sort were their Granges and Priories: But if it was of another Man's Foundation, then it was otherwise. To this I may also add, That the Pope every where in his *Decretals* arrogates this Right to himself as a Prerogative of the Apostolick See, namely, to grant these Privileges to Religious Orders, to take and receive Benefices at Laymens Hands by the Mediation of the Diocesan, whose Office it was to be a Mean between the Religious and the Incumbent, for an indifferent Rate, that neither of them should press too much the one upon the other. And, therefore, in the Beginning the usual Rate which they set down between the Benefic'd Man and the Religious Person, was one Moiety of the Benefice; because it was not thought that the Pope would charge a Church above that Rate. But afterwards by the Covetousness of the Monks and Friars themselves, and the Remissness of Bishops who had the Management of this Affair under the Apostolick See, the Incumbent's Part came to so small a Portion, that Pope *Urban* the Fifth by his Legate *Othobon* here in *England* *, was obliged to make the aforesaid *Legatine* Constitution; and because this Constitution had not the Effect wish'd for, it occasion'd the two Statutes already quoted under this Title, and here referr'd to in the Margin, both for a suitable Endowment of the Vicar there to do Divine Service, to inform the People, and to keep Hospitality among them.

† Lindw. lib.
3. Tit. 9. c. 3.
Gloss. in v.
asserunt non
ligati.

* A.D. 1262.

But tho' most of these Appropriations were in the Hands of the Monks and Friars, and such other Religious Persons; yet Bishops and Cathedral Churches were not entirely free from Plunder, as I have already shewn
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in the Cathedral Church of *Salisbury*, to which *Henry* the First appropriated near twenty Churches in one Day: And the See of *Winchester* had two Benefices anciently annex'd to the Bishop's Table for good Eating and Drinking, *viz.* the Parsonage of *Eastmean*, and the Parsonage of *Hambleden* in *Hampshire*. Nor do I make any Question but the same was done in respect of other Bishop's Sees, and other Cathedral Churches, if the Matter was thoroughly enquir'd into.

'Tho' Appropriations at first did not imply an Exemption from the Jurisdiction of the Ordinary, it being expressly provided in the *Canon-Law**, * 16 Q. 2. 6. that no Person should be put into such Churches without Institution from the Bishop, to whom the Incumbents were to be accountable in all Spiritual Matters, as they were in Temporals to the Abbots; and in the oldest Appropriations, which I have met with, there is a *Saving of the Bishop's Right in all Things*, which Words are inconsistent with an Exemption: Yet afterwards the Forms of Appropriations were different. For tho' none could be made without the Bishop's Consent, yet that Consent was express'd different Ways, and had different Effects. If the Bishop only confirm'd the Lay Patrons Gift, then nothing but the Right of Patronage pass'd, and the Bishop's Jurisdiction still remain'd: But if the Bishop join'd in the Donation in these Words, *viz. Concedimus vobis talem Ecclesiam*, then he pass'd away his Temporal Rights to that Church †. If the Bishop granted the Church *pleno Jure*, then, according to the *Canonists*, he pass'd away his Diocesan Right, consisting in Rights which the Bishop had distinct from his Episcopal Jurisdiction, which it was thought he could not part with by any Act of his, since that would be to divest himself of his Order. Indeed, when the Pope's Power was grown Exorbitant in the Church, Appropriations confirm'd by his Authority were allow'd to carry with them Exemptions from the ordinary Jurisdiction: And, therefore, the Monasteries, which could bear the Charge, thought not themselves free from their Ordinaries, till they had obtain'd Bulls for that end; and then they took themselves to be free in their Conventual Churches as in their Chapels and Oratories on their own Lands. But now all Papal Exemptions are taken away by an Act of Parliament ‡, and the Churches so Exempt are put under the Jurisdiction of the Ordinary of the Diocess, or such Commissioners, as the King shall appoint. So that now no Papal Exemptions can be pleaded as to Appropriated Churches, how clear and full soever the Charters of Exemption were *. Wherefore, no Persons enjoying Estates belonging to Monasteries can now plead an Exemption from the Jurisdiction of the Ordinary by Virtue of the Papal Authority. † X. 3. 24. 7. ‡ 31 Hen. 8. ch. 13. * vid. Sect. 23. d. Stat.

An Appropriation can only be made to a Body Politick, or Corporate Spiritual, that has Succession; and thereby that Ecclesiastical Body is made perpetual Incumbent of the Benefice appropriated, and for ever shall enjoy all the Glebe, Tithes and other Profits belonging thereunto, and has therewith the Charge of the Souls belonging to the Parish where the Church appropriated is: Upon which Account it is, that an Appropriation regularly ought only to belong to a Spiritual Person, or (at most) to aggregate Bodies Spiritual that consist of Priests; because there is no Difference between a Church Appropriate and not Appropriate, saving that a Church appropriated is annex'd to the Corporation or Person to whom it is appropriated, and to his or their Successors for ever; but a Church not appropriated is had only for the Life of the Incumbent thereof: And, therefore, those that have Appropriations can no more grant their Title of Appropriation to others, whereby to make the Grantees become perpetual Incumbents of them

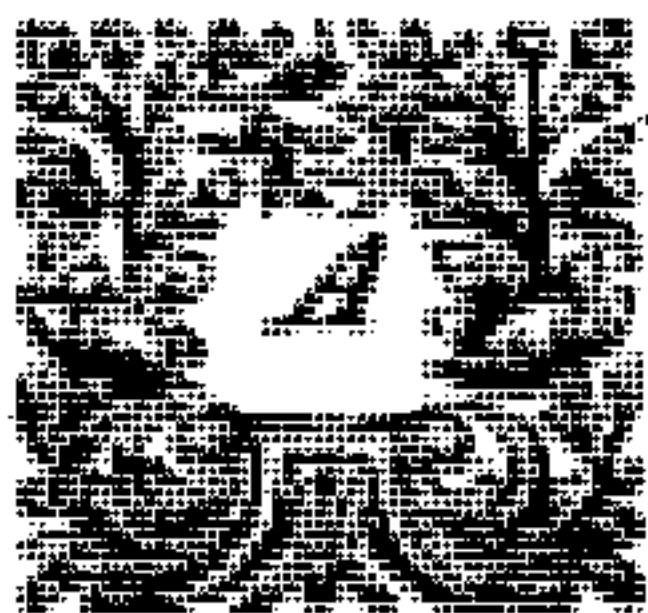
as Appropriations, than Incumbents of Churches Presentable can by their sole Act grant their Incumbencies to others ; but both may equally make Leases of the Profits thereof.

An Impropriation, of which there are in *England* Three thousand eight hundred and forty five, is properly so called, when it is in the Hands of a Layman : And an Appropriation is, when it is in the Hands of a Bishop, College, Religious House, and the like, as aforesaid ; tho' sometimes these Terms are confounded and used promiscuously. By a Statute * in *Henry* the Fourth's Reign, no Religious Person could in any wise be made a Vicar of a Church so appropriated, or to be appropriated, but thenceforth in every Church so appropriated, or to be appropriated, a Secular Person was to be appointed Vicar perpetual, and to be continually instituted and inducted thereinto.

* 4 H. 4. c. 12.



Of Archbishops, their Rise, Power and Jurisdiction, &c.



ARCHBISHOPS, according to the Report of the *Roman* Church, were by *St. Peter* set over those Cities, over which (in respect of *Pagan* Superstition and Idolatry) the *Arch-Flamens* heretofore presided * : But this seems to me to be an idle Invention of the *Papists*, on purpose to prop up and support the Antiquity of Bishops and Archbishops in the Church. And, according to the Opinion of *Wolfgang. Lazzus* in his Commentaries †, Bishops were made Metropolitans in *France* and *Germany* in those Sees, where there were formerly Rectors of Provinces, Pro-Consuls, and Pro-Consular Legates. An Archbishop in his Province is the Head and Chief of all the Bishops ; and, for this Reason, he is in the *Greek* Tongue stiled *Archi-Episcopus*, which signifies the same as *Summus Episcoporum* among the *Latins* ‡. But tho' an Archbishop be Superiour to all the Bishops of his Province ; yet, according to the *Canon-Law*, he is Inferiour to a Primate. *Sidonius Apollinarius* describing the Epitaph of Bishop *Claudian*, writes, that Archbishops or Metropolitans in *France* are immediately subject to the Pope's Jurisdiction ; and that, in other Places they are immediately subject to the Patriarchal Sees. For an Archbishop is frequently stiled by the Title of *Metropolitan* both in the Books of the *Civil* and *Canon-Law* * ; and, according to *Rebuffus*, these Words have not different Significations : So that a Metropolitcal Right is that which accrues unto Archbishops †.

* So Dist. c. 2.

† Lib. 2. c. 2. de Repub. Rom.

‡ 21 Dist. c. 1.

* 9 Q. 3. 1. 2. 3. 4. 5. 6. &c.

† VI. 1. 16. 5. X. 1. 30. 1. X. 1. 43.

‡ 21 Dist. c. 1.

Isidore supposes, That *Archbishops* were called *Metropolitans* from the Number of the Cities, which they had in their Care ; because Pope *Pelagius* writes, That as there ought to be one Metropolitan to preside over every Province, so in every Province there ought to be (at least) eleven or twelve Cities ; and as many Bishops ‡. And (perhaps) *Pelagius* at that Time thought such a Distinction of Provinces and Diocesses very necessary and convenient for the Government of the Church : But this Division or Distinction did not always continue ; for the Will of Princes

Princes and the Course of Time have now changed the Form of Provinces *. *Budaus* will have the *Metropolis* or Mother City to be that out of which Colonies or other Towns proceeded; that is to say, from whence the *Coloni* and the *Incolae* were deriv'd and translated to some other Place †: And thus a *Metropolis* or Metropolitcal City is in respect to a Colony, what a Mother is to a Daughter; and, according to *Suidas*, it is called a *Metropolis* or Mother City, from the two *Greek* Words *μητηρ* and *πόλις*. And according to this Sense a *Metropolitan* Bishop is he, who has his See in that City from whence Colonies were drawn and deriv'd. But this Interpretation does not truly quadrate with an Archbishop, nor are Archbishopricks deem'd Colonies, which were translated from such a City; because Colonies were such Draughts of People as were translated and sent to distant Kingdoms and Nations, such as the *Romans* sent to *Noricum*, the *Upper Hungary*, *Chartres*, and the like, and in Midland Countries to the Rivers *Saue* and *Drave*. The Colonies of the *Goths*, *Vandals*, and other Nations, being propagated and dispers'd into several distant Parts, could not be subject to one Archbishop. But the Cities of Archbishopricks may in a metaphorical Sense be stiled *Metropolitcal* Cities; which as Mothers do take care of their Children, so do these Cities, or the Bishops thereof, take care of such Churches as are subject to them, and placed in the same Province, as may be inferr'd from a Law of *Theodosius*, by which Law he gave to the City of *Berytus* in the Province of *Phœnicia*, the Name of a *Metropolis* *.

* Rhenan. Not. utriusq; Imp.

† Bud. in l. 4. D. 1. 16.

* C. 11. 21. 1.

An Archbishop, according to the ancient *Canon-Law*, was elected by Provincial Bishops meeting together in the *Metropolitan* Church, by and with the Consent of the Clergy and all the Citizens †; and by a Decree of Pope *Anicetus* it is enacted, that an Archbishop should be ordain'd by all the Suffragan Bishops ‡. See his Epistle to the Bishops of *France*. But by the *Papal* or *Modern Law* the Right of electing an Archbishop does not belong to the Suffragan Bishops of the Province, but to the Canons only of the Cathedral Church itself, whereunto such Archbishop is to be chosen. And from hence I infer, That *Suffragan* Bishops ought not of *Common Right*, according to this late Law, to be present at such Election even with the *Canons*, unless there be a Custom for them to elect together with the *Canons*. The *Russian* or *Muscovite* Archbishops had their Authority from the Patriarch of *Constantinople*, which were sometimes chosen in a Convention or Convocation of all the Archbishops, Bishops, Abbots, and Priors of Monasteries, by finding out a Person of a Holy Life and Conversation in their Monasteries and Religious Houses, if possible: But now they say, that the Czar or Prince of the Country is wont to convene before him certain Persons, and out of their Number to chuse an Archbishop, according to his own Judgment, Will and Pleasure *. In *England* the King has the Nomination of an Archbishop; and, after such Nomination, he sends a *Conge d'Eslire* to the Dean and Chapter, to elect the Person thus named by him, under the Pain of a *Præmunire* on their Refusal or Disobedience.

† 63 Dist. c. 19.

‡ 66 Dist. c. 1.

* Sigism. lib. Bar. in comm. rer. Muscov.

After an Archbishop is elected, he is confirm'd by the Primate or Patriarch, where there is such Person existing and presiding over the Province: But if the Archbishop be exempt from his Jurisdiction, then he shall, according to the *Papal-Law*, be confirm'd by the Pope †, whether the Election be made of *Common Right*, or according to the King's Nomination in *France*. After this an Archbishop ought to be consecrated and anointed, if he has not undergone this Ceremony before; and after

† X. 1. 6. 36. & 44.

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Consecration, he shall have the *Pall* sent him, which he ought not to delay suing for above three Months after Consecration ‡: But before he has receiv'd the *Pall*, he cannot exercise the Office and Rights of his Episcopal Order or Function *, nor consecrate Virgins, nor hold a Synod. See *Bertachin*. Treatise of Bishops, *Tit.* 3. and *Chap.* the last. For these Things are only lawful after Consecration, and obtaining of the *Pall*, and not before, tho' Confirmation has been made. Tho' a Bishop may be consecrated by three Bishops without the Help and Presence of more, at the command of the Metropolitan; yet an Archbishop ought to be ordain'd and consecrated by all his Provincial Suffragans †.

‡ *Can. Apost.*
20. *Clem. lib.*
3. *X. 1. 11. 6.*

The Power and Authority of Archbishops is chiefly over such Bishops as are plac'd under them, and stiled their *Suffragans*; who are by the Synod of *Antioch* commanded to shew a particular Respect unto the Metropolitans, and to attempt no Innovations in their Diocesses without the Metropolitan's Privy and Advice ‡; nor ought Metropolitans to attempt any Thing without the Advice of their *Suffragan* Bishops, according to an ancient Law made in *France* by *Charlemagne*. See the first Book of the Laws of *France* touching *Suffragan* Bishops *. For tho' an Archbishop has a proper and peculiar Diocess subject to him, and is vested with ordinary Jurisdiction as every Bishop is; yet he exercises an extraordinary Power over his *Suffragans*, as being the Person who is entrusted with the care of the whole Province †; and in respect of this extraordinary or further Power his *Suffragans* pay him Procurations ‡. He has Cognizance of every Dispute and Controversy, which a Clergyman has with any of his *Suffragans*, if they be aggriev'd by them *; and, in Supply of the Bishop's Negligence, he may do that which a Bishop ought to do according to his Duty and Pastoral Office †. Wherefore, he may go thro' his Diocess by way of Visitation; and, by Inquisition, correct the wicked Lives and Actions of his Subjects: And whilst he is thus in his Visitation, he may demand Procurations ‡, make use of the Pontifical Ensigns; and, according to the *Papal-Law*, command the *Cross* to be carried before him *. But this last Foppery is not practis'd here in *England*.

‡ 9 *Q. 3. 1.*

* *Cap. 8.*

† 9 *Q. 3. 2.*

‡ *X. 1. 32. 1.*

* *X. 1. 16. 10.*

† 9 *Q. 1. 46.*

‡ 9 *Q. 3. 3.*

‡ *X. 3. 39. 14.*

* *X. 2. 16. 1.*

X. 5. 33. 23.

Tho' an Archbishop be the Ordinary Judge of his *Suffragans*, and may call them to an Account for their ill Behaviour; yet this does not always hold true, according to the *Papal-Law*: For if an Archbishop should proceed to the Deposition of one of his *Suffragans* for Crimes committed by him, he cannot take Cognizance thereof according to that Law, no, nor even in a Provincial Council itself; because the Deposition of a Bishop by that Law belongs to the Pope alone. But this is not Law with us here in *England*; since an Archbishop, as well as a Provincial Council, may depose a Bishop: And such was the Case of the Bishop of *St. Davids* lately, who was depriv'd by the Archbishop of *Canterbury*; and the Deprivation well justify'd herein. But an Archbishop may even by the *Papal-Law* as well as by the *Canons* of the Church, not only excommunicate and interdict his *Suffragans* †, but his Vicar-General may also do the same. And tho' an Archbishop has this Jurisdiction over his own *Suffragans*; yet he has not Jurisdiction over the Persons and Estates of Men dwelling and existing in the Diocess of his *Suffragan* Bishop, unless it be in some particular Cases ‡, viz. When the *Suffragan* is negligent, as aforesaid, after three Admonitions. And a *Suffragan* is said to be negligent, when, thro' Sloth, and without any reasonable Impediment to excuse himself by, he does not consider those Things which he ought to do; and in this Case (it seems) that

† 12 *Dist. c. 13.*

‡ *X. 1. 31. 11.*

Gloss. ibid.

that Negligence differs but little from Contempt. Again, an Archbishop may, by Virtue of an Appeal made to him, compel his *Suffragan* Bishop to the Administration of Justice, if he be negligent therein, or denies the same to any Person: And tho' the Cause does not by this Means, according to some Men's Opinion properly devolve to the Archbishop, yet (I think) the other to be the better Opinion, *viz.* That by the Negligence of a Man's own proper Bishop, the Cause devolves to the *Metropolitan*. *Hostiensis* reckons up One and twenty Cases, wherein the Metropolitan may exercise Jurisdiction over the Subjects of his *Suffragans*: But see the Statute of the Realm touching this Matter *.

* 23 H.8.c.9.

It has been hinted, that an Archbishop is the chief Bishop and President of the Church in every Province, where such Archbishop is: For there was a Division of Provinces a long time before the coming of our Saviour *Christ*, tho' (perhaps) not the same as it is at present; and this Division, according to the ill-grounded Fancy of some Persons, is said to have been afterwards reviv'd by the Apostles, and their immediate Successors. And, therefore, say they, where Secular Primates were heretofore given, the Ecclesiastical Laws have order'd Patriarchs and Ecclesiastical Primates to be placed: But in the Metropolitans Cities, which had Inferiour Judges, those Persons are at present set over them in Church-Affairs, which are now distinguish'd by the Names and Titles of Archbishops and Metropolitans, as aforesaid. To these, therefore, it belongs to take Cognizance of Church-Matters among their own *Suffragans*. And if the *Suffragans* shall receive any Hardships from their Archbishops, they may appeal (according to the *Canon-Law*) to their Primates, or to the Apostolick See; but here in *England* to the King in his Court of *Chancery*, or to the Upper House of Convocation†. For an Archbishop ought not to make any Canon or Decree in the Diocese or Province of his Suffragan, or receive any such contrary to or without his Suffragan's Consent *: Nor ought he to meddle in such Matters as are common to both without the Consent of the Bishop.

† 24 H.8.c.12.

* X. 5. 31. 8.

When the Archbishop visits his Inferiour Bishop, and inhibits him during such Visitation, such Inferiour Bishop cannot collate to a Benefice within his Diocese, by reason of a Lapse during the Time of such Visitation; but he ought to present the Person to the Archbishop for his Institution, because that during the Inhibition his Power of Jurisdiction is suspended†. This was a Point on a Special Verdict in the County of *Lincoln*; and the *Civilians*, who argu'd thereon, seem'd to agree herein. But the Case was argu'd on another Point, and that was not resolved. As by the *Canon-Law* the Pope cannot be punish'd by a General Council, as being the Head of such Council; so by the same Law an Archbishop or Metropolitan cannot be punish'd by a Provincial Chapter or Council for the like Reason: But this was only calculated for giving the Pope a greater License of doing Evil, and for enlarging his Power over the Church; since surely by the Law of right Reason both the Pope and an Archbishop may be thus punish'd; and so they have often found by Experience. And an Archbishop, in his Travels or going out of his Province, becomes Subject to the Archbishop of the Province where he has his Abode and Commorancy‡. An Archbishop cannot divide his Province into two; nor can there be two Archbishops in one and the same Province*, any more than there can be two Suns (say the *Canonists*) in the same Firmament.

† Trin. 13. Car. B. R.

‡ X. 1. 9. 9.

* 101 Dist. cap. 10.

When the Power of the Church was first establish'd here in *England*, it was settled under the Archbishops of *Canterbury* and *York*, who had then no Preheminence or Jurisdiction one over the other, the former

* Lindw. lib.
5. Tit. 15. c.
1. Gloss. ib.
v. tantum.

being Primate over the Southern, as the latter was over the Northern Parts of the Kingdom of *England*. But as the *Christian* Religion in *England* first took Root in the See of *Canterbury*, once the Royal City of the Kings of *Kent*, this See was given to *Austin* the Monk, and his Successors for ever, by King *Ethelbert* on his Conversion; and the Archbishop is now stiled Primate and Metropolitan of all *England*, and has Precedency not only before all the Clergy of the Realm of *England*, but also as the first Peer (next and immediately after the *Royal Blood*) before all the Nobility of the Kingdom. In the College of Bishops he has the Bishop of *London* for his Dean, the Bishop of *Winchester* for his Chancellor, the Bishop of *Lincoln* for his Vice-chancellor, the Bishop of *Salisbury* for his Præ-centor, the Bishop of *Worcester* for his Chaplain, and the Bishop of *Rochester* (Time was) for his Cross-bearer*. The Archbishop of *Canterbury*, as he has the Precedency of all the Nobility, so likewise of all the Great Officers of State: He writes himself *Divinâ Providentiâ*, whereas other Bishops only use *Divinâ Permissione*, for the Kingly Stile of *Dei Gratiâ* is now thro' great Modesty omitted.

† Heylin's
Help to Hist.
v. *Canterbury*.
‡ Cok. Inst. 4.
cap. 74.

The Coronation of the Kings of *Great Britain* belongs to the Archbishop of *Canterbury*, if he be able to perform the same; and it has been formerly resolved, that wheresoever the Court was, the King and Queen were *Speciales & Domestici Parochiani Domini Archiepiscopi*. He had also heretofore this Privilege of Special Remark, viz. That such, as held Lands of him, were liable for Wardships to him, and were to compound with him for the same, tho' they held other Lands in Chief of our Sovereign Lord the King†. All the Bishopricks in *England* (except *Duresme*, *Carlisle*, *Chester*, and the *Isle of Man*, which are of the Province of *York*) are within the Province of *Canterbury*‡. The Archbishop whereof has also a peculiar Jurisdiction in thirteen Parishes within the City of *London*, and in other Diocesses, &c. Having also an ancient Privilege, That wherever any Mannors or Advowsons belong to his See, they forthwith become Exempt from the Ordinary, and are reputed *Peculiars*, and of the Diocess of *Canterbury*. If you consider *Canterbury* as the Seat of the *Metropolitan*, it has under it One and twenty Suffragan Bishops, whereof Seventeen are in *England*, and four in *Wales*: But if you consider it as the Seat of a *Diocesan*, it only comprehends some Part of *Kent*, viz. Two hundred fifty seven Parishes (the Residue of this County being in the Diocess of *Rochester*) together with some other Parishes in a dispers'd manner lying in several Diocesses, where the Archbishop has any Mannors or Advowsons, as aforesaid.

* A. D. 622.

The *Metropolitan* See of *York* had its Original at the first Reception of the Gospel in *England* (according to some) when King *Lucius* establish'd *Sampson* the first Archbishop thereof, which seems to me an idle Story, because 'tis much doubted whether we ever had such a King or not: But, soon after the Conversion of the *Saxons*, *Paulinus* was by Pope *Gregory's* Appointment made Archbishop thereof*. Indeed long before Pope *Gregory's* Time we have an Account (if it may be rely'd on) that there were at the Beginning of the fourth Century three *English* Bishops at the Council of *Arles*, viz. those of *London*, *York* and *Caerleon*; and *Sulpicius Severus* tells us, that their Bishopricks were so mean that they lived there at the Charge of the Publick. This Province of *York* anciently claim'd and had a *Metropolitan* Jurisdiction over all the Bishops of *Scotland*, from whom they had their Consecration, and to whom they swore *Canonical* Obedience, till Pope *Sixtus* the Fourth created

created the Bishop of *St. Andrews* Archbishop and Metropolitan of all *Scotland* *. The Archbishop of *York* styles himself *Primate* and *Metropolitan* of *England*, as the Archbishop of *Canterbury* does *Primate* and *Metropolitan* of all *England*, by the way of Preheminence thro' the Grace and Favour of King *Ethelbert* (as 'tis said) to *Austin* the Monk, who was the first Archbishop of this See. About Two hundred and fifty Years since †, when *George Nevil* was Archbishop of *York*, the Bishops of *Scotland* withdrew themselves from their Obedience to him; and had Archbishops of their own, till the Time that Episcopacy was abolish'd in *Scotland*. The Archbishop of *York* has Precedency of all the Dukes not being of the *Blood Royal*, as also before all the Great Officers of State, except the Lord Chancellor. The Diocess belonging to this See of *York* contains the two Counties of *York* and *Nottingham*, and in them Two hundred eighty one Parishes, whereof Three hundred thirty six are Impropriations.

* Heylin nt
supra. v *York*.

† A. D. 1466.

The Archbishop of *Canterbury*, as he is *Primate* over all *England* and *Metropolitan*, has a Super-eminency and even some Power over the Archbishop of *York*: For (under the King) he has Power to summon him to a National Synod; and the Archbishop of *York* ought to come with his Bishops (says the Law) *ad nutum ejus Canonicis ut Dispositionibus obediens existat*. The Archbishop of *York* was also *Legatus natus* (according to some Accounts) as well as the Archbishop of *Canterbury*; and had the *Legatine* Office and Authority equally annex'd to his Archbishoprick: But upon abrogating the Pope's Power here in *England* by *Henry* the Eighth, in the seventh Year of his Reign, it was concluded, that the Archbishop of *Canterbury* should no more be stiled the Pope's *Legate*, but *Primate* and *Metropolitan* of all *England*. And as the Archbishop of *Canterbury* has the Honour to crown the King; so has the Archbishop of *York* the Honour of crowning the Queen, whenever it happens; and is her perpetual Chaplain.



Of an Archdeacon, and his Office in the Church.

THE Care of the Pastoral Office being a Matter of weighty Concern, as well as of great Difficulty and of a large Extent: The Law has, therefore, rightly provided, that there should be some Persons in the Church, who, together with the Bishop, should bear this Burthen; and who should aid and assist the Bishop in his Pastoral Care and Office *. And such a Person is an Archdeacon, who of *Common Right* within his own Precinct is the next great Person in Point of Dignity, after the Bishop † and his Chancellor; saving the Right of the Dean, which belongs to him in the Cathedral Church: And, therefore, as the Law styles him, the Bishop's *Vicar* or *Vicegerent* ‡, because in many Cases he supplies the Bishop's Place and Office in such Matters as do belong to the Episcopal Function, he ought to be in Priests Orders, and always on the Watch, to see that such as are in lower Offices do discharge their Trust with Diligence. And, as he is the Bishop's Vicar, he has his Power from the Bishop

* X. I. 23. 7.

† X. I. 23. 1.

‡ X. I. 23. 1.

Bishop ; and ought to exercise the same with that Vigilance and Sagacity in the House of GOD, that he may deservedly be called *Oculus Episcopi*, which he often is in our Law-Books. But tho' Archdeacons are the Bishops Vicars, yet they are plac'd in a certain Station of Dignity : And, therefore, they cannot be remov'd at the Bishop's Beck or Pleasure, nor can the Bishops exercise their Office ‡.

‡ Abb. inc. 1.
X. 1. 23. 1.

An Archdeacon in a large Sense of the Archdiaconal Dignity is said (at least) to have a Cure in respect of that Part of his Office, which concerns the Clergy of the whole Diocese, or his own District * : For an Archdeacon ought to take Care of the Clergy so far as it may regard the Conversation and Honour of the Clergy. And he is stiled an Archdeacon *quasi Princeps Ministerii*, it being his Duty to do all those Things which do belong to the Ministerial Office, as I shall shew by and by. And as simple Deacons are in Subjection to Presbyters, according to the *Canon-Law* † ; so are also Presbyters and Arch-Presbyters in Subjection to these Archdeacons. They are stiled the first of the Deacons according to the Sense of the Word, unto whom a Dignity does of *Common Right* belong ; and as such, in the *Romish* Church, they are Superiour to Abbots and Priors themselves. The Ministerial Office of an Archdeacon is to read the Gospel, whenever he pleases, in the Church, or else to command some one of the Deacons to do it in his stead ; to examine such Persons as are to be promoted to Holy Orders, and to be instituted into Ecclesiastical Benefices, and to present Persons examin'd and approv'd unto the Bishop for Imposition of Hands, and Canonical Institution, and the like ‡. And, moreover, in the *Romish* Communion it is his Duty, according to the *Papal-Law*, when the Bishop sings Mass, to order all the Inferiour Clergy to appear in their proper Habits * ; and to see that all the Offices of the Church be rightly perform'd ; to ordain the Acolothist, to keep the Sacred Vessels, &c. †

‡ X. 1. 23. 7.

* X. 1. 23. 2.

† X. 1. 23. 3.

Pope *Clement* the Fifth in an Epistle of his gives an Archdeacon the Name and Title of *Oculus Episcopi*, saying, That he is in the Bishop's Place to correct and amend all such Matters as ought to be corrected and amended by the Bishop himself, unless they be of such an arduous Nature, as that they cannot be determin'd without the Presence of his Superiour the Bishop. But the Question is, What these Matters are, which are of such an arduous Nature, that the Archdeacon cannot do of himself ? To which I answer, That regularly he cannot inflict any Punishment, but can only proceed by Precepts and Admonitions : For tho' he be a Cenfor and Corrector of the Manners of the Clergy within his Archdeaconry, as now practis'd ; yet Originally he could only enquire into the Behaviour of the Clergy, hear the Causes of Persons subject to the Bishop, by way of Complaint, and was oblig'd to refer all Matters of greater Consequence to the Cognizance of the Bishop ‡. But in Process of Time from being a *simple* Scrutator, an Archdeacon became to have Jurisdiction in a more ample Manner by the Grant of the Bishop at first, and then at length by immemorial Custom and the *Canon-Law* itself. And hence it was that Archdeacons began to have the Power of Visitation vested in them of *Right*, which was formerly only delegated to them by the Bishop himself, in Case he was any wise hinder'd from visiting his Diocese. For the Bishop ought to visit his Diocese every Year in his own Person, unless he thinks fit to omit the same, because he would not burthen and aggrieve his Churches ; and then in such a Case he ought to send his Archdeacon, which was the Original of the Archdeacons Visitation. But *Hostiensis* says, That the Bishop may send whom he pleases, and the Archdeacon may visit

‡ Abb. inc. 7.
X. 1. 23.

(not-

(notwithstanding) if the Archdeacons Right of Visitation be founded on Custom ; because one Visitation does not prevent and hinder another. An Archdeacon may visit every Year, and oftener too if it be expedient ; but he is not oblig'd by any Necessity of Law to visit oftener than *de Triennio in Triennium** : He ought to go in Person then to the Place to be visited, and not to send another Person to this End and Purpose ; for if he does, he shall not have the Procuration in Money due in respect of his Visitation. But 'tis otherwise in respect of him, whom he sends in his own Name : For he shall have and receive for himself and his Attendants his full Procurations in Victuals. Some will have it, that an Archdeacon does of *Common Right* execute this Visitatorial Power in his Archdeaconry : But others seem to hold the contrary Opinion, saying, That an Archdeacon has a Visitatorial Power only of *Common Right per modum simplicis Scrutini*, as being the Bishop's Vicar, according to what I have before hinted ; and this is good Law with us here in *England*, unless such Archdeacon has a contentious and coercive Jurisdiction given him, either by some Grant of the Bishop, or else by Prescription or by immemorial Custom, which last cannot happen with us here in *England*.

* X. 1. 23. R.

For in the *Norman* Times we read, That Archdeacons in *England* were then first taken into a Part of the Jurisdiction under the Bishop ; and only visited those Years that the Bishop did not : For we meet with no Archdeacons vested with any kind of Jurisdiction in the *Saxon* Times. We read indeed sometimes of Archdeacons, but they had then nothing to do in the Diocess, but only attended the Bishop at Ordinations, and other Publick Services in the Cathedral Church. *Lanfrank* was the first that made an Archdeacon with Power of Jurisdiction in his See here in *England*† ; and *Thomas*, the first Archbishop of *York* after the Conquest, was the first that divided his Diocess into Archdeaconries ; and thus did *Remigius* Bishop of *Lincoln* divide his large Diocess into seven Archdeaconries‡. So that Archdeacons with us could not have this Power of *Common Right*, nor by immemorial Custom.

† Angl. Sacr. Vol. I. p. 150.

‡ H. Hunting. Angl. Sacr.

But as Abbots in the Church of *Rome* may by Privilege and Custom prescribe to take Cognizance in Matrimonial and other Causes of the Church, so likewise by Custom and Privilege Archdeacons may prescribe to have Cognizance in such Causes : Which yet they cannot have of *Common Right*, because of *Common Right* it only belongs to the Bishop. Archdeacons ought by their *Officials* and other Ministers, to whom Credit is given in Notorious Cases, to enquire *Simpliciter & de plano* (says the Law) by the Means of a General Inquisition in the Parish-Church, wherein they exercise the Power of Visitation, whether there be any Thing that wants Correction and Amendment either in Persons or Things belonging to such Church ; as Things under an ill State and Management, or in bad Custody. And, by a Provincial Constitution in *Lindwood**, Archdeacons and their Officials are enjoind, That in all their Visitations they make of Churches, they do shew special Regard in their Inquiries touching the Structure and Fabrick of them, which consists in the Walls, Windows, Coverings, and the like, thereunto belonging ; and particularly in respect of the Chancel, if (perchance) they want Repair. And if they find any Defects of this Kind in them, they ought to appoint and prefix a certain Space of Time *sub Pœnâ* for the Repairs and Amendment thereof. Under the Appellation of *Things* abovemention'd, I mean all the Rights that do any wise appertain and belong to the Church ; and under the Appellation of *Persons*, I do here

* Lib. I. Tit. 9. cap. 4.

comprehend Laymen as well as Clergymen: For an Archdeacon in Matters belonging to his Visitation has Jurisdiction (at least) by Custom even over Laymen, and so it is settled in *England*.

An Archdeacon ought to be a Man of Prudence and sound Learning in the Church, and of an upright Conscience and Conversation in the World*, tho' he has not regularly speaking a Cure of Souls, since he has only that from the Bishop, as being the Bishop's Vicar deputed by Law: And hence it is, that he cannot grant the Cure of Souls to another without the Bishop's License†. But tho' an Archdeacon regularly has not the Cure of Souls; and consequently, cannot commit the same to another: Yet by Custom in some Places, the Archdeacon has under him a distinct Parish, wherein he may exercise the Cure of Souls.

My Lord *Coke* indeed says, That Archdeaconries are Benefices with Cure of Souls‡: But even some of our common Lawyers have put a *Quare* on this great Man's Assertion. For, notwithstanding what my Lord *Coke* has said, some of our common Lawyers hold, That an Archdeaconry is not a Benefice with Cure of Souls, nor is it comprehended under the Name of a Benefice within the Statute of the 21st of *H. 8. ch. 13.* against Pluralities, tho' the *Proviso* had been omitted: For there is no such Exception out of the Statute* of Queen *Elizabeth* concerning the reading of the Thirty nine Articles; and if an Archdeacon reads not the Thirty nine Articles within the Time limited by the 13th of *Elizabeth*, his Preferment is not void by that Statute, because it is not a Benefice with Cure of Souls. So that an Archdeaconry is a Dignity, and not a Benefice with Cure of Souls, according to the Sense of the Common Law: For by a Dignity†, we understand that Promotion or Preferment, to which any Jurisdiction is annex'd. And thus in the Year-Books of *Edward* the Third‡, an Archdeacon is stiled a Dignitary; and so likewise he is in *Latche's Reports of Law**: And, therefore, an Archdeaconry is not incompatible with a Benefice having the Cure of Souls. For if any Person having a Benefice with Cure of Souls takes an Archdeaconry, his Cure is not void by Cession†. But by the *Canon-Law* if one having a Benefice with Cure of Souls accepts of an Archdeaconry, the Archdeaconry is void.

By the *Canon-Law* no one is qualified to be an Archdeacon, unless he be a Deacon*, since he is stiled the first of the Deacons by that Law, unto whom this Dignity does of *Common Right* belong; and as such, he is Superiour to Priors and Abbots in the *Romish Church*. And as an Archdeacon ought to be in Deacons Orders (at least) no one ought to be preferr'd to an Archdeaconry till such Time as he is Twenty four Years of Age compleat, or Twenty five Years of Age *anno currante*‡: And according to the twelfth *Canon* of the Council of *Trent*, Session the eighth, an Archdeacon ought to be a *Licentiate* either in Divinity, or else in some one of the Laws; since an Archdeacon is a Dignity in the Church. By a Statute of the Realm* in King *Charles* the Second's Time, he that accepts of an Archdeaconry is oblig'd within two Months after he shall be in actual Possession of such Ecclesiastical Promotion, without some lawful Impediment to be allow'd and approv'd by the Ordinary of the Place, and then within one Month after such Impediment remov'd; and on the Lord's-Day, openly, publickly and solemnly to read the Morning and Evening Prayers appointed to be read; and according to the Book of Common Prayer before the Congregation there assembled, openly and publickly to declare his unfeign'd Assent and Consent unto all Things therein contain'd and prescrib'd according to the Form of the Words, and no other.

An Archdeacon is by Custom a greater Person in his District than the Dean of a Cathedral Church, and (particularly) in those Things, which do of *Common Right* or by Custom belong to his Office: For an Archdeacon is greater than a Dean in Point of Jurisdiction, and out of the Cathedral Church; because in all such Matters a Dean ought to be Subject to him; but in the Cathedral Church, and in the Celebration of Divine Service, an Archdeacon ought to be Subject to the Dean. But in all these Things the Custom of Churches ought to be regarded; according to which a Dean *simply* speaking is inferiour to an Archdeacon. An Archdeacon exercises Jurisdiction according to the Custom of the Place, where he is Archdeacon*: And, therefore, it seems, that he may do all such Things as are necessary to support his Jurisdiction. So that in whatever he has the Cognizance of a Cause he may therein pronounce a Sentence. Hence it is that an Archdeacon may punish Laymen for not repairing their Church, and according to the *Canon-Law* enjoin them Pennance.

* Dd. in c. 5.
X. 1. 23.

By a Book of Canons made for the Government and Discipline of the Church of *England*, and publish'd in the Year 1571. every Archdeacon ought to have a good and sufficient Study of Books at his own House, and (particularly) those which are entitled the *Monuments* or *Book of Martyrs*. And by the same Canons an Archdeacon who has the Power of visiting his Archdeaconry either of *Common Right* or by Prescription, is enjoin'd to visit the same (at least) once every Year; forbidding him to substitute any Person to himself as an Official, unless he be one that has his Education in the University, has apply'd himself to the *Civil-Law*, and is Twenty four Years of Age compleat; but a succeeding Canon will have him to be Twenty six†: And he ought not only to be endu'd with sound Knowledge and Learning, but also with Gravity and Modesty fit for the undertaking of this Office. Moreover, 'tis enacted by the said Canons, That Archdeacons and their Officials or Substitutes shall in their Visitations call the Clergy to an Account, and examine what Proficiency each of them have made in the Study of the Scriptures, and propose some Part of the New Testament to be learn'd by Heart by such of them as have not taken a Master of Arts Degree in one of the Universities, and oblige them to repeat the same at the next Synod; and denounce such of them as are negligent and contumacious herein to the Bishop. The Archdeacon likewise, at the end of his Visitation, ought to present to the Bishop all such Persons as he shall find in every Deanery qualify'd in Point of Doctrine and Judgment for Preaching, and instructing the People. And out of these the Bishop may chuse whom he pleases for his Rural Deans. Lastly, Archdeacons by Virtue of the Canons ought to take Care, that the Acts of their Courts be safely and faithfully kept; and once every Year they ought to bring or transmit to their Bishops the Originals of all Wills which have been proved before them in the foregoing Year, that they may be laid up in the Bishop's Registry; taking Copies of such Wills, if they please, to their own use.

† Can. Reg.
Jac. 127.

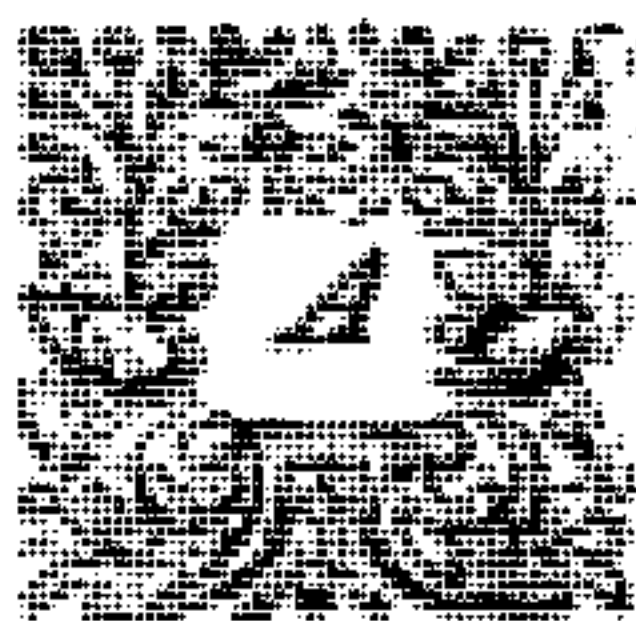
If an Archdeaconry be in the Gift of a Layman, the Patron presents to the Bishop, who gives Institution in like manner as to another Benefice; and then the *Dean* and *Chapter* inducts him, that is to say, after some Ceremonies places him in a Stall in the Cathedral Church to which he belongs, whereby he is said to have *locum in Choro*: And tho' a Person may have a Prebend in one Church, and a Prebend in another; yet a Man cannot have an Archdeaconry in two Churches at one and the same Time‡.

‡ X. 3. 5. 14.

Of



Of Attentates, or Attempts on Appeals.



ATTENTATES, in *Latin* called *Attentata*, are not only said to be such Proceedings as are made in a Court of Judicature, (pending Suit) and after an Inhibition is decreed and gone out; but, according to *Oldradus* *, those Things which are done after an Extrajudicial Appeal, may likewise be stiled *Attentates*; where 'tis said, That the Pendency of a Suit, and the Prohibition of a Superiour Judge is the Cause of an *Attentate*. And, according to *Federicus de Senis* †, those Things which are done after a Sentence pronounc'd even before an Appeal made, may in like manner be term'd *Attentates* as well as those Things which are done after an Appeal in Point of Time, and an Inhibition decreed by the Judge *ad Quem*: And those Things which are done after an Appeal from an *Interlocutory* are called *Attentates*, if they are done after an Inhibition decreed and issued forth ‡: And 'tis the same Thing, if any Thing be done and attempted after the Judge *a Quo* has admitted and submitted himself to an Appeal from an *Interlocutory*; since the Inferiour Judge cannot proceed in any Step of the Cause, whilst an Appeal is depending thereon *. But, if an Appeal shall be found to be notoriously null, then there shall be no Room in Law for *Attentates*; and the Process made by the Judge *a Quo* is valid; nor shall *Attentates* have any Place in Law, when an Appeal is not notify'd to the Inferiour Judge. See *Ancharanus* as quoted in the Margin †.

Tho' *Attentates* (pending an Appeal) ought to be revok'd in the first Place, and before any other Proceeding in an Appeal ‡; yet if they require a deeper Search, and a more narrow Enquiry, and cannot incontinently be prov'd, the Principal Cause shall not be suspended and deferr'd upon the Account of the *Attentates*, but both Causes shall be prosecuted together *. In the *Imperial* Chamber a Libel of *Attentates* is exhibited, and Suit is contested thereupon, tho' otherwise, when *Attentates* are notorious, a Libel or Contestation is not necessary; but the Judge may on the Party's Request made to him for his *mercenary Office* proceed *de plano*, and immediately revoke all *Attentates* †. Wherefore in a notorious Case the Appellant ought to take care and see, that on the suspending of the principal Cause all *Attentates* be first revok'd ‡. Yea, the Judge may, *ex Officio*, without any Report or Petition made to him by the Party, revoke all such *Attentates*, because the Judge is more offended by them than the Party griev'd; and the Law, which forbids any Thing to be innovated or attempted, (pending an Appeal) is by Contempt set at naught.

In punishing *Attentates* it ought to be consider'd, whether the Appellant or the Appellate made the *Attentate*: For if the Appellant did it, he is deem'd to have wav'd his Appeal, and to have made himself unworthy of the Benefit thereof; and therefore, the Sentence, from which he has appeal'd, shall immediately pass in *Rem Judicatam*; and the Judge *a Quo* may proceed to Execution, as if it had never been appeal'd *.

* Conf. 119.
& 206.

† Conf. 126.
per tot.

‡ Alex. Conf.
89. lib. 1. n. 6.

* Tusch.
Conc. 376.

† Conf. 158.
n. 19.

‡ VI. 2. 15. 7.

* C. 3. 39. 4.

† Gail. lib. 1.
Obf. 146. n. 3.

‡ VI. 2. 8. 1.

* Bald. in c.
24. X. 2. 28.



Of the Banns of Matrimony.

THE *Banns* of Matrimony, or Matrimonial *Banns*, may be defin'd to be such publick Edicts, Intimations, or Proclamations, as are solemnly denounc'd and propounded in the Church, or in some other lawful Congregation of Men, in order to the Solemnization of Matrimony *. And the Publication of these *Banns* is said to be solemnly made, when it is made on three several solemn Days, and according to the approv'd Custom of the Country, which ought to be observ'd in this Respect †; especially, if there be any Canon or Synodical Constitution enacted touching it. And as publick *Banns* ought to be previous unto the Solemnization of *Carnal* Matrimony; so, according to the Papal *Canon Law*, they ought to be previous to a Contract of *spiritual* Matrimony ||: But herein there lies a Difference, *viz.* Because in the one Confirmation is not binding, if these *Banns* or publick Edicts do not go before the Contract; but in the other it is binding and valid, because (say the *Papists*) the Pope has not so great a Power in dissolving *Carnal*, as he has in dissolving *spiritual* Matrimony *.

* X. 4. 3. 3.

† Host. in. c. 3. X. 4. 3. v. *competenti.*

|| vi. 1. 6. 47.

* X. 3. 32. 7.

Now the Publication of the *Banns* of Matrimony ought to be propounded in all the Churches of that Place, where the Persons willing to contract Marriage, do reside and dwell, or (at least) in several of those Churches; and this ought to be principally regarded and observ'd, when the said Parties are of different Parishes †. But, according to some Writers, this is little taken notice of and observ'd in some Places; yea, for the most part beyond Sea, the Publication of *matrimonial Banns* is made in one Church only, which is a foul Practice too much follow'd and encouraged here in *England*: And, according to these Men, it is sufficient, if it be made in so publick a Manner, that all Persons may thereby become acquainted with it ||. 'Tis said, That these *Banns* ought to be publish'd in the several Churches whereunto the Parties do belong: but according to some Lawyers, it is well enough, if these *Banns* are publish'd out of the said Churches; provided, this be done in competent Places, as in Places where Sermons are preach'd, or divine Service publickly perform'd; and in some Countries, in the Market and the like. It is therefore said, That these *Banns* ought to be publish'd in Churches, because Men do for the most part assemble and come together there, and may there best understand what passes in the World. If the Persons, who shall contract Matrimony, live in one Place, and they were born and their Parents do live in another, the *Banns* of Matrimony ought in Regard of them and their Parents to be publish'd in the respective Churches likewise, where their Parents dwell and inhabit; because the Truth, touching their Birth and Parentage, may be best known from their Parents themselves, if they have any living: And as an enquiry ought to be made, where the Truth may be best discover'd, so it is the safest way to make this Publication in both Places. For 'tis expedient that it should be done in the Place of the Parents Habitation, because it may come to the Parents Knowledge, whose Consent is sometimes requisite; and in the Place of the Parties, because we shall there have a more certain Account, whether they have already contracted themselves with others in Wedlock or not.

† Innoc. in d. cap. X. 4. 3.

|| X. 1. 37. 1.

* Tit. 14. v.
clandestine.

Though it be well enough for the *Banns* of Matrimony to be publish'd on each of the Days, when three Holidays successively come together, as it happens in *Christmas, Easter, and Whitson-Week*; yet the Publication thereof, ought not to be so hasten'd and dispatch'd, as to have them proclaim'd the second or third time in one and the same Day. In the Gloss, on a *legatine* Constitution of Cardinal *Otho*, in *Linwood's* Provincial *, a Person contracting Matrimony without Publication of these solemn *Banns*, shall not be heard on his Prayer, to have his Wife restor'd to him on her *Elopement* or Departure. Yea, he ought in the first Place to prove these three Things, *viz.* a Publication of *Banns*, a carnal Copulation had with her, and a matrimonial Contract solemniz'd. The Institution of this solemn Denunciation of matrimonial *Banns*, was wisely contriv'd to come at the Knowledge of such Impediments as are legal Obstructions to the Solemnization of Marriage; such as Consanguinity, Affinity, Præ-contract, Want of Consent of Parents or Guardians, and other lawful Causes sufficient to hinder Marriage: But this is now shamefully eluded by Licences and Faculties obtain'd for Money.



Of Baptism, and the Effects thereof, &c.

† Ch. 3. v. 5.

|| Ch. 28.
v. 19.

BAPTISM is the first of the Two Sacraments in the Church of *England*, (for our Church rejects the five pretended Sacraments of *Penance, Matrimony, Confirmation, Orders, and Extreme Unction*, retain'd in the *Romish* Communion) and is as the Gate or Entrance into Christianity itself, whereby we are born again unto God, and take upon us a new Life †; and without which, in the Opinion of some Men (at least) we cannot obtain everlasting Salvation, according to St. *Matthew's* Gospel ||, nor can we receive the other Sacrament of the Lord's-Supper without Baptism. For it is only by Baptism, that the Person baptiz'd becomes a Member of Christ's Church: And therefore, according to the Distinction of the *Romish* Church, both *original* and *venial* Sin is taken away and destroy'd by Baptism; and thus we are made worthy Partakers of that holy Mystery.

In treating therefore, of *Baptism*, I shall here, *first*, consider what it is. *2dly*, I shall explain the Effect of *Baptism*. *3dly*, I shall declare, who may baptize, and who ought to be baptiz'd. *4thly*, I shall consider whether this Sacrament may be reiterated or repeated. And, lastly, I shall shew what ought to be *extrinsically* observ'd in this Sacrament. Now *Baptism*, according to the common Definition of it, is an external Ablution or Washing of the Body in Water, which, by applying a certain Form of Words, operates and denotes an internal Ablution or Washing of the Soul from *original* Sin. For as Circumcision was instituted among God's own People, the *Jews*, as a Token of Faith, and a Sign of Justice, and was made to signify a Purgation of *original* Sin, in respect of Infants; so does Baptism also now signify a Regeneration or Renewal of the old Man: And thus *Baptism* succeeded in the Place of *Circumcision*. According to the Doctrines of the *Papists*, there are five Things of the Substance of *Baptism*, *viz.* 1st, The Intention of the Person baptizing, whether such Intention be general or special only: *2dly*,

2dly, The Faith of the Person to be baptized, if he be an adult Person, otherwise he shall be baptized in the Faith of his Parents: And in adult Persons, according to the *Canon Law*, Catechism ought to be previous unto Baptism*; because the Salvation of Baptism is made by virtue of Faith. And, therefore, in Baptism, 'tis necessary that those Things should be exacted, which are necessary to Faith; and these are three, viz. a Suspension of Faith, a Profession of Faith, and an Observation of Faith: And to these, the Person being of an adult Age, ought to answer in his own proper Person†; but Infants ought to answer by their *Sponsors*, or Sureties, who do not answer in their own Person, but in the Person of the Infant. 3dly, The Form of Words instituted by Christ himself in Baptism ought to be express'd, as, *I baptize thee in the Name of the Father, Son and Holy Ghost*. Bishop *Beveridge* shews, that in the close of the second Century, *Praxeas*, and others, baptiz'd only into one Person of the Trinity, viz. that of *Christ* who died for us: And, therefore, against these Hereticks, probably the Forty-second Apostolical Canon was made; whereby it is enacted, that every Bishop or Priest, who did not perform three Ablutions in *Baptism*, should be deposed: For *Christ* did not say, *Baptize into my Death*, but *in the Name of the Father, Son, and Holy Ghost*. 4thly, An elementary Ablution is held necessary: And, therefore, *Baptism* ought to be made in some Vessel, so that the Person to be baptized may be dipped in Water; and such an Immersion or Dipping ought to be made thrice, according to the aforesaid Canon, unless Custom has made one Dipping alone sufficient||. But yet, I think, according to the *Canon Law* itself, *Immersion* is not strictly necessary unto *Baptism*; but that it may be perform'd even by *Effusion* or *Sprinkling*. And this is particularly true, when either the Custom of the Church suffers it, as it does here in *England*; or else when Necessity requires it on the score of some Defect, or thro' danger of the Child's Death, who is to be baptized; or, lastly, when the Priest is so weak, that he is not able to support the Infant in order to dip it. For, in these, and the like Cases, it is sufficient to sprinkle or pour Water on the Child's Face, or only to dip the more principal Part of the Infant in Water. But 'tis to be observ'd, that tho' *Baptism* may be well enough perform'd by sprinkling or Effusion of Water, where the Custom is such; yet by the *Canon Law*, the better Custom is to dip the Person thrice, because it denotes our Faith of the Trinity, and the three Days of Christ's being in the Grave, according to *Johannes's* Annotations on the *Summa Confessionum* *. The last thing of the Substance of *Baptism*, according to the Papal Law, is, that this Ablution and the Pronouncing of the Words, ought to be contemporary Acts: But as this Practice draws no absurdity along with it, it may be well enough observ'd in our Church.

* Con. 4.
Dist. c. 54.

† Con. 4.
Dist. c. 77.

|| Con. 4.
Dist. c. 80.

* Lib. 3.
cap. 24.

The Doctrine of the Schools is, That a Sacrament requires *Matter*, *Form*, and *Intention*: And as Water is the Matter of this Sacrament, so is the expressing of the Act, *in the Name of the Father, Son, and Holy Ghost*, the Form thereof: but I am at a loss to know, what the Intention of a Sacrament is, unless it be what the Church requires to be done therein, according to the Council of *Florence*. But those, that understand Antiquity, know very well, that this was not the Opinion of Pope *Stephen*, in whose Time the Distinction of *Matter*, *Form*, and *Intention*, was not heard of; tho' the *Roman Church* says, that this Doctrine was receiv'd by Apostolical Tradition, establish'd long before that Pope's Time. In respect of the *Matter* of *Baptism*, it is rather made by Water than by any other Liquor; First, Because as Water cleanses our Cloaths, and washes off the Filth of our Body, so *Baptism* washes away the Spots and Filth

Filth of the Soul. And another Reason is, because a scarcity thereof should not be a Plea of Excuse unto any one, which it may be, if it were to be perform'd by Wine, Oil, or any other Liquor; since many Persons are in want of these, and such things are dearer than Water. A third Reason is, because the *Matter* of baptizing should be common to all Men. And a fourth Reason is, because the Water which came out of our Saviour's Side, on piercing thereof, was a Sign of this Sacrament, according to the Archdeacon, on the third Part of the *Decrees*†. But others say, that Baptism was rather made by Water than other Liquor, because as Man did by the Sin of our first Parent incur Uncleanneſs, Ignorance, and Concupiscence; so by *Baptism* we are freed from these three Evils: And this is noted in the Properties of Water, *viz.* in its Purity, Perspicuity and Frigidity. For Baptismal Water, by its Purity, cleanses us; by its Perspicuity, it illuminates us; and by its Frigidity, it tempers us from the Heat of Concupiscence. As to the Form of this Sacrament in the vulgar Tongue, it consists not only in Signs, but also in the Order of the Words themselves, wherein it was instituted: And these Words may be pronounc'd either in *English, Latin, French*, or in any other Language, provided the Words are apt and proper to the Occasion: But a Transposition of the Order of the Sacramental Words, does, in some Mens Opinion, vitiate Baptism.

As to the Effects of Baptism, the Person is, *First*, deliver'd from the Power and Tyranny of the Devil, according to the *Canon Law* ||. *Secondly*, He has by Baptism, a full Pardon and Remission of all his Sins *. *Thirdly*, He is endued with the Grace of the Holy Ghost, and with true Innocence †. And, *Fourthly*, Persons baptiz'd, are incorporated into the Communion of Christ's Holy Church, and made Members thereof by this Holy Mystery ||; and being hereby redeem'd from *original Sin*, they have Life, Light and Salvation, in and thro' *Jesus Christ*; and are made Children and Heirs of the Kingdom of Heaven, and have the Benefit of Christian Burial at the time of their Death.

In respect of the Person that administers Baptism, he ought, according to the *Canon Law*, either to be a Bishop or a Priest *, unless it be in case of extreme Necessity; for by the *Canon Law*, Deacons ought not to baptize without the command of the Bishop or Priest, unless a Bishop or Priest should happen to be at a great Distance, or extreme Necessity should require it †: for in case of Necessity, in the absence of a Priest or Bishop, a Deacon may, *suo Jure*, baptize and administer the Eucharist unto Persons sick and weak; but if a Priest be present in the Church, he cannot do it ||, tho' Necessity should require it, unless he be commanded thereunto by the Priest, as when there are many Persons to be baptiz'd, or to receive the Eucharist, and one Presbyter is not sufficient for them all. But in case of Sickneſs, not only a Deacon, but even a Layman and a Woman may baptize, as well as hear Confessions in the *Romish Church* *, tho' none but a Priest can give true Absolution †. The Persons to be baptiz'd ought either to be Infants, or else Persons of an adult Age on their Conversion to Christianity, of which by and by.

In the Primitive Church, it was a great Controversy, whether Persons baptiz'd by Hereticks out of the Church, ought to be baptiz'd again by the Orthodox, after they came into the Church: And tho' this was resolv'd and decreed by the Bishops in the Council of *Carthage*, held under St. *Cyprian*, as he himself relates the Matter in his Epistles ||; yet this Opinion was (notwithstanding) afterwards disallow'd of by others, and not received in the Church *. *Sozomen* in his Church-History gives us this Account of Baptism, *viz.* That some Children of *Alexandria*, being

at Play by the Sea-side, did, in a jesting Manner, imitate the Acts of the Church used in Baptism; and *Athanasius* being created Bishop of the Play, baptized some Children that had not been baptized: but *Alexander* Bishop of *Alexandria* being advertis'd hereof, was much troubled; who calling for the Children, ask'd them, what their Bishop had done and said to them? And understanding that all the Rites of the Church were observ'd therein, he did, by the Advice of other Priests, approve of their Baptism, and would not suffer them to be re-baptiz'd. And by a Provincial Constitution in *Lindwood**, a Priest was heretofore prohibited the Re-baptizing of Persons that had been baptized even by Laymen; and such Priests as question'd the Validity of Lay-Baptism, and rebaptiz'd such Persons again, were, by that Constitution, look'd upon as foolish and ignorant Men. * Lib. 3. Tit. 24. c. 2.

The usual Times of baptizing of adult Persons, were at *Easter* and *Whitsontide* in the *Romish* Communion, according to the *Canon* Law †; and twenty Days before their Baptism they were to be catechiz'd, and undergo an Exorcism of Purgation, to drive the Devil out of the Person to be baptiz'd ‖. And by another Provincial Constitution following*, it was ordain'd, That if Children were born within eight Days before *Easter* or *Whitsontide*, they ought to be reserv'd unto the time of a general Baptism, if that might be done without any danger of Death to the Persons then born; and by the Papal *Canon* Law, this Space of Time was extended to eight Months in respect of *Jews* to be baptiz'd, that they might prove themselves to be true Converts to Christianity †. But these Constitutions are out of use at present with us; and that Part of the *Canon* Law we never receiv'd in *England*. † Con. 4. 12. ‖ Con. 4. 55. * Eod. lib. & Tit. cap. 3. † Con. 4. 93.

By the Mosaical Dispensation, Circumcision was a Federal Admission to the *Jewish* Religion; and, that being taken away, *Baptism* was instituted in its stead: which though in Circumstances not agreeable to Circumcision, yet both are alike in this Respect, *viz.* That both of them were the respective Rites of their Admission into the several Covenants, and the Covenantees became thereby entitled to the respective Privileges which were annex'd to them, and in both Cases they were obliged to observe the whole Law, to which they were respectively initiated. It has been said, that *Baptism* in the Christian Church is a necessary means to Salvation; but if it be so, surely a Suspension for three Months, according to King *James's* Canons ‖, inflicted on such Ministers as refuse to baptize, is a very slender Punishment, where the Child dies unbaptized thro' his Negligence or Omission. ‖ Can. 69.

As Names were in the old Law impos'd and given to Persons circumcised at the Time of their Circumcision; so are they now, at this day, impos'd and given to such Persons as are baptized*: And this, because in Baptism the Person baptiz'd, according to *Hostiensis*, and the Archdeacon, in their Notes on this Chapter quoted in the Margin, deserves to have his Name written in the Book of Life; and so says the Law in another Place †. But here 'tis to be observ'd, that it does not belong to the Priest's Office to impose this Name in Baptism, but rather to the Parents or the Godfathers: But yet the Priest may refuse to pronounce the same, if the Parents or Godfathers do impose and give them ludicrous, filthy, or ill-sounding Names. To support the Child at the Font, there ought to be three Persons (at least) according to the aforesaid *Lindwood* ‖, *viz.* in the Baptism of a Male there ought to be two Males and one Woman, and in the Baptism of a Female Child, two Women and one Man; and these are called Sponsors or Sureties for their Education in the true Christian Faith, and the like*. * Con. Dist. 4. cap. 18. † Con. Dist. 2. cap. 36. ‖ Lib. 3. Tit. 24. c. 1.

† Lindw.
lib. 5. Tit. 2.
cap. 1. v.
Baptismus.

‡ Lindw. ut
supra.

* Can. Reg.
Jac. 79.

By the antient Canons, it was Simony to take any thing for the Sacraments of the Church, because they ought to be administred freely †; but the *Canonists* themselves taught the Clergy to evade their own Laws: For they told them, That tho' they ought not to take any thing for *Baptism*; yet they might sell the Water to the Parents, before it was consecrated ‡. Which is one of the worst of their Evasions, since Water is an Element free and in common to all Mankind for their necessary Use and Conveniency. So that a Minister ought not in any case to be paid for Baptism, it being his Duty to baptize in the Church; tho' if the Child be in danger of Death, he is bound to go to the House, &c.* But if he baptizes in a private House, when the Child is likely to live, and he is paid for his Journey thither, 'tis as bad as being paid for the Water; because, 'tis contrary to his Duty to baptize in such Cases. And tho' some Ministers have sued their Parishioners for a Fee due to them on Baptism, yet I cannot find any thing due for it by virtue of any Custom or otherwise: And, therefore, when the Curate of *Bridlington* in *Yorkshire* libelled against his Parishioner for a Shilling, as due to him for baptizing his Child, a Prohibition was granted. 'Tis more laudable, that a Person should be baptized as soon as possible, than that he should expect Baptism for any length of Time; especially till he comes to an adult Age: and this for three Reasons. *First*, by reason of the Imbecility of human Nature, according to which the Child may easily die: and in this Case, according to some Men's rash Opinion, he is damn'd if he dies without Baptism. *Secondly*, because (as some fancy) the Devil has not so great a Power over Children baptized and cleansed from *original* Sin, as he has over Persons unbaptized: and this (the *Papists* say) is in respect of bodily Injuries. And, *Thirdly*, because a Person in his Infancy is more easily induced and accustomed to such Things as relate to the Christian Religion, which then sit stronger on his Mind. But 'tis to be observ'd, That tho' the Baptism of Children ought not to be delay'd, yet Baptism ought not to be immediately conferr'd on adult Persons, as soon as they are converted to Christianity, but it ought to be deferr'd for a certain Time on a threefold Account, *viz.* *First*, *Propter cautelam Ecclesiæ*, lest the Church should be deceiv'd in their Conversion, conferring this Sacrament (perhaps) on such as only pretend to a Conversion. *Secondly*, That before Baptism, they may be fully instructed touching the Christian Faith. And, *Thirdly*, out of Reverence to the Sacrament, *viz.* when Men are admitted to Baptism on the chief and solemn Feasts of the Year, at *Easter* and *Whitsontide*. But if such adult Persons are fully instructed in the Faith, and Sicknes happens, or any other danger of Death, they ought to be baptized without delay.



Of Bastards and Bastardy.

A *Bastard*, according to the *Civil* and *Canon* Law, is a Person born of a Woman out of Wedlock, or not legally marry'd; so that, according to Order of Law, his Father is not known: And, therefore, by the Law, he is sometimes, in *Latin*, stiled *Filius nullius*, the Son of no Man; and sometimes he is term'd *Filius Populi*, the Son of every Man. For says the Law,

Cui

*Cui Pater est Populus, Pater est sibi nullus & omnis:
Cui Pater est Populus, non habet ille Patrem.*

And thus Bastardy is an unlawful State of Birth, which disables the Bastard, both according to the Laws of God and Man, from succeeding to an Inheritance. And, according to the foregoing Definition of a Bastard, some are born of single Women (among which I reckon Widows) and some are begot and born of marry'd Women. Of single Women, some are such as a Man may make his Wife, if he himself be sole and unmarried; as those that are kept as Concubines in the Place of a Man's Wife: and some others are such as a Man cannot make his Wife, though he himself be sole and unmarried; because they are already either pre-contracted to some other; or else they are in so near a degree of Affinity or Consanguinity to each other, that the Law would condemn the Marriage, and render the Issue thereof unlawful. Therefore, according to the Definition above mention'd, and the Rules of Bastardy founded thereon by the *Civil* Law, such Children as are born of single Women, and begotten of single Men, who are, in Case of Issue, to marry them if they please, are by that Law stiled by the Name of *Filii Naturales*; because they were from such Women as Men held for their Wives, tho' they were not; and these might be legitimated several ways. But such as were born and begot of a single Woman, through a vagous Lust, without any Purpose of maintaining such as a Concubine, but on a Desire only of satisfying a Man's Sensuality, were called *Spurii**, whether they were begotten by a single or a marry'd Man; and these were for the most part *Putative* Children, and their Father not otherwise known than by the Mother's Confession, who sometimes owns the Truth, and sometimes otherwise. But where any Children were born of a single or marry'd Woman, that has prostituted herself to every Man's Pleasure, and publickly profess'd herself to be a Harlot, the *Civil* Law stiles them by the Name of *Manzeres*.† † Vid. Host. And, lastly, such as were born of a marry'd Woman in Adultery, who did not make such a publick Profession of her Lewdness, were, in that respect, call'd *Notbi* ||; because they seem'd to be her Children, whom the Marriage shews to be such, but are not: And these are counted to be Bastards, if either the Husband has been so long absent from his Wife, as by no possibility of Nature the Child can be his; or that the Adulterer and Adulteress were so known to keep Company together, as that, by a just Account of Time, it could not fall out to be any other Man's Child but the Adulterer's himself. And yet in these very Cases, within this Realm, unless the Husband be all the time of the Impossibility beyond the Seas, this Rule of Law holds true, *viz. Pater is est, quem Nuptiæ demonstrant*. But the most nefarious kind of Bastards, are they whom the Law stiles *Incestuous* Bastards, which are begotten between *Ascendants* and *Descendants, in infinitum*; and between Collaterals, as far as the divine Prohibition, and the right Interpretation thereof extends itself.

The Effects of these several sorts of *Bastardy* are diverse in Law. As, *first*, it stains the Blood, since he that is a Bastard can neither challenge Honour, nor a Coat of Arms from the Father or Mother, because he was begot and born out of Matrimony, which (according to the *Canon* Law) is the first step to Honour: And, therefore, the Apostle calls Marriage Honourable. Whereupon it must follow, if this be true without any Limitation, that the Opposite thereof is Shame, in respect to carnal Copulation: For though it is no Sin for a Bastard to be a Bastard; yet it is a Defect in him to be such a Person, and a thing easily subject to Reproach.

Secondly,

Secondly, It repels him that is a Bastard from all Succession descending from Father or Mother, whether it be in Goods or Lands, unless there be some other collateral Provision made for the same; because all Laws and Statutes, that have been made to any of these Purposes, were intended for the Benefit of such as are Legitimate and next of kin by lawful Succession, and not by unlawful Copulation. To legitimate him that was a Bastard, when no Claim could be made to his Birth-Right but by Grace, by the *Civil* Law was made sundry Ways. As, *first*, where the Father of the Bastard (they being both single Persons) marry'd the Woman, by whom he begot the Child *. *2dly*, Where the Father did by his Will and Testament, or by some publick Instrument subscrib'd by Witnesses, name him to be his natural and lawful Son, or *simply* his Son, without the Addition of any other Words, as *Base* or *Natural*; and therewithal made him his Heir, which could only be in case the Father had no other natural and lawful Son then living †. *3dly*, When the Prince by his Rescript ‖, or the Senate by their Decree, granted any one the Favour of Legitimation, which was done (for the most part) in such Cases only, where either the Child's Father, or the Child himself, offer'd his Attendance on the Court or Prince *. In this Realm, none of the said ways of Legitimation take place, as far as I can learn, but only that which is done by Parliament; and that very rarely too: For, besides those that King *Henry* the VIIIth did, in the variety and mutability of his Mind towards his own Issue ‡, I think, we cannot shew many Examples. For as for that, which is wrought by subsequent Marriage, being a thing antiently pressed by the Clergy of this Land, to be admitted in like manner as used in other Countries where the *Canon* Law ‖ herein takes Place, it was rejected by the Earls and Barons with one Voice, saying, They would not change the Laws of the Realm in that Point, which to that time had been used and approv'd by all Men †. All these cases of Bastardy in other Countries, whether they be such or not, are to be try'd and determin'd according to the Ecclesiastical Law: But here, with us, 'tis disputable, to what Law and how far they do appertain either to the Ecclesiastical or Temporal Courts.

As to the Matter of Bastardy, what it is, both the Ecclesiastical and Temporal Courts are pretty well agreed; but they differ in the Prosecution thereof: For the Ecclesiastical Law brings it into Judgment two ways; the one *Incidentally*, and the other *Principally*; but the common Law makes two sorts of Bastardy, *viz. general* and *special*. I shall first here treat of the Ecclesiastical, and then of the Temporal Division of Bastardy. Now Bastardy is said to be *incidentally* propounded, when 'tis laid in bar of some other thing that is *principally* commenced: As when one sues for an Inheritance that he pretends is due to him by his Birth, and another impugns him therein by objecting Bastardy against him, on purpose to exclude him from his Action in the Inheritance: Here, I say, the Bar is in the *Incident*, because it comes exclusively to the Action of Inheritance; but the Action of the Inheritance itself was in the *Principal*, because it was begun in consideration of the Inheritance, and not with an intent to prove himself Legitimate; which (perhaps) he never thought of when he first entred the Action for the Inheritance. In which case, the Person charged with Bastardy, may demand an Admission to prove himself Legitimate before the Ecclesiastical Judge, and to be pronounced as such a Person: *Ad curiam enim Regiam* (says *Glanvil* *) *non pertinet agnosce-re de Bastardiâ*, against which, the Law of the Land does not oppose itself, but acknowledges it to be the Right of the Church †. And yet to avoid all subtle and surreptitious dealing in this Behalf, it has set down

* Lib. 7.
c. 13.

† 9 H. 6.
c. 11.

* C. 5. 27.
11.

† C. 5. 27.
11. Nov.
117. cap. 2.
11 Nov. 89.
c. 9.

* C. 5. 27. 9.

† 28 H. 8.
cap. 7.
1 Mar. 1.
Parl. cap. 1.

‖ 4. 17. 6.

† 20 H. 3.

a wary Form of Proceeding, by which the same shall be brought to the Ordinary; and such as have an Interest in the Suit, may have notice thereof, and Time to object in Form of Law against the Proofs and Witnesses of him, that pretends himself to be a *Mulier*, if they think fit to be heard: and what shall be certify'd herein by the Ordinary, as concerning the Birth of him that is charg'd with Bastardy, that is to say, whether he was born before or after his Parents Marriage, shall be supply'd in the King's Court, either by judging for or against the Inheritance*.

* Glanv. lib.
7. cap. 15.

But Bastardy is then taken to be *principally* propounded, when either one finding himself to be grieved with some malicious Speech of his Adversary, who reproaches him with Bastardy, or else fearing to be impeached in his good Name or Right, takes a Course to clear his Nativity, by suing him or them by whom he is reproach'd, or fears to be impeach'd in his Right and Credit; and hereby proves himself to be Legitimate against any Allegation or Objection to the contrary: Therefore, if such malicious Person shall either not appear, or bring no good Matter against his Proof, but that it stands still good and effectual in Law to all Intents whatever, tho' (perhaps) hereby he shall be able to carry the Inheritance, because it does not belong to the Ecclesiastical Law to judge of Lands, Tenements, &c. and that the Statute sets down a precise Form how Suits of this Nature shall be try'd; yet if no Contradictor appears herein, and the Suit was only commenc'd against such as openly reproach'd him, or secretly buzzed abroad any Defamation of him in respect of his Legitimacy, it will surely by Accident be good for the Inheritance itself. For where a Man's Legitimation is sufficiently proved, all things follow thereon, which naturally thereunto belong. But if any Man urges the Form of the Statute †, being interested therein, it must then necessarily be follow'd; because it would otherwise be thought, that whatever was done before, as far as it concerns the Inheritance, was done by Collusion, though it was but in Consequence. This kind of Proceeding was much more in use formerly than at present, and never any Opposition made against it, though now it is impeach'd by a Prohibition at the common Law. And so far touching the Ecclesiastical Proceedings in this Business of *Bastardy*.

† 9 H. 6.
ch. 11.

The Temporal Courts divide Bastardy into what the common Lawyers call *general* and *special* Bastardy. The first is so called, because it comes *Incidentally*, and is in gross objected against some that sue in a Matter Principal, in order to disappoint his Suit: As when a Suit is commenced in a Temporal Court for an Inheritance, and the Defendant pleads in Disability, that the Plaintiff is a Bastard. For the Issue must be join'd upon it, and transmitted by the King's Writ to the Ordinary, who is to try it in his Consistory Court, not according to the Canons, but in Pursuance of the Rules of the Common Law, though it be of Ecclesiastical Cognizance: For these Laws differ in this Matter, *viz.* By the *Canon* Law he is no Bastard, that is born before Marriage, if the Parents afterwards intermarry; but it is otherwise by the Common Law; for such a Child is a Bastard ‖. This is sent to the Bishop with certain Additions for the greater perspicuity of the Inquiry thereinto; as that whether the Person charged with Bastardy was born in lawful Matrimony or not, or whether he was born before his Father and Mother were lawfully contracted together in Marriage, or after*. Which Inquiry the Ordinary is to make by his own Authority; and if he finds the Truth of the Matter upon examination to be this or that, he is, after Sentence in his own Court, to certify the Matter, as it appears to him, under his Seal unto the King's Courts accordingly, which Certificate is conclusive to them; and they are to

‖ 20 H. 3.
ch. 9.

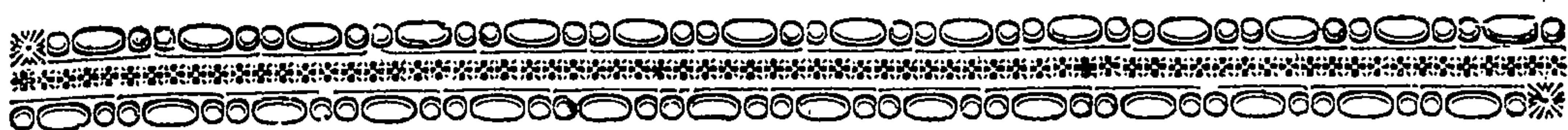
* Lib. In-
trat. fol. 35.

* 9 H. 6.
ch. 11.

give Judgment as 'tis found before the Ordinary, either for or against the Inheritance in Question*.

But where the principal Matter of the Suit is concerning Bastardy itself, as when an Action of Slander is brought for calling the Plaintiff Bastard, and the Defendant justifies that he is a Bastard, which shall be try'd by the Country; and this is call'd *special* Bastardy. Others define *special* Bastardy to be, where the Marriage is confessed, but the Priority or Posteriority of the Birth of him whose Nativity is in Question, is controverted: which, in my Opinion, is nothing else but *general* Bastardy diversify'd in Terms, but agreeing in Matter and Substance with the other. For even these Things, which (they pretend) make *special* Bastardy, are Parts and Members of *general* Bastardy, and are either confessed or enquired into by virtue of the King's Writ for the same. For, *first*, in respect of Matrimony here mention'd, it is acknowledg'd both by the Plaintiff's Pleading of it, and the Defendant's answering thereunto: and, therefore, the Plaintiff's Plea is thus, *Thou art a Bastard for that thou wast born before thy Parents were contracted together in Wedlock, or their Marriage solemniz'd in the Face of the Church*: To which the Defendant replies, *I am no Bastard, because I was born in lawful Wedlock, or after my Parents lawful Marriage*. In both which there is a Marriage confess'd, and the Question only is touching the Priority or Posteriority of the Birth of him, that is charged with Bastardy, whether such Nativity happen'd before or after the Parents Marriage; which, as they hold, is the other Member of *special* Bastardy: And yet this Priority or Posteriority of Birth comes no less in enquiry to the Ordinary in the Case of *general* Bastardy, than they make it to be traversable in *special* Bastardy; and, therefore, the Writ to the Ordinary for *general* Bastardy is conceiv'd in this manner, *viz. Inquiratis utrum prædictus A. pars rea, genitus vel natus fuit ante Matrimonium contractum inter talem Patrem suum & talem Matrem suam: vel post*†. So that they must either confess there is no such Bastardy, as is pretended, different from what is try'd before the Ecclesiastical Judge, or that they themselves confound the Members that should divide the same, and make them one or the other as they please: for both *simply* they cannot be, unless they be distinguish'd with other Notes and Differences, than hitherto I find they are. But in truth, if these Things are well consider'd, *special* Bastardy is nothing else but the Definition of the *general*, and the *general* again, is nothing else but a Definite of the *special*. For whoever is born out of, or before lawful Marriage, is a Bastard; and again he is a Bastard, that is born before, or out of lawful Matrimony: so that these Things, to be a Bastard, and to be born out of lawful Wedlock, are convertible the one with the other; and 'tis hard to make a Divorce between these things that are so near in Nature to each other, as being convertible Terms; and to try them in different Courts, since they have so near an Affinity to each other, being the same in Substance and Nature. Wherefore, I think, they ought to be try'd by the same Law, *ne continentia causarum dividantur*: which is as great an Absurdity in Law, as it is in other Learning, to deny a general Principle or Maxim of the Profession. And thus far concerning the Reasons and Arguments that may be brought against this *special* Bastardy. *Lindwood* in his Catalogue of Causes, which he makes to be of Ecclesiastical Cognizance in his Time, reckons *Legitimation* or the *Trial of Bastardy*, as one among the rest; because in those Days there was no Dispute or Practice to the contrary, whereby the Ecclesiastical Courts were hindred by the Temporal in their Proceedings touching Bastardy.

† Lib. In-
trat. fol. 35.



Of Ecclesiastical Benefices, the Division of them, &c.

IN treating of Ecclesiastical Benefices, I shall, *First*, consider after what manner they were instituted in the early times of the Christian Religion. *Secondly*, I shall enquire, what Nature they were of in the middle Age of the Church. And, *Thirdly*, I shall shew, what Kind they are of now at present. By the early Times of the Christian Religion, I mean the days of the Apostles, when all things in the primitive Church were in Common, and when Clergymen could not pretend to any such thing as Property, but were contented to live out of the Common Stock; such Persons as were converted to the Christian Faith, selling their Estates, and laying the Price thereof at the Apostles Feet. By the middle Age of the Church, I mean that which was soon after the Apostles; because then they began to purchase Lands and Estates for the Maintenance of the Clergy; and Bishops had the Dispensation of the Fruits and Profits thereof, by applying them as they thought meet and convenient for the good of the Church: And such of the Clergy as had Estates of their own, were, by the Laws then in being, not to partake of that Provision which was reserv'd for the Maintenance of such as liv'd in the Cathedral Churches with their Bishops in Common, and were poor and indigent: and this was the State of the Clergy after the *Roman* Emperors became Christians. By the third Age of the Church, I mean That when Christians began to shew less Fervency for Religion, and the Clergy themselves began to purchase large Estates of their own out of the Rapine they made from the Blindness of Man's Devotion towards them: For as yet, they possess'd themselves of their Estates, and acquired great Wealth to the Church, without giving much Scandal or Offence to Religion itself; which they did, till Popery began to erect itself, and lord it over the rest of Mankind; and when Churches began to be built and endow'd not only for the Indigent, but likewise for all Ministers serving the same; and otherwise, even in those times, Benefices could not be acquired. But this Acquisition of Benefices, in process of time, introduced Pride and Laziness among the Clergy, and gave them to understand, that they were rather Rulers of Men, than Servants of God: for as long as they liv'd on the Common Stock, or on the Contributions of the People, they were generally Men of Piety and Humility, and regarded their Flock more than many of them do at present. And, from this growing evil of purchasing Estates in the Church, 'tis to be observ'd, that Persons of Wealth and Birth came to have Ecclesiastical Benefices; and even such as had large Estates of their own, were wont to live on the Revenues of the Church. And thus I have distinguish'd these three *Æra's* of the Church, in respect of Ecclesiastical Benefices, in order to destroy that Contrariety which may otherwise arise concerning the Laws relating to Church-Benefices.

Now under the Name and Appellation of an *Ecclesiastical Benefice*, we may reckon not only a Benefice *with Cure of Souls*, but even a Prebend, Dignity, Parsonage, and all Churches and other Benefices whatever, either
with

* Dd. in
c. 27. X. 1.
3. v. *Benefi-*
cium.

with or without Cure of Souls, which are acquired *cum Titulo*, and by Canonical Institution *. And, in this Sense, a Benefice is twofold: For it is either said to be a Benefice *with Cure of Souls*; or otherwise in *Latin*, said to be *simplex Beneficium*. In the first Case, if it be annex'd to another Benefice, the Beneficiary is obliged to serve the Parish-Church in his own proper Person, unless there be a reasonable Custom or Constitution to the contrary, whereby the Church may be served by a Vicar: But 'tis otherwise, if such Custom or Constitution be not founded upon Reason. As for Example, when the Canon of a Cathedral Church has a Benefice with Cure of Souls *in Titulum*, and his Personal Residence is necessary at the Cathedral Church for his Advice and other Matters; or else that he cannot be supported from his Prebend: for such a Cause as this is founded upon sufficient Reason, that he may, by a Concurrence or Statute, hold both, and serve the one by a Vicar. But 'tis otherwise, where there is no such Custom or Constitution for serving the Cure by a Vicar.

† Duaren de
Ben. lib. 2.
cap. 4.

But tho' the Words *Beneficium Ecclesiasticum*, in a large Acceptation thereof, may comprehend all Ecclesiastical Livings, whether they be Dignities, or Parochial Cures, as in the Statute of the 13th of *Richard II.* where they are divided into *Elective* and *Donative*; yet, according to a more strict and proper Interpretation thereof, an *Ecclesiastical Benefice* may, in *Latin*, be defin'd to be *Res Ecclesiastica, quæ Sacerdoti vel Clerico, ob sacrum Ministerium utenda in perpetuum concedatur* †; that is to say, an Ecclesiastical Estate, which is granted to some Priest or Clergyman for Term of Life, to be enjoy'd by him on the Account of his Ministry in the Church. It is called *Res*; because it is not the Ministry or Office itself, but rather the Profit arising from thence, which is the Benefice. And it is called *Ecclesiastica*, because, according to the *Canonists*, such Profit is dedicated to God and his Church. [*Sacerdoti, &c.*] because where an Ecclesiastical Thing is granted to Laymen, it is not properly said to be a Benefice in this Sense. And it is said *ob sacrum Ministerium*, because such a thing, as dedicated to God, ought to be for the Use of such as wait and serve at his Altar. [*Utenda*] because the Persons receiving the same, have only the *Usu-Fruet* thereof, and not any Fee or Inheritance therein. And it is said to be *in perpetuum*, because the Clerk is to enjoy and receive the same for ever during Life; or (as others say) because the Thing is annex'd to the Church for ever. So that, according to this Definition, an Ecclesiastical Benefice extends itself not only to Parochial Churches, and the Cure thereof, but also to Dignities and all other Eccle-

|| Inst. pt. 3d.
cap. 71.

* 9 E. 3. 22.
10. E. 3. 1.
† 29 E. 3.
44.

|| Reg. fol.
58.

* 11 H. 4.
60.

† 1 Q. 3. 7.

siastical Promotions, as to *Deaneries, Archdeaonries, Prebends, &c.* || But my Lord *Coke* affirms *, that it appears, in the Books of the Common Law †, That *Deaneries, Archdeaonries, Prebends, &c.* are Benefices with Cure of Souls, tho' they are not comprehended under the Name of *Benefices with Cure of Souls*, within the Statute of 21 H. 8. c. 13. by Reason of a special *Proviso* ||; which they had been, if no such *Proviso* had been added: But, with my Lord *Coke's* Leave, these were never reckon'd as *Benefices with Cure of Souls*, according to the *Canon Law*, or the Law of the Church, as anciently receiv'd here in *England*. *Hobart*, in *Colt and Glover's Case*, against the Bishop of *Litchfield* and *Coventry*, says, speaking of the Statute of 21 H. 8. c. 13. That *Bishopricks* are not included, within that Law, under the Benefices: so that if a Person takes a *Bishoprick*, it does not avoid by Force of that Law of *Pluralities*, but by the antient Common Law, as it was held in *Henry the IVth's Time* *. The *Canonists* hold, That an Ecclesiastical Benefice consists of the sacred Function, and of the Provinces thereunto belonging †; it being a distinct Portion of Ecclesiastical Rights join'd to a spi-

spiritual Function: and till it be set apart and distinguish'd from Temporal Interests, it is not properly an Ecclesiastical Benefice*; and it is term'd a Portion, in that it includes Fruits; for it cannot properly be called a *Benefice* without *Fruits* †.

* X. 3. 8. 10.

† Abb. in c. 28. X. 3. 5.

But all Church-Livings are not stiled *Ecclesiastical Benefices* after one and the same Manner, but by various and several Appellations; and, therefore, the Persons in Possession of them, are also stiled by divers Names and Titles, as *Deans, Archdeacons, Parsons, Vicars, Prebendaries, Bishops*, and the like: Wherefore, I shall here give the Reader the several Divisions of these *Benefices*; whereof some are *properly* so called; and others are term'd so *improperly*. Of Benefices properly so called, some are stiled *greater*, and others *lesser* Benefices. Among the greater in the *Romish* Church, the *Canonists* reckon the Papacy or Pontificate, which is even called a Benefice*; and the *Greater* are distinguish'd from the *Lesser* by the means of *Collation*: And 'tis certain, that all such as are called *Prelacies*, may be term'd the *greater* Benefices; as that of the Pontificate, a Patriarchship, an Archbishoprick, Bishoprick, Abbacy, and the like; but Rectors of Churches do not properly come under the Appellation of *Prelates* †. *Secondly*, There are some Benefices which have a *Cure of Souls* annex'd to them; and some, which have not ||, as aforesaid. And this *Cure of Souls* is, according to *Innocentius**, consider'd in a threefold manner, *viz.* *First*, When he that is set over the Benefice is oblig'd to administer the Sacraments; and *Secondly*, when he is bound to preach and expound the Word of God unto the Parishioners of that Place; and *Thirdly*, to read Divine Service and the like; and in the *Romish* Church, to hear Confessions: Wherefore, in these kind of Benefices, 'tis necessary that their Rectors should be in actual Priests Orders, or (at least) they ought to be so within a Year after they have taken the Benefice on themselves. And this Year shall be computed from the Time that any one has had a quiet Possession of his Living or Benefice, or (at least) from the Time that he might have had such, if it be not through his own Default that he had not such. We call these benefic'd Men, by the Name of *Rectors, Curates, Perpetual Vicars, Pastors*, and the like. Again, there are some Benefices which are said to be *Benefices with Cure of Souls*, in respect of a *Contentious* Jurisdiction, which is annex'd to certain Benefices †: And these Beneficiaries have the Power of Visitation, Inquisition, receiving of Procurations, Suspending, Excommunicating and Absolving; which Things they may sometimes do without a Benefice ||, as in the case of an Archdeacon. *Sine-Cures*, or Benefices without a Cure of Souls, are such as those, whose Rectors are not oblig'd to the Discharge of the aforesaid Duties, but are only bound to attend Divine Service at Canonical Hours*: And these are called *simple Benefices*, and have always perpetual Vicars annex'd to them for the *Cure of Souls* †.

|| X. 5. 40.
32. X. 3. 5. 8.
* 21 Dist.
c. 1. 3.

† Gloss. in c. 2. Clem. 3.
7. 5. v. *Prælati*.
|| vi. 3. 4. 32.
* In d. cap.

† Extra. 3. 4.

|| Dd. in c. 4. X. 1. 23.

* X. 3. 7. 2.

† X. 3. 5. 30.
vi. 3. 4. 6.

Another Division of *Ecclesiastical Benefices*, according to the Canon Law, is, that there are some, which are stiled *Regular*; and others, which are term'd *Secular* Benefices. The first are given to Regulars, or Persons in Monasteries; and the second are given to Secular Clerks, who do not profess a Monastick Life, or any Rule of Living ||. These Qualities do, for the most part, accede to Benefices from their Charter or Rescript of Foundation, *viz.* when such Benefices are given either to Regulars or Seculars thereby. But sometimes *Regular* Benefices are possessed by Secular Men, and sometimes *Secular* Benefices are held by Regulars, by legal Prescription; *viz.* When a Secular Church has, for Forty Years together, been in the Possession of a Regular Clerk, so that the Quality being now

|| vi. 3. 4. 5.

adjudg'd to be chang'd hereby, it does from a *Secular* become a *Regular* Church, and may be held by Regulars: And, on the contrary, if a *Regular* Church has been possess'd by a Secular Clerk for so many Years, it becomes a *Secular* Church*. For the Time of Forty Years, according to the Common and Ordinary Law of the Church, is sufficient in a Prescription of Ecclesiastical Matters relating to Churches†; provided, that there be in such a Possession of a Benefice, a concurrent Title, together with the Time of such Prescription, that is to say, a Canonical Institution, and what we call *Bona Fides*: For otherwise the Quality of Benefices is not alter'd by Time alone. But from Regular and Secular Benefices, a third *Species* of Benefices may arise, which we commonly call *Commendams*; which is, when the Pope does, by virtue of some Privilege, grant a Secular Benefice unto a Regular Person, or on the contrary, a Regular Benefice unto a Secular Person: And from hence, Persons came to hold two Churches, one by way of Title, and the other *in Commendam* ||; of which hereafter, under its proper Title.

Some Benefices have Sacred Orders annex'd to them, and Persons promoted thereunto, are oblig'd to be in Holy Orders, or such Orders (at least) as are requisite thereunto; because where there are two Things or more annex'd unto each other, if a Person accepts of one, he seems to have oblig'd himself to fulfil the other: as it happens, where a Clergyman takes a Living with *the Cure of Souls*; for then, on his acceptance of the Benefice, he is bound to perform *the Cure of Souls**. And there are some Benefices, which have no Orders annex'd to them; as that of a Canonry: And, in such Benefices as these, a Person is not bound to see himself promoted to Holy Orders according to the *Canon* Law, as he is in the other Case, unless the Advantage or Necessity of the Church requires it†. But against this *Gloss* in the Margin, and the Text itself, some are of an opinion, That if a Benefice has Orders annex'd to it, the Person promoted thereunto ought, at the Time of his Promotion, to be vested with Holy Orders ||. But this admits of a Distinction; for there is one Kind of annexing in respect of the Aptitude, and another Kind of annexing in respect of the Act it self. In the first Case 'tis necessary, That the Person, at the Time of his Promotion, should be of such an Age as is requisite to such Orders, which the Person promoted ought to take: For then 'tis not necessary, that he should be actually in such Orders; but 'tis well enough, if he be qualify'd to receive such Orders, being then oblig'd to receive the same at the Time of the next Ordination. For though a Dignity or Church *with Cure of Souls*, has Priests Orders annex'd to it; yet 'tis not necessary that the Person promoted thereunto, should be in such Orders at the Time of his Promotion, but 'tis sufficient for him if he afterwards becomes a Priest; because since such Annexing is only in respect of Aptitude, he ought to be apt and fit for such Orders, and that is enough. But in the second Case, when such Annexing is in respect of the Act it self; 'tis necessary for the Person promoted, to be at the Time of his Promotion, vested with the Orders annex'd to his Benefice. By a Statute of the Realm of *England**, 'tis required, That all beneficed Persons, as well as Dignitaries, should be in Orders at the Time of their Admission and Institution thereinto.

In the Council of *Lateran* it was decreed, that no one should have several Dignities, or retain more Parishes than one at the same time, under the Penalty of losing the Benefice or Dignity thus accepted; and the Person that was collated or presented thereunto, was to lose the Right and Power of Collation or Presentation for that Turn. And because this Decree was ill observed, Pope *Innocent* through a desire of putting a stop

* Rot. decis.
32.

† X. 2. 26. 4.
X. 2. 12. 3.

¶ vi. 1. 6. 15.

* Gloss. in
c. 6. X. 1. 14.

† Gloss. ut
supra.

|| 60 Dist.
c. 1.

* 14 Car. 2.
ch. 4.

stop to this kind of Avarice in the Clergy, decreed, that whoever should for the future be admitted to any Benefice *with Cure of Souls* annex'd to it, should be *ipso Jure* deprived thereof on his taking a second Living, if the first had a Cure of Souls annex'd to it * ; and if he endeavour'd to hold the second with the first, he should stand deprived of them both ;^{38.} and he, to whom Presentation or Collation did belong, might present or collate whomsoever he pleased ; and if he delay'd to present or collate thereunto beyond the space of six Months, such Presentation or Collation should devolve unto others, according to a Decree of the *Lateran* Council. By the *Canon* Law, a Person, after he has once obtained and been in full Possession of a second Benefice, cannot desert the same, and return again to his first Living ; because such Living is immediately void by his Affecution of a second Benefice †. But yet we have another Law ||, which seems to oppose the Law next immediately quoted ; by which the Person has his Option given him, to retain which Living he pleases. But (I think) this last Law here quoted can only have place at this Day, *viz.* when the Bishop of the *Diocese*, where the first Living *with Cure of Souls* lies, will not confirm his Translation, or going to a second Church : For if he passes to a second Benefice without the Bishop's Licence or Dispensation, the Bishop may, according to the *Canon* Law, either ratify or not ratify such a Translation ; and thus he shall in such measure have his Option of the first or second Benefice. But this Law seems to carry much Hardship along with it, *viz.* that a Bishop should thus hinder such a Person (perhaps) on the Account of one small Living, which he has under him : And therefore it is not received here in *England*, where the Statute-Law prescribes what Livings are compatible, and what not *. By the *Canon* Law *Incompatible* Benefices are Dignities, Parsonages, and other Benefices, which do by some Statute or approv'd Custom require a Personal Residence : and hence it comes to pass, that even Prebends, which do by Statute or Custom require a personal Residence are deemed *Incompatible* Benefices. And this is true, where any one is *strictly* and *precisely* obliged to a personal Residence : But 'tis otherwise if he be not bound hereunto *per Substractionem Beneficii*, that is to say, by a Sequestration of the Profits.

When a Dispute or Controversy happens between any Persons touching a Benefice, the Confession of one of the Litigants, that such Benefice belongs to his Adversary, shall not profit and avail the adverse Party, when the Question is *de Titulo Beneficii* : but such Title ought to be prov'd, whereby it may appear, that he has a Right in the said Benefice † ; because no one can be in Possession of Ecclesiastical Benefices, without Canonical Institution first obtained ||. And this Rule of Law proceeds, when a Person would *ex toto* infer the Proof of a Title to a Benefice by the Confession of the adverse Party. But if any one has set forth his Title, which is reckoned dubious by Facts and Deeds produced by the adverse Party ; then if such adverse Party confesses his Adversary to have a better Right than himself, the Confession of the adverse Party shall in such a Case be for the Advantage of the other Party ; since a Title is confirm'd by such a Confession *.

Panormitan observes of a beneficed Clergyman, that by the *Canon* Law he cannot lay up his Patrimonial Estate for his Kindred, and live on the Revenues of the Church, which ought at the time of his Death to come to the Church again ; and he that does so, (says the Abbot) commits a deadly Sin : But then this great Commentator afterwards contradicts himself, in quoting the antient Laws of the Church, when all things were in common among Clergymen and Laymen, that were Christians. But in process of time, when Churches began to be endow'd, and a distinct

Por-

* Abb. Conf.

38.

† X. 3. 5. 28.

|| X. 3. 5. 7.

* 21 H. 8.

ch. 13. Sect.

8, 9, & 10.

† Gloss. in c.

2. X. 1. 3.

|| vi. de Reg.

Jur. c. 1.

* Bocr decis.

293. n. 2.

† X. 3.3.3. Portion was assign'd unto the beneficed Clerks, they might then, (says he) lay up the Profits of their Patrimony, and live on the Revenues of the Church, provided they did not do this with a covetous Mind. But, in order to enrich and aggrandize the Church, Priests were forbidden to marry: And therefore by the Papal Canons, a Clergyman that has a Wife cannot have an Ecclesiastical Benefice †; much less can a *Bigamist* have such a Benefice, according to that Law. But this is otherwise among such as are of the Re-form'd Religion: and tho' the Punishment of Disability does not take place among the *Protestant* Clergy during the Marriage, that is between them and their Wives; yet it were to be wished, that many of them would not hasten so much into Wedlock, to gratify a carnal Appetite, before they can well maintain a Wife and Children.

In many Glosses the Competency or Sufficiency of an Ecclesiastical Benefice, ought to be considered not only in respect of the Person who serves the same, but even in respect of the *Onera* and Charges incumbent on such a Benefice. In respect of the Person, we ought have a good Regard to the Nobility of his Condition, and likewise to his Knowledge, Morals, personal Merit, and his virtuous Behaviour. In respect of the *Onera* and Incumbrances of a Living, we ought to consider whether it be sufficient for himself and his Family, and to maintain Hospitality; and likewise to pay and satisfy such Dues as do of right belong to the Bishop and the Church. This I call a sufficient Benefice or Allowance, which every Person that founds and endows a Church, ought to make for the Maintenance of its Minister. But a *fat Benefice* is said to be that which so abounds with an Estate and Revenues thereunto belonging, that a Man may expend a great deal in Delicacies of eating and drinking, maintain his Family, keep Hospitality, and discharge all other Incumbrances, as aforesaid.

- * X. 3.38.22. If a Patron shall neglect to present unto a Benefice, that has been void above six Months, the Bishop may collate thereunto*; and if the Bishop shall neglect to collate thereunto for six Months, it devolves to the Archbishop||; and if the Archbishop shall not fill it up within six Months ensuing, it lapses to the King, but according to the *Canon* Law to the Pope*. But no one can present or give a Benefice to himself; since there ought to be a personal Distinction between the Giver and Receiver †: And such Persons as shall confer Benefices on unworthy and disqualified Persons after a Notice or Correction given, shall for that Turn be deprived of the Power of presenting unto such Benefices||. A Person that is admitted unto a Benefice *with Cure of Souls*, ought to be twenty-four Years of Age compleat, or (as we say) twenty-five *anno Currente**. A Benefice ought to be void, before it can be dispos'd of or given away; especially if it be by any Person's Death: And this in order to avoid all unlawful Solicitation, and the impious Desires of getting other Mens Preferments, by wishing for their Deaths †. For as the *Civil* Law looks upon all Reversionary Grants and Donations of Estates with an odious Eye, which are made during the Life-time of the Persons in Possession, and to whom they belong, and condemns all Pacts and Covenants made about Succession||; so the *Canon* Law excommunicates and deposes all such Persons as do procure the Presentation or Collation to Ecclesiastical Benefices during the Life-time of the present Incumbent or Possessor thereof †, unless such Person shall in his Life-time, for some just Cause or other, be legally deprived thereof; or the same shall be obtained through Incapacity, or some other way than by the Incumbent's Death.
- † X. 3.9.2.3. & 13. For according to the *Canonists**, Benefices are said to become vacant several ways, *viz.* by Death, Resignation, Deprivation, Deposition, Trans-
- || C. 2.3.30. C.8. 34.4. lation,
- * Dd. in c. 10. vi. 1. 3. V. *vacabunt.*

lation, and the like : For according to the Archdeacon †, a Benefice is said to be vacant or void, that is without a Minister to officiate therein. But it is to be observ'd, that a Benefice is sometimes said to be vacant *de Facto*, and sometimes *de Jure*. A Benefice is said to be vacant *de Facto*, and not *de Jure*, when the Possession thereof is lost by Spoliation or Intrusion, and the like : But when a Person is *de Facto* incumbent on the Possession of a Benefice without a Title, then it is said to be vacant *de Jure* and not *de Facto*. A Person does, *ipso Jure*, lose and forfeit a Benefice by a Fault committed by him ; and then such Benefice is said to be void or vacant by Deprivation or Deposition. As, *First*, if he has purchas'd and obtain'd the same by *manifest Simony* ; for 'tis otherwise by the *Canon Law*, if it be acquired by *occult Simony* *. *Secondly*, A Benefice is said to be forfeited, if the Pastor or Possessor thereof be an Heretick Convict †. *Thirdly*, A Clerk shall forfeit his Benefice if he becomes an Intruder, and steps thereinto by Force and Violence ; usurping the same by his own private Authority ||. *Fourthly*, If he does by Calumny impeach an Election, and is not able to prove his Accusation : and if during the Time of three Years, which is the Term of Suspension for this Offence, he meddles with the Administration of his Office * ; (for in this Offence, Suspension ought to be previous to Deprivation.) A Beneficiary shall likewise lose his Living if he be guilty of Sodomy †, Assassination ||, or be found guilty of Forging the Pope's Letters * ; and also for striking or prosecuting a Cardinal in the *Romish Church* †. But we here in *England* do not follow the *Canon Law* in several of these Respects, as I shall observe hereafter under the Title of *Deprivation*.

There was a Canon made in the fourth *Lateran Council*, forbidding Ecclesiastical Prebends, or any other Offices in the Church, to continue long void, but that they should be filled up, and conferred on such as were fitly qualify'd for the Administration of them within six Months ||. But yet this Canon was not made in Derogation to any shorter Term of Time in the obtaining of Spiritual Benefices, given by any special Right, which remain in their antient State, as before : For if a Dispute be touching a Benefice, which is granted to any one by Option, he that has the Right of Option ought to chuse within twenty Days, if there be a Specialty of Law for so doing *. In making a Presentation to a vacant Church, according to the *Canon Law*, a Layman ought to Present within four Months, and a Clergyman within six, otherwise a Devolution or Lapse of Right happens † ; as I shall shew hereafter, with the Reasons thereof. Though a Mandatary, to whom the Pope has, by virtue of his Prerogative, and his own proper Right, given a Mandate for a Benefice, ought, within ten Days after the Presentation of such Mandate made to him, to whom it is directed, to accept of that Benefice which is void, from the Day of his Knowledge thereof, lest the Ordinary should collate thereunto ; yet in *France* a Mandatary cannot interrupt an Ordinary Collator, till a Month is expired from the Day of such Presentation. But in *England*, we have nothing to do with the Pope's Mandates, Reservations of Grace, and Provisions of Benefices.

If an Incumbent of a Church *with Cure of Souls*, under eight Pounds *per Ann.* take a second Benefice *with Cure*, to which he is instituted and inducted, without obtaining a Dispensation for holding them both, by which the first is void in respect of the Patron, so that he may present according to the Statute : and before the Patron presents upon such Voidance, the Archbishop does, by Force of the Statute || of the 25th of *Henry VIII.* grant to him a Licence *perinde valere*, to hold the first with the second Benefice ; this is not a good Licence, tho' confirm'd according

† In c. 4. vi.
I. 6. v. vacabunt.

* X. 5. 3. 13.
extra 5. 2.
† X. 5. 7. 9.
vi. 5. 2. 19.

|| vi. 3. 4. 12.

* vi. 1. 6. 1.

† X. 5. 31. 4.
|| vi. 5. 4. 1.
* X. 5. 20. 7.
† vi. 5. 9. 5.

|| X. 5. 8. 2.

* vi. 3. 19.
c. unic.

† vi. c. ut
sup.

|| 25 H. 8.
ch. 21.

to the Statute, to take away the Patron's Presentation, tho' his Church was only void by Force of a Canon*, and not by the 21st of *H. 8. ch. 13*. For by the Canon, the first Benefice was so void, that the Patron might have presented before any Deprivation; and after the Patron has a Title to present, this Title cannot be taken away from him by a subsequent Licence or Dispensation, unless such Licence or Dispensation could make a void Church become full †, according to *Baldock's Case* against the King. *Trin. 14 Car.* and upon a Writ of Error affirmed. *Roll's Abr. pt. 2. 359.*

† Vaugh.
Rep. pa. 21.



Of a Bishop, his Rise, Power, and Office in the Church, &c.

A Bishop in *Greek* called *Ἐπίσκοπος*, is an Overseer or Super-intendant of Religious Matters in the Christian Church among Men, and ought, as a good Shepherd of the People, to feed his Flock, and to watch for their Souls ‖, and in the Behalf of his Flock, to preserve it from the Incurfions of Wolves and other ravenous Beasts *: For his Office is rather a Trust of great Care and Vigilance in the Church, than a Function of Power and Government therein. And this Office *Fabian* strenuously discharg'd in the Council of *Chalcedon* against the *Eutychian* Heresy; which was condemned by all the Bishops there present at that Council, together with the wicked Doctrines and Opinions of those Hereticks †. Wherefore only such Persons ought to be elected Bishops, as are Men of good and prudent Behaviour, of a right and orthodox Faith, well-temper'd in their Manners, of a mature Age and great Humility, perfect in Body, and of an unblemish'd Birth, according to the Canons of the Church. And from what Place soever they come, let them purify all Things with an Integrity of Conscience ‖, and not cohabit with lewd Women; but in the Place of a Wife, if possible, let them cleave and adhere to the Church of Christ, and not to one of their own Framing*. And, according to the Papal *Canon* Law, they ought not only to be without Wives, but without Children, which few of them are in *Popish* Countries, where they are restrain'd from Marriage: And, instead of natural Children, let them have all the Faithful of their Family, that the Goods and Estate of the Church may not be spent on their own Progeny, which they ought to lay out on the Poor †. They ought likewise to take care that they be not promoted to this Dignity by evil Arts and Means, *nec prece, nec pretio*; and ought to be so far free from all Canvassing and Sollicitation, that they ought to acquire their Benefices on earnest Request made to them, and as it were by Compulsion, avoiding the same on Intreaties made to them: such was the Merit and Modesty of Bishops in antient Times, before large Revenues and Jurisdiction were added to their Bishopricks. Therefore, in those Days, if any one came to a Bishoprick through a Corruption of Gifts and Presents, or by any other base and sordid Methods, he was not only tumbled down from the height of that Dignity, but was depos'd from the Degree or Order of the Priesthood, with a Mark of perpetual Infamy ‖; and he that was once depos'd or ejected, could not afterwards be re-admitted to the Honour and Degree, which he had thus shamefully lost *. Besides, that

‖ Acts. ch.
20. v. 18.
* Dist. 21.
c. 1.

† C. 1. 3. 23.

‖ C. 1. 3. 31.
& 42.

* C. 1. 3. 48.

† Nov. 6. c. 1.
Nov. 123.
c. 1. Nov.
137. c. 2.

‖ C. 1. 3. 31.

* C. 1. 3. 14.

which

which was given for this Degree or Order of Priesthood, was forfeited to the Church, that sustain'd this Injury ; and the Person that receiv'd the Gift or Present, was fined in Twofold : And so the Law stands now in point of Simony here in *England* *. This Crime of canvassing or soliciting for Church-Preferment is by the *Canon* Law called *Simony* ; and is by that Law punish'd in a most grievous and rigorous Manner, if the Law was duly put in Execution, as I shall hereafter observe under the Title of *Simony*. The Emperor *Justinian* has prescribed a Form to be observ'd in the Election of a Bishop, (for Bishops were antiently chosen by the People out of the best and most learned of the Clergy) and, it was Pope *Innocent* the Third, who, for bye ends to the Hierarchy, changed this Form in some Respect. But most Christian Princes do, at this Day, claim the Nomination of fit Persons to be made Bishops, and to receive Episcopal Institution into Cathedral Churches, as they likewise do the Nomination of Abbots for all Monasteries in their own proper Dominions, where Religious Houses are suffer'd ; and in Popish Countries, these Persons do afterwards receive their Confirmation from the Hands of the Pope : And tho' here in *England*, the Dean and Chapter do elect a Bishop upon the King's Nomination of him to a Bishoprick † ; yet it is nothing less than a *Præmunire* for them to refuse and set aside the King's Nomination. And *Covarruvias*, though a *Popish* Writer, thinks this to be a very good Law ; because (says he) 'tis the Interest of a King to know what sort of Persons they are, that have the Administration of Churches and the Government of Monasteries, within their own Territories and Dominions ||.

* 31 Eliz. cap. 6.

† 1 Edw. 6. cap. 2.

|| Cap. Possessor. p. 2. §. 10. n. 5.

Though a Bishop comes under the Appellation of a Priest or Presbyter ; yet a Priest or Presbyter does not come under the Appellation of a Bishop : because there are many Priests which are not Bishops, tho' there is no Bishop, that is not a Priest in the Church. Indeed the Power of Bishops and Presbyters was heretofore for some Time in common, but in such a Manner (say the *Canonists*) as that it accrued to Bishops by a kind of Right, and the Apostles gave it to Presbyters by a kind of Privilege indulged them for the common Good and Advantage of the Church. And this continued till such Time as Schisms and Contentions arose in the Christian Church ; so that every one thought the Persons he baptiz'd, were his spiritual Children and in his own Power : And, therefore, the Power of Presbyters was by a general Decree abrogated all over Christendom ; and one certain Presbyter was hereby made to preside over the rest.

A Bishop, according to St. *Paul*'s Direction *, ought to be vested with fourteen Conditions or Qualifications. For he ought to be Blameless, that is to say, without any Crime or Blemish imputed to him ; the Husband of one Wife ; not given to Wine ; a Person of Prudence, Modesty, Hospitality and Chastity ; a Teacher of the People ; no Striker or litigious Person ; not given to filthy Lucre or Covetousness ; a Man that governs his own House ; no Novice ; but a Person well apparelled : For it is not the Name, but the Life of the Person, that makes a Bishop. An Election therefore to a Bishoprick, ought to be made of a Person that is fitly qualify'd for it, in respect of Knowledge, Age, and good Manners ; and, according to the *Canon* Law, to be a Person born in lawful Wedlock or Marriage †. And thus the Council of *Lateran* ordains, because some Persons had been elected Bishops, which were no wise qualify'd in respect of Age, Knowledge, Morals, and the like ; decreeing, That in all the Offices of the sacred Ministry, there should be three Things especially requisite and necessary, *viz.* Maturity of Age, Gravity of Manners, and Knowledge of Letters || : And, therefore, if we wou'd argue *à Minori ad Majus*,

* 1 Tim. ch. 3. v. 2. 3, &c.

† X. 1. 6. 7.

|| X. 1. 14. 15. X. 1. 6. 7.

these

these Qualifications are with greater strength of Reason required in a Bishop. And by the said Council, it is at this Day required, That a Bishop or Prelate in the Church should be thirty Years of Age at the least ||: nor can this Law be dispensed with, in respect of a Bishop that is under such an Age, in opposition to the said Council. For 'tis certainly very unfit, that such Persons should be prefer'd to the Government of others, who know not how to govern themselves. And hence it is, that St. *Paul*, in his first Epistle to *Timothy* *, says, That in the Choice of a Bishop we ought to have a Regard to a Person, *that ruleth well his own House, having his Children in subjection with all Gravity*. According to *Innocentius*, a Bishop, suspected of Sedition against the State of any Kingdom or Commonwealth, ought not to be promoted to a Bishoprick: and that no one ought to intercede with the Prince for him, who lies under the Prince's Displeasure; because the Person thus interceding for him, would thereby incur the same Displeasure. In the *Justinian* Code, we read of a Law made for expelling the Patriarch, or Bishop of *Aquileia*, that City, for Sedition against the State or Republick of *Venice*; and it was therein said, That he ought not to be heard on his Prayer to be restored, because he is still presum'd to make worse Attempts, and to think it his Duty so to do. How justly, therefore, was the late Bishop of *Rochester*, Dr. *Francis Atterbury*, depriv'd of his Bishoprick, and expell'd the Kingdom for High-Treason against the King and Government! A Bishop divested of his Bishoprick on the Score of some Crime committed against the State or Commonwealth, wherein he presided as a Bishop, ought to be banish'd and live a Hundred Miles distance (at least) from such State or Commonwealth; and if a Bishop, divested of his Bishoprick on such Account, shall presume to return or come into such State or Commonwealth again, he shall be deliver'd up, and committed to some Monastery which is situated in another Kingdom. But by the Papal Law, a Bishop ought not to be deliver'd to a Secular Court of Judicature against his Will: for, according to that Law, if a Judge shall order a Bishop to be thus deliver'd up and treated, he shall be depriv'd of his Office, and condemn'd in the Sum of Twenty Pounds of Gold to the Use of the Church.

The Election of a Bishop or Archbishop, where the Papal *Canon* Law prevails, ought to be made within three Months after such Vacancy †; otherwise a Devolution was heretofore made to the Pope on that Account ||: but now 'tis made to the next immediate Superior, *viz.* to the Primate or Archbishop *, who in this Case has the Power of electing a Bishop in *Popish* Countries, where the King has not the Nomination of him. And such Bishop elected, ought to be confirm'd within three Months after such Election by his Archbishop, or else by the Pope in some Countries †. As an Election is previous to Confirmation; so, according to *Berachinus*, and other *Canonists*, Consecration is subsequent thereunto: For though a Person may be said to be a Bishop upon Confirmation; yet, without Consecration, he cannot do some Things which relate to the Office of a Bishop, as to Ordain and give Holy Orders to Persons suing for the same; but before Consecration he may do all such Things as relate to Jurisdiction. A Bishop is said to be *in Morâ* in suing for Consecration, if he does not apply for the same within the Time prefix'd by the Canons; that is to say, within three Months from the time of his Confirmation had and obtain'd in the Church. So that *first* of all a Bishop is elected; *Secondly*, This Election is confirm'd, whereby the Bishop elected does, in some measure, obtain a Right of Administration; and *Thirdly*, he purchases his Consecration: so that it appears from hence, that

† 50 Dist.
c. 11.

|| X. 3. 8. 12.

* X. 1. 6. 41.

† 100 Dist.
c. 1. 75.
Dist. c. 2.

that the one arises from the other. For, by virtue of his Election, he obtains Confirmation; and by virtue of his Confirmation, he receives Consecration, and a full Administration of his Pastoral Office. And hence the *Canonists* commonly say, That Episcopal Consecration is an Order: and, therefore, in several Laws, a Bishop is said to be ordain'd, and in some Laws, he is said to be consecrated, since 'tis by Consecration that he receives the Episcopal Order. But 'tis no more an Order, according to *Papish* Theologists, than the *Prima Tonsura*, they allowing only seven Ecclesiastical Orders; whereas the *Canonists* allow of nine of them in the Church, by reckoning the *Prima Tonsura* and the Episcopal Order as two.

Valesius, in his Notes on the Ecclesiastical History of *Socrates Scholasticus* observes, that there were in *Egypt*, *Lybia*, and *Pentapolis*, no less than a Hundred Bishops, at the Time when he wrote his History; and about the same Number you meet with, in the second Apology of *Athanasius* against the *Arrians* *. From the sixth Book of this History of *Socrates*, we read, that the Bishops formerly were not wont to preach to the People out of the Pulpit: for *Socrates* takes notice of this as a Thing singular in *Chrysostom*, viz. That being about to make an Oration to the People, he went up into the Pulpit, that he might be the more easily heard by the Congregation: For most commonly, in those Times, the Bishops preach'd on the Steps of the Altar in a standing Posture, having not as yet assum'd to themselves the Pride and State of a Throne. And of this we are often inform'd from King *Childebert's* Constitution, which *Sirmond* has recorded in the first Volume or Tome of the *French Councils* †: But 'tis imperfectly reported there. I only mention this to shew, that Bishops then did not think Preaching beneath their Office, as some have done since; for, among other things that belong to a Christian's Salvation, Preaching the Word of God (and not of Men) was thought very necessary; because as the Body is nourish'd by natural and material Diet, so likewise is the Soul refresh'd and nourish'd by this spiritual Food, if duly apply'd. And because Bishops sometimes were not able to preach the Word of God unto the People by reason of Sickness and the Infirmary of old Age and the like, (for as yet they had not incumber'd their Office with secular Employments) they provided fit and able Persons, at their own Costs, to discharge this great Duty of their Calling; who were, in their stead, to instruct the People committed to their care, in such a manner, as that they were edify'd both by Preaching and exemplary Lives ‖: And this gave the first Hint or Thought to their Successors, after the Empire became Christian, of erecting Cathedral and Collegiate Churches, which have not turned much to the Praise and Advantage of Religion itself for above a Thousand Years last past (especially) in *Papish* Countries. For no sooner had Bishops entangled themselves with Temporal Affairs (which they were too fond of) but they began to lay aside the Spiritual Business of their Office, to build unto themselves sumptuous Houses, which they call'd Palaces; and to procure large Churches to be erected for them in their several Districts, stiled Cathedrals and Conventual Churches; and in these they placed Persons as Co-adjutors to them in their Episcopal Function: But more of this hereafter, under the Title of Churches.

Every City had its proper Bishop, and whoever endeavour'd to deprive a City thereof, was, by the *Civil* Law, punish'd with Infamy and Confiscation of Goods, tho' this was done even by the Prince's Commission *: And, hereupon, according to that Law, Bishops were commanded to exhibit a Personal Residence in the City allotted to them, and not to absent themselves from thence for a Year together; nor to travel and go into foreign Parts under pain of Deposition, if they did not return to their

* Pag. 788.

† Pag. 309.

‖ 7 Q. 1. 1.

* C. 1. 3. 36.

* C. 1. 3. 43. Dioceſs on the Summons and Command of their Superior *, unleſs they
 Nov. 6. l. 3. were retain'd in the Prince's Service beyond the Year ; for by the Prince's
 Nov. 123. 2. Command, Biſhops, and other Prelates of the Church, might at the
 10. Time, when this Law was made for their Punishment, engage themſelves
 in the Management of publick Secular Affairs. The Canons of the
 Church require a conſtant and aſſiduous Reſidence in Biſhops, and others,
 † 7 Q. 1. 20. having the Cure of Souls committed to them †: And the Council of *Trent*,
 as bad as that Council was, avers this to be a Matter of divine Com-
 mand *. By the 11th Canon of the Council of *Sardis*, no Biſhop was
 * Sefs. 22. to abſent himſelf from his Church without evident Neceſſity above three
 c. 1. de Re- Weeks : But as this was only a Provincial Synod, it did not extend to the
 form. whole Church, but only ſhews the Senſe of thoſe Fathers in reſpect of
 Episcopical Reſidence. But,

By the 8th Canon of the firſt Council of *Nice*, which was a General
 Council, it was enacted, That two Biſhops ſhould not have a Title to,
 or Preſide over one and the ſame Church or City, as a Dioceſs was then
 call'd : Upon which Account *Auſtin* reſents it †, that he was ordain'd Bi-
 ſhop of *Hippo*, during the Life-time of *Valerius* Biſhop of that Place,
 and at his Procurement; *Valerius* not knowing it to be forbidden by the
 Council of *Nice*. For *Valerius* being advanced in Years, and a *Grecian*
 by Birth, and not ſufficiently qualify'd to preach in the *Latin* Tongue,
 aſſum'd, and made uſe of *Auſtin* as a Co-Biſhop, for the greater Benefit
 of the Church of *Hippo* ||, and the whole *African* Church. For we read,
 || 7 Q. 1. that both *Valerius* and *Auſtin* were *Titular* Biſhops; and, therefore, one
 c. 12. City had two Biſhops contrary to this Canon : And thus we likewiſe read,
 that there were two lawful Biſhops of *Rome* at the ſame Time, viz.
Liberius, and *Felix*; and alſo two Biſhops of *Antioch*, viz. *Miletius*
 and *Paulinus*; ſo that the Canons of the Church were little regarded in
 thoſe early Times of Chriſtianity. But hereunto 'tis ſaid, that there
 are ſome Things, which are lawful *Jure extraordinario*, on the Account
 of ſome great Benefit or Neceſſity, which are otherwiſe forbidden *Jure*
 * Lib. 2. *ordinario*. And on this Account, that ſubtle Caſuiſt *Ockham* * diſtin-
 Tract. 1. guiſhes, That tho' the Papacy or Eccleſiaſtical Monarchy, be of divine
 Right (according to the *Popiſh* Notion of it) yet, for the Advantage
 and Neceſſity of the Church, the Monarchical State thereof may be
 changed in an extraordinary Manner, for ſome Time, into an Ariſtocrati-
 cal Form of Government; (which in the primitive State of the Church
 was the true and original Form thereof :) for the Neceſſity and Advan-
 tage of the Church (ſays he) renders thoſe Things lawful, which other-
 wiſe would be unlawful to do. And, therefore, tho' this ſeems contrary
 to the Words of the Law, to have two Biſhops in the ſame City or Di-
 oceſs; yet it is not repugnant (ſays he) to the Mind and Intention of the
 Law.

By the Papal *Canon* Law, it is not lawful for a Biſhop to be tranſlated
 from one Biſhoprick to another, without the Pope's Licence or Diſpen-
 ſation for accepting thereof †, under Pain of being deprived of the Bi-
 ſhoprick he is in poſſeſſion of; and, upon acting contrary hereunto, he ſhall
 likewiſe loſe the Biſhoprick which he ſues for. But, by the Council of *Sar-*
 † X. 1. 7. 1 *dis* ||, Tranſlation of Biſhops from one City or Biſhoprick to another was
 & 4. abſolutely forbidden, in order to prevent Avarice and Ambition in Men
 of that conſpicuous Dignity and Office : For we cannot find any one, that
 || Can. 11. is willing to paſs and be tranſlated from a better to a worſe Biſhoprick in
 vid. Can. point of Power and Revenues. But you ſee the *Canon* Law makes a cun-
 Ap. 11. Can. ning Diſtinction here, in order to gratify the Pope's Treafury, ſaying,
 Nic. 15. Can. That this cannot be done by his own proper Authority, without the
 Ant. 21. Pope's

Pope's Licence and Dispensation for so doing ; since he is so matrimonially wedded unto his Church, that he cannot quit the same, even on the Score of going into a Religious House or Order. But a Bishop translated from one Bishoprick to another by his own Authority, does not, even by the *Canon Law*, stand depriv'd *ipso facto* ; but a declaratory Sentence is necessary hereunto.

A Bishop, in his own Diocese, ought to be obey'd by all Persons whatever under the Royal Dignity, how great soever they may be in point of Dignity or Estate, provided they be of that Diocese, and that the Matter of Obedience does concern and relate to his Episcopal Office : And the Papal Law carries this Obedience so far, that it makes even the Emperor himself subject to the Bishop of the Place * ; for by this Law, no Prince is exempt from the Jurisdiction of Bishops ; and, according to the *Papists*, this is a Matter of *common Right*. St. *Ambrose*, Bishop of *Milan*, (say the *Canonists*) excommunicated the Emperor *Theodosius* : And, therefore, they do from hence infer, That a Bishop, in his Diocese, is greater, and ought to have Precedence of all secular Princes, how great soever they may be in Point of Dignity and Estate, as having a Jurisdiction over them : But this does not hold (say they) *è conuerso*. For a Bishop is set over Things spiritual, but a secular Prince is only set over Things of a Temporal Nature, which are inferior to Things Spiritual ; and a Man is *tantò Major, quantò Dignioribus & Melioribus præst.* But, notwithstanding what the Pope's Creatures may pretend from this Example of Episcopal Power over Kings and Princes, it is to be observ'd, that *Theodosius* was a very weak Prince, and *Ambrose* a very haughty Prelate : And, therefore, if Bishops should now assume such a Power over Kings and Emperors, they would surely be corrected and taught better Manners.

A Bishop may prove himself to be a Bishop several ways, if an Exception be objected to him that he is no Bishop. *First*, By the Bulls or Letters of his Election : but then this only serves in the *Romish* Countries. *Secondly*, He may prove himself such *per Collationem Ordinis* †, which was granted ; and this conferring of the Episcopal Order ought to be in Writing. The *Third* kind of Proof, is made by common Fame and Opinion, whereby he is and has been accounted a Bishop for many Years ‖. And a *Fourth* sort of Proof arises from Length and Diuturnity of Time, which is a good Presumption of his being Canonically promoted to the Prelacy * : For if it appears, that he has been in the Possession of the Prelacy for a long time, no Defect can be objected against him, because upon an Objection that he was not Canonically promoted, 'tis sufficient for him, if he has serv'd in that Dignity for a long Time as a Person duly promoted, unless the contrary appears. But if any Defect appears in his Promotion by Inspection of the Instrument or Writings, he ceases to be a Bishop. And 'tis likewise to be observ'd, that Prelacy itself cannot be proved by Prescription ; since Episcopacy is not prescribed by any Time whatsoever.

Valesius in his Notes on the History of *Eusebius Pamphylus* observes, That probably the first Christian Priest did, in Imitation of the *Jewish* High-Priest, wear a Plate of Gold on his Forehead, as a Badge of Honour to his Office : And *Epiphanius*, in his History of the *Nazarean* Heresy, says, That *James*, the Brother of our Lord, who was ordain'd the first Bishop of *Jerusalem*, wore such a Plate of Gold on his Forehead ; and the same is said of *Mark* the Evangelist, in a Manuscript concerning his Sufferings. I will not contend for the Truth hereof : But if we can believe these Accounts of this Matter, we may pretty reasonably infer ; That from hence, in succeeding Ages, arose the Use of the Mitre.

As

* II Q. 3. II.

† 2 Q. 1. 9.

‖ Specul. Tit. de Prob.

* Inn. in c. 56. X. 1. 6.

As by a Canon of the Council of *Lateran*, Bishops cannot be depos'd by their Metropolitans, without the Pope's Leave or Licence so to do *, (tho' the Archbishop, with his Suffragans, may inquire into the Merits of the Cause;) so a Bishop, according to the Papal Law, cannot by his Power alone, depose any Clerk from his Orders, though he may, by himself, give a Person Orders †: And, therefore, in this Case, that Rule in Law does not hold good which says, *viz. Ejus est solvere, cujus est ligare*. And thus, according to that Law*, the Pope can only dissolve the Bond of spiritual Matrimony, which is contracted between a Bishop confirm'd and his Church; for that which is done by God's Vicar, the Pope, (say the *Romanists*) is deem'd to be done by God himself; and thus is that Saying in the Scripture fulfilled, *Whom God has join'd together, let no Man put asunder* ||. For as it appears by these Words, That no Man can dissolve carnal Matrimony but God alone, so 'tis the same thing (say they) in spiritual Matrimony, since no one can dissolve the same but God alone, or (in the Phrase of the *Romish Church*) his Vicar-General upon Earth, the Pope. But if it be objected, that carnal Matrimony is sometimes dissolv'd by the Sentence of inferior Judges; then they answer with Pope *Innocent*, That an inferior Judge is not then said to dissolve the Marriage by his own proper Authority, but by the Authority of the Canons which receive their Force from the Pope; and so, consequently, from God; since the Power of making Canons (according to the *Papists*) first proceeded from God himself. But in *England*, an Archbishop may deprive a Bishop; and so may a Bishop depose a Clerk by his own Power alone, if their Crimes deserve so severe a Punishment: And 'tis said in the *Canon Law*, That a Bishop that is unprofitable to his Diocese, ought to be depos'd; and no Co-adjutor assign'd him*; nor shall he be restor'd again thereunto.

Bishops in a Council, act as a College or Corporation, and not as single Persons: And in their Diocesses, they do constitute and make Episcopal Synods, after the same Manner as Metropolitans do make Provincial Councils. But sometimes an Assembly made by a Bishop, is called an Episcopal Council: And a Bishop in such Assembly or Council being within his Diocese, may make a Decree or Canon, which shall oblige all those, that are subject to his Jurisdiction; and such a Decree is stiled an *Episcopal Canon* ||. But yet 'tis to be observed, That a Bishop cannot ordain or appoint any Thing that is contrary to the general Canons of the Church. Bishops in their Diocesses have a free Jurisdiction, and may *ex Officio* enquire into Crimes, and punish them according to the Canons of the Church, without any Impeachment to their Jurisdiction: And if need be, they may invoke the secular Arm, provided (nevertheless) that, by such an Invocation, no Prejudice does accrue to the Bishop's Power and Jurisdiction; for the secular Power does not hereby acquire any Right, but only executes another's Power and Authority: for a Bishop cannot have *armatos Officiales*, if he has not a Temporal Jurisdiction, for the Execution of Justice; but ought to invoke and call on the secular Arm for his Assistance: For as in spiritual Matters, (says the *Canon Law*) secular Princes ought to have recourse to the Church; so in Temporals, Ecclesiastical Princes ought to have recourse to secular Princes, since the Prelate's Office ought not to be disturbed by promiscuous Acts of Justice. Besides, the Exercise of the temporal Sword is forbidden the Church, even by our Lord himself saying unto *Peter*, *Put up thy Sword into the Scabbard*: And thus the only Arms the Clergy ought to make use of, are Prayers and Tears.

A Bishop, in the *Canon Law*, is said to be *Oculus Dei* †; and, therefore, he ought not to be judged by such as are his Subjects: Let not the Sheep

Sheep rebuke the Shepherd, nor the common People accuse their Bishop, because the Disciple is not above his Master, nor the Servant above his Lord, says the Canon*: nor can a Bishop be compelled personally to appear before a Judge in order to take an Oath, but the Judge ought to send a Commissioner to his House to swear him there: nor can a Bishop, against his Will, according to the Papal Law, be compell'd to give Evidence or Testimony in any Cause: But if he be willing to give Evidence in a Cause, the Judge, or his Minister, ought to come to the Bishop's House, and examine him; and a Bishop gives Evidence by only having the Gospels propounded to him, without touching or laying his Hand on them.

'Tis the Bishop's Province to consider and judge what number of Clerks it is fit for him to ordain: And if he ordains any one that has not a Title, or where-withall to live on, he is oblig'd to maintain and provide for him. But a Bishop of another Diocess, ought neither to ordain or admit a Clerk without the Consent of his own proper Bishop, and without Letters Dimissory ||; and Father *Ofius* said, That whoever should thus ordain a Stranger, without the Leave and Consent of his own Bishop, should have his Ordination adjudg'd invalid; and herein (says *Ofius*) we are all agreed †. If a Bishop shall presume to ordain any Person against his Will, such Bishop shall be liable to a Year's Suspension: And if any Person that is already a Clerk, shall refuse, at the Bishop's Instance, to be further promoted to a Benefice, (which seldom happens among Clergymen) he shall be ejected out of the Preferment he is already possess'd of ||. A Bishop has of *Common Right* the Institution and Collation unto all vacant Benefices appertaining to him within his own Diocess; and may collate his own Son or Nephew unto such Benefice, if he think fit: but of this hereafter. And as a Bishop cannot ordain or admit a foreign Clerk to a Living without the Leave or Licence of his proper Bishop; so neither can he consecrate a Church out of his own Diocess, or do any other Episcopal Act without Leave had and obtain'd*: But if he has consecrated a Church, or done any other Episcopal Act (as aforesaid) relating to his Order, such Act is valid, though he may be punish'd for it.

As a Bishop may, by the Incumbent's Consent, according to the *Canon* Law, divide one fat Benefice into two, if occasion be; so he may in the like manner, on a good Account, unite two Parish Churches †: But here in *England*, the Patron's Consent is also necessary. Tho' by the Papal Law, the Church succeeds to a Bishop dying Intestate, as to all his Goods and Estate*; yet even by that Law, a Bishop has the Power and Liberty of making a Will, and disposing of all such Goods and Estate, as he has acquired before he became a Bishop, to his Kindred by Consanguinity, even to the fourth Degree; but if he has acquired such Goods and Estate *intuitu Ecclesie*, he cannot make a Will, unless it be to the Advantage of the Church; which is not Law with us in *England*.

Of *Common Right*, the Dean and Chapter are Guardians of the Spiritualties, during the Vacancy of a Bishoprick ||: But the Usage of *England*, is, That the Archbishop is the Guardian of the Spiritualties during such Vacancy as to Matters of Jurisdiction: for as to Ordination (according to *Lindwood's* Opinion) they ought to call in the Aid and Assistance of some neighbouring Bishop. In the Case of the Dean and Chapter of *Durham* against the Archbishop of *York*, there was much Evidence given, that antiently, during the Vacancy of the See of *Durham*, the Archbishop had exercis'd Jurisdiction, *viz.* both *voluntary* and *contentious* Jurisdiction, as Guardian of the Spiritualties: But since *Henry* the VIIIth's Time, it has been for the most part administred by the Dean and Chapter †.

* 6 Q. 1. 9.

|| 71 Dist. per totum.

† 15 Q. 6. 1. 2. 3 & 4.

|| 74 Dist. c. 1. 2 & 3.

* 92 Dist. c. 4. 5 & 6.

† 16 Q. 1. 53.

* 7 Q. 1. 17.

|| X. 5. 7. 9.

† Vent. Rep. pt. 1. p. 225.

We read, that when Cities were first converted to Christianity, the Bishops were elected *per Clerum & Populum*; for it was then thought convenient, that the Laity as well as the Clergy, should be consider'd in the Election of their Bishops; and that both Laity and Clergy should concur in the Nomination of them; because he, who was to have the Inspection of them all, might come in by a general Consent. But, as the Number of Christians afterwards very much increas'd, this was found to be very inconvenient; for Tumults were rais'd, and sometimes Murders committed at such popular Elections; and, particularly, at one Time no less than three Hundred Persons were killed at such an Election. To prevent the like Disorders, the Emperors being then Christians, reserved the Election of Bishops to themselves; but in some Measure conformable to the old Way, that is to say, upon a Bishop's Death, the Chapter sent a *Ring* and *Pastoral Staff* to the Emperor, which he deliver'd to the Person whom he appointed to be Bishop of the Place. And tho' the Pope or Bishop of *Rome*, who, in Process of Time, got to be the Head of the Church, was well enough pleased to see the Clergy grow rich; yet he was not satisfy'd, that they should have any Dependence on Princes: And, therefore, he pretended, That they took Money for their Nomination of Bishops, or (at least) charged their Revenues with Pensions; and, thereupon the Canons in Cathedral Churches, came to have Choice of their

* X. 1. 6. 18. Bishops*, which by an Incroachment of the Papacy were usually confirm'd at *Rome*. But Princes had still some Power in those Elections: For we read in the *Saxon* Times, that all Ecclesiastical Dignities were conferr'd in Parliament. And this appears by *Ingulphus* Abbot of *Croiland*, in the Reign of *William the Conqueror*, who tells us that *à multis annis retro-actis nulla erat Canonica Prælatorum Electio*; because they were donative by the Delivery of the *Ring* and *Pastoral Staff* as aforesaid: the one signifying that the Bishop was wedded to the Church, and the other was an Ensign of Honour always carry'd before him, and was a Token of that Support which they ought to contribute to the Government, or rather that he was now become a Shepherd of Christ's Flock. *Hildebrand*, who was Pope in the Reign of the Conqueror, was the first that oppos'd this way of making Bishops here; and for that Purpose he call'd a Council of 110 Bishops, and excommunicated the Emperor *Henry IV.* and all Prelates that receiv'd Investiture at his Hands, or by any Layman *per traditionem Annuli & Baculi*. But, notwithstanding that Excommunication, *Lanfrank* was made Archbishop of *Canterbury* at the same Time, and by the same Means, according to *Malmshury*; but the *Saxon Annals* in *Bennet College* Library are, that he was chosen by the Senior Monks of that Church, together with the Laity and Clergy of *England*, in the King's great Council. Howbeit, *Anselm* did not scruple to accept the Bishoprick by the Delivery of the *Ring* and *Pastoral Staff* at the Hands of *William Rufus*, tho' never chosen by the Monks of *Canterbury*: And this was the Man, who afterwards contested this Matter with *Henry I.* in a most extraordinary manner. For that King being forbidden by the Pope to dispose of Bishopricks as his Predecessors had, by the Delivery of the *Ring* and *Staff*, and he not regarding that Prohibition, but insisting on his Prerogative, the Archbishop refused to consecrate those Bishops whom the King had appointed: at which he was so much incensed, that he commanded the Archbishop to obey the antient Customs of the Kings his Predecessors, under pain of being banish'd the Kingdom†. This Contest grew so high, that the Pope sent two Bishops to acquaint the King, that he would connive at this Matter as long as he acted the Part of a Good Prince in other Offices.

Where-

† Pol. Virg.
Hist. Angl.
lib. 2. Hen. 1.

Whereupon the King commanded the Archbishop to do Homage, and to consecrate those Bishops whom he had made : but this being only a feign'd Message, to keep fair with the King, and the Archbishop having receiv'd a private Letter to the contrary, the Archbishop still disobey'd the King. And at length, after several Heats, the King yielded up the Point, reserving only the Ceremony of Homage from the Bishops, in respect of the Temporalities to himself: whereunto *Anselm* consented ; provided, it was done before Consecration. And then the Archbishop consecrated those Bishops whom the King had appointed ; and promised, that no Person elected to be a Prelate should be refused Consecration, because of the Homage he had done to the King. But yet that very King re-assumed his antient Prerogative, and invested the very next Archbishop who succeeded *Anselm*, with the *Ring* and *Pastoral Staff*, tho' he did not long enjoy it.

Now to add more Solemnity to this Matter, and that Canonical Elections of Bishops might not seem Usurpations on the King's Prerogatives, in appointing whom he pleas'd to vacant Sees ; King * *John*, by his Charter *de communi Baronum consensu*, granted †, That Bishops should be canonically elected, provided leave was first asked of him, and his Assent required after such Election, and that he might have the Temporalities during any vacancy. So they were then chosen by the *Dean* and *Chapter*, or by *Priors* and *Convents* ; but yet the King retain'd this antient Prerogative of recommending the Person to them : And that he might influence the Election, he usually sent for the *Dean* and *Chapter*, or some of their Number, commission'd by the rest, who met in his Royal Chapel, or in some Church near it ; and these chose the Person he had recommended. This occasion'd frequent Contests between our Kings and Popes ; but still the Crown justly claim'd an Authority over all spiritual Things and Persons ; and when the Kings were willing to oblige any Pope in this Matter, they would recommend a Person to the vacant See, and the Person thus recommended, had his Bulls dispatch'd at *Rome* ; and, by a particular Warrant from the Pope, was consecrated and invested with the Spiritualities of the See. And even when the Pope's Supremacy was most exalted here, the Kings of *England* were never totally divested of this antient Prerogative : For upon the Vacancy of a Bishoprick, a Writ issued out of *Chancery* in order to seize the Temporalities into the King's Hands, and before they could be restor'd to the new elected Bishop, he was to appear before the King either in Person or by Proxy, and renounce every thing in those Bulls which might be prejudicial to the Crown, or contrary to our Laws. And having taken an Oath of Fealty and Allegiance to the King, there issued forth another Writ, reciting that all this was done ; and by that Writ, the Temporalities were restor'd.

The Parliament, in *Henry* the VIIIth's Time, pass'd an Act *, That Bishops should not be presented to the Pope, or sue out Bulls of Confirmation from *Rome* ; but that, on the vacancy of any See, the Person should be presented to the Archbishop: And likewise if an Archbishoprick should become void, the Successor should be presented either to an Archbishop in the King's Dominions, or to four other Bishops whom the King should appoint ; and that upon such Vacancy, the *Dean* and *Chapter* should certify it to the King in *Chancery*, and pray they may proceed to a new Election. Whereupon the King grants them a Licence under the Great Seal (called a *Conge d'Eslire*) to elect the Person whom he has nominated and appointed by his Letters Missive ; and they are to chuse no other under a severe Penalty. Within twelve Days after the

* Palm. Rep. 25.
† Cok. 1 Inst. 134. 344.

* 25 H.8. c. 20.

Receipt

Receipt of this Licence or *Conge d'Eslire*, they are to proceed to the Election: which is done after this manner, *viz.* The *Dean* and *Chapter* having made their Election, must certify it under their Common Seal to the King, and to the Archbishop of the Province, and to the Bishop elected: And then the King gives his Royal Assent, under the Great Seal, directed to the Archbishop, commanding him to confirm and consecrate the Bishop thus elected. And the Archbishop subscribes it, *viz.* *Fiat Confirmatio*; and grants a Commission to his Vicar-General, to perform all Acts requisite to that Purpose. Thereupon the Vicar-General issues forth a Citation to summon all Persons who oppose this Election, to appear, &c. which Citation is affix'd by an Officer of the Arches on the Door of *Bow-Church*, and he makes three Proclamations for the Opposers, &c. to appear; after the same Officer certifies what he has done to the Vicar-General; and no Person appearing, &c. at the Time and Place appointed, &c. the Proctor for the *Dean* and *Chapter* exhibits the Royal Assent, and the Archbishop's Commission directed to his Vicar-General, which are both read, and then accepted by him. Afterwards the Proctor exhibits his *Proxy* from the *Dean* and *Chapter*, and presents the new-elected Bishop to the Vicar-General, returns the Citation, and desires that three Proclamations may be made for the Opposers to appear: which being done, and none appearing, he desires that they may proceed to confirmation *in Penam contumaciæ*; and this is subscribed by the Vicar-General in a Schedule, and decreed by him accordingly. Then the Proctor exhibits a summary Petition, setting forth the whole Process of Election, in which 'tis desired that a certain Time may be assign'd him to prove it; and this is likewise desired by the Vicar-General. Then he exhibits the King's and Archbishop's Assent once more, and that Certificate which he return'd to the Vicar-General, and of the affixing the Citation on the Door of *Bow-Church*, and desires a Time may be appointed for the final Sentence, which is also decreed. Then three Proclamations are made again for the Opposers to appear, but none coming, they are pronounced *contumacious*; and 'tis then decreed to proceed to Sentence; and this is in another Schedule read and subscribed by the Vicar-General. Then the Bishop elect takes the Oaths of Supremacy, Canonical Obedience, and against Simony; and then the Dean of the Arches reads and subscribes the Sentence. The *Dean* and *Chapter* are to certify this Election in twenty Days after the Delivery of the Letters Missive, or they incur a *Præmunire*: And if they refuse to elect, then the King may nominate the Person by his Letters Patents.

* 25 H. 8.
ch. 20. §. 5.

Next after Confirmation follows the Consecration of the Bishop elected*, according to the King's Mandate, which is solemnly done by the Archbishop, with the Assistance of two other Bishops, according to the approv'd Rites and Ceremonies of the Church of *England*, and in conformity to the Manner and Form of consecrating Bishops according to the Rule laid down in the fourth Council of *Carthage*, about the Year 470, generally receiv'd in all the Provinces of the *Western Church*. After the Premises, there issues a Mandate from the Archbishop to the Archdeacon of his Province, to install the Bishop elected, confirm'd, and consecrated, who either by himself or Proctor, (which last is most usual) being in the Presence of a Publick Notary introduced into the Cathedral Church, on any Day, between the Hours of nine and eleven, by the said Archdeacon, he first declares his Assent to the King's Supremacy, &c. and the Archdeacon being accompany'd with the Canons, &c. leads him to the Choir; and, placing him in the Episcopal Seat, pronounces as follows †, *viz.* *Ego Autoritate mihi commissâ Induco & Inthronizo Reverendum in Christo Patrem*

† 9. 6. d.
Stat.

Do-

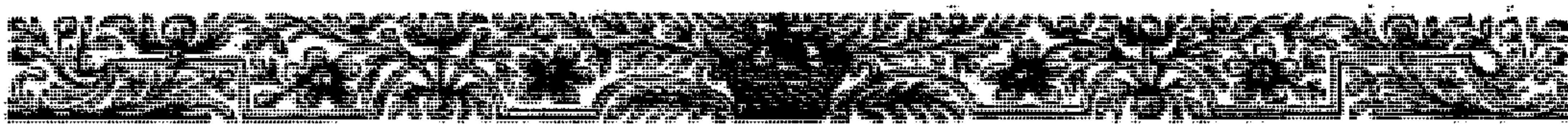
Dominum J. S. Episcopum ; & Dominus custodiat Introitum suum & Exitum ex hoc, nunc & in seculum, &c. Then, after divine Service proper for the Occasion, the Bishop being conducted into the Chapter-House, and there placed on a high Seat, the Archdeacon and all the Prebendaries of the Church acknowledge Canonical Obedience to him. And the Publick Notary, by the Archdeacons Order, records the whole Matter of Fact in this Affair, in an Instrument to remain as Authentick to Posterity : And this is called *Investiture*. After all which, the Bishop is introduced into the King's Presence to do his Homage for his Temporalties or Barony, which he performs, by kneeling down and putting his Hands between the King's Hands, sitting in a Chair of State, and by taking a solemn Oath to be true and faithful to his Majesty, and that he holds his Temporalties of him.

In the Time of the *Saxons*, all Bishops and Abbots sat in State-Councils by Reason of their Office, as they were spiritual Persons, and not on Account of any Tenures ; but after the Conquest, the Abbots sat there by virtue of their Tenures, (as already rehears'd) and the Bishops in a double Capacity, as Bishops, and likewise as Barons by Tenure : And this appears * when Archbishop *Becket* was condemn'd in Parliament ; for there was a Dispute, who should pronounce the Sentence, either a Bishop or a Temporal Lord. Those, who would have a Bishop do it, alledg'd, That they were Ecclesiastical Persons, and the Person to be condemn'd, being one of their own Order, they insisted that one of them ought to do it ; but the Bishops reply'd, that this was not a spiritual, but a secular Judgment, and that they did not sit there *merely* as Bishops, but as Barons. And in the very next Year it was declar'd by the Constitutions of *Clarendon* †, That Bishops, and all others holding of the King *in Capite*, have their Possessions of him *sicut Baroniam, & sicut ceteri Barones debent interesse Judiciis curie Regis, &c.* And they ought to sit there as Bishops likewise, that is to say, not as mere spiritual Persons vested with a Power only to Ordain and Confirm, &c. but as they are the Governours of the Church : And 'tis for this Reason, that in the vacancy of a Bishoprick, the Guardian of the Spiritualties was summon'd to Parliament in the Bishop's Room. And tho' the five new Bishops of *Bristol, Chester, Gloucester, Oxford* and *Peterborough*, made by *Henry* the VIIIth, have no Baronies ; yet they sit there as Bishops of those Sees by the King's Writ.

* An. 10. & 11. H. 2.

† Cap. 12.

But notwithstanding the Laws of *William the Conqueror*, Bishops still sat as Judges in the King's Courts, as they had done in the *Saxon* Times ; but it was upon Causes merely that concern'd the Church : so that the Conqueror's Law extended only to separate the Laity out of the Ecclesiastical Courts, and not the Clergy out of the Lay-Courts, as the Bishops would have it in *Henry* the II'd's Reign ; when the Clergy, especially those of the highest Rank, disputed their Services due by Tenure, as if they design'd to have no Lay Lord over them, nor even the King himself ; acknowledging no Superior but the Pope. Doubtless the Use of Tenures in those Times, was of great Importance to the Peace of the State and Government of the Realm, since by these Tenures, not only all Degrees of Men were principally united and made dependant on the Crown, from the Lord Paramount to the Tenant Peravale ; but especially were united with the Laity, and made subject to the King, without which, a strange Metamorphosis in Government must needs have ensued, beyond the Shape of any reasonable Conceit ; the one half almost of the People of *England* being absolutely under the Dominion of a foreign Power.



Of Blasphemy, and the several Kinds.

TH O' *Blasphemy*, in the general Sense of the Word, is defin'd to be an irreligious defaming or depraving of something that is good and sacred; yet strictly and properly taken, it is an offering of some Indignity or Injury unto God himself, either by Words or Writing*: And it is threefold, *viz.* *First*, when we ascribe something to him which is not suitable to his Nature; and this is a Sin, as the Divines call it, *contra misericordiam*. *Secondly*, When we deny him some Attribute which is essential to his Godhead; and this, they say, is a Sin contrary to Justice. And, lastly, when we attribute to the Creature, that which is only proper to the divine Creator of all Things; and this they term a Sin against the Majesty of God †. *Lucas de Penna* ||, reckons up no less than ten *Species* of Blasphemy; but *Angelus Clavafius* *, has reduced them all to the three foregoing Kinds.

St. Jude in his Epistle says, That to blaspheme the divine Majesty, is a very great Crime: And *Athanasius* in his Comment on this Text of the Gospel, *viz.* *Whosoever shall speak Blasphemy, &c.* says, That there is this Difference between all other Sins and Blasphemy, *viz.* That he who commits other Sins, transgresses the Law; but he, who Blasphemes, acts the part of an impious Man, in defiance of the Deity itself. Therefore as Blasphemy is a Malediction and a Sacrilegious Detraction from the Godhead, it has different Punishments annex'd to it by the *Canon Law*, according to the Measure and Dignity of him to whom it is offer'd; for as that Species of Treason is greater which is committed against the Prince, than that which is committed against an inferior Magistrate, so (says the *Canon Law*) is that *Species* of Blasphemy greater, which is committed against God, than that which is committed against his Saints. For in the *Romish Church*, Blasphemy extends itself to the Virgin *Mary*, and all the Saints of her Communion.

Blasphemous Words, are not only an Offence against God, and contrary to Religion itself, and as such ought to be punish'd in the Ecclesiastical Court: But they are also a Crime against the Laws, State, and Government of the Realm, and even against Christianity itself; which makes one Part of the Law of *England*. And, therefore, they are punishable at the Common Law also. See *Taylour's Case* in *Ventris's Reports* *. By a Statute in the 9th and 10th of King *William III.* it is ordain'd, That if any Person bred in, or professing the Christian Religion, shall by Writing, Printing, Preaching, or by advis'd Speaking, deny any one of the Persons in the Trinity, or assert there are more Gods than one, or deny the Christian Religion to be true, or the Holy Scriptures to be of divine Authority; and shall be convicted thereof by Indictment or Information at *Westminster*, or at the County Assizes, he shall be disabled to hold any Office, and shall not enjoy that which he has, but the same is made void †.

There were various Punishments heretofore for this Crime. The Emperor *Justinian* punish'd it with Death ||. Sometimes it was punish'd by cutting out the Tongue *; but by the *Civil Law*, the Punishment did

not

* Navar.
cap. 12. n.
81. Leff.
lib. 2. de
Blasph.

† Lindw.
lib. 1. Tit. 9.
cap. 1. v.
Blasphemia.
|| In l. 5. c.
10. 11.
* In summ.
v. *Blasphem*
ia, n. 3.

* Pt. 1st. 293.

† 9 & 10
Will. cap. 32.
|| Nov. 77.
c. 1.
* Spelm.
Conc. A. D.
840.

not extend to Life or Limb; for a Layman was anathematiz'd, and a Clergyman depos'd †: But, by the *Canon* Law, if Blasphemy was publickly committed, the Offender was to undergo publick Pennance, but even in that Case a Bishop could absolve him; and for a private Blasphemy, any Priest might do it. Our *Saxon* Ancestors were not guilty of this Crime; and, therefore, amongst their Laws we find no mention made of any Punishment for it. King *Henry* III. order'd that Blasphemers should be arrested, but the Books do not say how they should be punish'd. By the Ecclesiastical Laws of *England*, as they were reform'd by the Thirty two Commissioners under *Edward* the VIth's Reign, the Punishment inflicted on Blasphemers, was, That the Guilty were to be incapable of any publick Trust and Imployment, were not suffered to be Witnesses in any Court, or to any last Will, and were not to have the Benefit of the Law *. But as this Body of Laws was never confirm'd by Royal Assent, or by Parliament, they are in no wise binding and valid. By the 109th of King *James* the 1st's Canons, this Offence is to be presented to the Ecclesiastical Court in order to Punishment; and 'tis comprehended under the Words of *Wickedness of Life*: for 'tis not expressly named, as Adultery, Whoredom, and other Crimes are. *Baldus* says, that Blasphemy is a kind of Heresy †, for which a Layman is anathematiz'd by the Church of God, and a Clerk deposed from all Ecclesiastical Orders. The *Canon* Law seems not severe enough in the Punishment of this Crime, probably because the *Romish* Church holds, that there is a Blasphemy against their Saints; and Blasphemy against God and against their Saints, has but one and the same Punishment with them, which is a solemn and publick Pennance, if the Crime was publickly committed ||, as already hinted. In the Primitive Times this Sin was punish'd by delivering the Offender over to Satan, which was an Ecclesiastical Censure of the *greater* Excommunication; whereby the Offender became to others as a Publican and an Heathen *.

|| Anton. in c. 2. vi. 5. 10.

* Reform. Legum Eccles.

† In l. 6. c. 9. 1.

|| X. 5. 26. 2.

* Matth. 18. v. 17.



Of Bulls Papal, and the Meaning thereof.

THE Word *Bulla* in *Latin*, properly denotes a Bubble or Bladder of Water swoln with Air, which is form'd from the falling of Rain, and which immediately vanishes and disappears: And hence that old Proverbial Saying had its rise, *viz. Homo Bulla*, or Man is a Bubble, to shew the Vanity and Shortness of human Life †. But the *Canonists*, as I shall treat of a *Bull* in this Place, add a more reverend Esteem unto the Pope's *Bulls*, and make them to signify something in *Popish* Countries ||. The Word *Bulla* also denotes *the Boss of a Nail or Bridle*; and hence, according to some Mens Opinion, it is, in a metaphorical Sense, taken for a Seal, or a *Diploma* sealed by it: But among the Antients (I think) it was a golden Badge or Ornament, which Persons, that triumph'd over their Enemies, wore before them on their Breast, hanging down like a Medal in our Days; and it came to signify a Deed, Instrument, or Writing described on Parchment or Vellum, with a Piece of Lead hanging thereunto by a String; and such Writing or Instrument is called a *Bull* from the Lead annex'd to it *. On this Label of Lead, the Heads of the two Apostles St. *Peter* and St. *Paul* are impressed from the

† Reb. Prax. Ben.

|| X. 5. 20. 506.

* Gloss. in Clem. 2. 9. c. unic. v. aurea Bulla.

Papal

† Alex. conf.
215. vol. 2.

*A. D. 1638.

Papal Seal: And this is made use of to distinguish other of the Pope's Writings from his Briefs, there being no Lead affix'd to these last but only Wax. For the Apostolical Letters are of a twofold Kind and Difference, *viz.* some are called *Briefs*, because they are compriz'd in a short and compendious way of Writing; and such are sealed on Wax only, *cum annulo Piscatoris*, that is to say, with the Impression of a Signet-Ring, which the *Romanists* are so weak as to believe that it was the Seal or Signet of St. *Peter* the Fisherman, and that he made Use of it. The other Apostolical Letters are called *Bulls* from the Leaden *Bulla* (as afore-said) hanging and affix'd thereunto: And, therefore, these Letters are not said to be expedited till that *Bull* is annex'd to them †; and as soon as the Leaden *Bull* is affix'd to them, these Letters are said to be compleatly finish'd. And because they often carry'd the Papal Thunder of Excommunication along with them, for the Non-payment of the Pope's pretended Dues, they became a Terror to weak and simple People for some Ages, till at length from their frequent Demands (which was only Begging at first) these Fulminations from the *Vatican* were turn'd into Ridicule; and as they were called *Bull-Beggars*, they were used as Words of Scorn and Contempt, and only repeated to quiet and frighten ignorant Children withal. *Eybenius Cherubinus* has made a Collection of these *Bulls*, and printed it at *Rome* * in six Volumes in Folio: which gives us a full View of the wonderful Art and Craft of the Hierarchy in raising such a Structure of Power and Iniquity to itself, which none can pull down but the Almighty Hand of God alone. For therein we see the Church of *Rome* almost in its Beginning, how it rear'd itself by degrees on Papal *Bulls*, and how the weak Parts of the Building have been since strengthen'd by the Cunning of the several Undertakers, the Pope and his Cardinals. Out of this Collection we may frame a good History of *Popery*; and the learned *Puffendorf* in his Introduction to the History of *Europe*, seems to me to have made use of it in writing of the *Spiritual Monarchy*.



Of Burial, and the Right and Practice thereof.

BY the *Canon* Law, the Bishop of the Diocess had not only the lawful Distribution of the Goods of Persons dying both Testate and Intestate; but has likewise the Care of seeing that all Christians, after their Deaths, be not deny'd Church-Burial, according to the Usage and Custom of the Place, and the Rules of the Ecclesiastical Law: For every Christian that dies in the Communion of the Church, has a Right of being bury'd in the Church-yard, and likewise of having the Office of the Church perform'd by the Parish-Priest at the Time of his Interment, if it be not otherwise prohibited by Law; as it is with us unto Persons excommunicated, and laying violent Hands on themselves, by a Rubrick of the Burial-Service. So that by *Christian Burial*, we mean the Burying of any Person in the Church-yard, or some other sacred Place, wherein other Christians are usually bury'd; and the Performing of the Service of the Church at the Time of his Interment. I say *in some sacred Place*, because though every Person may have a Burying-Place in his own Estate, and

and may be bury'd there, whether such Place be peculiar to himself, or common to others ; yet such Place is not sacred, unless it be made so by the Intervention of the Bishop's Authority *.

The Use of Christian Burial is a Right accruing to the Church, and it was first introduc'd by the *Canon* Law for the sake of Decency, and of putting other Men in mind of their latter end ; but it was afterwards made use of as a Matter of Profit and Advantage to the Clergy, when they came to sing their *Dirges*, and perform other Religious Offices for the Dead || : But the great Abuse of this innocent Ceremony, and the Scandal occasion'd to Religion by the Greediness of the Clergy, did, in Process of Time, cause a Law to be made by † Pope *Innocent III.* against demanding any thing for burying in the Church-yard, and against selling the Ground where the Corpse was interr'd. But still the Clergy were left at liberty to receive what they could get for Exequies and other Funeral Offices, which they seem'd to be much asham'd of at the first Institution of this Christian Right in the Church ; believing it then to be their Duty to perform this Service for the Dead, as they were Parish-Priests, *Gratis*, in virtue of their Office, and out of a tender Regard to the Living ; and, therefore, they would then receive nothing for their trouble ||. But when they saw how fond and superstitious Men grew on this Account, by their Preaching to the People, That the Souls of their deceased Friends were at Rest by this Holy Ceremony *, they began to make some Demands for the Performance thereof, which were small and inconsiderable in the Beginning ; and, because there was no Law then to ground their Demands on for the Celebration of this Office, they invented the Use of Church-yards and Holy Ground to bury the Dead in †, and then sold out the Soil to the People for this Purpose : but the People at length reflecting how impious it was in the Clergy to sell that Ground, which was dedicated to the Service of God and his Church ; a Complaint thereof was made to the afore said Pope, who forbid the same by a *Decretal*, as already mention'd.

But as I can find no Law here with us forbidding the Clergy to receive any Money for this Office, so I find none that does expressly warrant them to demand any : And, therefore, they must ground their Demand on some immemorial Custom or Prescription for so doing. In the *Saxon* Times there was a Funeral Duty to be paid called, *Pecunia Sepulchralis* & *Symbolum animæ*, and a *Saxon Soulshot* ; which was required to be paid by the Council at *Ænham*, and enforced by the Laws of *Canutus* ||, Cap. 14. and was due to the Church, unto which the Party deceas'd did belong, whether he was there bury'd or not. But some take this for the Foundation of *Mortuaries*, but then the Money must be turn'd into Goods : For in *Glanvil's* Time, a Freeholder was allow'd to make his Will of all other Things, provided that he gave his first best Chattel to his Lord, and his second to the Church. And this was not originally *pro animâ defuncti*, as *Lindwood* * thinks, from the Modern *Canonists*. For others have said, that this was in Lieu of Tithes subtracted, and Oblations not duly paid : But of this I shall observe hereafter, when I come to speak of *Mortuaries* ; for I apprehend a *Mortuary* and the *Pecunia Sepulchralis* to be two distinct Things.

It is said in the *Canon* Law, that if a Person dies Intestate, and does not in his Life-time make choice of a Place to be bury'd at, he shall be bury'd in the Sepulchre of his Ancestors ; provided, his Parish-Church has a Canonical Portion of that which he leaves behind him for Church-Burial †. For tho' Pope *Leo* the III^d, made a Decree, that every one should, according to the Custom of the antient Patriarchs, be bury'd in

* Myns. in
§. 9. J. 2. 1.
13 Q. 1. 1.

|| 13 Q. 2.
22.

† X. 3. 29.
13.

|| 13 Q. 2.
15.

* 13 Q. 2.
22.

† 13 Q. 2.
17.

|| Spelm.
Con. p. 517.

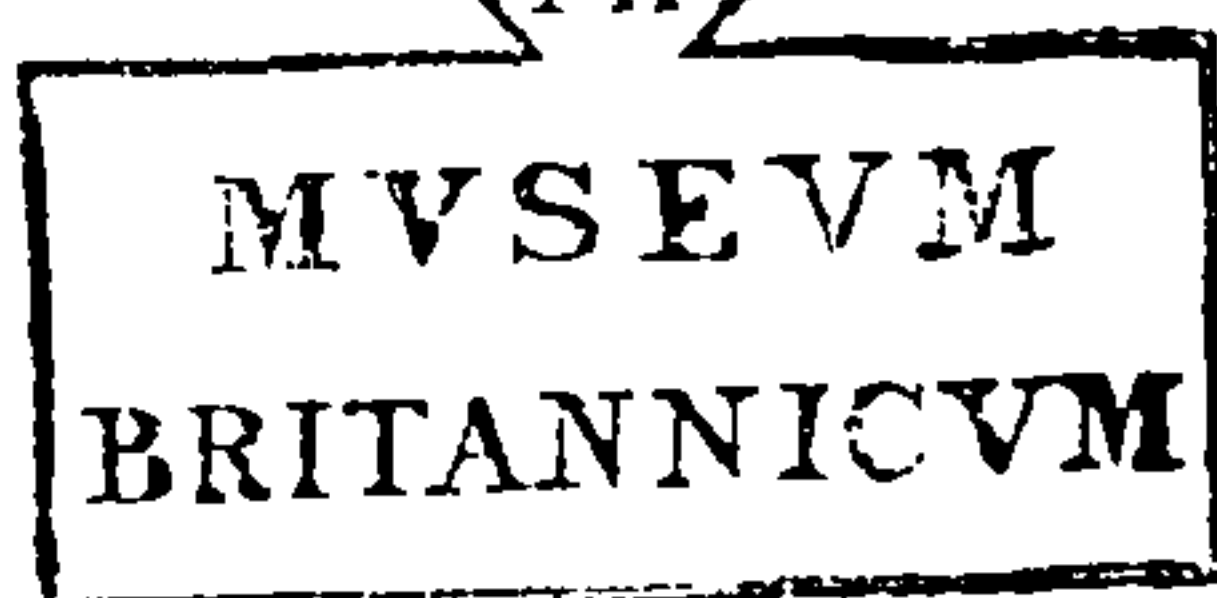
* Lib. 1.
Tit. 3. c. 1.

† X. 3. 28. 1.

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¶ vi. 3. 12. 7. the Sepulchre of his Parents ||; yet no one was to be deny'd to chuse a Place in his Life-Time where he would be bury'd, or where he would bury another: But because the Labourer is worthy of his Hire (says that Pope) he order'd, that the third part of his Funeral Substance should be paid to that Church wherein he ought to be bury'd, if he did not make choice of being bury'd elsewhere; and if this was paid, he was to be bury'd where he pleas'd. And this was decreed under the Pain of Excommunication. So that now the Clergy were grown very high in their Demands. But this was alter'd, and only a fourth Part of his Substance did belong to the Parish-Church where such Parishioner was bury'd, and not to the Church in which Parish the Person died: and then this Portion was due on his Election of Sepulture. But if a Parishioner of a Cathedral Church was bury'd elsewhere, the Canonical Portion was due to the Chapter of such Cathedral out of his Funeral Estate, or Goods left to the Church on the Account of Burial*. For a Cathedral sometimes has a distinct Parish which has Parochial Rights as well as an inferior Parish Church; and where a Cathedral Church has a distinct Parish, the Parochial Rights belong to the Chapter, and not to the Bishop. The Distinction which the *Canonists* make in Receiving this Portion, is, that it is paid in respect of their Labour and the Journey they take to the Church, not in regard to divine Service perform'd on that Occasion, since that would be Simony †.

I have said, that nothing ought of *common Right* to be demanded for the Burial of any one in consecrated Ground, as the Church or Church-yard is; yea, nothing ought to be demanded for the Burial Service ||, since a Clergyman is obliged hereunto in virtue of his Benefice; but is otherwise, if he be not obliged in virtue of his Benefice; but even then he ought not to covenant and bargain for any Thing: because, according to the *Canon Law*, it would even then be Simony; since Burial (says the Law) ought not to be sold. But though a Clergyman cannot demand any thing of this kind for Burial, yet Laymen (says the Law) may be compelled to observe pious and laudable Customs. And a Person, that sues to have a Custom observ'd herein, ought to use a great deal of Caution in his Suit: for if he sues on the Account of the Soil, or on the Burial-Office, he shall lose his Suit*; nor shall it be any Advantage to him then to alledge a Custom therein. But if he alledges, That it has been a Custom for every Person dying to leave so much to be paid to the Priest or to the Church, or that so much has been anciently paid thereunto for every Person deceas'd, he shall prevail in his Suit ||.

Though, by the Papal Law, the Person who buries a foreign Parishioner dying Intestate in any other than the Parish-Church of the City or Place, where the Person died, shall be oblig'd to restore his Bones, and to compound for the Benefits which he has taken to himself on that Account †; yet Scholars and Strangers dying in their Travels may, and ought to be bury'd in the Parish where they die, or else be carry'd to the Cathedral Church for Burial; for as that Church extends its Power all over the Diocess, it ought to admit such Persons unto Burial. But the Abbot || makes a Distinction in respect of Scholars, who come into a Parish with a Design of staying there for some time, and such as come thither only with a Design of passing thro' the same and not tarrying: For in the first Case they ought to be bury'd in the Parish Church where they die; but in the second, they ought to be carry'd to the Cathedral Church, as aforesaid.

By the *Canon* Law, if a Clergyman knowingly and presumptuously buries any one that is an Heretick, or a Receiver or Favourer of Hereticks, in sacred Gound, he incurs the Punishment of Excommunication: But he, who buries any of the aforesaid in a Profane Place, does not incur the said Punishment, tho' he should (perhaps) at the Time of their Burial, recite the Prayers of the Church, or use any other Ecclesiastical Ceremonies thereat; since this is not called Church-Burial. But a Clergyman is not forbidden to bury an Heretick, or a Favourer thereof, under the aforesaid Penalty, unless he has been denounced as such; because, since the Council of *Constance*, we are not oblig'd to avoid any Person under a Pretence of any Sentence or Ecclesiastical Censure generally pronounced, either by the Law itself, or by the Ministry of Man. But all and every Person, that administers Ecclesiastical Burial to a Person, knowing or believing him to be an Heretick, or an Encourager of such, shall, according to the Papal Law, *ipso facto*, incur this Censure of Excommunication. Hence it follows (say the *Canonists*) that not only he, who *more Fidelium* attends the Body of an Heretick to the Church as a Priest, and buries it there, is liable to this Censure; but even he, who carries an Heretick's Body that is found in the Field, to any Church or Church-yard, and buries it there. For even such an one is said to give Church or Christian Burial to an Heretick.

As to the *Civil* Law, in respect of Burial, we find two *Prætorian* Edicts relating to the Right of *Sepulchres*†. The first is touching the Religious Observation, and the Expences of Funerals: And the second is about the Bearing or Burying the Corpse of the Person deceased. And, by this Law, if a Father has been at any Expence for his Daughter's Funeral, he may immediately have an Action against the Husband, in whose Hands the Dowry was, without waiting for any Time in Law, which was given him for the Restitution of such Dower: For by the second Edict of the *Prætor*, an Action (in *Latin* stiled *Actio Funeraria*||) is given to him, that has expended any Thing on the Account of another's Funeral, against those to whom it belong'd to discharge the Funeral Expences. By the Novel Constitutions, Burial may not be inhibited or deny'd to any one; nor can a dead Corpse be arrested on any Account, no, not so much as for Debt*. *Tancredus* says, That in *England*, Sepulture, or Burial of the Dead, may be deferr'd and put off for the Debt of the Person deceased†: But this is not valid according to the *Canonists*, nor according to the present Laws of *England*. For though a Debtor may in his Lifetime be sometimes imprison'd for Debt||; yet his Corpse or dead Body shall, by Death, be freed from any such Imprisonment, because Death sets all Things free. Nor may the Body of any Debtor be detain'd and lie unbury'd above Ground (at the Suit of his Creditors) as a certain kind of Pledge or Pawn, till such Time as the Debt is entirely paid: for it has been often determin'd, that a Man's Debts ought not to be any hindrance to his Burial, since Burial ought not to be deny'd to the Corpse of any Debtor, whether he be rich or poor. Yea, if a Creditor should appeal, in order to hinder the Burial of his Debtor's Corpse, his Appeal (says that Law) ought not to be receiv'd, since the Business of Burial requires a quick Dispatch, nor does it admit of any delay tho' the Debt be entirely Liquid. For some have thought, that the Debtor's Corpse, if the Creditor demands the same, may be detain'd without Burial, as aforesaid. But this Opinion is inhuman and contrary to Christian Charity, and, as yet, not suitable to the Manners of *Barbarians* themselves; and, therefore, 'tis evidently condemn'd by many Persons. 'Tis reckon'd impious among

† D. 11. 7.
1. & c. D. 11.
8. 1.

|| D. 11. 7.
12.

* Nov. 116.
c. 5. Nov.
60. 1. 1.
† In c. 25.
X. 2. 28.

|| X. 3. 23. 3.

Hea-

* Ch. 7.
v. 33.

Heathens, and much more so among Christians, to keep a poor Debtor's Corpse without Burial, since it can in no wise discharge the Debt. For natural Reason, as well as divine and human Laws, will not suffer Burial to be deny'd to the Corpse of any deceas'd, unless it be for some Cause, relating to the Advantage of the State; for 'tis written in *Ecclesiasticus* *,
For the dead detain it not: That is to say, give Burial freely thereunto without Reward, and hinder not the same.

¶ C. 3. 44.
14.

It was likewise forbidden by an Edict of the *Prætor*, for any one to remove or transfer the Body of any deceas'd Person from one Place to another, without the publick Authority of the Emperor ¶. And hereupon we read, there formerly happen'd a great Sedition in the State; for that *Macedonius* an *Arian* did, by his own Authority, and against the Will of the greatest part of the People, remove the Coffin, wherein the Body of *Constantine the Great* was laid, out of the House where this Coffin stood, into the Church: which Thing the Emperor *Constantius* resented very highly, tho' he himself was an *Arian*, not only because there were several Persons killed in this Sedition, but because *Macedonius* had presum'd to remove his Father's Body without advising with him about it †. Nor by the *Civil* Law can a Corpse be bury'd in another's Tomb or Sepulchre, contrary to the Will of the Proprietor; and the Person acting contrary hereunto, is liable to an Action on the Case ¶.

† Socrat.
Hist. lib. 5.
cap. 32.

¶ D. 11. 7.2.

By the Law of *England*, the Freehold of the Church is in the Incumbent to some Purposes; and so is the Freehold of the Church-yard: and, therefore, none can be bury'd in the Church without his Leave, (for the Ordinary, or Church-wardens cannot license it) but they may in the Church-yard, because it is the burying Place of the Parishioners; And tho' the Parson gives Leave to bury in the Church, yet something may be due to the Church-wardens (by Custom) for burying there. *Edward Topsal*, Clerk and Parson of *St. Botolphs* without *Aldersgate*, and the Church-wardens of the same, libelled in the Ecclesiastical Court against Sir *John Ferrers*, Kt. alledging, That there was a Custom within the City of *London*, and especially within that Parish, that if any Person dies within that Parish, being a Man or Woman, and be carry'd out of the said Parish and bury'd elsewhere, there ought then to be paid to the Parson of this Parish so much, if he or she were bury'd in the Chancel elsewhere, and so much to the Church-Wardens, being the Sums that they alledg'd were by Custom payable to them, for such as were bury'd in their own Chancel. And then alledging that the Wife of Sir *John Ferrers* died within the said Parish, and was carry'd away and bury'd in the Chancel of another Church, and so demanded of him the said Sum; whereupon Sir *John Ferrers* pray'd a Prohibition, and it was granted: For it is an unreasonable Custom, that a Man should be forc'd to be bury'd in the Place where he dies, or else to pay for it as if he were, and so upon the Matter to pay twice for his Burial *, which is nothing less than Extortion in the Parson that demands it and does not officiate. Nor is that Custom less against Reason, that he, that is no Parishioner, but only passes through a Parish in order to his Burial, or lies for a Night in an Inn, should have paid for his Passage to the Priest that offers the Corpse Burial.

* Hob. Rep.

† 30 Car.
ch. 3.

By a Statute in *Charles* the II^d's Reign †, the Minister of every Parish is to keep a Register of all Burials, and of *Affidavits* of Persons bury'd in Woollen; and these *Affidavits* must be brought within eight Days after the Burial, otherwise the Minister must enter a *Memorandum* of the Default, and of the Time when he gave Notice thereof to the Parish Officers, which Notice must be given in Writing under the Minister's Hand; and tho' this may be done at any Time, yet the best way

way is soon after the eight Days are expir'd; and if the Minister makes Default in any of these Particulars, he shall forfeit five Pounds.

That Matters relating to Burial, belong to the Cognizance of the Ecclesiastical Court, is very plainly declared by a Consultation in the *Register* *. Touching the Place of Burial, a Parson, to an Affize brought against him for a House, pleaded, That he was Parson of *P.* and that to be Parcel of his Church by Time immemorial, and that there had been burying of dead Bodies there †: Whereupon *Persey* was of an Opinion, that the Temporal Court ought not to take Cognizance thereof. And as to the Church-yard, it is a good Plea against the Jurisdiction of the Temporal Court, to plead, that the Land is the Parson's Church-yard ‖. And *Bracton* (I think) alledges the true Reason hereof, because it is dedicated to God: For, says he, *Negotium terminabitur in foro seculari, si de Feodo Laico agatur, nisi fuerit dedicatum & deo sacratum; sic enim res efficitur sacra: Hoc autem dici non potest de re in liberam & perpetuam Eleemosynam datâ* ‡. For though a Thing be given in *Frank-Almogne* to an Ecclesiastical Person, yet it still remains of Lay-Fee, and is not said to be dedicated to God. Therefore a Trespass done on a Parson's Glebe-Land (which is a Freehold) cannot be try'd in a Spiritual Court *: But 'tis otherwise, according to *Fitz-Herbert*, Tit. *Prohibition* 26. in a Trespass done in a Church-yard: For if a Man takes Trees that are growing in a Church-yard, the Parson may sue for them in Court Christian ‖. *Sed Quære.*

* Reg. 50. b.

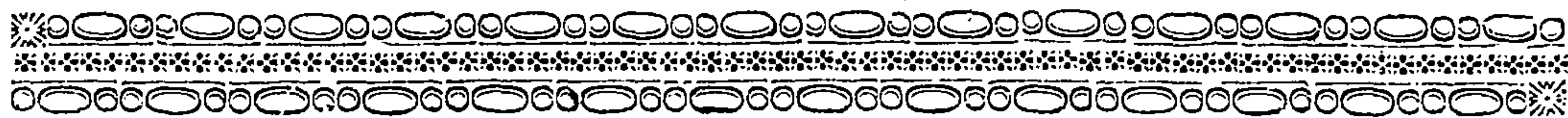
† Lib. 44. Aff. pag. 8.

‖ 44 E. 3. Lib. Affiz.

‡ Bract. lib. 5. cap. 16.

* 19 H. 6. 20.

‖ 17 H. 3.



Of Calumny, and the Oath thereof.

TH O' the Word *Calumny*, when it is extended to *Judicial* Matters, often denotes a malicious Vexing of any Person with false, vain, and fraudulent Law-Suits †, whether it be by way of Action or Exception, or by a malicious Procrastination and Delaying of a Suit; yet I shall here use it as it signifies an Oath, which the Plaintiff and Defendant are both obliged to take next immediately after Contestation of Suit, according to the general Rules of Practice ‖: Because it relates to the whole Cause, and was introduced in favour of the publick Welfare, not only to avoid Frauds and litigious Suits, but likewise to hinder the Truth of a Cause from lying conceal'd *: and, therefore, a Custom directing the contrary, is deemed unreasonable and invalid, as being derogatory to the Advantage of the Publick Weal. But by the Perverseness of Man, according to *Socinus* ‡ and others, such a Custom may now become valid, since *Litigants* in this Age, do rather take this Oath with a Design of committing than avoiding Calumny; it being every where taken with so much Levity and Readiness, both by the Parties themselves, as well as by their *Judicial* Proctors, that the Religion of an Oath plainly passes into contempt ‖.

† D. 8. 13. 1. 1.

‖ X. 2. 7. 7.

* C. 2. 59. 2. 4.

‡ Inc. 5. X. 2. 7.

‖ Bald. in l. 24. C. 8. 45. n. 1.

This Oath is sometimes stiled *the Oath of Malice*, and heretofore could not be refused, but now it may (according to some Mens Opinion) when the Party to whom it is tendred, has founded his Intention on some publick Instrument: And it ought not only to be taken in Causes of the

- * vi. 2. 4. 2. *first Instance*, but also in Causes of *Appeal* and *second Instance* *. And though, according to the general Rule of Practice, it ought to be taken on the Motion of either of the Parties immediately after Contestation of Suit, as aforesaid ; yet sometimes it may and ought to be taken even before
- † vi. 2. 4. 1. Contestation of Suit, as on a *Dilatory* Exception and the like † : Nay, if this
- X. 2. 7. 7. Oath be taken at any Time afterwards, how long soever it be, it does not
- ¶ vi. 2. 4. 1. invalidate the Process ; no, tho' it should be wholly omitted ¶. But the Oath of *Calumny* may be *tacitly* remitted, which is done when 'tis not *eo ipso*
- * vi. 2. 4. 1. demanded by either of the Parties ; yet it cannot be *expressly* remitted * ; because such a Pact or Agreement would open a Way to Calumny and Malice ; and would, consequently, carry along with it much Mischief and dishonest Dealing in Law-Suits. If the Plaintiff shall refuse to take this Oath, he shall forego his Action or Cause of Suit ; and if the Defendant shall refuse it, he shall be condemn'd as a Person confessing the Cause of
- † X. 2. 7. 7. Action †. The Plaintiff herein swears, That he does not commence his
- §. Pæn. 1. Suit thro' Malice, but with an honest Intent, and not with a View of *Calumny*, believing his Action to be just ; and the Defendant swears, That he will not propound any Exception *animo Calumniandi*, with a Design of vexing the adverse Party, but only such as may be for his just
- ¶ C. 2. 59. 2. Defence ¶. And thus *Calumny* is, when any one does *ex certâ Scientiâ vel Dolo* bring an unjust Action, or maliciously implead another in Judgment ; or when the adverse Party does in this manner propound any unjust Exception, for the sake either of prolonging the Suit, or defaming his Ad-
- * C. 2. 59. 1. versary *.

The *Canonists* say, that this Oath was introduced by the Law of God, and for a Proof hereof, they quote the 22d Chapter of *Exodus* †, where it is said, ' If a Man shall deliver unto his Neighbour Money or Stuff to keep, and it be stolen out of the Man's House, if the Thief be found, let him pay double : But if the Thief be not found, then the Master of the House shall be brought to the Judges, and examined on Oath, whether he has put his Hand unto his Neighbour's Goods.' But, according to *Rebuffus*, this Oath of *Calumny* is not observ'd in *France* : And 'tis the same Thing, according to the Usage and Custom of *Saxony*. In *Holland* and *England*, tho' the same be not often administred, yet it is not entirely abolish'd and grown into disuse in their Courts of Law : But in *England*, Proctors are not allow'd, but prohibited by King

¶ Can. 132. *James's* Canons ¶, to take this Oath *in Animam Domini*, as Advocates and Proctors are obliged to do in *Popish* Countries, according to an Imperial Constitution * enacted for this End and Purpose. Indeed heretofore it was a Doubt, even in *Popish* Countries, whether a Proctor might take this Oath, but now 'tis determin'd that he may, according to a Text of

† vi. 2. 4. 3. the *Canon* Law †. And in pursuance hereof, Oaths of this kind are daily taken in the *Imperial* Chamber and elsewhere, by Proctors *in Animam Domini* ; though a general Mandate or Proxy is not sufficient to this

¶ vi. 2. 4. 3. End, but a special Proxy is required hereunto ¶. In the *Imperial* Chamber, if this Oath of *Calumny* be demanded by the Party, it may not be omitted : For tho' Nullities of the *first* and *second Instances* are not regarded ; yet a legal Process, and a Judicial Order is required, though it be a supreme Court of Judicature. Hence it comes to pass, that if the Oath of *Calumny* be there *Judicially* demanded and not taken, and it be concluded in the Cause by the Parties on both sides, the Judge may, *ex officio*, rescind this Conclusion thus made ; and by an interlocutory Order, enjoin the Party to take this Oath as demanded, under pain of Law : For the Judge may, by virtue of his Office, even after a conclusion in the

* X. 2. 34. 32. Cause, demand this Oath to be taken *.

Though

Though a Judge should be impower'd to proceed in a Cause in a summary Way, & *sine figurâ Judicii*; yet according to *Bartolus*, he cannot remit this Oath of *Calumny*; and the Text in the *Clementines* proves this very clearly: For both the *Civil* and *Canon* Law, enjoins it to be taken in every Cause both Civil and Criminal. But this (I think) admits of a Limitation; for we have an express Text in the *Canon* Law, which says, That this Oath is not administred in spiritual Causes touching Churches, Tithes and Things Spiritual *, because such Causes are ended not by any rigorous Form of the *Civil* Law, but by a Canonical *Equity*.

* X. 2. 7. 2



Of a Canonry, and the several sorts of Canons in a Cathedral or Conventual Church.

A *Canonry*, in the Sense of the *Canon* Law, is an Ecclesiastical Benefice in some Cathedral or Collegiate Church, which has a Prebend, or a stated Allowance out of the Revenues of such Church commonly annex'd to it: For he that has a Canonry, either really has at present, or (at least) may expect to have on the next Avoidance, a Prebend laid to his Canonry; and in respect of such Prebend he has *Jus ad rem*, though not *Jus in re*, as the Books phrase it ||. For in some of the said Churches there are *supernumerary* Canons, (whom we falsely call *Prebendaries*) which do not receive any of the Profits or Emoluments thereof, but only live and serve there on a future Expectation of some Prebend: But in other Canonries, which are included within the Number of such as do receive a Benefit from thence, the Canonry has of Necessity a Prebend, and a Prebend of Necessity has a Canonry belonging to it, whether the Prebends be distinct or inseparably annex'd to their Canonries or not; and in these a *supernumerary* Canon, when he obtains a Prebend, ceases to be a *supernumerary*, and becomes a *numerary* Canon †.

|| vi. 3. 7. 8.

The Persons that do enjoy these Canonries are stiled *Canons* from the *Greek* or *Latin* Word *Canon*, which sometimes signifies a List or Register of the Clergy, because such Persons Names were entred into the Register or Matriculation-Book of the Church; or (as others think) because they do receive a Portion or stated Allowance out of the Treasury of the Church; which Allowance was, by the ancient Lawyers, called a *Canon*, and not a *Prebend*, as now it is: And as a Canonry (according to *Innocentius*) is much more honourable than a *simple* Benefice, these Canons are stiled Clerks of the *first Degree*, and other beneficed Men, Clerks of the *second Degree*. Yet these Canons even of a Cathedral Church have not properly a Dignity ||, though a Dignity be annex'd to their Canonries: but in a large Sense, as they are collateral to Bishops, they are Men of great Honour in the Church, and thus they have a Dignity *; and if there be not a Custom to the contrary, they have Precedence of Abbots and all other Dignitaries in a Cathedral Church, and walk before them in all Processions, because they are not divided from the Bishop. There are some Canons that officiate in respect of the more solemn Part of Divine Service, which they ought to perform as Canons of a Ca-

† Ægid. Bellam. Conf. 34. n. 4.

|| Dd. in c. 11. vi. 1. 3.

* Felin. in c. 28. X. 1. 29.

Cathedral Church; and as these Persons are oblig'd to perform the Communion Service, and other solemn Parts of Divine Worship, in their turns Weekly *, they are sometimes called *Hebdomadal* Canons, and are in one Degree before *simple* Prebendaries. In the *Romish* Church, there are some that are stiled *Regular*, and others that are term'd *Secular* Canons. The *Regular* Canons are such as are placed in Monasteries, and hence it is forbidden unto them to hold a Place in two Monasteries †; and these Persons have a Right of voting in their Chapter ‖. *Volaterranus* informs us, that the Abbot *Arnulphus* founded the Order of *Regular* Canons about the Year of our Lord 1066: But *Munster* says, that the Canons of *Spires*, *Worms*, and *Mentz*, laying aside the Profession of a Monastick Life, became *Secular*, and began to live asunder about the Year 966. And all those are reckon'd among *Secular* Canons, that are not of that Kind which we stile *Regular*; as there are many in *France* and other Countries. There are also in *Popish* Countries, Women which they call *Secular* Canonesses, living after the Example of *Secular* Canons, which do not renounce their Properties, or make any Profession*; but the Council of *Vienna* did not approve of these, and calling them *Biguns* †, commands them to chuse some Monastick Rule or Order of Life.

The supernumerary Canons were those unto whom the Pope gave a Canonry, and the first Prebend that should become void; but yet they could not, by their own Authority, take possession of a vacant Prebend ‖: And of these Supernumeraries there are two *Species*, one of *Law*, and the other of *Fact*. That of *Law* is, when the Pope commands a Chapter to admit such a Person as a Canon or Friar; and, then they conferring the Right of a Canonry on him, he is by such Admission made a Canon. The other is, when the Pope creates a Canon beyond the Number limited, and commands the Chapter to assign unto such Canon a Stall in the Choir and Place in the Chapter*. These Supernumerary Canons, if they have a Stall in the Choir, and a Place in the Chapter, ought to be present at all Elections, Alienations, and other Debates, as other Canons are, unless there be a Custom to the contrary †. And if an Archdeaconry ought to be conferr'd on a Canon, it may be conferr'd on a *supernumerary* Canon, having a Stall in the Choir, and a Place in the Chapter, according to *Castrensis* ‖; but this only proceeds, when he is voluntarily installed, and not when he comes by a Papal Mandate, I think.

Canons are Collaterals unto Bishops, as Cardinals are to the Popes; and, therefore, as Men cannot be Cardinals without being in Orders; so neither can Men be Canons of a Church, without being in Orders*: For the Number of Canons ought not to be supply'd by Laymen †. But though a Canon, that is not in Holy Orders, cannot be a Member in any Cathedral or Collegiate Church, or have a Voice in the Chapter; yet a Canon, promoted to Holy Orders before he is of a Lawful Age for the susception of Orders, shall have a Voice in the Chapter, because this Right and Power principally flows from the Canonry itself. At this Day, by a Canon of the Council of *Trent*, none can be chosen but such as are in Priests, Deacons, or Sub-deacons Orders; and hereby they are obliged to be resident and officiate in their Churches, under the Penalties ordained by that Council ‖. For antiently Persons might be Canons of a Church, if they were Clerks in the *Lesser* Orders. In respect of Canons and Prebendaries, the same is enacted by a Statute in *Charles* the II'd's Reign here in *England*, excepting the Law-Professor at *Oxford*, who may be a Layman*. But (notwithstanding the Law of Residence as aforesaid) if a Canon of any Church shall absent himself from thence with or in the Service of his Bishop, he shall receive the Profits of his Prebend, tho' there should be a

Con-

* X. 3. 5. 25.

† X. 3. 36. 9.

Gloss. in

c. 2. Cl. 1. 9.

‖ X. 1. 6. 47.

* Cl. 3. 10. 2.

† Cl. 3. 11. 1.

‖ Fed. de
Sen. Conf.
290. n. 5.* D. Conf.
n. 5.† Fed. de
Sen. d. Conf.
n. 5.‖ Conf. 366.
lib. 1.‖ Sess. 24.
c. 12. de
Reform* 14 Car. 2.
cap. 4.

Constitution of such Church to the contrary; which was the Case of two Canons in the Church of *Melda*, and this Constitution was strengthened with an Oath by the Apostolick See †.

† X. 3. 4. 15.

The Bishop, with the Consent of the Chapter, may restrain the antient Number of Canons, and Prebendaries, and out of many Canonries and Prebends, constitute a lesser Number: for it tends to the Disparagement of the Church (say the *Canonists*) that the Canons, who constitute and make one Body-Politick, should not be able to support themselves in a suitable and decent Manner on the Rents of the Church. So that one lawful Cause for restraining the Number of Canons and Prebendaries in any Church, is, when the Rents and Revenues of the Prebends and Canonries are not enough to support the Prebendaries and Canons in a fit and convenient Manner: For there ought to be only so many Canons and Prebendaries in a Church, as may handsomely live on the Rents and Revenues thereof.

The Collation of Prebends and Canonries in a Cathedral Church does, according to the Opinion of several Persons, belong of common Right to the Bishop and Chapter together ||; and wherever the Bishop and Chapter have such Collation *simul & conjunctim*, neither the Bishop alone, nor his Chapter alone, can collate thereunto: But *Ægid. Bellamera* * is of a contrary Opinion, and says, that the Bishop has the sole Collation unto these Preferments. With us here in *England*, sometimes the King, and sometimes the Bishop sole Collates thereunto; and in some Cathedrals the Chapter chuse their Canons. But of *common* Right, in secular Collegiate Churches, vacant Prebends and Canonries are dispos'd of by Way of Election and Presentation made by the Dean and Chapter; and it belongs to the Bishop to give Institution hereunto †; unless there be a Custom to the contrary, which ought to be regarded.

|| Fed. de Sen. Conf. 232.
* Conf. 10. n. 58.

† Fed. de Sen. Conf. 34. per tot.



Of Cancellation, or Cancelling of Deeds.

TH O' *Cancellation* may more properly be inserted in the Title of Instruments; yet I shall give it the Reader in this Place at large, because it may serve to explain what comes afterwards under the aforesaid Title of Instruments, and that of Last Wills and Testaments. Now *Cancellation*, according to *Bartolus* ||, is an expunging or wiping out of the Contents of an Instrument by two Lines drawn in the manner of a Cross: But, notwithstanding the Authority of this Definition, there are several ways of cancelling a Deed or Instrument in Writing. And the first kind of *Cancelling* is made by Word of Mouth; and a second is made by some Act done, which has a much greater Power and Operation in Law, than that which is made by word of Mouth only; especially when the whole is made in such an effectual manner, that the Instrument cannot be read. The *Cancelling* of an Instrument, or Last Will and Testament, which is made by a Notary on some Request, is effected by the making of some other Instrument or Testament, or in such a manner whereby the first Instrument is not torn; because such an Instrument ought to appear as a cancelled Deed *: And 'tis the same Thing, if such *Cancellation* be made by the Judge's Decree; because the Notary may not then tear an Instrument thus cancelled. The *Cancelling* of an In-

|| In l. 1. D. 28. 4. 3.

* Alex. Conf. 74. lib. 1.

* Conf. 305.
lib. 4.

† Bald. ut
supra.

¶ Bald. ut
supra.

* Alex. conf.
14. n. 17.
lib. 6.

† D. 28. 4.
1 & 2. &
Dd. ibid.
¶ Gloss. in
l. 1. D. 28. 4.

* Zaz. Conf.
2. vol. 1.
n. 29.

† Vasc. de
Succ. l. 2.
§. 15. Requis.
17. n. 61. 62.

¶ Dd. in l. 1.
D. 28. 4.

Instrument formally made by Debtor and Creditor, discharges the Debt; and that is call'd a formal *Cancelling* of a Deed, according to *Baldus* *, when it is made upon a good Consideration, where the Consideration adds Strength to the *Cancelling* thereof: And this also proceeds in a *Cancellation* which is not formally made, when it appears, that the same was made by the Creditor, for it shall discharge the Debtor †; and such Instrument is presum'd to be cancelled by the Creditor, if it be found cancelled in his Custody, and he was deem'd a Man of Care and Caution in other Matters. But if such Instrument be found cancelled in the Custody of the Debtor, unless it be upon a formal Consideration, it does not discharge him, if it may be proved that the Instrument was intrusted to his Keeping; for it shall be presumed, that he himself cancelled it ¶. But in a doubtful Case, if an Instrument be found cancelled, it is presum'd to be cancelled by the Will and Consent of the Creditor, whether it be found cancelled in the Keeping of the Debtor, or in the Hands of any other Person *. If it be written on the Back of an Instrument, or of a Bill of Hand-writing, that Part of the Debt or Legacy is paid, it is a *Cancellation* as to that Part of the Debt or Legacy, and the same is presum'd to be made by the Creditor's Consent.

He that cancels or defaces a Testament, is thereby deem'd to have a Will and Meaning of taking away the Force and Virtue thereof †; which Will, in this respect, ought to observ'd as a Law: and so the Testament cancelled and defaced, is to be adjudged void ¶. And that this *Cancelling* or Defacing of the Testament being objected destroys the Force thereof, is suppos'd to be extended to those Testaments Nuncupative, that are afterwards reduced to Writing: so that if a Man first makes a Will by word of Mouth, then causes the same to be written, and afterwards willingly cancels or cuts the same Writing or otherwise defaces it, such Testament is then as if it had never been written at all *. Nor does it avail a Man to prove the same by Witnesses: for tho' Writing does not belong to the Substance of the Testament, yet by *Cancelling*, the Testator is presum'd to have repented of the Making of it, and to have revoked the same †. Moreover, tho' no Cause of Unworthiness appears either in the Executor, or any Legatee, which could induce the Testator to disappoint them of their Hope; yet by *Cancelling* the Will, the same shall be void; and the Testator is presum'd to have done it in Favour of them that are to have the Administration of his Goods after he dies Intestate ¶. And thus much of *Cancellation* for the present, till I come to speak of Instruments and Last Wills and Testaments.



Of Cardinals, their Rise and Power in the Church.

ABOUT the Year 817, when Pope *Pascal* the 1st, was advanced to the Papacy, the Priests of the several Churches in *Rome*, in order to have a nearer and closer Correspondence with the Pope, and as well to qualify themselves for electing him, as to adorn their Power with a more eminent Title, began to call themselves *Cardinals*; and arrogated so much to themselves, especially having excluded the People of *Rome*

Rome from any Voice in the Election, that a Pope was seldom chosen, unless it was out of their Number : Whereupon, after the Death of *Pascal*, *Eugene* the II^d, was created Pope, from the Title of *Cardinal* of *Sancta Sabina*. And thus in Process of Time, this Order of *Cardinals*, which was unknown to the Christian Church in former Ages, became an Order erected in the Church of *Rome*, superior unto Bishops themselves : For at first they were only esteem'd and reckon'd among the Number of Priests and Deacons, till after the tenth Century, when they began to exalt themselves above their Degree. But notwithstanding this, they were accounted inferior to Bishops till the Year 1200, or (others say) till the Year 1305, when *Clement* the Vth, was Pope ; since which Time they have so far advanced themselves, that they set themselves above Kings, or (at least) make themselves equal to them, and retain Bishops themselves as Servants in their Houses : and it will be impossible to cleanse and reform the *Romish* Church (that *Augean* Stable of Filth and Nastiness) till both Cardinals and Bishops are brought to their former Ranks and proper Places in the Church.

Heretofore none but Cardinal-Priests, and Cardinal-Deacons, could chuse the Pope ; for as yet a Cardinal could not be a Bishop, because a Bishoprick requires continual Residence ; and, as a Cardinal is the Pope's Assistant, and his Presence always required in Council, he cannot reside on his Bishoprick, which was once looked upon as a very great Crime not to do. Nor ought any Person whatever to stand for the Papacy, unless he advanced himself thereunto by distinct Degrees, as Cardinal-Priest, or Cardinal-Deacon : And, by the *Canon* Law, if a Pope was inthron'd without a Canonical Election of Cardinals, and the Presence of Religious Clerks, he was not to be deem'd Apostolical, but *Apostatical* * ; and by these Cardinals the Pope governs his Territories. But tho' the Number of Cardinals, by a Constitution of Pope *Sixtus* the Vth, was limited to Seventy, according to that of *Christ's* Disciples ; yet Popes, by a Dispensation, do sometimes exceed this Number, and sometimes they do not come up to it.

* 79 Dist. c. 1.

Among these Cardinals, we find some Persons descended from the chiefest Families in *Europe* : and among them, to encourage their Fidelity to him, the Pope divides the four chief Offices of State. The first is that of *Great Penitentiary*, who, together with his Counsellors, prescribes the Measure of *Penance* to such Persons as make a Confession of their Sins, after he has consider'd and ponder'd the Matter well ; that is to say, after he has compounded with them for an easy *Penance*. There are other Inferior *Penitentiaries*, that are subject to him ; and do either absolve the Persons Confessing, or else do, by concealing their Names, remit them to the supreme Tribunal of the *Great Penitentiary*, for a Punishment of their Sins, according to the greatness of their Crimes. The second great Officer is that of the Pope's *Vicar*, who has the Care of Divine Worship, and of the Spiritual Government of the Church. The third is that of his *Vice-Chancellor*, for he reserves the Office of *Chancellor* to himself. And the fourth great Officer is that of the Pope's *Chamberlain*. He has other Ministers under him, as all other Princes have : But of these I shall not discourse.

These Men are stiled *Cardinals* †, because (according to some Men's Opinion) they are serviceable to the Apostolick See, as an Axel or Hinge (in *Latin* called *Cardo*) on which the whole Government of the Church turns ‥. Yet they may more properly be so stiled by way of *Adjective*, because they have from the Pope's Grant the Hinge and Management of all

† Gloss. in c. 4. extra. 3. v. *Cardinalibus*.

‡ 22 Dist. c. 2.

all the Affairs of the *Romish* Church, according to *Sylvius* on these Words of *Virgil*, viz.

—— *Haud tanto cessabit cardine rerum.*

* X. 5. 33.
23.

They are said to be part of the Pope's Body in the same Sense as Senators are said to be Part of the Prince's Body: And sometimes they are stiled the Pope's Brethren, and Co-adjutors, by whose Advice he governs and judges the *Popish* Part of Mankind. And thus the Church has first its Senate or College of Cardinals; out of which, on the Pope's Death, another Pope is chosen as from his Body: And, therefore, as these Men are said to be the Pope's Companions, they are of the greatest Dignity in that Church; and are, according to *Job. Andreas*, stiled Children of the first Degree to the Pope, who is the only Spouse of the Church, if we may believe the *Romanists*. In all Embassies and Legations, by a Decree of the Council of *Lateran**, they bear the Arms of the Apostolick See; and Legates à *Latere* are for the most part chosen out of the Body of Cardinals. The Council of *Basil* prescribed a Form for the electing of all Cardinals many Years ago, but this Form is now laid aside by the Pope's sole Nomination of them: and every such Election, when it obtain'd, was to be made by the Consent of all the Cardinals then present; and by way of Scrutiny; pitching on some honest Man of good Morals, and born in lawful Wedlock, who was a Licentiate or Doctor in some Faculty, of thirty Years of Age, and could not be the Pope's Nephew either by Brother or Sister's Side, or the Nephew of any of the Cardinals. But now as Cardinals are made by the Pope's Will and Pleasure, they may be not only the Pope's Nephews, but are very often his natural Children called by the Name of *Nephews*.

† X. 1. 33.
11.

In Respect of their Titles or Benefices, there are Cardinal-Bishops, Cardinal-Priests, and Cardinal-Deacons; and all these Cardinals, in Respect of their Titles decreed them, have almost all of them Episcopal Jurisdiction; and these Titles are equivalent and borrow'd from the Churches or Diocesses †: And by these Titles the Dignity of the Cardinalship is divided and distinguish'd. The Cardinal Bishops are the Cardinals of *Ostia*, *Præneste*, *Sancta Sabina*, *Velitra*, *Albano*, *Sancto Ruffino*, *Tusculano*, &c. The Cardinals were summon'd formerly by the Pope to meet twice a Week as the Pope's Council, which was called the Consistory; but now upon the Decrease of Business in the Church, once a Week is sufficient. To these Pope *Innocent* the IVth, about the Year 1250, gave the Red Hat, and granted the Honour of riding thro' the City of *Rome* on Horse back ||.

|| Pol. Virg.
lib. 4.



Of Catechism or Catechizing.

Catechism is derived from the *Greek* Verb *καταχέω*, originally signifying the same as in the *English* Tongue. This Preposition *κατα* makes it, being a Verb *Neuter*, to have an *active* Signification: And he is properly said *καταχέειν*, who tells us any thing which he would teach us by way of *Instruction*. And hence it signifies to teach the Rudiments or first Grounds

Grounds of any Art ; but in a peculiar Sense, to teach the Principles of the Christian Religion, which we in *English* call *Catechizing*, as fitly enough derived from the *Greek* Word. Some say, that Heathen Authors never knew the Use of this Word, but they are entirely mistaken ; for *Lucian* uses it in this very sense, *viz.* to teach the Rudiments of an Art*.

* Vid. Steph. Lex.

By Catechizing then, according to the general Notion of the Word, I mean nothing else but the Minister's Instructing the Youth of his Parish in the ways of Virtue and Religion by an easy and familiar Method, which here in *England* was enjoined by the antient Canons of the Church, as may be seen in the 11th Canon of the Council of *Clovesloe*, and in the 6th of King *Edgar's* Canons. Now the Business of Catechizing was instituted for three Reasons. *First*, For the Instructing Youth in the common Articles of Religion and the Christian Faith. *Secondly*, That they may be able to give an Answer, in making a Profession of their Faith. And, *Thirdly*, That they may make a Promise, and give some Surety of the Observance of this Faith. And because a Person of an adult Age *proprium habet peccatum*, and may of himself answer for himself, these three Things, as abovemention'd, are required of him : But as to an Infant guilty of no actual Sin, and who cannot in his own Person be said to believe, these three Things are required from him by his Substitute or Vicar, who answers for him touching his Profession and Observance of this Faith. For it was the Custom of the Catechumens, or Catechized before the receiving of Baptism, to repeat the *Creed* and at every Article the Priest asked them, *whether they believed?* To which they answer'd, *yes I believe* : Wherefore, when they said, *they believe the Remission of Sins*, *Novatian* not allowing the Remission of Sins, abolish'd that Article, and the Confession of Faith, which the Catechiz'd repeated †.

† Cypr. Epist. 70 & 76.



Of a Caveat, and the several Kinds thereof.

A *Caveat* in Law is in the Nature of an Inhibition ; and is an Intimation given to some Ordinary or Ecclesiastical Judge by the Act of Man, notifying to him, that he ought to beware how he acts in such or such an Affair : And this suspends the Proceedings of such ordinary or Ecclesiastical Judge, till such Time as the Merits of such a *Caveat* are determin'd, or (at least) till the same is subducted. Among the several sorts of *Caveats*, these are three, *viz.* The first relates to the Admission of Clerks unto Ecclesiastical Benefices ; the second to the admitting of Persons to Letters of Administration ; and the third has a respect to the Probate of last Wills and Testaments. I shall begin with the first.

If a Patron, before his Church is void, suspects some Pretender or other will contest the Title of his Advowson, it is advisable for him to enter a *Caveat* with the Bishop or his Register in this Form, *viz.* *Caveat Episcopus Winton, nè quis admittatur ad Ecclesiam de H. nisi convocatus vel citatus R. B. &c.* The *Canonists* allow this to be done in the Incumbent's Life-time *quia veretur damnum futurum* ; and that if another receives Canonical Institution after the entry of such a *Caveat*, without Notice given to him who enter'd it, the Institution is void. But 'tis otherwise at the Common Law : For a *Caveat* is only for the Benefit of the Bi-
shop,

shop, and to prevent his being found a Disturber; it does not preserve *Jus illaesum* so as to make all subsequent Proceedings void, because it does not come from any Superior. And 'tis the same in the Spiritual Court as it is in the Temporal, that is to say, it is only an Act of Caution for the better Information of the Judges. In the Case of *Hutchins* against *Glover*, it was concluded that a *Caveat* is void, if it be entred before the Church is void, and upon that Reason only, which implies, That if it had been seasonably enter'd, it should have had its effect by the Common Law. For in the Lord *Zouch's* Case it was said, That if a Church becomes void, and a stranger enters a *Caveat* with the Bishop's Register, that none be instituted to the Church till he be made privy to it, and the Bishop before he has notice of the *Caveat*, institutes a Clerk, such Institution is merely void by the *Canon* Law; for the Register ought to notify the *Caveat* to the Bishop, and his Negligence, in this Case, shall not prejudice him that enter'd it. And if the Bishop, upon notice of the *Caveat*, assigns a Day to him that puts it in, and before the Day institutes a Clerk, such Institution is merely void. And 'twas said in *Hutchins's* Case, That a *Caveat* to hinder Admission and Institution into an Ecclesiastical Benefice, according to the *Canon* Law, was only in force for three Months; and that any one may safely present after that Time, as if no *Caveat* had been enter'd*. But though a *Caveat* enter'd in the Incumbent's Life time be idle and to no purpose, according to the Common Law: For 'twas said both in *Rone's*† and *Hutchins's* Case, that a Bishop need not regard a *Caveat* enter'd before the voidance of a Church; yet (I think) a Bishop would do well to shew regard hereto, as being a Judge, and not only so, but the great Pastor of the Diocese too; and ought, consequently, so to behave himself, as to manifest his due respect to Equity as well as strict Law: And, therefore, to do what he lawfully may, that no Person by his Haste be surpriz'd, but may have a timely opportunity to set up his Interest without any Disadvantage thereunto. But 'tis not adviseable for a Bishop to refuse Admission and Institution of a Clerk only, because a *Caveat* was enter'd before such Voidance, but that he only suspends the Admission of him, till he can enquire touching his Life and Conversation and the like; lest the Bishop, in a *Quare Impedit*, should be found a Disturber‡. And this puts me in mind, that a *Caveat* may be enter'd against the Admission of a Clerk upon the score of scandalous Crimes committed by him; but then these Crimes ought to be of such a Nature as would induce Deprivation, if they were done after Institution: But in this Case, even by the *Canon* Law, the *Caveat* ought to be enter'd after the Incumbent's Death; and the Bishop, before he receives such a *Caveat*, may require proper security for the Prosecution and Maintaining thereof.

Secondly, In respect of Letters of Administration, which if granted whilst a *Caveat* is depending, it is void in Law. *W. Administratrix*, sued the Defendant in the Court of Chancery: The Defendant shew'd, That before Administration was committed to the Plaintiff, he put in a *Caveat* in the Ecclesiastical Court, pending which *Caveat*, the Plaintiff obtain'd Letters of Administration, of which he demanded Judgment pending the Appeal. It was said that the same was a good Cause to stay the Suit till the Appeal was determin'd. In this Case it was also said, that the same was not like to a Writ of Error; for by purchasing a Writ of Error, the Judgment is not impeach'd till the Record is reversed: but the very bringing of an Appeal, is a Suspension of the first Judgment for the principal Matter*. And thus also in this kind of *Caveat*, there is a difference between the *Common* and *Canon* Law: For if after a *Caveat*

* Crok. Rep. pt. 2d. 464.

† Poph. Rep. p. 133. Rolls. Rep. 1. p. 191. 227.

‡ Rolls ut supra.

* Gouldesb. Rep. p. 119.

veat enter'd against the granting of Letters of Administration, they be (notwithstanding such *Caveat* depending) granted by another, it is good at Common Law; but 'tis otherwise in the Spiritual Court, where, by the *Civil* Law, an Administration (pending a *Caveat*) is void.



Of a Cause, Controversy, Suit, Instance, and the like.

IN Judgment some Persons are necessarily present as *Principals*, and others only as *Accessaries*. The *Principals* are the Judge, Plaintiff, and Defendant in Civil Causes; and some add Witnesses hereunto: But, I think, Witnesses ought more truly to be reckon'd among *Accessaries*. And therefore, since Witnesses only serve to strengthen and confirm the Plaintiff or Defendant's Intention when other Proofs cannot be had, I shall treat of them hereafter in a more proper Place, and proceed to treat of a *Cause*, as being that which gives a Beginning to Judicature.

Now the Word *Cause* is so call'd (according to some†) from the *Latin* Word *Chaos*, which was the beginning of all things; and in this Sense, a Cause may be said to be the *material* Beginning of a *Judicial Process*: But, in my humble Opinion, a Cause which is deduced in Judgment is so called from the *Latin* Word *Casus*; because it casually happens and comes to pass. There are seven Causes consider'd in Judgment, *viz.* the *Material*, *Efficient* and *Formal* Cause; and likewise a *Natural*, *Substantial*, and *Accidental* Cause; and, lastly, a *Final* Cause. The first is the *Material* Cause, from whence any thing immediately proceeds and comes to pass; and that which happens or is derived from it, is in *Latin* term'd *Materiatum* or *Res Materiata* *: As when a Cup or Bowl is made of Silver, the Silver is called the *material* Cause thereof, and the Cup or Bowl is called the *Materiatum*. But in respect to Judicature, the *material* Cause of a *Judicial Process* is the very Cause itself which is brought into Court, whether it be a Civil or a Criminal Cause†; because a *Judicial* Proceeding immediately happens, and is derived from the Cause itself: And the *Judicial Process* may be called the *Materiatum*. The *Efficient* Cause is that which makes an Act, or performs some Work by the Help and Means of the *Material* Cause: And, according to *Baldus*, is divided into a *proximate* and *remote* Cause, as may be exemplify'd in Building. For the Mason or Builder of the Walls is said to be the *proximate* Cause, as being the immediate Maker of the Walls: But the Proprietor or Master thereof, who causes the Walls to be built, is the *remote* Cause thereof: Therefore, in matters of Judicature, the *efficient* Cause is the Judge, Plaintiff and Defendant; because the Court and Business of Judicature consists of these three Persons: And this is call'd the *proximate efficient* Cause of Judicature, because Judicature immediately proceeds from these three Persons. A *remote efficient* Cause may also be consider'd in Judicature; as when a Person litigates by his Proctor and the like. For then a Proctor is the *Proximate*, and his Client is the *remote* Cause; or rather the Proctor may be term'd the efficient Instrumental Cause. The third Cause consider'd in Judgment is the *Formal* Cause, which

† Card. in Clem. 1. §. ab olim. in 3. oppos. de Sepult.

|| X. 5. 40. 10.

* Text. Gloss. & Bart. in l. 18. D. 13. 7.

† X. 5. 40. 10.

|| X. 5. 40. 10.

which consists in the Order and Method prescribed and laid down by the Law for doing any Act; as when an Act ought to be done with some solemnity of Law; for then such solemnity is said to be in the Form of the Act itself. An example hereof we have in a last Will and Testament, wherein (according to the *Civil Law*) seven Witnesses are *formally* requir'd: so that if one of these Witnesses are wanting in Number, the Testament is not valid*. 'Tis the same thing in a Stipulation, wherein the Form is, That an Interrogation be previous thereunto; and an Answer ought to follow on such an Interrogation or Question put †: And so it is in the Alienation of a Minor's Estate, and of that of the Church||. And thus where the Law says, that such an Act ought to be executed in Writing, that Writing *Baldus** styles the Form of the Act. That is called the *Formal Cause* of a Thing, which gives a Being to the Thing; and if that Form be omitted, it vitiates the Act †. But in respect of the *Formal Cause* of a *Judicial Cause*, we may reckon the Order and Solemnity of the Process itself, *viz.* That a Libel ought to be first exhibited; 2dly, Contestation of Suit made; 3dly, a Term-Probatory assign'd; and, lastly, a Sentence pronounc'd: For if this Form or Order be omitted or perverted, the Sentence is not valid||. Moreover, 'Tis of the Form and Solemnity of Judicature, that the Judge should sit on the Bench, and not stand up. The fourth Cause consider'd in Judicature is the *Substantial Cause*; on which the whole Force, Name, and Effect of the Act itself depend. For Example, in a Contract of *Bargain and Sale*, the Substance of that Contract is the Thing and Price agreed on: For without these Things, such Contract cannot be made and executed, without its being null and void*. Thus also in Matters of Judicature, the *Substantials* of all *Judicial Processes* are the Essential Acts of Judicature themselves; as a Libel, Contestation of Suit; the Oath of Calumny in some Courts and the like. I would not have any one fancy, that the Instance which I have given in the *Formalia* of Judicature, to be one and the same with this of the *Substantials*: For in the *Formalia*, I only consider the Order of the Solemnity, but in *Substantials*, I consider the Acts themselves properly intervening †. The fifth Cause consider'd in Judicature is a *natural Cause*; and those Things are said to be natural to any Act, which *tacitly* proceed from the Nature of the Act itself, without that which is said to be of the Act: Thus we say in a Loan or *Mutuum* wherein it *tacitly* proceeds from the Nature of it, that they ought to be founded on Equity on both Sides, and ought to be satisfy'd||. And also in a Contract of Sale, wherein it *tacitly* proceeds from the Nature of it, That the Vendor should be liable to an Eviction*, and should not be obliged to pay the Price, but only to deliver the Goods †. And thus in matters of Judicature, First, 'Tis the Nature of a *Judicial Process*, that it ought to be determin'd in that Court where it had its Beginning||. 2dly, That it ought to be an individual Thing*. And 3dly, That an Equality be observ'd between Plaintiff and Defendant, and that it should not halt on either Side. And, lastly, That the Instance of the Cause ought to be finish'd within three Years in a Civil, and two Years in a Criminal Cause †. A sixth Cause consider'd in Judicature, is stiled an *Accidental Cause*; and the *Accidental* of any Act, is said to be whatever advenes to the Act itself already substantiated||; For an *Accident*, according to the *Logicians*, is that, *quod potest adesse & abesse ab aliquo subiecto præter ipsius subiecti corruptionem*. Therefore every Pact which is annex'd to a Contract of Sale, besides the Thing and the Price, is call'd an *Accidental Pact* or Covenant; because, according to *Baldus**, the Contract may subsist without it. And thus in Judicature, all Things that happen in a *Judicial Pro-*

* C. 6. 23.
12.

† D. 45. 1.
5. 1.
|| D. 27. 9.
per tot. c. 1.
2.

* In l. 12.
C. 6. 55.
† D. 10. 4.
9. 3.

|| C. 7. 45. 4.
Bart. ibi.

* C. 4. 38. 15.

‡ Clem. 2.
1. 2.

|| D. 12. 1. 3.

* C. 8. 45. 6.

† D. 19. 1.

11.

D. 18. 1. 25.

|| D. 5. 1. 30.

* D. 10. 2.

27.

† C. 3. 1. 13.

|| D. 18. 1. 72.

Gloss. ibi.

* In l. 13.

D. 18. 1. 8.

fin.

Process by the Opposition of either Party, besides the Substance and Form of the Process itself, may be called the *Accidentals**: And an Example * C. 3. 1. 3. hereof may be given in all Exceptions, which the Litigant propounds against the Person of his Adversary, or against Witnesses, the Libel, and the like. All these Things are called *Accidentals*; because some new Incident in Judicature may emerge upon them, on which the Judge ought to proceed by Interlocution, and the principal Matter in Question, may be handled without them; because it does not touch the Substance or Form of the *Judicial* Process. The last Cause consider'd in Judicature, is what we call the final Cause; and it is so stiled, because some Act is done to that End; and if this End ceases, the Effect of that Act ceases with it †: Thus in a *Judicial* Process, the final End thereof is a definitive Sentence; for that a Cause is brought into Court, to the end that it should be determin'd by a Sentence ‖, and that every one should have his Right*: And to this end the Laws tend very much, and abhor to find Suits engender and protract Suits †. And that the Sentence itself is the final End of a *Judicial* Process, appears from hence; because where there is no Sentence, the Effect of the *Judicial* Process, which is the Execution, ceases. *Socinus* says ‖, that the final Cause of every Act is the principal Intent of the Man that does that Act; and as the principal Intent of a Man's commencing and prosecuting a Suit, is the coming at a Sentence, the Sentence itself is the final Cause of the Suit; which is properly called the Cause, and none else; and is the Cause of all other Causes, according to *Aristotle*.

Having thus shewn after what manner these seven Causes are consider'd in Judicature, I shall next consider, as a Supplement hereunto, whether a *Judicial* Process may be made (at least) by the Consent of the Litigants, without the Intervention of these seven Causes, or some of them? *viz.* Whether the Parties may renounce the Substantials and Formals of a *Judicial* Process; and thus of the other Causes abovemention'd. And, first, as to the material Cause, the Parties cannot wave and renounce the same; because as a *Judicial* Process is *quid Materiatum* from the Cause itself deduced in Judgment, it cannot *in esse* be produced *sine ejus Materiâ*; and consequently, neither the Parties, nor the Judge can act *Judicially* without the material Cause; because it is impossible in the Nature of Things, since a Shipwright may as well build a Ship without Planks and Timber †. 2dly, In respect of the *Efficient*, the Parties cannot renounce the same, nor can a *Judicial* Process be produced, *in esse*, without it; because it would be as absurd and ridiculous, as for a Child to be born without a Father. 3dly, In Respect of the *Formal* Cause, it admits of this Distinction, *viz.* That either the Form is such as principally respects the Favour of one of the Parties, and then the Party may wave such a Form as is in Favour of himself, and the *Judicial* Process is valid, as in the Oath of a Witness; for a Witness is obliged to swear *pro formâ*, otherwise his Deposition is not valid without an Oath*, and yet the Oath may be remitted to the Witness by consent of Parties, and his Deposition shall be valid, because this Form is introduced in favour of the Party. Or else the Form is such as principally respects publick Right, and then it cannot be wav'd; as the Order of a *Judicial* Process: But this ought only to be understood to proceed, when the Parties would omit the Form of a *Judicial* Process, and would have the Judge's Sentence valid without such Order observ'd, which they cannot do. But if the Parties would wholly set aside this Order, and would have the Judge proceed *ex arbitrio*, they may do this, and the Sentence shall be valid as an Award of Arbitration and the like †; because the Parties may ratify a Sentence that is null, and it shall be valid *in vim pacti*. 4thly, In regard of a

† D. 37. 14. 6. 2.

‖ C. 3. 1. 13.

* vi. 2. 14. 1.

† C. 3. 1. 2.

C. 7. 51. 3.

‖ Conf. 251.

† D. 7. 8. 14. 3.

* C. 4. 20. 9. Abb. in c. 39. X. 2. 20.

† Abb. in c. 4. X. 1. 29.

Substantial Cause, wherein, in every respect, you may make the same Distinction as I have done in a *Formal Cause*; because these two Causes, *quoad hoc*, do tread the same Steps: And as the Parties cannot renounce the *Formalia* of a Cause; so neither can they the *Substantials* of a *Judicial Process**, because the *Formalia* are in Favour of the Publick to this End, *viz.* for the preventing of Forgeries, &c. 5thly, In respect of a *natural Cause*, I make this Distinction, *viz.* There are some Things which arise from the Nature of a *Judicial Process* for the Advantage of the Publick, as the *Peremption of Instance* by three Years continuance†; And some things which arise from thence for the Advantage of the Parties; and these the Parties may wave if they please; as touching that Rule in Law, *viz.* Where a *Judicial Process* is begun, there it ought to be ended. For a Litigant may (pending a *Judicial Process* before one Judge) draw his Adversary before another Judge, if he does not oppose the same by an Exception of *Pendency of Suit*; and such Process shall be valid; because if he does not oppose it, he is deem'd to give his Consent, and he may impute it to himself||. Therefore, it appears, that Consent of Parties may toll this Naturality, (because it respects the Interest of the Parties themselves) lest the Defendant should be molested in several Courts*, and lest that should come into Judgment which has been expressly agreed on between the Parties, that it should not come into Judgment. Therefore it follows, that the Parties may agree, That that should not come into Judgment, which otherwise of its own Nature would come into Judgment. Lastly, In respect of the final Cause of Judicature, which is the Sentence, the Parties may renounce the same; and by an Accommodation (pending Suit) cause no Sentence to be pronounced, putting an end to the Suit without the same†.

A *Judicial Cause* is defined to be that very Right, which is deduced and set fourth in a *Judicial Proceeding*: And hence it is, that a *Judicial Cause* is either said to be Civil or Criminal, according as the Action or Accusation is deduced in the said Proceeding||: And a Cause is so called before as well as after Contestation of Suit, comprehending both a Civil and a Criminal Cause. The Difference between a *Cause* and a *Controversy* herein consists, *viz.* That it cannot be stiled a *Cause*, unless it be in Judgment: But a *Controversy* may happen, either in or out of Judgment, that is to say, it may be either *Judicial* or *Extra-judicial*, according to the Circumstances of the Matter: For a *Controversy* may be *sine lite**.

A *Controversy* is said to happen not only by bringing an Action on the Plaintiff's side, but also by objecting or propounding any Exception on the Part of the Defendant: And 'tis said to be a *Controversy*, whether it happens *de Jure* or *de Facto*. A *Controversy* also happens by any kind of Resistance or Opposition made whatsoever: and 'tis a *Controversy* even before a Contestation of Suit, or Issue join'd in the Cause.

A *Cause* herein differs from what we in *Latin* stile a *Negotium*; because it is not stiled a *Cause* unless it be in Judgment†, as aforesaid: But a *Negotium* is said to be such either in or out of Judgment; or in other Terms, it may be either stiled *Judicial* or *Extra-judicial*. Hence a Proctor, *ad Negotia*, may be concern'd for his Client both in and out of Judgment; that is to say, he may have the Management of Matters *Judicial* and *Extra-judicial*: But a Proctor, *ad Causas*, cannot have the Management of *Extra-judicial* Matters||.

The Word *Lis*, which we in *English* translate a *Suit*, is a more general Term than any of the former: For 'tis sometimes put for the *Instance* of a Cause*, and sometimes for the Cause itself deduced in Judgment: And in this Sense, he that renounces the Suit, is deem'd to renounce the

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* D. 50. 1.
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† C. 3. 1. 13.

|| Abb. Joh.
Ec. in c. 9.
X. 1. 2.

* C. 3. 1. 10.

† Alex. in
l. 4. C. 2. 3.

|| Bald. in
l. 16. C. 2.
4.

* C. 2. 4. 16.

† Dd. in l. 41.
C. 2. 4.

|| C. 3. 1. 13.

* D. 50. 16.
36.

Instance and Cause of Suit. According to *Baldus*, the *Lis* or Suit begins before a Contestation of Suit; but, according to the more common Opinion, the Gloss of *Baldus* is herein reprobated and disallow'd of: For a *Lis* or *Suit* does not commence but from Contestation of Suit. Yet *Felinius* limits this receiv'd Opinion in four Respects. *First*, in favour of *Liberation* or a *Discharge*. *2dly*, *Quoad inducendum vitium Litigiosi*. *3dly*, In Respect of introducing a Pendency of Suit. And *4thly*, In respect of perpetuating the Jurisdiction of the Judge: Because, in all these Cases, a *Lis* or *suit* commences before a Contestation; and thus by a Citation only.

The *Instance of a Cause* is said to be that *Judicial* Process, which is made from the Contestation of a Suit, even to the Time of pronouncing Sentence in the Cause, or till the end of three Years: For when no Sentence is pronounc'd in a Civil Cause within three Years, or in a Criminal Cause within two Years*, the *Instance* is said to be perempted. And thus when we say that the *Instance is perempted*, we mean that the *Judicial* Process is accounted *pro non facto*; because no Sentence can be pronounced thereon. Yet this Word has no Relation to the Cause, nor to a *Judicial* Proceeding; for that the Cause is not perempted, altho' the *Instance* be so: Nor is the Right of the Party, nor the *Judicial* Process in Right of that Party so far perempted, but that the same may be begun again, and ventilated *de Novo*; but only that *Judicial* Course of Proceeding, which was begun and ended within the Time limited, is perempted. This, I say, is by a *Peremption of Instance* render'd vain, fruitless, and accounted *pro non facto*; because we cannot thereby come at the final Cause of Judgment: *viz.* a Definitive Sentence, unless the matter be deduced in Judgment *de Novo*. And this *Peremption of Instance* was introduced in Favour of the Publick, lest Suits should otherwise be rendred immortal and perpetual†. 'Tis the common Opinion of the Doctors, that an *Instance* begins to have its Currency in Causes from the Time of contesting Suit; so that if Litigants do not contest Suit for One Thousand Years, the *Instance* of Suit would not begin during that Time: And hence *Baldus* observes||, That if the Parties should litigate for ten Years touching the Legitimation of Persons without contesting Suit, the *Instance* would never perish in that Time.

But what is to be done in Causes, wherein no Contestation of Suit is required, as in *summary* and *executive* Causes? Why in these Causes the *Instance* is current, as soon as the Judge begins to take Cognizance of the Merits of the Cause*. But for a fuller Declaration hereof, it may be said, that in Causes of this Nature, that Act which is done immediately after Contestation of Suit in Causes wherein Suit is contested, has the Force of Contestation of Suit. And hence the *Instance* shall begin its currency from that Act†.

If the Parties litigant have proceeded in a Cause after the ordinary way of Proceeding, *viz.* by exhibiting a Libel, contesting Suit, and doing other *Judicial* Acts in a solemn and plenary manner, when they might have well omitted those *Judicial* Solemnities, and have proceeded in a summary way by virtue of some Statute; they do hereby seemingly renounce the *summary*, and embrace the *ordinary* way of Proceeding; whether the Parties do expressly consent or agree hereunto or not: So that if any Defect shall arise in *Judicial* Proceedings, which of *common Right* vitiates the Process or Sentence, such Defect shall vitiate the Process thus begun in a *plenary* way. And in such a Case, the Common and not the Municipal Law shall be observ'd||; because the Party is hereby deem'd to have receded from the *summary* way of Proceeding; and, consequently, the Common Law ought to be observ'd. For, according

* C. 3. l. 13.

† C. 3. l. 13.

|| In l. 73.
D. 5. l. 2.

* Alex. in
13. C. 3. l.

† Dd. in l. 21.
& 23. C. de
Proc.

|| Gloss. &
Dd. in l. 22.
D. 12. l.

to

* Bald. in
l. 5. C. 7. 14.

† Gloss. in
l. 22. D. 4. 2.

|| Lanf. in
Clem. cap.
saep.

to *Baldus*, when the Parties may proceed *summarily*, and they chuse the *ordinary* way of Proceeding, the Cause is made *Plenary*: And thus this seems entirely to depend on the Will of the Parties *. If a Libel intervenes and be exhibited in a Cause, wherein a Libel is not required; and, the Cause being thus commenced *viâ ordinariâ*, it ought to be ended in a solemn manner by a Sentence; for that the Cause is hereby made a *Plenary* Cause, and ought to be determin'd *Plenarily* †. If the Prince commits a Cause to the Judge to proceed therein in a *summary* Manner, and he proceeds *plenarily*, the Process is invalid, as being made in a *Plenary* and *Ordinary* way ||.

The whole Course or Mode of *Judicial* Proceeding is divided into three Parts. The first Part lasts from the Date of the Citation to the joining of Issue or Contestation of Suit, *exclusively*. The second continues to a Conclusion in the Cause, *inclusively*. And the third Part endures from a Conclusion in the Cause to the Time of pronouncing a definitive Sentence, *inclusively*: And each of these three Parts has its distinct Divisions; one of which successively follows the other. The first entire Part of Judicature is stiled *Principium Judicii* among the *Civilians*, beginning with the Citation, and ending with Contestation of Suit *exclusively* as aforesaid: And, consequently, all the Acts and Members done in this first Part, are said to be done *in principio Judicii*; because Judgment is then said to be begun, when Contestation of Suit is made. Therefore I shall here consider, what are the particular Acts or Members that are compriz'd in this first Part of Judicature; wherein there is usually said to be an Intervention of ten Acts; some of which I shall treat of in the following Chapters, namely, *First*, Of a Citation; *2ly*, Of Contumacy; *3dly*, Of exhibiting a Libel; *4thly*, Of Re-convention; *5thly*, Of What the *Civilians* call *Laudatio Authoris*; *6thly*, Of Nomination; *7thly*, Of Interrogation; *8thly*, Of Satisfaction or Bail; *9thly*, Of Exceptions; And, *10thly*, Of Contestation of Suit: Of all of which severally in their proper Places. Moreover, 'tis here to be noted, that we come at this *Principium Judicii* several ways, *viz.* either by way of Action, Accusation, Inquisition, Denunciation, or by imploring the Office of the Judge. Of which four ways of commencing Judicature, I shall here first briefly discourse of by the Bye.

† D. 5. 1. 35.

|| D. 3. 3.

42. 2.
* H. D. 44.
7. 2.

Judicature is first commenced by way of Action: But this only consists and lies in a Civil Cause; as when any one prosecutes that which is due to him by impleading the adverse Party *civilly*, as I shall hereafter observe. And the Plaintiff is then said to bring his Action; or, as we phrase it in *Latin* Terms, *agere in Judicio*. In every Personal Action, there is a twofold Cause of suing; the one called the *Proximate*, and the other the *Remote* Cause thereof †. In a Personal Action, the *Proximate* Cause is the Obligation||, and the *Remote* Cause is the Contract *: And in such an Action 'tis sufficient to express the *Remote* Cause in this or the like Manner, *viz.* *Peto à te Decem ex Mutuo vel ex Deposito*, that is to say, I demand of you the ten Pounds, which I lent you, or which I lodg'd in your Hands by way of *Deposit*: And the Reason of this is, because a *Proximate* Cause is presum'd and inferr'd from a *Remote* Cause. But in such an Action it is not enough barely to express the *Proximate* Cause in the Libel: because such a Libel would be uncertain, and consequently inept, for that it concludes no certain Right of Action, nor can the Defendant deliberate with himself, if the *Remote* Cause of Action be not express'd in the Libel, whether he will submit or contend in the Cause. In a *Real* Action, the *Proximate* Cause is the Property or Ownership of the Thing in Controversy; and the *Remote* Cause is the Fact whereby such Ownership

ship or Property is caused ; or the very Right of bringing the Action. As for Example, I demand such an Estate, because it was devis'd or sold to me by *Titius*, and a delivery thereof made : And, in such an Action, according to the common Opinion of the Doctors, it is sufficient to express the *Proximate Cause* in the Libel ; and such a Libel is valid, because the Defendant is thereby render'd more certain of the Plaintiff's Right of Action ; and, consequently, he better knows, whether he will contest or give up the Suit *. For several Persons cannot at one and the same Time have an entire Property in one and the same Thing † ; nor can Dominion and Property accrue unto one Person by virtue of several Titles ‖. And, therefore, it is not necessary in such a Libel to express the Name of the Action ; because the Nature and Quality of the Action is inferr'd and demonstrated *ex Causâ petendi*, that is to say, from the Cause and Manner of concluding *. And the Judge may, and ought to infer what Action is commenced from what is deduced therein, if the Matter be obscure : which is much for the Plaintiff's Advantage. For in a doubtful Cause that Remedy and that Action is understood to be given, which may be best apply'd to the Fact or Case in Point †.

* X. 2. 3. 2.
D. 2. 13. 1.
† D. 13. 6. 5.
15.
‖ D. 41. 2. 3.
7.

* X. 2. 8. 3.

† D. 5. 1. 66.

The second way of coming into Judgment, is by way of *Accusation*. As when any one brings a Criminal Cause into Judgment by impeaching or accusing his Adversary, and this thro' the Means of a Libel or some other Complaint form'd in Writing, touching some Crime committed by the Party accus'd, and inscribed by the Accuser, as I have already observ'd under that Title.

The third way we come into Judgment, is by way of Inquisition or Enquiry. And this Method of *Judicial* Proceeding, likewise obtains in all Criminal Causes, wherein an enquiry is made, and the Process is form'd for the Advantage of the Publick ; whenever a Person has committed some Crime, and no particular Man accuses him thereof : For in such a Case, the Judge may then *ex mero Officio* make some enquiry touching the same, lest such a Crime should go unpunish'd. And the Judge may punish the Person found guilty thereof upon such an enquiry, by the Means of legal Evidence : for by the Law, no one can be condemn'd of any Crime, unless some *Accusation* or *Inquisition* be previous to such a Condemnation. But of this hereafter.

A Law-Suit ought to be decided in Pursuance of such Laws, as have an Existence at the Time when the Suit or Controversy was commenced, and not according to a Privilege obtain'd *pendente lite*, unless mention be therein made of the Pendency of such Suit. Now the Pendency of a Suit in respect of both the Parties, is induced by joining of Issue in the Cause : Therefore, tho' it may be stiled *Lis* or *Suit* before Contestation of Suit ; yet it cannot be said to be *Lis Mota*, or Pendency of Suit, till afterwards. Nor is there any Thing pray'd by the Defendant, because a Libel has been offer'd to the Judge : And therefore, before Contestation of Suit, the Defendant is not *in Mora* *. But a Libel offer'd to the Prince, effects a Pendency of Suit ; and so does the Prince's Rescript or Decree : which *Baldus* understands to be true, when such Rescript is granted at the Instance of a Party ; but it is otherwise, if it be granted *Motu proprio* †. But a Pendency of Suit, in respect of the Plaintiff, is induced *ex solâ Commissione*, or by the Judge's Decree for citing the Defendant, tho' such Citation has not as yet reached his Knowledge, but 'tis necessary, in respect of the Defendant, that he should have Knowledge of it ‖.

* Bald. Conf.
150. N. 1.

† Bald. Conf.
490.

‖ Clem. 2. 5.
Rom. Conf.
330. n. 2.

It has been said, That by the *Civil* Law, Criminal Causes ought to be determin'd within the Space of two Years : yet some have doubted how

* D. 48. 19.
10. fin.
† D. 2. 12. 10.

this ought to be understood, since these are of greater Weight and Importance than Civil Causes * ; and various Reasons have been assign'd for this Doubt. For it seems to impugn a Law in the *Digests* †, which grants Delays and Imparances in Law rather in Criminal than Civil Causes. But to this I answer, That as to the *Instance* or Time of *Instance*, the *curricula annorum* were justly lop'd off, to the end that the Parties might proceed in Criminal Causes with more Care and Vigilance, as being in an *odious* Affair or Matter. But 'tis otherwise in such Delays as conduce to the finding out of Truth in the Cause, from which Delays a Criminal Cause ought not to be barr'd in any wise ; because these Delays ought to go with a more open Bosom in Criminal than in Civil Causes. Again, it has been remembred, that Civil Causes ought to be ended within three Years time ; but yet you may extend this Term, if the Matter be delay'd thro' the Cavils and Subterfuges of the adverse Party. But tho' Civil Causes, of how great Weight and Consequence soever, according to some Mens Opinions, are of less Moment than Criminal Causes ; yet *Bartolus*, and the Doctors ‖ are, by Implication, of a different Opinion, delivering it as their common Suffrage, That Civil Causes are, in some Respects, equivalent unto Criminal Causes, and of as great Importance. As where a great Sum of Money is sued for ; or where the State of Man or the like is in Debate, and canvass'd in Judgment. But I then say, That this Equivalency only respects the careful and diligent admission of Proofs ; but, as to the Time of *Instance*, they are not equivalent. By the Usage of *England*, *France*, and *Holland*, there is no certain Time prescribed, within which Criminal Causes ought to be determin'd ; yet they ought to be decided and come to an end with all possible Dispatch ; and to be heard before all other Causes. But where the *Civil* Law is most strictly practis'd, the Time of *Instance* shall not commence or run till after Contestation of Suit ; because 'tis not call'd an *Instance* till Judgment is commenced. But Judgment is not begun till Contestation of Suit, as aforesaid. Hence if any Dispute arises before Contestation of Suit, those shall only be deem'd Acts of *Imparance* in respect of Time : As when the Dispute is about the Jurisdiction of the Court, or about a suspected Judge, or any other *dilatory* Matters ; as an Exception touching the Litigant's Person is. These, I say, are not reckon'd any Part of the *Instance*, tho' the Dispute should last ten or twenty Years.

I have said, That the *Instance* of a Civil Cause may continue for three Years : But this is otherwise in *Fiscal* Causes *, and Causes of publick Employment : Nor does the *Instance* of a Cause expire at the end of three Years, if the Judge before whom the Cause was begun, dies near the end of that Term, and another succeeds him, for the Law gives his Successor another entire Year to dispatch the Cause ; and thus, in this Case, the *Instance* is prorogued by a Disposition of Law beyond three Years † : And 'tis the same Thing when the Judge is changed or removed from his Office on the account of Absence, Infirmary, or any just Cause. Nor does this Form of *Instance* obtain, when the Judge may proceed and give Sentence at his own Discretion : Nor does it prevail in the Causes of such Persons, unto whom the Laws have granted the Benefit of Restitution *in integrum*, as unto Women, Minors, and Church ; nor does it proceed, when the Cause is concluded, and the Process transmitted for the Advice and Opinion of some eminent Lawyer thereon. But touching this Matter, I make some Doubt ; for when the Judge perceives the *Instance* to lapse, he may read Sentence, and refer himself to the Judgement of the Person he consults.

* C. 3. 1. 13.

† C. 3. 1. 13.

Of Ecclesiastical Censures, and the Division thereof.

THE *Canonists* define an *Ecclesiastical Censure* to be a spiritual Punishment inflicted by some Ecclesiastical Judge, whereby he deprives a Person baptiz'd, of the Use of some spiritual Things, which conduce not only to his present Welfare in the Church, but likewise to his future and eternal Salvation. 'Tis call'd a *Punishment* by way of *Genus*; for herein all Censures agree: And 'tis said to be *Spiritual*, because (say they) it is *Pana anima*, a Punishment inflicted on the Soul of Man; for so far do the Priests extend their Arm of Power. And 'tis said to be *inflicted by some Ecclesiastical Judge*, to point out the efficient Cause of such a Censure: For since an Ecclesiastical Censure is a Spiritual Punishment, it cannot be impos'd (according to the *Canon Law*) by any other than an Ecclesiastical Person, who has the Power of inflicting the same; tho' some have question'd, whether the Church has the Power of inflicting Censures. Such as maintain the Affirmative, quote St. *Matthew's* Gospel for their Purpose, where the Power of binding was conferr'd on the Apostles in these Words, *viz. Whatsoever ye shall bind on Earth**, &c. which Words, (say they) as they are general, ought to be understood in a general Sense touching every Censure and every Thing, which may be deem'd necessary to good Government in the Church: And as the Power of pronouncing Censures, conduces to good Government *in Foro externo*; it, therefore, follows (say they) that the Church has this Power *in Foro interno*. 'Tis, moreover, added in the abovemention'd Definition, *viz. Whereby he deprives a Person baptiz'd*, in order to shew, That a Person baptiz'd ought to be the only Subject of this Censure: For as an Heathen or Infidel is not a Subject of the Church, he cannot be subject to Censures inflicted by the Church, as a Person baptized is, who is a Member of the Church. 'Tis also therein said, *of the Use of some Spiritual Things*, to shew how it differs from Civil Punishments, which consist only in Things Temporal, as Confiscation of Goods, Pecuniary Mulcts or Fines, and the like. But the Church, by its Censures, deprives us of things Spiritual, as the Use of the Sacrament, the Execution of Ecclesiastical Offices and Employments, &c. And 'tis likewise said of the Use of *some* Spiritual Things; because such a Censure, does not deprive a Man of all Spirituals, but only of some Particulars; since it does not deprive him of virtuous Actions, nor take from him the Power of doing such. Lastly, This Definition speaks of such Things *as conduce to eternal Salvation*, in order to manifest the End of this Censure: For the Church, by Censures, does not intend the destroying of Mens Souls, but only the saving them, by enjoining Repentance for past Errors, a Return from Contumacy, and an Abstaining from future Sins.

Under the Name of an *Ecclesiastical Censure*, we may reckon Suspension *ab Officio & Beneficio*, an Interdict, and a Sentence of Excommunication †: So that a Church-Censure, according to Pope *Innocent III.* is † X. 5. 40. threefold; who being ask'd, what was meant by *Ecclesiastical Censures*,^{20.} answer'd,

* Ch. 18.
v. 18.

answer'd, That Excommunication, Suspension, and an Interdict, was thereby intended. But (I think) this Answer lame and imperfect, if any other *Species* of Censure besides three may be assign'd. For hereunto it is objected, That Irregularity, Deposition, and Degradation, are Ecclesiastical Censures: But hereunto I answer, *First*, That Irregularity is no Church-Censure, because every Irregularity is not put *in Pœnam delicti*, since some are inflicted on the account of some Defect without any Offence committed. And again, because Irregularity was not principally instituted for the Correction of Men's Manners alone as a Censure is; but on several other accounts. And as to Deposition and Degradation, 'tis plain, that these are not Censures: For a Censure, according to its Institution, may be remov'd on a Foundation of Repentance and Amendment in the Delinquent; but Deposition, and Degradation, are without hope of any Remission; and, therefore, the Law styles them an indissolvable Bond; but a Censure, a dissolvable Bond.

An Ecclesiastical Censure is twofold; the one inflicted by Law; and the other inflicted by Man. A Censure inflicted by Law, is said to be that which is pronounced by the Legislator, with an Intent of making a Law or general Statute perpetual; and is, *ipso Jure*, inflicted on Transgressors thereof by way of Punishment. But a Censure *ab Homine*, is said to be that which is pronounced by some Judge or Superior commanding something, not with a Design of making a Law or Statute perpetual, but with a Purpose of enacting some temporal and transitory Precept; and is inflicted on contumacious and disobedient Offenders. Some say, That a Censure *ab Homine*, ceases on the Death of the Person, that pronounced the same; but a Censure inflicted *à Jure* continues, tho' such Law be extinct, or the Law-giver removed from his Office*. Besides, a Censure inflicted *à Jure*, can only be pronounc'd by such as have the Power of making Laws, as *General* and *Provincial* Councils, the Pope and his Legate in *Popish* Countries, a Bishop in his Diocese, and the like.

But touching a Censure of Excommunication, Suspension, and Interdict, there is one *Species*, which is stiled a Censure *latæ Sententiæ*, and another *Sententiæ ferendæ*. The first is said to be that, which is incurr'd *ipso facto*, without any other Sentence of the Judge: But a Censure *Sententiæ ferendæ*, is said to be only that which favours of Commination, and is not *ipso facto* incurr'd before the Judge's Sentence, as all the Doctors confess. Now a Censure *latæ Sententiæ* may be known from the following Rules, *viz.* *First*, When these Particles or Words are put in the Law, as *ipso facto*, *ipso Jure*, or *latæ Sententiæ*. *2dly*, When Adverbs are put and go along with the Censure; as *confestim*, *statim*, *illicò*, *extunc*, *omninò*, *prorsus*, *incontinenti*, *protinus*, &c. *3dly*, When the Censure is given by a Verb of the present or præterperfect Tense; as when 'tis said, *That he who does this or that, is excommunicated or suspended*, or let him be excommunicated or suspended, *aut Noverit se Excommunicatum vel suspensum*, *aut Noverit se excommunicari vel suspendi*, or, I Excommunicate him, and the like. *4thly*, When the Censure is by Verbs of the *Imperative* Mood, and present Tense; as, Let him that shall do so or so, be subject to an Excommunication, or *habeatur pro excommunicato*, or let him incur Excommunication, and the like: And this is the common Opinion of all the Doctors. And likewise from the following Rules we may easily distinguish a Censure not to be *latæ*, but *ferendæ Sententiæ*, *viz.* *First*, When it is said, *Let him incur a Censure of Commination*, or *we command it under the Pain of Excommunication, Suspension*, and the like. *2dly*, When a Censure is pronounced by a Verb of the future Tense; as

when

* X. 1. 40.
10.

when 'tis said, That he *who shall do so or so, shall be excommunicated or suspended*, and the like. 3dly, When it be doubtful, whether the Censure be *late*, or *ferenda Sententia*, it shall then be judged not to be *late*, but *ferenda Sententia*: For odious Matters admit not of an Ampliation, but ought to be restrain'd and interpreted in the mildest Sense, according to that vulgar Maxim of all Lawyers and others, *viz. In pœnis benignior est Interpretatio facienda* *.

* vi. de Reg. Jur. 49.

There is a Difference between an *Ecclesiastical Censure*, and an *Ecclesiastical Severity*: For under the Appellation of a *Censure*, we only include Excommunication, Suspension, and an Interdict †; but under the Denomination of an *Ecclesiastical Severity*, every other Punishment of the Church is intended, according to the Quality and Nature of the Offence: But according to some, a *Censure* and a *Severity* is the same Thing. And in the like manner an *Ecclesiastical Censure* and an *Ecclesiastical Animadversion* are different Things: For a *Censure* has a relation to a *spiritual* Punishment ‖, but an *Animadversion* has only a respect to a *Temporal* one *, as Degradation and the Delivering of a Person over to the Secular Court. All Ecclesiastical Persons or Prelates, to whom an Ordinary Jurisdiction is given either by Law, Custom, Canon, or Privilege, may fulminate these Church-Censures: But Persons having only a simple Cure of Souls, cannot do it at this day, because there lies a Prescription against them †. And therefore an Archdeacon, as being a Prelate, may thunder out an Ecclesiastical Censure against Delinquents.

† X. 5. 40.

20.

‖ 5. 40. 20.

* X. 5. 37.

12.

† Lindw. lib. 1. Tit. 3. c. 1. v. *Constit. Ecclesiasticam.*



Of a Certificate, and the several Kinds thereof.

A *Certificate* (in *Latin* called *Certificatorium*) is, according to *Lindwood* †, a Responsive Letter, or Letter by way of Answer, directed to the Judge on or touching some Mandate which issued out from him to cite some Person or other. By the Provincial Constitution quoted in the Margin, it was ordain'd, That no Certificate should be deliver'd or otherwise granted to any one under Seal of a Rural Dean, unless the same was first *openly* and *publickly* recited before the Sealing thereof on some solemn Day, as on a *Sunday*, or some other Festival enjoin'd to be solemniz'd by the Church, after the end of the Offertory in the Church, where the Person cited dwelt or had his chief Residence: I say *openly* and *publickly*, that it might be heard by all the People. For it ought not to be done in any secret Place of the Church, but in the Hearing of the Congregation, that it may hereby appear, that a Rural Dean putting a Seal thereunto, was not in any Fraud or Deceit. Provided always, that the Person cited had a sufficient Term allow'd him for his Appearance, the Day and Place for the same being prefix'd thereunto. But if he was in any Case so far straitned in Point of Time, that he could not appear at the Place according to the Time prefix'd, such Certificate ought to be granted in the Church or some publick Place, on a Citation publickly made before credible Witnesses, so that the Day of the Citation, and the Place itself be express'd in the Certificate. And thus a Certificate ought not by any means to be made before the Citation itself was executed, as it was customary before this Constitution was enacted, for Rural Deans, being

† Lib. 2. Tit. 1. c. 2. v. *Certificatorium.*

bribed hereunto, to seal false Certificates. A Certificate ought to contain the Tenor of the Mandate, and the Form and Manner of the Execution of it made by the Mandatary; so that the Form of the Mandate be diligently observ'd*.

* N. 1. 3. 22.

† 14 H. 6.
21 H. 6.

But I shall here say something of Bishops Certificates, which is another kind of Certificate than that abovemention'd, because I find no Title so fit for this Matter hereafter. Therefore, if Excommunication, Bastardy, Bigamy, Deposition, or a Divorce, be certify'd by a Bishop of this Realm, such Certificate is admitted in the King's Courts; but the Pope's cannot be: And as Bishops Certificates are, in these Cases, admitted at the *Common Law*, so divers Statutes since have authoriz'd their Certificates duly made into the King's Courts, in certain other Cases. But there are two Cases, where the Certificate of a Man's Excommunication from a Bishop, shall not disable the Party excommunicated from bringing his Action, as regularly Excommunication does, when 'tis duly certify'd. For *First*, if a Bishop be a Party to a Suit, and excommunicates his Adversary; such Excommunication (though it be certify'd) shall not disable or bar his Adversary from his Action. *Secondly*, Where an Action of Debt was brought by an Executor, and an Excommunication under the Bishop's Seal was certify'd and pleaded against such Executor; this was adjudg'd no good Plea, because the Executor was to recover nothing to his own Use †. But if this was the only Ground and Reason of such Judgment, then where this Reason is not found in Fact; as it may often happen, when the Goods and Chattels are great, and the Debts and Legacies small, and where the Executor has a Clause *de Residuis* by the Will, whereby all the Remainder of the Goods and Chattels, after Debts and Legacies paid, bequeath'd to him; I think that in a different Case the Law should be otherwise, because a great deal comes to the Executor's own particular Use.

‡ Nov. Nat.
Br. p. 54. f.

This Certificate of *Excommunication* by Bishops, of all others is most in Use, and would be more so (especially on the Statute *de Excommunicatione capiendo*) if the great Expence of that way of Proceeding did not prevent the same, as likewise the manifold Abuses about the Execution of that Writ committed by Under-Officers. In these Certificates, the Bishops and such others, having in some particular Cases Authority to certify (as the Chancellor of *Oxford*, the Guardian of the Spiritualities, and the Bishop's Official or Vicar-General, *ipso in remotis agente*) ought to see, that they make no Error; and, therefore, ought to observe these three Things. *First*, That it be therein express'd ‖, that the Party against whom they certify, is excommunicated *Majori Excommunicatione*; because for the lesser Excommunication, a Man shall not be imprison'd for his Perseverance therein. *Secondly*, It ought to be certify'd, that he was by Name and particularly so excommunicated, and not in Gross, in the Company of a Multitude (as it often happen'd in ancient Times) or indefinitely and in the generality; as when the Bishops excommunicated all, who should violate the *Great Charter*. For that Excommunication (according to *Fitz-Herbert*) must grow on some special Suit against a Man either *ex Officio*, or else mov'd by a Party, whereon a *Significavit* may be grounded. *Thirdly*, Though an inferior Officer under the Bishop, as his Chancellor, Commissary, Archdeacon, and the like, has excommunicated the Party certify'd; yet the Bishop's Certificate must run, that it was done *nostrâ auctoritate ordinariâ*. But I cannot find in any Place of the *Register*, or in *Fitz-Herbert's Natura Brevium*, that it is necessary (at the *Common Law*) to express in the Certificate the particular Cause of Excommunication. 'Tis true, that when the Proceeding is on any

any of the ten Crimes mention'd in the Statute * made for that Purpose, the particular original Cause must be express'd in the Certificate. Nevertheless, when the Proceeding is on any other Crime of Ecclesiastical Cognizance, or in Matters Testamentary, Matrimonial, or for Tithes, &c. whether moved *of Office*, or at the *Instance* of the Party; there the *common Law* (as before) is retain'd.

Now we find Precedents of these Writs in the *Register*, wherein no particular, but only a general Cause is express'd. Which, as in other Certificates of Bishops, as touching *Bastardy* and the like, the Court believes without further Traverse or Examination, *viz.* In divers Precedents of this kind of Writs is only contain'd †, That the Party was excommunicated *propter suam manifestam contumaciam*: But what was the original Cause of his being conven'd, out of which such Contumacy grew, is not declar'd at all; and yet the Certificates were allow'd to be good in Law. Likewise in another Precedent of the same Writ, tho' more particularity be found; yet 'tis left so general, as that no special and certain Cause can be known thereby to the Court whereunto it is directed: For 'tis certify'd ||, that a Party was excommunicated *propter suam manifestam contumaciam, in non parendo certis mandatis licitis sibi factis*: But what those Mandates were, we do not learn. And these Certificates do only in the generality mention the Parties Contumacies and Disobedience. So there is also a Precedent of Crimes themselves certify'd in the generality, whereupon a Writ of *excommunicato capiendo* was nevertheless awarded: For 'tis said *, that a Clerk excommunicated *propter manifestas suas offensas*, was order'd to be arrested and imprison'd.

But tho' this be a special Right and Liberty of the Church of *England*, yet this Writ *de excommunicato capiendo* is not always to go forth, and on every Certificate of a Bishop whatever, or of any other thereunto authoriz'd, tho' the Certificate be contriv'd in ever so due a Form. For if he that excommunicated the Person, be himself, for some suppos'd Contempt, to be attach'd at the Suit of the Party certify'd, then the Execution of attaching the Party excommunicated shall be respited, till the other Plea of attaching the Ordinary be determin'd †; lest otherwise the Party's Suit against the Ordinary should be hinder'd by his Imprisonment. Yet 'tis to be understood, that a Bishop shall have a *Significavit* upon his own Certificate, touching an Excommunication for *Contumacy* incurr'd even in his Predecessor's Time ||. But tho' the Certificate be duly made, and the Writ *de excommunicato capiendo* be thereupon issued forth; yet if there be a loose or corrupt Execution thereof by the Sheriff or his Under-Officers, both the Bishop's Endeavour, and the King's Care, to have Justice inflicted on contemptuous Persons, are wholly frustrated. And tho' this Carelessness in times past was not so common as at present; yet it seems by the *Aliàs* and *Pluriès* in the Register *, that Sheriffs and their Under-Officers were then also slack enough in the Performance of this their Duty; tho' 'tis said in the King's Writ in this Behalf †, that the undue Execution of it, redounds *in contemptum manifestum Regis, Episcopi damnum non modicum & gravamen, ac Juris Ecclesie sue lesionem*. In which Respect, such a negligent Sheriff is (by Law) on a Writ to be called into the Court from whence the Writ issued, and there to answer his Contempt. And thus much of the Bishop's Certificate, of which I shall say more hereafter under the Title of *Excommunication*.

* 5 Eliz. cap. 23.

† Reg. in Brev. orig. p. 65. a. 66. a. 69. a.

|| Ibid. 65. b.

* Ibid. p. 66. b.

† Ibid. p. 67. b. & in Brev. Jud. pag. 39. 71. b. & 72. a.

|| Nov. Nat. Br. p. 64 & 65. f.

* Reg. in Br. orig. p. 65. a.

† Ibid. p. 65. b.

Of Chancellors, Commissaries, Officials, and Vicar-Generals.

CHancellors or Bishops Lawyers, in *Latin* called *Ecclesiecdici* or *Episcoporum Ecdici*, were first introduced into the Church by the second Canon of the Council of *Chalcedon*: And were Men trained up in the *Civil* and *Canon* Law of those Ages, to direct the Bishops in Matters of Judgment relating as well to Criminal as to Civil Affairs in the Church. For I find by several Laws in the *Justinian* Code (some of his own making and some other Emperors before his Time even from the Days of *Constantine the Great*;) that Bishops in their Episcopal Audience, had the Cognizance and Practice of all Matters relating to the Church, whether they were of a Civil or Criminal Nature, and to this End and Purpose they had their Chancellors and Officials to assist them in Points of Law, and to defend the Rights of the Church, according to *Gothofred* in his Annotations on the Law here quoted in the Margin ||, who collects the Matter from *Papias*; tho' some think these Officers were of a very late Date, and introduced by the Sloth and Negligence of Bishops, unwilling to hear and determine those Causes wherein they had Jurisdiction. But these Lawyers were not at first deputed and assign'd unto any certain Place, but supply'd the Office of the Bishop (at large) in hearing Ecclesiastical Causes which were of a *Contentious* Jurisdiction, or (at least) assisted him therein: And, therefore, they ought to be well skilled in both Laws, which few of them are at present. They carry the Bishop's Authority every where in Matters of Jurisdiction; and as they and the Bishop make but one Consistory, they are sometimes stiled the Bishops Vicars-General, extending their Authority throughout the whole Diocess: And herein they are distinguished from the *Commissaries* of Bishops, whose Authority is only in some certain Place of the Diocess, and in some certain Causes of the Jurisdiction limited to them by the Bishop's Commission; and, therefore, the Law calls them *Judices* or *Officiales Foranei*, as if you would say, *Officiales astricti cuidam foro Dioceseos tantum* *. But now a Chancellor as distinguished from a *Vicar-General*, *Commissary* and *Principal Official*, is he, that has that Cognizance of all Causes both of *voluntary* and *contentious* Jurisdiction committed to him; whereas properly speaking, a *Vicar-General* has only all Causes of *Voluntary* Jurisdiction delegated to him †; and a *Principal Official*, only Causes of *Contentious* Jurisdiction granted him. And thus the Power of Vicar-Generals differs from that of Principal Officials; since Officials are said to be those Persons, to whom the Cognizance of Causes is generally committed by such as have Ecclesiastical Jurisdiction; and on such Persons the Cognizance of Causes is transferred throughout all the Diocess, but not the Power of Inquisition, nor the Correction of Crimes; nor can they remove Persons from their Benefices, or collate to Benefices, without a special Commission to do these Things: For a general Commission alone of taking Cognizance in Causes, is not sufficient to constitute any one a Principal Official to these Ends, unless the same be either express'd by Word of Mouth,

|| C. 1. §. 33.
2.

* Gloss. in
2. Clem. 2.

† vi. r. 13. 2.
Lindw. lib.
2. tit. 4.
c. 1.

or

or in Writing, by the Persons that commission him, so that his Intention hereby may be made known and appear. But Vicars-General may do all the aforefaid Matters by virtue of their Office, except collating to Benefices. And these are the Persons, to whom Archbishops and Bishops do by Commission or Letters Patent delegate their Power and Jurisdiction in Ecclesiastical and other Matters.

But (besides these) Archdeacons have likewise their *Officials* for their Exercise of Ecclesiastical Jurisdiction in certain Parts of the Diocess; having acquired Jurisdiction from their Bishops, either by an expresse Composition or Grant, or else by Prescription and Length of Usage, Time out of Mind. And though in a large Sense of the Word, every one may be called an *Official*, to whom the Administration of any Office is committed; yet here the Office and Business of these Persons consists chiefly in the Cognizance and Hearing of Causes, which are transferr'd in virtue of the Office itself, by some general Commission made to them for that End and Purpose*. Though an Archdeacon's Official cannot visit (at least) *Jure proprio*; yet he may do this in the Right of the Archdeacon, when the Archdeacon himself is hinder'd ||. But, notwithstanding the aforementioned Distinction of a *Chancellor* and a *Vicar-General* in Spirituals, strictly speaking; yet in Truth, and according to the common way of Speech, a Chancellor is a Vicar General to the Bishop to all Intents and Purposes of Law: And if the Bishop will not chuse a Chancellor, the Metropolitan may and ought to do it; for the Bishop himself, according to the Common Law, cannot be a Judge in his own Consistory, but in some particular Cases. And for this Reason it is, That if the Bishop provides an insufficient Chancellor, it properly belongs to the Ecclesiastical Law to examine the Matter: And tho' it be objected, That the Bishop ought to examine the Person himself before his Admission of him; yet (I conceive) he may well enough examine him afterwards: And this was the Opinion of Ch. J. *Richardson* in *Sutton's Case* †. If a Minister, after Induction, becomes very Irregular, he may be examined and deprived: But if he becomes Dumb or Blind after Induction, he shall not be remov'd; but the Bishop, in this Case, shall allow him a *Co-adjutor* ||, *Jones's Case*. Therefore, if the Canons of the Church be, that no insufficient Person shall exercise the Office of a Chancellor and the like, it is merely with their Law to try the same; and the Common-Law Judges cannot grant a Prohibition, in Cases wherein they are not Judges*; nor can they give any Remedy to the Subject therein. And *Nelverton* said, That upon a Conference, he and all the Court were of Opinion, that no Prohibition should be granted in this Case.

Sutton, Chancellor of *Gloucester*, moved for a Prohibition to stay a Suit before the Ecclesiastical Commissioners, on Articles exhibited against him; because he, being a Divine, and never brought up to the Knowledge of the *Civil* and *Canon* Laws, took upon himself the Office of a Chancellor to the Bishop of *Gloucester*; whereas there are divers Canons and Ecclesiastical Constitutions, and also Directions from King *James* and *Charles* the First, That no one should be admitted to a Bishop's Chancellorship without good Knowledge in the *Civil* and *Canon* Laws; since divers Causes triable in the Spiritual Court are of Weight, and the Judges there ought to be sound Proficients in those Laws, else they cannot administer Right to the King's Subjects. *Sutton* being examin'd on these Articles, confess'd himself to be a Divine, and to have a Spiritual Living; and said, that the Office of the Bishop's Chancellor was grantable for Life, and that the Bishop of *Gloucester* had granted him this Office for Life, with the Confirmation of the Dean and Chapter, where-

* vi. l. 13. 2.

|| Lindw. lib. 1. Tit. 10. c. 4. v. *Vistationibus*.

† Littl. Rep. p. 22.

|| Mod. Rep. p. 4.

* Brown. Rep. pt. 2.

by he had a Freehold therein, and ought to enjoy it during his Life. And that (notwithstanding this Answer) they proceeded against him : Wherefore he pray'd to have a Prohibition, but the Court deny'd it ; and he was thereupon deprived of his Chancellorship by the Ecclesiastical Commissioners.

By the *Canon* Law, neither a Layman, nor a Parson in Wedlock could exercise this Office of a Chancellor or Vicar-General, or any other Ecclesiastical Jurisdiction whatever ; because (says that Law) he is of another Condition or Profession ; and, according to the *Canonists*, Men ought not to associate and join themselves together in the same Office under a Disparity of Condition or Profession. But yet a Layman and a Clerk, even according to that Law, might be join'd together as Executors, in respect of any Man's last Will and Testament, where any Thing was to be got to the Church : which plainly shews the Knavish Distinction of the *Canon* Law for the Interest of the Clergy. But a Religious might, by the leave of his Abbot, be a Bishop's Chancellor, or Bishop's Official, or Vicar-General, tho' he was of another Profession, because (says the Law) this Office is an Office with Cure of Souls ; which is not true from the Nature of it in our Law-Books ; and many of the best *Canonists* have disavow'd it in their Works. After *Henry* the VIIIth had re-assumed the Supremacy*, a Statute was made, by which all Doctors of the *Civil* Law, whether marry'd or not, might be made Chancellors, and sit as Judges in Bishops Courts, tho' they were Laymen. 'Tis true this Law was repeal'd in the First and Second of *Philip* and *Mary*, but it was revived by the First of Queen *Elizabeth*.

* 37 H. 8.
ch. 17.

† Cok. Rep.
pt. 12.

|| 5 & 6 E. 6.
ch. 16.

In Dr. *Trevor's* Case†, it was resolv'd, by all the Judges giving their Opinions, in a Reference had to them by the Lord Chancellor, that the Offices of Chancellor, Register, and Commissary, in the Ecclesiastical Courts, are within the Statute of *Edward* VI. || against *Buying and Selling of Offices* : For though they are principally concern'd in Matters *pro salute animæ* ; yet they have also a Concern in Matters of *Matrimony* and *Legitimation*, which touches the Inheritance of the Subject ; and likewise about Matters of Legacy for Chattels *Real* and *Personal* ; and in this respect they are Courts of Judicature. And, therefore, the Officers of those Courts, are Officers as well within the View of that Statute, which restrains the Buying of Offices, as any other Offices within the Courts of Common Law*.

* Crok. Rep.
Jac. p. 269.

It has been already hinted, that a *Commissary*, in *Latin* stiled *Commissarius*, is a Title of Ecclesiastical Jurisdiction appertaining to such a Person as exercises Spiritual Jurisdiction (at least) so far as his Commission permits him, in such Places of the Diocess as are remotely distant from the Chief City : As when the Chancellor cannot call the Subjects of his Jurisdiction to the Bishop's principal Consistory without too great a Molestation and Inconvenience to them. And being by the *Canonists* in *Latin* sometimes term'd *Officialis Foraneus*, he is (say they) appointed to this especial End and Purpose, viz. to supply the Bishop's Jurisdiction and other *Judicial* Offices in the out Parts of his Diocess ; or else in such Parishes as are peculiar to the Bishop, and are exempted from the Archdeacon's Jurisdiction. But a Commissaryship is not grantable for Life, so as to bind the succeeding Bishop, though it should be confirm'd by the Dean and Chapter : And so it has been adjudg'd. The Case was thus, viz. The Deanery of *Wolverhampton*, annex'd to the Deanery of *Windsor*, being a Peculiar, and having ordinary Jurisdiction, the Dean made a Commissary, who was confirm'd by the Chapter ; and the Question was, whether this was good to bind the Successor ? *Dodderidge* said,

said, that such a Jurisdiction is judicial, and that such a Grant is but a Commission or Authority at all Times remaining in the Ordinary. 'Tis true, that Ecclesiastical Jurisdiction in *Judicial* Acts may be executed by a Substitute; but in Law they are the Acts of them that depute or substitute the other*. A Commissary may excommunicate, and prove a Last Will and Testament; but that shall be in the Name of the Ordinary†: And a Grant of such Power is not good, but only during the Life of the Ordinary, and shall not bind his Successor; for the Law has appointed, who shall execute such Jurisdiction *sede vacante*, viz. the Archbishops in their several respective Provinces||. And if that should be a good Grant to bind the Successor, then the Successor cannot remove him; and yet the Successor shall answer for the Acts and Offences of the Commissary, which is too hard and unreasonable*.

* 11 H. 4.
64. a. 7. E. 4.
14. 20 H. 6.
1.
† 20 E. 3.

|| 17 E. 3.
23.

* Noy's Rep.
153.

By the Statute of the 37th of *Henry VIII.* Cap. 17. Lay-Persons marry'd or unmarried, being Doctors of the *Civil* Law, may be Chancellors, Officials, Commissaries, Registers, &c. And it has been resolved, that a Patent granted to a Chancellor, Commissary, Official and the like, being a Layman, tho' no Doctor of the *Civil* Law, is a good Grant; for the Statute does not restrain any such Grant: And it is but an Affirmance of the Common Law, where it was doubted, whether a Layman or a marry'd Person might have such Offices. And to avoid such Doubts, this Statute was made: which explains, That such Grants are good enough, since it is but an affirmative Statute, and no Restriction couched therein. And tho' Doctors of the *Civil* Law, being Laymen or marry'd Persons, may have such Offices, yet this is no Restriction, but that others besides Doctors of that Law, may have them. And for this very Point there is an adjudged Case between *Prat* and *Stock*†; where, upon a Demurrer, the Statute was pleaded against the Plaintiff, to whom a Commissaryship was granted, being but only a Batchelor of Law; and, he having granted Letters of Administration, the Grant was deemed good. And it was also resolved, That where an Officer for Life accepts of another Grant of the same Office to him and another, it is not any surrender of the first Grant. But the Offices of an Officialty to an Archdeacon, and of a Chancellorship or Commissaryship to a Bishop, granted to two, where they were only grantable to one for Life, and being granted in Reversion, it is a void Grant by the Statute-Law against the Successors: For the Statutes restrain all Grants of any Thing, and render them voidable against the Successor, besides Grants of Necessity, and Leases for three Lives or one and twenty Years: And all other Grants, as well of Offices as of other Things, not warranted by the Statutes, are made void as against the Successors||. See the Case of *Vaughan* and *Compton* 14 *Jac.* at the Assizes for the Office of the Registership of *Suffolk*; and between *Jones* and *Pozwel* for the Registers Place of *Hereford*, wherein it was adjudged, That such Offices granted in Reversion were void unless granted as before directed, viz. Where the Grant has been by Survivorship.

† Hill. 35
Eliz. Rot.
181.

|| Cok. 10.
Rep. fol. 60.
Cok. 5. Rep.
fol. 14.

It has been said, that a Bishop's Official or Chancellor, is he, to whom the Bishop delegates the Cognizance of Causes in a general Manner; and as such, an Official or Chancellor, has the same Consistorial Audience with the Bishop himself that deposes him*: an Appeal does not lie from such an Official to the Bishop himself, but to him only unto whom it ought to be appealed from the Bishop himself: But 'tis not the same Thing in Commissaries, who are not Principal Officials, tho' deputed to an universality of Causes in a certain Part of the Diocess; because a Principal Official is an Ordinary, and the other only a delegated Judge.

* vi. 2. 15.
3.



Of Chapels, and the Division thereof.

THE *Latin* Word *Capella*, or in *English* a *Chapel*, is so called by *Rebuffus*, *quasi capiens populum vel laudem dei*; but according to the Archdeacon *, it is so stiled à *Caprinis pellibus*, that is to say, from the Goat-Skins with which Altars were heretofore cover'd: yet the *Provoft* † will have it to be termed à *Cappâ divi Martini*. Now a Chapel is a Place which usually contains a lesser compass or space of Ground than a Church does; and, consequently, does not hold so many Folk as a Church does: And in this Sense an *Altar* is sometimes termed a Chapel in the Books of the *Canon* Law. And sometimes, in these Books, a Chapel is said to be the same as an *Oratory*, and is called an *Oratory*; because Prayers, in *Latin* stiled *Orationes*, ought to be perform'd and celebrated therein, and no other profane Matters. A *Chapel*, according to *Rebuffus*, differs from a *Chapellany*; because, according to the *Canon* Law, every Parochial Church that subsists of itself, and has its own proper Bounds distinct and separated from the Mother Church, may be called a *Chapel* ‖; provided it be not a Cathedral or Collegiate Church: But a *Chapellany* is usually said to be that, which does not subsist of it self, but is built and founded within some other Church, and is dependant thereon.

A secular Chaplainship or *Capellania* was that, which Men built and founded on their own Estates, and in their own proper Houses for divine Worship, and was given to certain Priests for the Administration of Divine Service therein; and the Person thus officiating therein, was in *Latin* called *Capellanus* from the *Chapel* or *Chapellany*, over which he was set to celebrate the same *. And, upon this Account, he was to receive certain yearly Stipends; and that without the Authority of the Bishop of the Diocese. Wherefore, the *Canon* Law looks upon such a Foundation only as a *profane* Building; or, as *Johannes Faber* calls it, a Legacy to Pious Uses: And, therefore, it may be granted to any Priest, according to the Discretion of the Patron, Founder, or his Heir. But if the Patron of a secular or free Chapel presents to the same by the Name of a Church, and his Clerk be instituted and inducted thereinto, &c. it has lost the Name of a free Chapel.

A Chapel may be Parochial, and have Parochial Rights, and therein the Sacraments of the Church may be administred to the Parishioners in such a Manner, as that they shall not be oblig'd to repair and go to the Mother Church for Hearing of Divine Service, or Receiving the Sacraments: and for this end, they shall have a Parish-Priest particularly assign'd and appointed to them †, as in our Chapels of Ease here in *England*. And such a Church is often called a *Chapel*, to distinguish it from the Mother Church, on which it depends ‖; but yet a Chapel has not a proper Parish assign'd; nor can it be built and erected in prejudice of the Mother Church, nor without the Bishop's Authority. For it only belongs to the Bishop of the Diocese to constitute such a Church or Parochial Chapel: And, I think, this is true in all those Chapels, wherein any Person has Institution as a perpetual Curate thereof, tho' such Chapel should depend

on

* In c. 54.
Q. 16. 1.

† In c. 8.
Dist. 23.

‖ Clem. 5.
6. 1.

* X. 3. 37. 1.

† Lindw. lib.
3. Tit. 23.
c. 10. v. *Capellâ Paroch.*
‖ Lindw. lib.
3. Tit. 23.
c. 5. v. *Capellâ*
lib.

on the Superior or Mother Church*; and such Chapels may prescribe to Tithes and other Spiritual Rights, in opposition to the Mother Church. But tho' in such a Chapel there be no perpetual Curate instituted peculiarly thereunto, but such Curate is removeable at the Will and Pleasure of the Rector of the Mother Church†: yet even in such a Case, such a Chapel may have the *Jura Parochialia*, viz. by Custom prescrib'd; since Custom prevails very much in transferring the Right of one Church unto another||. And in the like Manner, this may be done by Composition*, Prescrip- tion†, and by Privilege|||.

Every dependant Chapel shall pay to the Bishop a particular and single Procuration, if it has a Congregation of People, and a Sufficiency to pay the same: for the Bishop ought to visit, and have a respect to every Member and Part of his Diocess*. But what I have here said, ought only to be understood as true, viz. when the dependant Church or Chapel has a peculiar Curate of its own, that is to say, a Minister or Curate distinct from the Minister or Curate of the superior Church. But 'tis otherwise, when the Rector or Prelate of the superior Church is the Curate of them both, though he there exercises the Cure of Souls by a Vicar, that is not perpetual, but only temporal and removeable at Pleasure: for such a Minister is not a certain Curate, which is necessary in order to oblige him to undergo a Visitation, and to pay Procurations *in loco Capellæ*†. If the principal Church be of one Diocess, and the Chapel united and annex'd to it, or dependant on it, be of another Diocess; then, by such Union or Dependency, the former Ordinary shall have the Power of visiting such Chapel united, and consequently receive Procurations due on the account of Visitation, if the Ordinary of the Place, where the Chapel dependant stands, did visit the same before such Union, and receive Procurations from thence on the score of Visitation*. And it is to be noted, that several Chapels may be dependant on one Church; as we find by Experience in several Places of *England*. In the Case of Baptism, tho' the Mother Church be in Law called the *Baptismal Church*; yet if the Mother Church be at a great distance, and the dependant Chapel be near at hand, it is sufficient if the Infant to be baptiz'd, be carry'd to the said Chapel without regard had to the Mother Church, provided there be a Font or *Baptisterium* in the said Chapel, and the Child's Parents be Parishioners belonging to such Chapel in respect of Baptism. See *Lindwood's* Gloss on the Provincial Constitutions†.

There are some Chapels which adjoin to, and are Part of the Church, and these are such as were built by Persons of Honour and Distinction for Burying-places for themselves and their Families. And there are Chapels in the Universities belonging to particular Colleges, and these are consecrated, and have the Sacraments administered therein: But they are not liable to the Bishop's Visitation, but to that of their Founder only. *Domestick Chapels*, which were built by Noblemen and others, for the private Service of God in their Families, without the Bishop's Leave, are such as are not consecrated; and because these were built without the Bishop's Consent, and had no Consecration, 'tis probable for this Reason, that they are exempted from the Bishop's Jurisdiction. *Free Chapels*, are such as were founded by the Kings of *England*; and this appears by the Writs of Prohibition, when the Privileges of such Chapels have been invaded by Abbots and others: For the Recital is||, *cum Ecclesia, &c. per Progenitores nostros, quondam Reges Angliæ fundata, &c. Capella libera à primæva sua fundatione fuerit*. Where the Word *libera* imports, that it is free from all Episcopal Jurisdiction, and only to be visited by the Founder* and his Successors, which is done by the Lord Chancellor. But yet the

* 16 Q. 1.

54.

† X. 2. 26. 10.

|| X. 3. 30. 31.

* X. 3. 30. 3.

† X. 3. 30. 23.

||| X. 30. 30.

30.

* X. 1. 31. 13.

† 3. 29. 27.

* X. 3. 36. 2.

† Lib. 1.

Tit. 6. cap. 2.

v. ad Ecclesi-

am.

|| Reg. 40.

41.

* F. N. B.

42.

King may license any Subject to build and endow a Chapel, and by his Letters Patents exempt it from the Visitation of the Ordinary.

* Lib. I.
Tit. 15. cap.
un. v. *Capel-*
larum.

There were, when *Popery* prevail'd here in *England*, some Persons that were called *Parochial* Chaplains; others that were stiled *Chauntry-Priests*, or Chaplains; and a third sort that were term'd *Anniversary-Priests* or Chaplains. The first had *Parochial* Chapels; the second had *Chauntries*; and the third celebrated *Annats* either for the Dead or the Living: and all these Persons were bound by an Oath to exhibit due Obedience to the Curate of the Mother Church, and not to be guilty of any Detraction against him. And the Chapels wherein these Priests celebrated divine Service, *Lindwood* * stiles Chapels *ex Gratia* and not *ex Debito*. And the same Thing may be understood of a Chapel, which is a Part of the Mother Church, or dependant on it, or annex'd to it; because it is a Cure of Souls. And *thirdly*, The like may be understood of a Chapel that has a Dignity, as in the Chapels Royal, and several others in *England*. For in what Sense soever the Word *Chapel* is used, the Chaplains ministering therein are always obliged to yield Obedience to the President thereof, in those Things that relate to his Office.

† *Lindw.*
lib. 3. Tit.
23. cap. 10.
v. *Capellis*
Parochialibus.

Chapels of Ease are such as are commonly built in very large Parishes, where all the People cannot come to the *Mother Church*; and in these *Chapels* the Cure is usually served either at the Charge of the Rector, or of such, who by Custom or Composition are to provide a Minister to officiate there; but generally the Sacraments are to be administered in the Parish Church, and not in those *Chapels* †. 'Tis true, in some particular Districts, where such *Chapels* are, they may baptize and administer the Sacraments, and may have *Chapel-Wardens*; but these Chapels are not exempt from the Visitation of the Ordinary, nor those that resort thither, from contributing to the Repairs of the *Mother-Church*, especially if they bury there. For tho' some Part of the Parish have always repair'd the *Chapel*, yet 'tis still the same Parish, and they are Part thereof: And, therefore, of *common Right*, ought to contribute to the Repairs of the Church; and the rather, because such *Chapels* were built for their Ease. But more of this hereafter under another Title.



Of a Church, and other Matters relating thereunto.

* Mat. cap.
21.
Joh. cap. 2.
† Dd. inc. I.
X. 3. 40.

|| X. 3. 38.
25. X. 3. 50.
2.

THE Word *Church*, in *Latin* stiled *Ecclesia*, has several Names in Law, and is taken in divers Senses: For it is sometimes in *Latin* call'd *Oratorium*, or in *English* an *Oratory*; sometimes *the House of God*, or of Prayer*; sometimes *a Temple*; sometimes the *Lord's Tabernacle*; and sometimes in *Latin* it is termed *Basilica* †. But then by the *Canon Law*, as it is stiled *Basilica*, it is an Edifice erected for the Service of a Church, which has not yet had Consecration bestow'd on it, as a Chapel in a Gentleman or Nobleman's House, and the like: and that is in *Latin* properly call'd *Ecclesia*, according to *Job. Andreas* on the *Decretals* ||, which has receiv'd Consecration. It is called a *Tabernacle*, because it is made and framed *de Tabulis*, or in *English* of Planks and Boards:

Boards : But, according to the Arch-deacon *, a *Tabernacle* is sometimes * 16 Q. 7. used and put to signify the whole Church. But under the simple Appellation of the Word *Church* or *Ecclesia*, the *Canonists* only mean a Cathedral Church. The Word *Church* is also taken for any particular Congregation or Assembly of Men, as the Church which was at *Corinth* †; and likewise in these latter Days, according to the Pride of some *Men*, it is put for the Persons that are ordain'd for the Ministry of the Gospel, that is to say, the Clergy ; and for this they quote the 5th Book of *Moses* ‖, where 'tis said, *A Bastard shall not enter into the Congregation of the Lord*, or (in other Terms) he shall not be promoted to the sacred Order and Function. I shall not here take the Word *Church* in the Sense of some Divines, viz. for an Assembly or Congregation of Christians wheresoever dispers'd or existing, but for the House of God wherein divine Service is perform'd, and wherein Clergymen do administer Holy Things : And of this kind there are four sorts of Churches, viz. *Cathedral*, *Collegiate*, *Conventual* and *Parochial* Churches ; but some make a *Collegiate* and a *Conventual* Church to be one and the same Thing. A *Cathedral* Church is that, wherein there are two or more Persons, with a Bishop at the Head of them, that do make as it were one Body Politick : And in the like manner, *Collegiate* Churches were such as were built at a convenient Distance from the *Cathedral* Church, wherein a number of Presbyters were settled and lived together in one Corporation ; and these were liberally endow'd by the Devout and Great Men of those Times wherein they were built, for the better attending the Service of God therein, and in the Limits round about them ; for the State of an Itinerant Clergy being found very inconvenient, Encouragement was therefore given to the Building of these Churches, as Christianity began to increase and prevail more and more in the World. A *Conventual* Church is that, which is appropriated to some Religious House ; and over which an Abbot or Prior presides : For in these Churches of *Regulars*, there ought not to be any secular Clerks for the Government or Administration thereof ; and if there be, they ought to be remov'd *. A *Parochial* Church is that, unto which all the Inhabitants of such a District or Parish ought to resort for hearing divine Service ; and herein it differs from a *Cathedral* or *Collegiate* Church, because it does not consist of a Chapter, as not being a Corporation aggregate ; and from a *Conventual* Church, because it is of a secular Nature.

At first there was only one Church in each Diocese, viz. at the Place where the Bishop and his Clergy resided, and perform'd all divine Offices : And so it was here in *England*, as at *London*, *Canterbury*, and the like ; and from hence, as Necessity requir'd, Clergymen were sent out to preach and baptize in the remoter Parts of the Diocese ; and this was stiled the Cathedral Church. But afterwards in Process of Time, some other Places of Worship were built here and there, in the Days of the *British* Christians, as at *Glastenbury*, *Evesham*, and the like ; and these were called *Collegiate* and *Conventual* Churches. In the *Saxon* Times, Noblemen began very early to build and erect Churches for their own Convenience †, which yet were not to be made use of, till consecrated by the Bishop ; and hence (according to some) began the Division of Churches : But when the *Parochial* Division of Churches began here in *England*, we cannot precisely say ; and so far is it from being true, that *Honorius* Archbishop of *Canterbury* settled this Work all at once ‖, that it does not appear to be then thought on. And yet this Work advanced so far in King *Edward the Confessor's* Reign, that 'tis complain'd of in his Laws, That in some Places there were three or four Churches, where formerly there had

‖ X. 5. 40. 19.

† 1 Corinth. cap. 1.

‖ Deut. cap. 23. v. 2.

* X. 1. 6. 27.

† Bede, lib. 5. cap. 4.

‖ A.D. 636.

† Vid. Spelm. had been but one†, by which means the Maintenance of the officiating Priest was much lessen'd.

In the greater Church of the City of *Constantinople*, and in other Churches adjoining and subject thereunto, the Number of the Clergy was to be stated and certain, according to the respective Estates of such Churches; and lest that such Churches should be reduced to Poverty, this Rule of Law was to be observed under a severe Penalty to be inflicted on such Persons as should act contrary hereunto. And it was ordained both by the *Civil* and *Canon* Law, That whenever a Church is built, such an Endowment ought to be settled thereon, as shall be sufficient to support and maintain the Priests, Deacons, and other necessary Persons in the said Church: For unless the Person will in the first Place thus endow the same, he shall not be allowed to erect and build a Church. And the Law moreover requires, That such an Estate be settled thereon, as will maintain Hospitality, and sufficiently discharge all Episcopal Dues. But if an Endowment be not settled thereon at the Time of founding the Church, the Bishop ought to see the same settled thereon at the time of its Consecration, otherwise the Church ought not to be consecrated.

A *Cathedral* or *Collegiate* Church ought not to be void or without a Prelate above the space of three Months: For if they, to whom the Election belongs, shall neglect or refuse to chuse a Prelate for such *Cathedral* or *Collegiate* Church for above three Months, the Choice thereof shall devolve to the next immediate Superior†; and if he shall not chuse within three Months more, he shall be punish'd according to the Canon. But a Church may be called a *Collegiate* Church, tho' it has no Prelate placed therein; yet this of a Prelate is generally reckoned one of the chief Badges of a *Collegiate*, or *Conventual* Church. For every College or Convent ought to have these particular Badges, *viz.* A common Seal, and the Use thereof*. *2dly*, The Election and Choice of a Prelate regularly speaking. *3dly*, The Liberty of treating and debating Matters in common, as in a Chapter or Common-Council†. *4thly*, They ought to have a common *Area*, or *Scite* belonging to it. And, *5thly*, They ought to have a *Refectorium* and a *Dormitory*, if they be of a Religious Order||.

* X. 2. 28. 48.

X. 3. 39. 30.

† X. 2. 19. 5.

X. 3. 24. 8.

D. 47. 22. 1.

|| X. 3. 35. 6.

A Church is said to be subject, and belongs to a Person *Pleno Jure*, when the Bishop exercises no Episcopal Right or Jurisdiction therein, but the whole Jurisdiction belongs to an Abbot, or some other Prelate: And therefore the Presentation, Institution, and Deprivation do belong to him, that has such a Church *Pleno Jure*. Thus in Churches belonging to Religious Houses, the Presentation of the Rector is not made to the Bishop, but the Religious themselves do give him Institution, and may afterwards deprive him (if occasion be) without the Bishop: yet this is only to be understood where the People, that is to say, the Parish, is of an exempt Jurisdiction; for otherwise in respect to the Cure of Souls, Recourse ought to be had to the Bishop. The Custody or Guardianship of a vacant Church does of *Common-Right* belong to him, who has the Right of Collating or giving Institution thereunto*: And such vacant Church during its Vacancy, ought to be governed by its own *Oeconomus* till such time as the Patron or Collator has made a Provision for it within the time assigned them by Law.

* Abb. in
c. 3. X. 5.
31. N. 3.

Churches and Temples have many Immunities in Law; some of which are in common with other Things Ecclesiastical; and some of them are proper and peculiar unto Churches and Temples alone. As that no Tumultuous Assemblies or Conventicles shall be held in Churches and

and Temples, or such things as may disturb divine Worship: Nor ought Civil Courts of Judicature to be held therein*, though it was look'd upon by the Antients to be a Matter of Religion not to begin any Councils, or hold any Senate, unless it was in some Temple or Grove. And so sacred was the Church unto some, that it had the Right of an *Asylum*, or Sanctuary, as it has at this Day in some *Popish* Countries †, for protecting the greatest Offenders against the State; and so Holy was the Ground thereof, that we also read, that heretofore no one was bury'd in the Church of the Martyrs. And this was also peculiar to Churches, *viz.* That though a Church was not consecrated, yet if Divine Service was perform'd therein, it enjoy'd the same Immunities as a consecrated Church; for we ought to shew our regard to the Divine Worship therein perform'd, and not to the Walls thereof.

When the Prebends of Cathedral Churches are so small as to induce Poverty, Chapels might be annex'd to them: yet a suitable Provision or Allowance was to be reserv'd to the Ministers or Presbyters of such Chapels. For before the Council of *Lateran*, the Canons of a Cathedral Church might have Chapels or Parochial Churches annex'd to their Prebends for their better Subsistence, if they could not be commodiously supported on the Revenues of the greater Church, reserving a due Portion to the Chaplains or Parochial Ministers: But, by a Provision of this Council, Chapels or Parish-Churches were taken away and deny'd to Canons. There are some Churches, that are not subject to the Archdeacon, tho' they are placed and situated within the Precinct and District of the Archdeaconry: As *Regular* Churches; and, such are the Monasteries of Monks, *Regular* Canons and Nuns. And 'tis the same Thing, if an Archbishop has specially reserv'd some particular Church unto his own Jurisdiction, so that the Archdeacon cannot exercise any Jurisdiction over those Churches: For in this Case such Churches shall not be said to be subject to the Archdeacon; as it appears in many Places, where Archbishops and Bishops exercise immediate and peculiar Jurisdiction. When two Churches are united together, they make but one Church in Law; and *à Modo* are said to be but one: And in this Sense, a Person shall not be said to have a Plurality of Benefices, but only one Benefice. If a Person bequeaths a Legacy to the Church in general Terms, when there are several Churches in the same City, he is understood to leave it to his Parish-Church, or to the Church where he is bury'd.

The Word *Church* is sometimes taken for the material Body or Fabrick thereof, as for the Walls, Windows, Covering and the like; and in this Sense, it comprehends the whole Church, *viz.* the Nave or Body of the Church, together with the Chancel, for the Chancel is even included under the Word *Church*||. Churches and Chapels in the Country, and even such Parish Churches as are in a City, are in our Books said to be *Minores Ecclesia*, in Respect of Cathedral Churches, which are there stiled *Majores Ecclesia*, to which the Priests ought, on Rogation-Days, to go and say their Litanies*. But the word Church sometimes signifies the general Government and Administration of the Spiritualties and Temporalties of the Church; and sometimes 'tis taken for the Prelacy thereof†.

I have before observed, that an *Oratory* is sometimes taken for a *Church*, but properly speaking an *Oratory* signifies a private Place, which is deputed and allotted for Prayer alone, and not for the general Celebration of divine Service: And hence, according to *Andreas*, an *Oratory* differs from a *Church* in the strict Acceptation of the two Words. For in a Church the Law has settled a certain Portion or Endowment meet for the Rector and other Necessaries*; but an *Oratory* is not built for the general Celebra-

* X. 3. 49. 5.

† X. 3. 49. 6.

|| Lind. lib. 1. Tit. 10. cap. 4. v. *Fabricam Ecclesie.*

* Lindw. lib. 1. Tit. 1. cap. 2. v. *Minorib. Ecclesiis.*

† X. 3. 26. 12. 2.

* Con. 1. Dist. 40.

† Con. 1.
Dist. 33.

* Con. 1.
Dist. 34 &
35.

† Con. 1.
Dist. 33.
¶ N. 5. 33.
10.

* vi. 5. 7. 4.
† N. 5. 33.
10.

tion of divine Service, or for saying Mass †, in the Phrase of the *Romish* Church. Nor is it endowed, but only ordained for Prayer alone (as afore-said) without the ministration of the Sacraments : And any Person may build such an Oratory without the Bishop's Consent, though a Clerk cannot celebrate divine Service therein without the Bishop's Licence. And tho' the Bishop may not grant such a Licence for the Celebration of divine Service therein on the greater Festivals of the Church * regularly speaking ; yet because *Oratories* of this kind are sometimes built on the account of Necessity, the Bishop ought to grant the same, when there is no Church in the Neighbourhood ; and divine Service may be administered therein on the said Festivals, and not otherwise †. But Bells ought not to be put up in the said *Oratories* without the Bishop's Authority ‖. And thus these *Oratories* are *ad orandum*, and not *ad celebrandum*, without the Intervention of the Bishop's Authority, or some other Privilege obtain'd from the Apostolick See : And as Churches are stiled *publick* *, so these are termed *private* † Oratories.



Of Church-wardens, and their Office.

† Can. Jac.
115.

¶ Vid. Post.
Tit. Repairs.

THE Office of Church-wardens, is not only to take Care of the Estate and Rights of the Church, and to demand and sue for Debts and Legacies belonging thereunto, but also to present and denounce all Hereticks, Schismatics, Whoremongers, Adulterers and Incestuous Persons, unto the local Ordinary ; and all Persons guilty of Perjury, Simony, Defamation, and other Infamous Persons living or offending within their Parish † ; and also all such as Scold or Brawl in the Church or Church-yard ; and such as on Sundays or Holidays refuse to attend divine Worship, and the holy Mysteries of Religion : provided, they are not hindered by any legal Impediment. Moreover, 'tis the Duty of all Church-wardens to present the Dilapidations of the Chancel and Mansion House belonging to the Rector or Vicar ; and to signify the Negligences and Errors of Curates and Ministers unto the afore-said Ordinary. *Thirdly*, Their Business is likewise to take care of the *Nave* and *Tower* of the Church ; and of the Bells, Books, and other Goods and Ornaments belonging thereunto ; and out of the Moneys of the Church to repair the same whenever need requires, or (at least) they ought to see the same done ; and also to see that the Church-yard be fenced in with a decent Rail or other Inclosure. And if the Moneys of the Church shall not be enough for compleating the Premises, they may, with the Consent of the Parishioners duly summon'd hereunto, impose a Rate, and levy a Tax on each Parishioner, according to the Measure and Proportion of their Estates ‖. And if any of the Parishioners shall refuse to pay this Rate or Tax at the day appointed for the Payment of it, or shall defer the same, the Church-wardens shall present or denounce him to the local Ordinary ; who, in the Spiritual Court, shall by Ecclesiastical Censures compel him to pay the same, and condemn him also in Costs of Suit.

The Church-wardens themselves, whose ancient and undoubted Office it is to make Presentments, do not take a particular Oath upon all Presentments they make ; but they do it by virtue of their general Oath as Church-

Church-wardens. And Ministers of Churches do the same, or rather by virtue of their general Oath of Canonical Obedience. It is the constant Course of Proceedings in the Ecclesiastical Court, that when a Presentment is made, they form Articles thereupon; but they never recite or mention the Presentment in the Articles; and it need not appear in them. But if there be no Presentment made, it is an error in not proceeding according to the Rules of the Court Christian, that is to say, according to the Rules of the *Canon* Law: And the proper Method for such a defect is by an Appeal, and not by a Prohibition at Common Law. For the common Law Courts will not take Cognizance whether the Ecclesiastical Courts observe their Laws or not: Prohibitions being only granted, when the Common Law is invaded or interfered withal.

It is not the Course of the Spiritual Court now to examine the Person presented upon Oath, that Oath being now abolish'd by Act of Parliament †: But they may ask him *oro tenus*, whether he will confess or deny the Presentment or the Articles exhibited. If he denies the Articles, then there is a negative Contestation of Suit; and it is proceeded to examine Witnesses to prove the same; and if it be not proved, a *voluntary* Promoter is condemned in Costs or Expences of Suit. *Sed Quare* of a Church-warden, who is a necessary Promoter. Church-wardens are not spiritual Persons, tho' their Office be a kind of Ecclesiastical Office *. Tho' Church-wardens may have their Action for such of the Parish Goods as are taken away, yet they cannot dispose of them without the Consent of the Parish; and a Gift of such Goods, made by them without the Consent of the Sides-men or Vestry, is void †: And tho' the Goods of the Church do belong to the Parishioners, yet they cannot have an Action of Account against the Church-wardens for wasting any of them, but must make new Church-wardens, and those new Church-wardens may bring an Action of Account against the former ‖. And though they should prescribe to chuse two Church-wardens, and that the Persons so chosen shall continue in that Office for two Years, yet the Parish may (notwithstanding the Prescription) remove such Church-wardens at their Pleasure, and chuse new ones; for otherwise the Parish might sustain great Loss, if the Church-wardens should continue so long in their Office contrary to the Will of the Parishioners; because in that Time they might waste all the Parish Goods belonging to the Church *.

Tho' the Free-hold of the Body of the Church be in the Incumbent thereof, and the Seats therein be fix'd to the Free-hold; yet because the Church is dedicated to God's Service, and is for the Use of the Inhabitants, and the Seats are erected for their more convenient Attending on divine Service, the Use of them is common to all the People that pay to the Repair thereof: And, therefore, if any Seat, tho' fix'd to the Church, be taken away by a Stranger, the Church-warden (and not the Parson) may have their Action against the Wrong-doer †. If the Goods of the Church be stolen or taken away, it is Robbery and Sacrilege; and the Church-wardens may have an Appeal of Robbery ‖; and a Libel may also be exhibited in the Spiritual Court against the Offender *pro salute anime*, &c. * *Syderf. Rep. pt. 1. p. 281.* but not to recover Damages. The Church-wardens may justify many Acts, in order to appease any Irreverence or Disorder in the Church or Church-yard in Time of divine Service, as to whip Boys, or take off the Hats of those that would irreverently keep them on †; and, lastly, they ought to present the Names of such Persons as do behave themselves irreverently in the Time of divine Service.

† 17 Car. 1.
cap. 11.
13 Car. 2.
cap. 12.

* Rolls 1.
Abr. p. 653.
Rolls 2.
Rep. 107.

† Bulstr.
Rep. pt. 3d.
p. 264.

‖ S E. 4. 6.
4 E. 4. 6.

* 26 H. 8. 5.
b. 13. Cok.
Rep. p. 70.

† S H. 7. 12.

‖ 37 H. 6. 39.

* Kebl. Rep.
pt. 2. p. 23.

† Saund.
Rep. pt. 1.
p. 13.
Syd. Rep.
pt. 1. p. 303.



Of Church-yards, &c.

AS we have a sure and certain Hope of a future Resurrection, and that the Soul being Immortal, will, at some Time or other, resume its Body again in a glorify'd Manner; a decent and religious Care has therefore been taken at all Times, and almost among all Nations, about burying the Bodies of the deceas'd in some sacred and religious Place, tho' the Worship of the true God has not been among them. And therefore, the Places where dead Bodies are bury'd, are in *Latin* call'd *Camiteria*, and in *English*, *Dormitories*; the *Latin* Word *Camiterium* being deriv'd from the *Greek* Verb *Koimede*, which imports *the laying a Man to sleep*. And *Christ* himself, in *St. John's Gospel* *, calls Death itself by the Name of sleeping: *viz. our Friend Lazarus sleepeth*; but *I will go, that I may awake him out of Sleep* †. And in another Place he saith, *the Girl is not dead, but sleepeth* ‖. And such like Expressions we meet with in several Places of Holy Writ. And 'tis likewise used in the same Sense and Manner among profane Authors: For a Person is said to be dead to us, because we cannot raise him from the Grave; though he only sleeps unto God, who can raise him from the Chamber of Death.

* Cap. 11.
v. 11.
† Mat. cap. 9.
v. 24.
‖ Psalm. 56.
Job. cap. 7.
&c 11. 14.
&c 21. 1 Cor.
cap. 11. &c.

According to the Papal Law, Church-yards are said to be consecrated for several just and weighty Reasons; among which (I think) some of them ought to be treated with the utmost contempt, *viz. First*, Because (as *Chrysostom* observes in his *Homilies* †) Dæmons usually resort-ed to the Sepulchres of Persons deceased: But this rather favours of Priestcraft than of any Truth or Fact, and was an Invention of the Clergy to get Money by Prayers for the Dead. Indeed, we read in *St. Matthew's Gospel* ‖, that the *Demoniack* dwelt in Sepulchres; and, coming out from thence, besieged and stopped up the Way: But this was effected by God himself, for the sake of *Christ's* working a Miracle. And *Franciscus Venetus* likewise, to magnify the Power of the Clergy, does, in the *second Tome of his Problems*, give us a strange Account of this Matter, saying, That the Bodies of Persons were frequently haunted by unclean Spirits; and that tho' the dead Bodies themselves did not strike a Fear and Terror into Men, yet the Spirits that surrounded them did; and that, a greater Terror into a Man that was solitary and alone, than into one attended with a Companion. And, therefore, it was usual to burn Lights about the Bodies of the deceas'd, in order to keep off and drive away those Powers of Darkness, which they dreaded so much, as is pretended. And hence it was that Church-yards were consecrated, besprinkled with holy Water, and scented with burning Frankincense, according to the Fopperies of the *Romish Church*. A second Reason, why Church-yards were consecrated, was, because the Clergy would keep this Ground to their own Behoof and Advantage; and as their own Property. For having persuaded the People into a foolish Opinion, that the Souls of the departed hover'd about their Bodies after Death, they could not be laid at Rest without the Help of the Priest; and that this could not be obtain'd unless they were bury'd in holy Ground, whereon the Priest exercised his Office: and thus they made

† Tom. 2.

‖ Mat. cap.
8. v. 28.
Mark cap. 5.
v. 2.

made the Church-yard a Place necessary unto Rest after Death, and made an immense Profit to themselves thereby. Besides, as Church-yards were separated and divided by Consecration from other profane and impure Places*; so the Bishops who consecrated this Ground, were wont to have a Spill or Sportule for the same from the credulous Laity. And thus, in Time, a Church-yard became a Place appointed and set aside for Christian Burial.

* 13 Q. 1. 1.
in prin.

By the *Civil* Law heretofore, the Corpse of Persons deceas'd were buried out of the City in the Fields†; and the Place, into which any dead body was brought, immediately became Religious of divine Right; and was so far exempt from all human Uses, that superstitious Antiquity did not believe it to be in any Man's Property||: But at this day 'tis not lawful to bury the Bodies of Persons deceas'd in any other Places than the Church or Church-yards*, unless it be the Corps of Persons capitally punish'd for any Crime, which are usually hung up on a Gibbet, and expos'd to publick view as a Terror and Example unto others. But we have so far departed from the ancient Law of the *Romans* in burying their Dead in Fields, that we have always made Church and Church-yard Burial necessary unto Salvation for the sake of the Priest. And so great a Regard have Men in these days for this Rite of Burial in Churches and Church-yards; that, according to the modern Law, a Real Action by Right of Property, or a *Quasi* Right of Property will lie for such Sepulchres as are in Churches†; and they may be sold and given by way of Division to one of the Heirs. Formerly when Mens Bodies were buried out of the City in the Fields, every one had a free Right and Power of erecting Statues, and setting up Monuments over the Grave of the Person bury'd, if he made the Sepulchre in his own Ground or proper Burying-place||: But now since it has been usual to bury in Churches, it is not lawful to erect Statues and Monuments there without the leave of the Ordinary*. But yet every one may, *suo Jure*, superadd some certain kind of Memorial or Inscription to such Sepulchres, and have the same engraven thereon†.

† C. 3. 44.
12.

|| C. 3. 44.
2 & 9.

* C. 1. 2. 2.

† C. 3. 44. 4.

|| C. 3. 44. 7.

* C. 3. 44. 7.

† Ibid.

As the Church-yard ought to be divided from other profane Places*; so it ought to be fenced in and railed, in order to keep out Hogs and other noxious Animals, that may annoy and defile the same. And every Church-yard about the Cathedral Church ought to contain forty Paces of Ground in Circuit from the said Church, and about a Parochial Church thirty Paces, unless it be in small Cities and Burroughs where they are straiten'd in point of Ground†. And, moreover, 'tis to be observed, by the *Canon* Law, that no other Buildings ought to be erected in the Church-yard, but such as do belong to the Clergy: But, by the *Civil* Law, no House at all ought to be built near the Church-yard; and if it be, it may be pull'd down and destroy'd||. By the *Canon* Law, the Church-yard ought to enjoy the same Privilege and Immunity as the Church itself, *viz.* to save a Criminal that flies thereunto for Sanctuary against the Law: But tho' the Punishment of Death, according to the Papal Law, shall not be inflicted on a Person flying to the Church or Church-yard for Refuge, or any other corporal Punishment; yet even by this Law, such Sanctuary shall not save him from a pecuniary Punishment*, because it brings Money to the Clergy, who share with the Civil Magistrate herein.

* 13 Q. 1.
1. prin.

† 17 Q. 4. 6.

|| D. 11. 8. 3.

* Dd. in
c. 6. X. 49.

By a Provincial Constitution in *Lindwood*†, all such Persons as shall fell or grub up any Trees, or mow and cut down any Grass growing in the Church-yard, or gather and carry away any Fruit growing therein, shall incur the Sentence of the *greater* Excommunication, and be shut out of the Communion of the Church, till such Time as they shall make Satisfaction and Amends for the Offence committed. Nor can the Parson

† Lib. 3.
Tit. 28.
cap. 6.

* 1. Roll.
Rep. p. 235.
255.

† 35 E. 1.

|| 1. Roll.
Rep. p. 255.
Roll. Abr.
311, 337.

* 2. Roll.
Abr. p. 287.

* 5 & 6 E. 6.
cap. 4.

himself cut down Trees growing in the Church-yard, tho' the Freehold, according to the *Common* Law, be in him, except it be for the necessary Repairs of the Chancel *; because they are planted, and grow there for the Ornament and Shelter of the Church. This is the ancient Common Law of this Realm: And, therefore, the Statute made in *Edward* the First's Reign † is but declarative of that Law, and the Rectors, that cut down Trees in the Church-yard for any other Purpose, may be indicted on that Statute, and fined; or may be prosecuted at Law; and the Courts at *Westminster* have granted Prohibitions in such Cases to stay any farther Waste. But it has been a Question, where the Rectory is impropriate, and the Vicaridge endow'd, to whom the Trees in the Church-yard do belong ||. If to the Vicar, 'tis only because he is to repair the Chancel; and if the Impropiator cuts them down, and the Vicar libels against him in the *Spiritual Court*, a Prohibition shall go; because if he has a Right to the Trees, he may bring an Action of Trespass against the Impropiator for felling them.

But tho' the Church-yard be the Freehold of the Parson (as aforesaid) yet 'tis the common Burial-Place of the Dead; and for that Reason 'tis to be fenced at the Charge of the Parishioners, unless there be a Custom to the contrary, or for a particular Person to do it in Respect of his Lands adjoining to the Church yard *, and that must be try'd at the Common Law. None shall use chiding Words in the Church or Church-yard, in pain of Suspension for so long a Time as the Ordinary shall think fit. *viz.* of a Layman *ab ingressu Ecclesiæ*, and of a Clerk *à Ministerio Officii* *.



Of a Citation, and the Force thereof.

† D. 4. 1.

|| D. 1. 3. 5
in fin.

|| D. 1. 4.
c. 4.

* Nov. 53.

AFTER the Action has been enter'd with the Judge or Register, which we in *Latin* stile *Editio Actionis*, the Defendant ought to be summon'd into Court to give an Answer by his Appearance to the Plaintiff's Action or Libel. Now the summoning of a Person into Court, is nothing else but the citing or calling him before the Judge, or some other Person that has Jurisdiction, for the sake of trying the Cause of Action commenced against him †. Heretofore, by the *Civil* Law, the Plaintiff or Person bringing the Action, had the Power of citing his Adversary into Court himself, who, unless he presently appear'd, or promised to give Bail by Surety, for his Appearance, might be forced into Court by Compulsion, or (as the *Civilians* say) *obtorto collo* ||. The Reason of this was, because the Judge or *Prætor* was wont to grant an Action against such as by Force rescu'd any Person that was cited into Court, that is to say, against such as deliver'd him out of the Hands of the Person that thus cited him *. But so great a Power granted to private Men seeming in no wise just, but rather contrary to Humanity, this Power of citing and dragging the Defendant into Court, was, by degrees, taken away, and a more gentle way of Summons was introduced; *viz.* That the Suit commenc'd against him should, by the Order and Authority of the Magistrate, be denounced to him by some publick Minister, either by way of Edict, or by Letters affix'd up in some publick Place †. Therefore, since this antient way of summoning was thought so cruel, the Judge did forbid every one presuming to cite his Father, Patron, and his Patron's Children into Court, or any others to whom the like Honour was due, without Leave and Per-

Permission first obtain'd, under the Penalty of 50 *Aurei* or Crowns to be inflicted on such as did impugn this Edict *. Nor did it import any Thing, whether such Children were emancipated or not †: For, by natural Reason and Equity, there is the like Honour and Reverence due to Parents, tho' we are not under their Power and Command. For the same Reason, an adopted Son cannot cite his adoptive Father into Court without his Leave. For tho' such a Son be *in alienâ Familiâ*; yet he owes Reverence and Honour to his adoptive Father. But he who is properly in the Father's power, owes still a greater Reverence; because, by the *Civil* Law, he cannot try a Cause against his Father, even with the Judge or *Prætor's* Permission, unless he has a *Peculium Castrense*; because he is, in this Respect, then deem'd to be a *Pater-familias*.

Citations then after the Action is entred and given in, are the Foundation and Beginning of all Judicial Proceedings †: Therefore, in speaking of them here in this Place, I shall, *First*, Consider when the Person cited ought to appear, and when he may absent himself; *Secondly*, I will shew what Exceptions may be made against Citations; *Thirdly*, I will point out the Interstices of Time which ought to be between one Citation and another; *Fourthly*, I shall discourse of a Peremptory Citation, and how a Citation is to be made *viva voce*, and how by Letters in Writing; *Fifthly*, I shall treat of the Punishment of a Person cited, and not appearing; and, *Sixthly*, I shall make some Remarks on the whole.

As to the first Point, it is a known Rule in Law, That a Person ought to appear, on whatever Account, or in whatever Cause he is summon'd before the Judge: and if he has any Exceptions either against the Judge or his Jurisdiction, he may then alledge the same under a Protestation *de non consentiendo in Dominum Judicantem, &c.* and then it shall be argued by Counsel, whether he be oblig'd or not, to abide by the Person or Jurisdiction of the Judge *. And hence arises the Practice of Persons pleading their Privilege, whether they be Soldiers, Scholars, or the like; but a Privilege cannot be alledged and pleaded, unless it be with a Proxy or Warrant of Attorney (a thing well known!) tho' the Absence of the Fact may be alledg'd and pleaded without such a Proxy or Letter of Attorney: as an Allegation of Sickness, Infirmary, or any other the like Matter is ‖. Hence it is, That if no Privilege shall be alledg'd or pleaded, the Court may proceed against the Person; and such a Process is valid, because the Jurisdiction of the Judge is not yet everted and overthrown. *Baldus* is very large and copious hereupon, and so are other of the Doctors.

If a Judge shall decree himself to be a competent Judge that is not such, an Appeal will lie: But if no Objection shall be made against him, the Process shall remain always valid, unless an Appeal shall intervene. But this Rule which says, That a Person ought to appear, has an Exception thereunto, *viz.* *First*, Unless some Caution be given by Sureties *de Judicio sistendo*, and these Sureties do engage for the Defendant's Appearance, &c. and that they will wave and renounce all their Privileges if they have any *. See *Bartolus* and *Baldus* hereon. For though a Surety or Sureties do promise and stipulate for the Defendant's Appearance, and that he shall stand to the Judgment of the Court; yet Sureties cannot be cited out of their own proper Jurisdiction, unless they wave and renounce the Privilege of their own Jurisdiction †. *Secondly*, 'Tis otherwise, if it be certain and notorious, That the Person citing me is not my Judge, as being a Person out of his Territory; or, who is otherwise a Judge notoriously incompetent ‖; as, according to the Papal *Canon* Law, a Lay Judge is over a Clerk: who, though he should not be known to be a

Clerk,

* D. 2. 4.
24 & 25.
† D. 2. 4. 4.

† Gail. 1.
Obf. 48.
N. 1.

* X. 2. 28. 7.

‖ Innoc. in
lib. 15. X. 5.
1.

* D. 1. 1. h. t.

† Gloss in
D. 1. 1. h. t.

‖ X. 1. 29.

29.

* X. 2.1.17. Clerk, yet he cannot be molested by a Lay Judge *: For a Lay Process against a Clerk is null and void by that Law †.

It has been already said, That a Citation is the Beginning and Foundation of every Law-Suit or Judicial Proceeding : so that every Judicial Act exercised against a Person not cited, is null and void, *ipso Jure* || : For a Citation, or Monition, is required in every Judicial Act, yea, even in Acts which are notorious *. Therefore in point of Practice, the Advocates ought diligently to consider, whether a Citation labours under any Flaw or Defect in such a manner, as not to oblige the Party cited to appear : For a Citation that is not valid, produces no Effect ; nor does it constitute any one to be *in Mora*, and is, as it were, no Citation at all. So that if a Process be upon such a Citation, the Sentence is null and void of course : Because it is the same thing, whether a thing be not done at all, or if it be done not according to Law. But 'tis otherwise, if the Party appears on such a Citation of his own accord. For then an invalid Citation receives Force and Strength by his Appearance, since the Presence of the Party without any Citation at all, is sufficient ; because a Person present regularly cannot be cited *.

* Gail. lib.
1. obf. 58.
n. 2.

I shall in the second Place proceed to shew in a more especial Manner, what Exceptions will lie against a Citation. And, first, a Citation ought to be certain in respect of the Person cited : For if such certainty be therein omitted, a good Exception lies against the same, and such Citation is rendred invalid ; as 'tis in many Cases hereafter to be remembered. 2^{dly}, A Citation ought to be made *ad locum honestum & tutum* † ; For if it be otherwise made, it does not † oblige the Party cited : And an Appeal surely lies, if a safe Place be not assigned in the Citation for the Appearance of the Party cited, altho' such Citation be made with an *Appellatione remotâ* ||. For if a Judge shall cite any one to a Place to which he cannot come with safety to his Person, he may freely appeal, having first propounded an Exception *de loco suspecto* *, though an Appeal be inhibited in the Letters Citatory, unless the Judge shall afterwards think fit to assign him a secure Place for his Appearance: And this Place of Judicature ought not only to be safe to the Client himself, but even to such Persons as intervene in his Behalf, as Proctors, Advocates, and the like †. And 'tis moreover to be noted, That whenever a Person is cited to a Place that is not secure, he may always Appeal, tho' it be in the *second* or *third Instance* ; because the Grievance is as often repeated, as the Person is cited *ad locum non tutum*. Pope Innocent, indeed, maintains, That 'tis well enough if the Place be safe and secure to the Proctor, tho' it be not so to the Client ; because he may send a Proctor : But *Hostiensis* holds the contrary, concluding, That it is not sufficient, that the Place be safe and secure to the Client or principal Party, unless it be also the same to the Proctor. And so *vice versa*, if it be safe to the Proctor, and not to the Client. For in Civil Causes, a Person cited may either appear personally by himself, or else by his sufficient and lawful Proctor ||.

* Glos. in
c. 4. 33. Q.
2. v. *Locus*.

† X. 2.28.47.

|| X. 1.38.10.

3^{dly}, A Citation ought to be made by a competent Judge, or (at least) in virtue of the Decree and Order of such a Judge, and affix'd up in some publick Place, if the Party cannot be personally cited : And in every Citation, the Judge's Name ought to be express'd therein * ; and an Error in his Name, vitiates the Citation. And if a Citation be uncertain in respect of Place, where the Person cited ought to appear ; or if it exceeds the Limits of the Judge's Territory, 'tis a just Cause of Exception, and is null and void *ipso Jure*.

* Cl. 2.10.2.

4thly, A Citation ought to be decreed at the Instance of the Party, and not *ex officio Judicis*: For a Citation made by a Judge, without any Motion or Petition from the Party litigant, is null and void *ab initio* †; since a Judge ought not even *verbally* to cite or admonish any one to appear, unless it be at the Request and Instance of the Party in Suit ‖; and if he does thus presume to act, his Monition or Citation is unjust and invalid, and as such, it binds not the Party to appear: But a Person cited in a doubtful Case ought to appear. Nor is the Party cited bound to appear, if the Citation be evidently peccant in point of Form or Matter. See *Innocent* *, where he says, That a Person is not bound to appear before a *delegated* Judge, unless some Evidence of his Commission does appear in the Citation †: But if the Party does appear, then his Appearance shall give Strength and Force to such an invalid Citation.

† Abb. in c. 9. X. 2. 19. N. 16.
‖ Abb. in c. 4. X. 2. 14. N. 19.

* In cap. 6. X. 2. 14. 4. & in cap. 5. X. 1. 29. verb. *v. nire.*
† D. 2. 12. 1. 1.

5thly, A Person ought always to be cited at the Place of his Dwelling-House, which he has in respect of his Habitation and usual Residence, and not at the House, which he has in respect of his Estate, or the Place of his Birth: For if he does not dwell there, he ought not to be cited there ‖. And a Citation affix'd and put up at the Doors of a Man's Dwelling-House (with us called a Citation *viis & modis*) ought to be affix'd and placed there at a fit and convenient Hour, and not in the night-time; and ought to remain there till such time as it may come to some Persons knowledge *: For, in the Absence of a Person, a Citation may be made and affix'd up at his Dwelling or usual Place of Residence †; and if it be affix'd there at an unseasonable Time (as aforesaid) it is invalid as liable to an Exception, as it is if the Person be not cited at his Dwelling; for the Law is not satisfy'd with it.

‖ D. 50. 1. 27. 1.

* Abb. in c. 4. X. 2. 15. N. 2.
† Abb. in c. 5. X. 2. 6. N. 6.

6thly, The Term of a Citation ought to be fit and convenient, and not too narrow and streight for the Party's Appearance. If a Citation be made for the Appearance of a Person on a Day certain, or at an Hour certain, and such an Act or Appearance ought to be made at some other Time or Hour, or in some other Manner than is described and set forth in the Citation, such Citation shall not be valid; nor shall that Act, which is done in any other Manner, be obliging *. But if a Party cited to a certain Cause does appear, he shall be obliged to answer unto other Causes, whereunto he was not cited, because an Appearance is the chief effect of all Citations. And hence it is not necessary to cite him *de novo*, if he be present in Court: And the more so, because regularly, the Plaintiff, before Contestation of Suit, may change his Libel, and the nature of his Action †. If a Party summon'd or cited, be so hindred that he cannot appear, he ought to send a Person to excuse his Appearance to the Judge, and to make Proof of such his Impediment: and a Sentence pronounced against a Person thus summon'd and hindred to appear, is null and void, if such Impediment appear'd to the Judge before Sentence read; for otherwise it shall not be void. Now Sicknes, or any bodily Infirmary, is a lawful Excuse or Impediment for the Non-Appearance of a Person cited ‖: and such Sicknes or Infirmary may be easily proved, either by sending a Physician to prove the same, or else by such Physician's Certificate. When I say Sicknes or Infirmary, I mean such an Indisposition of Body, as is a real Impediment to his coming to the Court: for a light Feveret, or an old Quartan Ague, is not a sufficient Excuse for his Non-Appearance *. A Person cited to appear at a Day certain, ought to appear at the usual Hour of that Day assign'd for Judicial Matters, that is to say, when there is no determinate Hour mention'd in the Citation for his Appearance †. If a Canon of a Church be cited to come to an Election at a Day certain, he ought to appear in the Morning, because the Election

* Bart. in D. 43. 24. 5.

† Marant. Spec. p. 6. Tir. de citat.

‖ D. 42. 1. 60. Jason in l. 1. D. 2. 5. N. 4.

* Abb. in c. 5. X. 2. 6. N. 19.

† Abb. in c. 24. X. 1. 29. N. 5.

usually begins at that Time; and at such an Hour by reason of Mass-Service in the *Romish* Church, which is celebrated in the Morning; and, according to the Custom and Practice of that pretended Church, ought to precede such Election.

And this is observ'd in all College Elections here in *England*, in the Choice of the Heads and Governors of Colleges in our two Universities, where the Sacrament of the Lord's Supper is celebrated before they proceed to an Election, instead of the *Romish* Mass. But a Person cited to a *Judicial* Act, may appear at any Time on the Day appointed for his Appearance at his own Pleasure, provided he appears before the darkness of the Night comes on, so that the Judge may perfect the Act whilst it is day-light; for a Person cited or admonish'd to appear on such a Day, ought to come at such an Hour as is fit for the dispatch of Business, or of that Act for which he was cited *. Whence it follows, that if that Act be usually dispatch'd in the Morning, he ought, according to the Doctors, to appear then: Therefore a Person thus cited to appear, in order to make an Election, ought to appear before Dinner on account of the Sacrament or Mass, as aforesaid †. But if the Act may be dispatch'd either in the Morning or Evening, the Party cited may, in such a Case, defer his Appearance until the Evening.

A Citation *sine Termino*, is a valid Citation; and in such a Case, a Person cited ought to appear as soon as possibly he can*: yet this ought to be consider'd *cum quodam Temperamento*, with some grains of Allowance or kind of Equity, since he is not obliged to appear immediately thereupon. If a Person cited does not appear at the Time assign'd for his Appearance on the score of some legal Impediment (as aforesaid) yet he ought to appear as soon as possibly he can after the Removal of such Impediment †: But if a Person, on a Summons, sets out so late in his Journey, that probably he cannot reach the Place to which he was cited for his Appearance, he shall not be excused on the score of such Impediment afterwards intervening *. And thus, in other Cases, if a Man coercts himself to the Extremity of an Act, he must blame and impute it to himself, that he has thus coercted or streighten'd himself so far in point of Time relating to an Act †. If a Person, cited to appear within twelve Days, shall say, *That he will not come*; yet the Judge ought to wait and expect the Lapse of that Term, and when the twelve Days are past, and not till then, his Contumacy may be accused; because he may, in the *interim*, change his Mind and Resolution. But a Person thus cited, and declaring he will not appear, need not be cited again, tho' otherwise he ought to be cited a second Time *. *Chassan. Cons.* 41. N. 2. *Alex. Cons.* 81. Vol. 4. For the Judge, in the former Case cannot proceed *nisi post terminum*: And the Day of the Term is not reckon'd in the Term, because the Day assign'd is understood *de Diebus proximis*, without computing the Day for which the Citation was made †.

7thly, By the *Civil* and *Canon* Law, a Citation is not valid, if it be made and decreed on a Holiday, because such a Day is not a Law-day †: But though a Citation ought not to be decreed on such a Day; yet it may well enough be serv'd and executed on such a Day, and no Exception shall lie against the Execution thereof, as it will against the Decreeing of it *. Nor ought a Priest by the *Canon* Law to be cited during the time he is officiating at Divine Service, or at the time of solemnizing Marriage, or at the time of his being at, and leading a funeral Procession; For in all these Cases, according to that Law, a just Exception lies.

I shall lay my *third* and *fourth* Consideration together; and in discoursing of a *Simple* and *Peremptory* Citation, I will endeavour to point

out

† Abb. in c. 19. X. 1. 6. N. 11.

* Abb. in c. 19. X. 2. 28. N. 6.

‡ Abb. in c. 6. X. 2. 14. N. 1. & 12.

* Abb. in c. 52. X. 1. 6. N. 9.

† Abb. ut supra.

* Bald. in l. 7. c. 4. 6.

† D. 40. 8. 3.

† D. 2. 5. 2. X. 1. 9. 5.

* X. 2. 1. 19.

out the Interstices of Time, which ought to be between one Citation and another. Now among Citations, some are stiled *Simple*, and others called *Peremptory* Citations in the *Civil* and *Canon* Law. *Simple* Citations are those, when and where there are more Citations than one made out: And these are made with certain Intervals and Intermissions of Times and Seasons, observ'd between the emitting and issuing out one Citation and the other; these being made *trinis vicibus*, or at three several Times*: But this is not practis'd here in *England*. *Peremptory* Citations, are those, which cite the Party (as we say) *simul & semel*: And by means of such a Citation alone, the Party cited or convened ought to exhibit his Presence *Judicially* in Court without more ado†. And these are call'd *Peremptory*, because, after such a Citation executed, no other Citation ought to be expected: For it annihilates and perempts all other *Simple* Citations, which might otherwise be expected, with their Causes of Exceptions. So that if a Person summon'd by the Means of such a *Peremptory* Citation, does not appear according to the Tenor thereof, he ought to be reputed Contumacious, unless he has a just Excuse, or some warrantable Exception against such a Citation. *Peremptory* Citations are, therefore, made three ways; *First*, When no *Simple* Citation has been previous thereunto. And this *Peremptory* kind of Citation, the Judge, by virtue of his Office, takes care to have expedited, when he requires the Party's Appearance to some Action or other upon Advice or Premonition thereby; obliging him to exhibit his Presence *cum primâ evocatione*; and not to expect any other subsequent Citation. *Secondly*, A *Peremptory* Citation is granted, if only one *Simple* Citation has been previous thereunto: But tho' this may be said to be a *Simple* Citation in point of Order, yet 'tis *Peremptory* in respect of the Force and Efficacy thereof, because the Judge does, in exprefs Terms, declare it to be *Peremptory*, that is to say, the last Citation. But then this second ought to include as much Time as three *Simple* Citations should contain||. When a Judge cites a Person *cum literis secundis*, he acts according to his own Prudence and Discretion; having a due Regard to Things, Persons, Times and Distances of Places, before he emits a *Peremptory* Citation *cum literis secundis*; because he cannot so easily interrupt a third Citation, and make a second Citation *Peremptory* without a good Reason, and an urgent Necessity for so doing. *Thirdly*, That a Citation should have the Force of a *Peremptory* Decree or Edict, the Word *Peremptorie* ought to be therein inserted and made use of, else it is not sufficient. But when a Citation is made by the Judge, who admonishes the Party *ore tenus*, to appear on such a Day, 'tis not necessary to use and insert the Word *Peremptorie*, because the Judge's Monition has the Force of a *Peremptory* Decree or Citation*.

The fifth Thing to be consider'd in this Chapter, is the Punishment of a Person cited and not appearing; for it is the Duty of a Person cited not to condemn the Authority of the Judge, but to give his Appearance: And a Person cited is then said to make a legal Appearance, when he appears during the sitting of the Court. And this is so true, that even a Person exempt from the Jurisdiction of a Court ought, in a doubtful Case†, to appear and plead his Privilege of Exemption before a foreign Judge. Now a Person cited and not appearing, may be reputed so Contumacious as to be arrested, fined, excommunicated, condemn'd in Expences, and likewise have his Goods put under a Sequestration: But in respect of an Excommunication and a Sequestration, we must distinguish and consider whether he answer'd, *That he would not appear and obey the Summons*; for then the Judge may proceed against him as a contumacious Person||: Or,

* D. 5. 1. 68.

† X. 2. 8. 1.

|| Abb. in c. 1. X. 2. 8. N. 9.

* Abb. in c. 14. X. 1. 29. N. 3.

† Abb. in c. 7. X. 2. 28.

|| Abb. in c. 10. X. 2. 14. N. 8.

or, whether he answer'd nothing, or said, *That he would deliberate thereon*, and the like ; for then he ought not to be proceeded against to Excommunication, &c. For if a Person cited, says, *That he will not appear*, he shall be hereupon deem'd and taken as a Person *manifestly* Contumacious ; so that he is not to be cited any more, *manifest* Contumacy requiring no other Citation : But 'tis otherwise, if his Contumacy be not what we call *manifest* Contumacy. But an invalid Citation, does not render the Party cited guilty of Contumacy, it having no Operation or Strength in Law at all *.

* Gloss. in
lib. 4. cap. 9.
2. Gloss. in
c. 4. X. 1. 29.

† Abb. in
c. 1. X. 2.
12. N. 5.
‡ Gen. cap. 3.
v. 9.

In my sixth and last Consideration, I shall make some proper Remarks and Inferences upon what has been already said. And, *First*, It is noted, that a Citation is a Matter of natural Right, introduced *ab origine Mundi* † : For God cited our first Parent, saying, *Adam ! Adam ! Where art thou* ‡ ? Now a Citation is sometimes made by Edict or Proclamation, and sometimes by a Messenger : when a Citation is made by way of Edict or Proclamation, it is necessary that it should come to the Knowledge of the Person. To receive and admit Witnesses, to publish Depositions, and to pronounce a Sentence, either three *Simple*, or one *Peremptory* Citation is necessary. In the *Imperial* Chamber, this Practice is observ'd in respect of a Sentence, but not in regard of other Judicial Acts : for, in such Acts as these, the Monition of the Judge is sufficient, as 'tis practis'd here in *England*, a monitory Citation being required to every *Judicial* Act.

* Abb. in
c. 23. X. 1.
6. N. 17.

† Bald. in
lib. 6. c. 7.
52.

‡ Marant.
Spec. Tir. 6.
de citar.

* Abb. in
c. 23. X. 1.
6. N. 8. 16.
& 17.

† Ant. Ca-
py e Decif.
101.

Secondly, It is to be known, that a Citation cannot be proved unless it be by the Oath of the Messenger or his Certificate * : nor is a Person presum'd to be cited, because the Notary of the Cause, writes in the Acts of Court, *that such a one was cited* ; unless it appears by some other Means †, or unless there be a Certificate of such Citation, as aforesaid. Yea, if the Judge pronounces the Person to be Contumacious, before the Mandatory or Apparitor has made his Return of the Citation, either upon Oath, or with a Certificate annex'd, such Act or Sentence is null and void *ipso Jure*, tho' the Judge should afterwards receive the Return of the Messenger or Mandatory thereupon accordingly : For there ought to be first had a *Constat* of such Citation executed by the Return of the Mandatory or Apparitor upon Oath, since this is a substantial Act ‡. A Person denying himself to have been cited, cannot prove the same : For a Negative of Fact cannot be prov'd either *directly* or *indirectly*, unless it has some Determination in point of Time, Place, and other Circumstances annex'd thereunto ; and then it only admits of an indirect Proof*.

Thirdly, 'Tis to be observ'd, that in all *Extra-judicial* Acts, one Citation, Monition, or *Extra-judicial* Interpellation is sufficient : As when those Persons that have an Interest in the Goods of the deceas'd, are cited to appear at the making of an Inventory ; for such a Citation is not properly made *ad Lites*, but only to be present at a certain kind of *Extra-judicial* Act or Proceeding. For all Persons agree, that Creditors, Legatees, and Trustees ought to be cited, and that specially by Name too, if they be certainly known ; for if they be not certainly known in particular, they ought then to be cited by a general Edict or Proclamation propounded and fix'd up in the publick manner †.

Fourthly, To the end that a Citation be valid, it ought to be decreed and emitted by the Judge's Authority, and at the Instance of the Party too in all Civil Causes ; for the Judge ought not to interpose his Office for the Advantage of a private Person, unless he be desired and request-ed thereunto. But if a Citation be issued out in Writing, and a proper Return thereof made, we ought to presume, that this was done at the pre-

previous Request of the Party: I say, That a Citation ought to be decreed and made out at the Instance of the Party. For though *Antoninus* says, That a Citation is presum'd to be made out at the Instance of the Party: yet *Aretinus* says, that this Conclusion was disallow'd of; because the Praying of a Citation is an extrinſick Solemnity, which is not presum'd, unless it does appear. But in three Cases, a Citation is not made out at the Instance of the Party ||. First, When the Party on such a Citation appears and makes no Exception hereunto. Secondly, When the Judge perceives that the Instance of the Party perishes; because then the Judge may cite the Party *proprio motu*; for that it is a detriment to the Publick Weal to have the Instance of the Party perish. The third Case is, when the Cause concerns the Good of the Publick, as in some Election or in a criminal Cause; because in such a Cause, the Judge or Magistrate may, by virtue of his Office, cite the Defendant and the Promoter thereof*.

|| Abb. in c. 1. X. 2. 1. N. 4.

My fifth Observation is, That by the *Canon* Law, a Citation is not valid, if there be more than four Persons thereby cited to appear: And by the same Law, an Extra-Provincial Citation is not valid *ultra duas dietas*, above two days Journey †; nor is a Citation valid, that contains many Conditions, if the same are manifestly inconvenient ||. A Process may be carry'd on against a Person, that is maliciously or blameably absent even to a definitive Sentence, if the State and Quality of the Cause will suffer this without any Inconvenience, after Contestation of Suit; or if it be such a Cause wherein it may be proceeded without Contestation of Suit, notwithstanding the Absence of the Party. And thus may a Judge also proceed against an absent Person without citing him, if there be an evident and notorious *Constat*, that such absent Person can make no Defence for himself*; and the Process so made, shall be valid, tho' regularly 'tis null and void without citing such Person. A vagabond Debtor may be cited in whatever Place or Jurisdiction he is found: And a Delinquent ought to be cited in the Place or Jurisdiction where the Delinquency was committed by him. A Citation may have a Beginning from the Plaintiff's Proctor; but to cite a Person unduly, is adjudg'd an Injury. A Citation, and the exhibiting of a Libel, are said to be a kind of Preparatory Acts to a Suit in a *Judicial* Process; and a Citation perpetuates the Jurisdiction of the Judge †, tho' the Act of the Citation itself be not a *Judicial* Act. A new Citation is not necessary, when the Judge prorogues the Hour prefix'd with the Knowledge of the Party: nor is a Judge bound to cite a Person *de novo*, if he expects the Appearance of the Contumacious Person the Day following.

* Abb. in cap. 60. X. 6. & in cap. 19. X. 2. 2.

† X. 1. 3. 28. || X. 2. 6. 2.

* Alex. in c. 5. X. 2. 28.

† X. 1. 29. 20.

Sixthly, 'Tis to be observ'd, That no Infant, Madman, or Pupil, ought to be cited, nor ought a Wife to summon her Husband into Court; since this appears to be against that receiv'd Reverence, which she ought to exhibit to her Husband. And hereunto, the Rescript of the Emperor *Alexander Severus* seems to have a View; wherein he says, Let not the Wife of the Patron be summon'd into Court without the Judge's Permission, and Cognizance had of the Cause. A Citation describ'd and registred in the Acts of Court, is presumed to be made and fram'd with all its proper Solemnities ||. As a Person's own proper Infirmary and bodily Indisposition excuses him from Contumacy on a Citation, if he does not appear*: so also does the Indisposition of his Friends and near Relations excuse his Non-Appearance, if he shall not appear.

|| Abb. in c. 1. X. 2. 1. N. 4. * D. 42. 1. 60.

Having thus far consider'd what the *Civil* and *Canon* Law says touching Citations, I shall conclude this Chapter with the Law of *England* in relation thereunto; which is chiefly groundd on the Statute of

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Henry

* 23. H. 8.
cap. 1.

Henry VIII. * By which Act, no Person shall be cited out of the Diocese or Peculiar Jurisdiction, where he or she dwells: except it be by some Ecclesiastical Judge or other Person within the Diocese or other Jurisdiction, whereunto he is so cited for some Crime or Offence contrary to Right and Duty; or upon an Appeal, or other lawful Cause; or when the Inferior Judge dares not cite him; or at the Instance of the Inferior Judge made to the Superior, when the *Civil* and *Canon* Law allows the same; or where the Inferior Judge will not cause the Party to be cited, or is any ways a Party to the Suit: And all this under the Pain of forfeiting double Damages to the Party grieved, and a Fine to the King, to be divided between him and the Protector. But the Archbishop may cite for *Heresy* in any Diocese within his Province, upon Consent or Neglect of the Bishop or Judge there. Again, This Act shall not restrain the Jurisdiction of the Prerogative Court for Probates of Last Wills and Testaments, &c. And, *thirdly*, an Ecclesiastical Judge shall receive but three Pence for a Citation, under the Penalty aforesaid. So that 'tis plain, the Purpose of this Statute was rather to provide for the Ease of the Subject, than for the Jurisdiction of the Judge or Ordinary; which appears, in that there is an Action given to the Subject, and a Penalty to the King for his Vexation, but none to the Ordinary. Again, the Archbishop is hereby restrain'd, to two Cases of Necessity, much fewer than he had in his power before, *Nolente Ordinario*; which shews, that that Parliament regarded the Subjects Quiet, more than it did the Archbishop's Jurisdiction. This very Clause of *referring*, after it begins with referring *generally*, checks it with this, *viz.* That *to be done in Cases only*, &c. which was a vain Correction, if it were left as general as before, that is to say, if it were lawful or tolerable in all Cases, without Cause shewn: and doubtless this Statute was not made, without the Advice and hearing of *Canonists* hereupon; and therefore, cannot be suppos'd to be ignorantly penn'd, as some imagine. Note, That a Prohibition will lie on this Statute, notwithstanding the Penalty annexed; because it has Words Prohibitory, as well as a Penalty annex'd to it, for the Breach of such Prohibition; but it had been otherwise, if the Penning had been only thus, *viz.* *If any one cites* another out of his Diocese, he shall forfeit ten Pounds ||: see the Case of *Jones* vers. *Jones*. But he that will have the Benefit of this Act, must pray a Prohibition before a Sentence in the Ecclesiastical Court. * A Prohibition was granted on this Statute in the Case of *Smith*, against the Executors of *Pendrells*, for suing in the Prerogative Court for a Legacy of ten Pounds, whereas the Parties liv'd in another Diocese. But because the Will was prov'd in that Spiritual Court, and the Suit was in the same Court with the Probate, and Sentence given there for the Legacy; and afterwards an Appeal from the Sentence to the Court of Delegates, where it was affirm'd, and Costs tax'd, and Excommunication upon this Sentence; and because no Endeavours were used to stay this Suit by the Statute during this whole Time till after Sentence on the Appeal: Therefore having allow'd the Jurisdiction of the Court for so long a time, he came now too late to have a Prohibition. And tho' a Prohibition was before granted, because, the Party had not Notice to oppose the same; yet the Court wou'd not compel the Party to appear and plead thereunto (as the usual Course is in such Cases) but upon Motion granted a Consultation. †

† Hob. Rep.
p. 187.

* Vent. Rep.
pt. 1st.

† Crok. Rep.
pt. 3d. p. 69.

* 23 H. 8.
chap. 9.

If a Suit be begun before an Archdeacon, where the Ordinary may license the Suit to an higher Court by Letters of Request according to the Statute of *Henry VIII.* * the Archdeacon cannot, in such a Case, dis-appoint

appoint and baulk his Ordinary by sending the Cause immediately into the Arches ; for he has no Power to give a Court Jurisdiction, but only to remit and wave his own Court, by leaving the Suit to the next : For since his Power was derived from the Bishop to whom he is Subordinate, he must yield it to him, from whom he has receiv'd it : And it was said, that it was so ruled heretofore *. By the *Canon* Law, in the Beginning, there was but one Bishop, who, having sole Jurisdiction, was the immediate Ordinary throughout the Diocess. Afterwards Suffragan Bishops were made under him, which induced a Restraint of the Archbishop's Power in their Diocesses : but, in special Cases, agreeing with our Law, an Administration granted by an Archbishop is but voidable. The Jurisdiction is open'd (for that is the Phrase of the *Civilians*) sometimes by himself, *volente Ordinario*, as in the Case of his Visitation ; and sometimes by the Party, in Default of Justice from the Ordinary, as by Appeals or Nullities. Again, it is sometimes open'd by the Ordinary himself, without the Party or Archbishop, as where the Ordinary sends the Cause to the Archbishop. For tho' the Archbishop (as *Panormitan* observes) is Ordinary of the whole Province †, yet he has not the Exercise of Jurisdiction, unless it be in certain Cases : where, among the rest of the Cases thus set down, this is one, *viz.* when any Question arises, or when the whole Cause is referr'd to him. And 'tis certain, according to *Hostiensis* ‡, that the Metropolitan, whether we call him the Ordinary of the whole Province or not, cannot exercise his Jurisdiction over the Subjects of his Suffragan Bishops, unless it be in the following Cases, reckoning up one and twenty ; *viz.*

* Hob. Rep. p. 16, & 186.

† Abb. in cap. 6. X. 3. 10. N. 2. & in c. 11. X. 3. 31. N. 8.

‡ in c. 19. X. 1. 31.

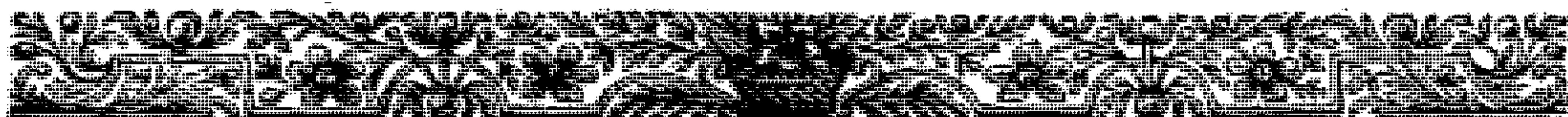
First, Where the Metropolitan Church differs in divine Service or Worship from the Church of his Suffragan. *2dly*, Where the Suffragan complains of his Bishop. *3dly*, If an Appeal be made to the Archbishop. *4thly*, When there is any Criminal Cause or Question in agitation between the Bishop and another Person. *5thly*, In Respect of some Crime committed in his Diocess. *6thly*, When he finds a Person subject to the Bishop to be justly charg'd, and such Subject refuses to make Satisfaction to his Bishop, being commanded so to do by the Metropolitan. *7thly*, In Respect of some Matter that concerns the Bishop's Diocess itself. *8thly*, When a Cause or Question is referr'd to him, the Archbishop, by the Way of Consultation. *9thly*, In those Things that concern the whole Province in general *. *10thly*, In Respect of assembling a Provincial Council. *11thly*, In notorious Injuries inflicted on himself or his Subjects. *12thly*, When the Diocesan is negligent in the Administration of Justice. *13thly*, When the Canons refrain from giving their Attendance on divine Service in contempt of their Bishop. *14thly*, When it is notorious, that the Bishop's Sentence is not binding or valid. *15thly*, In Respect of a yearly Visitation. *16thly*, Archbishops may grant a Faculty or Indulgence all over their Province. *17thly*, The Archbishop has Guardianship of the Goods belonging to the Bishop's Table, if idoneous Canons do not survive their Bishop. *18thly*, In Respect of a Privilege granted to him. *19thly*, In Respect of a Custom. *20thly*, If there be any Permutation between the Bishop and his Chapter. And lastly, When the Bishop wholly refers the Cause to him by sending the Parties thither ; the being recus'd either as a suspected Judge, or on some other Account. I shall only here consider the Eighth Reason, *viz.* When a Question or Matter is referr'd to him on the Score of Consultation. Now a Judge may, according to *Speculator* †, thus refer the Matter as often as he shall think fit, *viz.* either before the Suit, in the midst of it, or at any Time whatsoever. And *Baldus* writing after *Hostiensis*, refers himself to him, saying,

* Abb. in c. 6. X. 3. 10. N. 2.

† Tit. de Relation.

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ing, That tho' the Archbishop be Judge of the whole Province; yet his Jurisdiction is sealed up and sign'd; and is not open'd, unless it be in some certain Cases. But though the Law restrains an Archbishop from calling a Cause from the *Ordinary* Jurisdiction, *nolente Ordinario*, unless it be in the said Cases; yet the Law left it in the absolute Power of the Ordinary to send the Cause to the Archbishop *absolutely* at his own Will, without assigning any special Reason for so doing. And herein *Hostiensis* and *Dominicus* do agree touching a competent Jurisdiction.



Of Clerks, the several Orders thereof, their Privileges, &c.

HAVING already treated of Archbishops and Bishops under their proper Titles, I shall here proceed to speak of *simple* Clerks, or *Clergymen*, which, as they are dedicated to God's Service at the Altar for the Administration of divine Service in some Church or other †, and are therefore † C. 1. 3. 2. styled Ecclesiastical Ministers †: so, surely, they ought to be Ministers of † C. 1. 3. 10, the Christian Religion, and of a pure Orthodox Faith. They are in *Latin* call'd *Cleri* or *Clerici* from the *Greek* Word *κλήρος*, which signifies a Lot or an Inheritance; because (as they pretend) they are God's peculiar Lot or Inheritance: For, by the *Canon* Law, though all Christians may well enough be term'd God's Portion and Inheritance; yet, according to that Law, only those Persons among Christians are in a peculiar manner † C. 1. 3. 10, styled the *Lord's Portion*, whom God has separated and set apart from common Use to his Service, to be as it were his Domestick Servants; and (if we may believe the Text of that Law) the Persons thus set apart have been † C. 1. 3. 10, so styled from the very beginning of Christianity itself. But some think they were so called from the same *Greek* Word, which signifies *Election* * 12 Q. 1. 7. by *Lot* *; because *Matthias* was, by Lot, chosen to the Apostleship; being the first we read of, that was ordain'd thereunto †. And in this Sense, † 21 Dist. Bishops, as well as simple and inferior Clerks, may be styled *Clerici*: for in c. 1. the general Acceptation of the Word, according to the antient *Canon* Law, all Persons were styled *Clerks*, that served in the Church of Christ; whether they were Bishops, Priests, or Deacons. But now in the *Romish* Church, if we may call that the Church of Christ, wherein there are so many Corruptions and Abominations, the Word *Clerk* is confin'd to the seven Degrees thereof, according to the following Names of Distinction, viz. the *Ostiarius* or Door-keeper, the *Acolythist*, *Reader*, *Exorcist*, *Sub-deacon*, *Deacon* and *Presbyter* †: For some in that Church exclude a † 21 Dist. Bishop; and others therein make nine Orders, by including the *Bishop* c. 1. and *Psalmist*. But in the Church of *England*, we only allow of three Orders, viz. *Bishops*, *Priests*, and *Deacons*.

The *Romish* Church distinguishes these into the *Higher* and *Lower* Orders of the Church; and as she reckons *Sub-deacons*, *Deacons*, and *Priests* among the first, so she reckons the *Ostiarius*, *Exorcist*, *Acolythist* and *Reader*, among the latter. The first the *Canon* Law (by way of Distinction) styles *sacred* Orders; and the latter by the Name of the *lesser* Orders, which serve only as a Gate or Initiation unto the others. And no one

* X. 5. 29. 1. ought to be promoted to any of these seven Orders *per Saltum* *; nor ought

ought any one to be initiated into the lesser or inferior Orders, unless he be recommended as duly qualify'd by his Studies, and by a Prospect of future Knowledge, for the higher Orders in the Church. And 'tis for this Reason, that both the *Civil* and *Canon* Law have appointed certain Ages proper for the Assumption of these several Orders. By the *Civil* Law, no one was to be ordain'd a Presbyter, till he was thirty five Years of Age †: tho' by a later *Novel*, 'twas sufficient if he was above thirty. And no one by this Law could be ordain'd a Deacon or Sub-deacon under the Age of twenty five Years ||; nor a *Lecturer* or Reader under eighteen Years of Age. What were the Ages prescrib'd by the antient Canons, *Gratian* shews in his *Decretum* *. But touching this Matter, we have a fresher Canon in the *Clementines* †, which requires a Sub-deacon to be only eighteen Years of Age, a Deacon twenty, and a Presbyter twenty five Years of Age before Ordination. To which Time the Council of *Trent* has added somewhat ||, requiring a Sub-deacon to be twenty two, a Deacon to be twenty three Years of Age; and as to a Presbyter, this Council adheres to the Constitution of Pope *Clement* aforesaid. And 'tis enough for them to have arrived at these respective Years, tho' they have not compleated the same. But this Council has prescrib'd no Age for receiving the *Prima Tonsura*; nor for the lesser Orders in that Church.

For the lowest Degree of Clerks in the *Romish* Church, as they are *simply* so called, is that on which the *Prima Tonsura* is confer'd, when a Person first enters and registers himself in the Service of the Church, by having the Top or Crown of his Head shaved, either by the Bishop of the Diocess; or else by the Abbot, whose Monk he is *: And, according to the *Canonists*, this *Prima Tonsura* ||, is the entrance into all other Orders in that Church; so that a Person without the same, is incapable of all Ecclesiastical Benefices; because whenever he becomes a Clerk, he ought to prove his *Tonsura*. For, according to *Dominicus* †, 'tis not enough to have the Habit, unless he can prove himself a Clerk *de literis Tonsurae*. And that Church likewise styles this *Tonsura*, the Seminary from whence all other Clerks proceed, as from the *Trojan* Horse. And on this score (perhaps) 'tis, that *Divines* seem not to reckon this Order, regularly speaking, among Ecclesiastical Orders. And herein the *Canonists* and *Divines* in that Church disagree, the latter rejecting the *Tonsura*, and the Order of Bishops, whereas the former hold these two last Orders; and, consequently, make nine Orders in that Church.

So that from what has been already offer'd, we may, under the Appellation of *Clerks* (in a large Sense of the Word) reckon all Ecclesiasticks, in what Dignity soever they are placed; provided, they are chosen for the Ministry in the Church. And hence it is, according to this Notion, That all Persons that are not *Laicks* may be stiled *Clerks* ||: And thus, according to the *Canon* Law, there are two Distinctions of Christians, *viz.* *Clerks* and *Laicks* *. And in this general Sense of the Word *Clerks*, a Privilege *simply* granted to Clerks, comprehends and takes in all Clerks, of what Order, Denomination, or Dignity soever they be: for if he, to whom such Grant is made, be a Bishop; he is, therefore, a Clerk; & *sic de similibus*. But in a strict Acceptation of the Word, and likewise in an odious Matter (I think) by the *Canon* Law, Bishops are not included under the Appellation of *Clerks*: And in this Respect, the same seems to hold good in other Clerks, that are Dignitaries or Canons of Cathedral Churches *. And the Reason of this, is, because they have a distinct Quality in themselves, which is superior to and not be met with in *simple* Clerks: But, in a Matter of Privilege granted to the *People* of this or that Place, by the *Canon* Law even *simple* Clerks are included; because 'tis for the Good of the Church †.

† Nov. 123. cap. 13.

|| Nov. 37. cap. 2.

* 28 & 77. Diff.

† Cl. 1. 6. 3.

|| Sess. 23. c. 12.

* X. 1. 14. 1 ff.

|| In Cle. 1. 2. X. 1. 14. 1 ff.

† Conf. 91.

|| X. 3. 5. 16.

* 12 Q. 1. 7.

* X. 5. 40. 18.

* X. 2. 2. 17.

The *Justinian* Code gives us an ample Account of the Office and Duty of Clergymen, whereby they are commanded to give assiduous Attendance to divine Service, and to perform the Holy Liturgies in their own Persons and the like, lest they should be deceived by others; entirely forbidding them to submit their Thoughts to the Prosecution of worldly Interests and Emoluments*. They are thereby likewise commanded to abstain from all Conventicles of Men whatsoever, even out of the Church†, to have nothing to do with State-Affairs and publick Business, in no wise to meddle with any Employment in the Law‡, or take on themselves the Business of Registering and Engrossing of Last Wills and Testaments. For says the Law, 'tis not only absurd, but very opprobrious, for Clergymen to meddle and shew themselves skill'd in the Decisions of Law-Suits*: And yet we have several Clergymen with us here in *England*, that sit as Judges in our Ecclesiastical Courts, and determine Law-Suits without any Knowledge of the Law; thinking they are excused in this Respect, because they have no skill therein. They ought likewise, by the Civil Law, to abstain from all Gaming, and refrain idle Shews and Theatrical Plays and Pastimes, and not to have any Conversation with such as appear and play at them, under the Pain of Suspension *à sacro Ministerio*, and of three Years Banishment and Confinement to a Monastery†. But this Punishment ought not to be inflicted by any Bishop, under Pain of Excommunication, without full Proof had of the Matter against such Clerk‡. And *à fortiori*, Clergymen ought to forbear the Conversation of Women in no wise related to them, being only empower'd to keep their Mothers, Daughters, or Sisters, within the Limits of their Houses; because the Law of Nature will not suffer us to think, that they can commit any lewd Act with these Women.

The Privileges of the Clergy, are both by the *Civil* and *Canon* Law very eminent and remarkable. For, first, by the *Civil* Law, they are free from all mean and extraordinary Offices*, but not from Patrimonial Incumbrances. For, by the *Civil* Law, their Predial Estates are liable to Fiscal Payments and Taxes, as not being appropriated for the Service of divine Worship, but for profane Uses alone. Yet in respect of all personal Offices, they have been and still are exempted; as from Guardianships, Curatorships, and the like, unless it be in Right of Kindred: And such Guardianship they may undertake at this Day, unless they are Bishops or Anchorets.

By the Papal *Canon* Law, Clerks have this particular Privilege; That, in Criminal and Civil Causes, they cannot be convened before any other than an Ecclesiastical Judge†: and this Privilege was not deem'd so much a personal Privilege, as a general one; because it was publicly indulged to the whole Order of Ecclesiasticks. This was indeed an Indulgence granted to Clerks even in *Justinian's* Time, but then this Exemption was not so much founded on the *Civil* Law, or on natural Right, as they pretended afterwards, as it was on the Privileges granted them by the Favour of weak Princes and Emperors; as *Theodosius*‡, *Justinian**, and *Frederick* the First. And so long did the *Canonists* extend this Indulgence, that *Covarruvias* says†, That when such a Privilege is granted to Religious and other Ecclesiasticks, it cannot be diminish'd, infring'd, or taken away by any subsequent secular Constitution, though it may be, by Custom, restrain'd for certain Reasons, and in some Cases, as here by Law in the *Justinian* Code. Clerks coming heretofore out of the Provinces to the City, and being conven'd there, were oblig'd to defend themselves before the *Prætorian Præfect*‡. This Privilege, the Clergy here in *England* formerly contended for with all might and main, under that

* Nov. 133.
cap. 2.

† C. 1. 3. 15.

‡ C. 1. 3. 17.
& 18.

* C. 1. 3. 41.

† Nov. 125.
cap. 10.

‡ C. 1. 3. 30.

* C. 1. 3. 2.
& 6.

‡ C. Th. h. t.

* Nov. 79.

c. 1. Nov.

123. c. 8. &

21.

† Praët. Q. 1.

c. 31. N. 5.

‡ C. 1. 3.

33. 1.

that haughty Prelate Archbishop *Becket*, but the same was ever deny'd them by the Wisdom and Courage of our Kings. And so far does the Papal Law extend this Privilege, that he who pleads his Cause before a Lay Judge, does not only incur the Punishment of Excommunication ||, but also the Guilt of Sacrilege; because he acts contrary to the Liberty, which is granted to Ecclesiasticks. But (I think) this ought to be understood, when one Clergyman convenes another before a Lay Judge: But 'tis otherwise, in respect of violating the Liberties of the Church, if he convenes a Layman; for a Layman thus convened, represents the Person of the Defendant, and is consequently subject to a Lay Power; because the Defendant ought to observe his Court and Jurisdiction. Note, That a Lay Judge, by the Papal Law, who judges and punishes Ecclesiasticks, does not only incur the Crime of Sacrilege by such an Injury done to Ecclesiasticks, but likewise the Excommunication *Bullæ cænæ* reserv'd to the Pope alone for Absolution, as appears from the Words of that Bull.

It has been said, That by the Papal Law, Clerks are exempt from all Lay and Temporal Jurisdiction, not only in *Spirituals*, but even in *Temporals* too. In respect of *Spirituals*, all the *Canonists*, who were the Pope's Pensioners, do agree in this Doctrine, and think the Matter clear enough: For, say they, as the spiritual Power is one Thing, and the temporal Power is another, it cannot be doubted, but that the spiritual Power was granted to spiritual Places; since Christ only set his Apostles and their Successors over the Church, and not Kings and other secular Princes, if we may believe the perpetual and constant Traditions of the *Romish Church*: And this (say they) is inferr'd from the Council of *Constance**. And the *Spanish* Casuists and Divines do likewise hold, that Clerks are not subject to the temporal Laws and Power of the Laity, *quoad vim coactivam*, but only *quoad vim directivam*; saying, That these Men are not only exempt from all Lay Power by the Law of Man, but even by the Law of God: But in this Point there is a great Dispute and Controversy among the Lawyers. Some will have it, that they are exempt by the *Civil* and *Canon* Law, but not by the Law of God. That they are exempt by the *Civil* Law, appears from the *Novels*: And in this Matter there is little Disagreement among *Popish* Lawyers; and that they are exempt by the *Canon* Law, both in spiritual and civil Causes, appears from the Councils of *Constance*†, and *Chalcedon*||, and likewise from the third Council of *Carthage**, the Council of *Trent*†, and from several other Texts of Law. But in answer to all these Arguments, it is well known, that in the Beginning of Christianity, and in the early Times of the Church, they were subject to Lay Princes, as appears from the 13th Chapter to the *Romans*, where 'tis said, *Let every Soul be subject to the higher Powers*, &c. written by St. Paul, on purpose to put the Christians in mind of their Duty, to Civil or Lay Magistrates: And, therefore, St. Paul supposes, that not only Laymen, but even Clergymen too, are subject to the Lay Power; for that Particle (*all* or *every one*) excludes no one. And in the 25th Chapter of the *Acts*, 'tis said of Paul, that he stood at *Cæsar's* Judgment-Seat, where he ought to be judg'd. So that if we do not regard the Testimony of the Fathers, nor the written Traditions of the Church, yet we have this Assurance from Holy Writ, that the Clergy are not exempt, by the Law of God, from the Civil Power, either in *Spirituals* or *Temporals*.

By the Laws of this Realm, the Clergy have certain Privileges indulg'd them, in respect both of their Persons and Estates, which the Laity have not, tho' not so ample as the *Canon* Law gives them. As for instance, They are discharg'd from Purveyance, and are not to serve in

|| X. 5. 39.
49.

* Sess. 8.

† Sess. 8.

|| Can. 9.

* Can. 9.

† Sess. 25.
cap. 1.

|| i. Vent.
Rep. p. 105.

* 22 H. 8.
cap. 5. 22
H. 8. c. 8.
2 & 3 Ph. &
Mar. c. 8.
33 H. 8. c. 2.

† 2 Inst. c. 4.

any Temporal Office against their Will : And, therefore, where a Clergyman was made *Expenditor* by Commissioners of Sewers, he had his Writ of Privilege, for *militans deo non implicetur Secularibus Negotiis*; and so is the antient Law of this Kingdom ||, *Quod Clerici non ponantur in officia*. They pay no Toll for Goods which they have in Right of the Church, and were formerly by the common Law discharg'd from Pontage and Murage, but this Privilege has been abridg'd them since by several Statutes: For though it has been held, that they do not come under the general Words of the Statute, for repairing Bridges, which Enacts, that decay'd Bridges shall be repaired by the *Inhabitants*; yet it has been since adjudg'd otherwise, as appears by the Words of other Statutes *, that do concern the People in general: for by latter Judgments and Authorities in Law, they are made liable to all publick Charges impos'd on the People in *general* by Act of Parliament, unless they are expressly exempted by Name, and particularly for mending the Highways. Then as to their Persons, in an Action of Accompt, the Sheriff cannot have a *Capias* to take the Body; but he must return, *Quod Clericus est Beneficiatus nullum habens laicum Feodum*: And in such a Case, he shall have a Writ to the Bishop to summon him to appear. Nor can his Body be taken in Execution on a Recognizance upon a Statute-Staple; for he is exempted by the very Writ, *viz. Si laicum capias*; which implies, that if he be not a Layman, he must not take him †.



Of Collation, and the Division thereof.

|| Hostiens.
Se&t. Et qua-
liter. X. 3. 8.

* X. 3. 8.
14, & 15.

THE Word *Collation*, according to *Rebuffus*, in his Rubrick *touching Collations*, is a Term of a large Signification, appertaining to other things as well as to Matters concerning Benefices: But here I shall use it in a restrain'd Sense, to denote a Donation or Grant made of some vacant Dignity or Benefice in the Church, especially when such Grant or Donation is liberally and freely bestow'd without any Prospect of an evil Remuneration. And thus a Collation is either free or not so. The first is, when the Person that has the Power of Collating does collate *sponste & libere* ||: And such a Person may prefer one Man to another, provided he be a person fitly qualify'd; and such a Collation is either made at the proper Motion of the Person that grants it, or else at the Request of the Person that obtains it. A Collation, according to the Sense of the *Canon Law*, is sometimes made by Laymen, Chapters, Abbots, Bishops, Patriarchs, and sometimes by the Pope himself *: but a Collation, as we use the Word here in *England*, is another way of conferring Benefices than by the previous Presentation of any Patron, but only by the Authority of him, who has the Right and Power of granting Institution, either *from his own Gift*, or else *on the Refusal of the lawful Patron to present*, and this Person of *Common Right* is the Bishop. I say *from his own Gift*, because Bishops, with us, have a Right of Patronage unto Benefices, as Laymen have, and may dispose of them by their own Gift alone without any Presentation had or made, if such Benefices lie within their own Diocesses, and on the lawful Patron's refusal to present for six Months: because

because if such Patron does not present within six Months from the Avoidance thereof, the Bishop may collate thereunto. And thus a Collation from its efficient Cause may be understood to be twofold, *viz.* *Ordinary* and *Extraordinary*. The first is said by the *Canon* Law to happen, when a Bishop or Chapter, who have the Right of conferring Benefices either by Law or Custom, do grant such Benefices to any one qualify'd thereunto *pleno Jure* *. And the second is said to be, when it is made either by the Pope's Rescript, or else by the Bishop's conferring the same on a Lapse or Devolution. So that Collation is said to be that Act, which is done by him that has the Power of conferring and bestowing an Ecclesiastical Benefice, on whom he pleases, without the Act of another: And it differs from Presentation, because Presentation belongs to the Patron in virtue of his Right of Patronage alone, whereas Collation does not belong to him, though he be an Ecclesiastical Patron, but it appertains entirely to him, that has the Right of Admission and Institution into a vacant Benefice, as the Bishop of the Diocese, or the Archbishop of the Province has, in Case of a Devolution. But *Hostiensis* says †, That a Collation is the granting of a Prebend, which is free and exempt from all Right of Patronage, by him who has the Right and Power of conferring the same: which Grant ought to be made openly, freely, purely, and without any Diminution caus'd by him, who has this high Preheminence vested in him, and by him who has the Right and Power of conferring Benefices.

Where the Bishop refuses to give Institution, because the Clerk is not qualify'd, he may Collate by way of Lapse or Devolution (as aforesaid) if the Patron does not present another within six Months from the Avoidance, and not six Months after notice of the Bishop's Refusal: but Notice ought to be given by the Bishop to the Patron immediately, or within as convenient time as may be. But in the Bishop of *Peterborough's* Case against *Catesby*, the Question was, whether the Time *within six Months*, for the Patron's Presentation, and likewise for the Bishop's Collation, shall be reckon'd according to twenty eight Days to the Month, or according to half a Year, dividing the whole Year into Days; and 'twas adjudg'd ||, That the Bishop could not collate till after the 'half' Year, according to the Division of Days, and not at the end of six Months, reckoning twenty eight Days to the Month. For the Court held, that *Tempus Semestre* in the Statute of *Westminster* *, is meant of Half a Year according to the days of the Year, in the whole containing three hundred sixty five Days, *which* being divided, is one hundred eighty two Days; and that Time the Patron has to present, who is the Person chiefly regarded in Law. And there is a Precedent in *Edward* the Ist's Time (which was soon after this Statute) wherein it was resolv'd, That the *Tempus Semestre* should be taken for half the Year, and not for six Months only. And it was further resolv'd; That the Metropolitan may not collate till the Year be fully ended after the avoidance of the Church: And for the same Reason the Ordinary may not collate till the half Year ended †.

If an Infant or Feme-Covert does not present within six Months as aforesaid, the Bishop may collate by way of Lapse: but the Bishop shall not have this Advantage, where the Church becomes void by Resignation or Deprivation, without giving Notice thereof to the Patron; for these two are Acts, to which the Bishop is privy. Nor shall the Bishop collate where he refuses the Patron's Clerk for Non ability, or for a Crime, unless he gives Notice of it to the Patron: But after six Months, the Patron shall have a Writ to the Bishop, if the Church remains void, and the Bishop shall collate thereunto. I shall speak more of *Collation* to Benefices hereafter under the Title of *Lapse* or *Devolution*, unto which Title I must refer the Reader for a fuller Account hereof.

* X. 3. 3. 25.

† X. 3. 5.

|| Com. Banc.

* Chap. 5.

† Crok. Rep. An. 5. Jacob.



Of Commemorations, Annals, Anniversaries, &c.

IN the Beginning of Christianity, there was an honourable mention made in the most solemn Offices of the Church, and an express Recital of the Names of such Persons (under each Parochial or Diocesan District) who had departed this Life in the Fear of God, and in Communion with the Church: But as Converts multiply'd, and grew too numerous to admit of such a Practice in general for all Men, it was restrain'd in After-Ages to Persons of a more eminent Sanctity, whose Names were recited at the Altar in the Diptychs of the Church. And these Names were recited with a kind of Prayer of Thanksgiving, and an Oblation made for them, as *Tertullian* attests in his Book *de coronâ Militis**. And tho' this was done Yearly on the Day of their Death, yet it was for the sake of the Living, as a Testimony of their Faith, Hope, and Charity, and to keep up a Sense of a future State; rather than with any Prospect of lessening the Pains of the departed, or of praying them out of any Purgatory. For those, who *most* wanted the Benefit of such Prayers as these, were struck out of the Privilege, as Criminals and wicked Men: And they, who had least occasion or need of them, *viz.* they of whose Condition a better Hope was entertain'd, had the most unquestion'd Title to them, as well as the largest Share of them.

But *Annals, Anniversaries, Obits*, and the like, were the Off-spring of After-Ages, as they are now practis'd in the *Romish* Church by the Priests, for the sake of filthy Lucre, and of getting Money to maintain an idle Clergy. For they did not come into the Church till after the Invention of Purgatory: And then, as Commemorations were formerly made with Thanksgiving, in Honour of good Men departed this World, they changed these pious Offices into Prayers for the Dead, erected Chauntries for Masses, Shrines for Adoration, and Altars for Oblations; and thus came *Annals, Anniversaries, Obits, Altarage, and Oblations* into the Church. *Annals* are Masses said in the *Romish* Church for the Space of a Year, or for any other Time, either for the Soul of a Person deceas'd, or for the Benefit of a Person living †. And the Persons that were deputed for the Celebration of these Masses or Offices, were neither Titularies, nor perpetual Curates; but Persons entirely conductitious, and removable at Pleasure, or (at least) as soon as the Time was expired. An Anniversary, in *Latin* stiled *Anniversarium*, is a certain Office in that Church, which is celebrated not only once, *viz.* at the end of the Year, as an *Obit* is, but ought to be said every day throughout the whole Year for the Soul of the deceas'd ‖: And if the Person, who ought to perform the same, be lett and hindred in his Duty by any reasonable Impediment, as Blindness, Sickness, or any Infirmary, he shall be excus'd the Omission thereof; but then in other Respects he is bound to make a Recompence for the same, as by Psalms and private Prayers. *Trentals* or *Trigintals* were also a number of Masses, to the Tale of thirty, said on the same Account, according to a certain Order instituted (as pretended by St. *Gregory*): And to the Person performing the same, something certain is paid, for nothing is to be done without Money to the Priest. And thus much of the *Romish* Superstitions for the present. Our

* Cap. 3.

† Lindw. lib. 3. Tit. 23. cap. 2. v. *Annalia*.

‖ Lindw. ut sup. v. *Anniversarius*.

Our Observation of Saints Days may easily be deduced from this early Custom of *Commemorations*; and may derive a pretty clear Defence and Vindication from hence, if we confine them to the Feasts of the Apostles: But if we increase them to the Number of *Romish* Saints, we shall diminish the religious Esteem, which Men retain for proper *Commemorations*. To what I have said before, I wou'd here add, that the Custom of the Church in her *Diptychs*, had its Rise from the Custom of Cities in making Persons free, whose Names were upon that Occasion inserted in the publick Registers, and kept in the City Archives: Thus when any were made free of the Christian Community by being admitted into Christ's Church, their Names were also inserted in her Register, which was a two-leav'd Book of Record; one Page of which contained the Names of her living, and the other of her deceas'd Members. In our two Universities, it is usual for Colleges to observe a *Commemoration* of their Founders and other famous Men, by whose Beneficence the College has been endow'd; and it is so far from being condemn'd by our Church, that a Service is approv'd for that End, and used accordingly: And this is surely a laudable Act of Gratitude, as long as they avoid *Popish* Obits, Anniversaries, and the like.



Of Commendams, and of their Rise and Division.

AN Ecclesiastical Benefice is sometimes granted to a Person not only by way of *Title*, but sometimes to hold the same *in Commendam*. 'Tis said to be granted by way of *Title*, when 'tis assigned and given to any one, as his own, according to the legal and ordinary way of obtaining Benefices: And from hence a *Title*, in this Place, is taken for any legal Method of obtaining an Ecclesiastical Benefice; tho' the Word *Title* has several other Significations in our Law-Books. But a Benefice is said to be granted *in commendam*, properly speaking; when 'tis granted to any one *in custodiam* as a *Deposit*: For the Word *Commendare* * sometimes imports the same *D. 16. 3. 24. as *deponere*; so that in this Sense a *Commendam* is nothing else but the D 50. 16. 186. Care and Custody of a vacant Church granted to some Person or other for the Benefit of the next Incumbent. For in former Times, when a Provision cou'd not be made for the perpetual Cure of a vacant Church so soon as it ought to be, either through occasion of Wars, Pestilence, and such other Causes, the Bishop recommended the said Church to the Care of some honest and worthy Man to govern it, besides his own Care, till a Rector was provided, who then had nothing to do with the Revenues, but was to govern them, and consign them afterwards over to another. But in Process of Time *Commendataries*, by divers Pretences of Honesty and Necessity, made use of the Fruits themselves; and, to enjoy them the longer, sought out Means to hinder the Provision: And for a Remedy hereof, an Order was then made, that the *Commenda* shou'd not last longer than for six Months. But the Popes, by the Plenitude of their Power, exceeded these Limits, and granted the *Commenda* for a longer Time; and at last for the Life-time of the *Commendatary*, giving him Power to use the Fruits, besides the necessary Charges. And hence came *Commendams* then to be two-fold, *viz.* Temporal, or for a Time only; or else perpetual and

and for Life. The first was for the Advantage of the Church, and the latter for the Advantage of the *Commendatary*, with a Power of disposing of the Fruits thereof as a true Beneficiary †. And thus this Invention, which was well design'd at first, then so degenerated, that a *Commenda* was used in the corrupt Times of the Church, as a Cloak for Pluralities: the Clergy observing the Words of the Law, to give but one Benefice to one Man, contrary to the Sense thereof; for that a *Commendatary* for Life is the same in Reality with a Titulary Clerk.

Afterwards *Commendams* were of a threefold kind. The one was stiled *semestris*, which was for six Months only; a second was *perpetual*, and for Life; and a third was intermediate and *diuturna*, but yet limited to a certain Space of Time. The *Commenda semestris* grew out of a natural Equity, that in the Time of the Patron's Respite given him to present, the Church should not be without a provisional Pastor, which was a Law of Necessity, agreeable to the Law of Nature. And this might upon the same Reason be continued with Revenues as long as the Patron's Respite lasted; as to six Months after Notice, in this Case and the like. But after the Lapse justly incurr'd, the *Commendam* was to cease, and the Bishop might collate: And in this Sense a *Commenda* was nothing else but holding the Living by way of Sequestration. The Council of *Chalcedon* under *Leo* † ordain'd, That no one Clerk should be registred or enrolled in the Churches of two Cities at one and the same time; that is to say, he shou'd not be admitted to Pluralities*. But then the *Canon-Law* immediately distinguishes, saying, That he who retains more Churches than one, ought to hold one by way of *Title*, and the other by way of *Commendam* †. In the second Council of *Nice*, under *Adrian*, that Synod forbids a Clergyman to be reckon'd in two Churches. *Negotiationis enim est & turpis lucri proprium, & ab Ecclesiasticâ consuetudine penitus alienum*, says the Canon. We have heard from the Words of our Lord himself, *That no one can serve two Masters, but that he will love the one and despise the other*: which is the same Case in a Plurality of Benefices. But yet in Country Villages Pope *Leo VII.* indulg'd this Practice thro' the thinness of the Inhabitants, which open'd a Way for Pluralities; but then it was with some Appearance of Modesty, since one of those Churches was to be only a Church *Sub commendatione*, as the Law phrases it †: and the Curate thereof was not the Rector, but no more than a Proctor or Guardian, and he that granted the *Commendam*, might revoke it whenever he pleas'd. But this was but an Evasion of that good Law above mention'd, unless it be taken as a *Commenda Semestris*.

By the Papal *Canon Law*, none cou'd obtain more than one Parochial Church, unless one Church depended on another; or unless he held one by way of *Title*, and the other *in Commendam* †. And in the Council of *Lyons*, 1275, 'tis said, "Let no one henceforward presume to grant a Parochial Church unto any one in *Commendam*, unless he be of lawful Age, and in Priests Orders, nor such without evident Necessity and for the Benefit of the Church; and such *Commendam* shall not last beyond the Space of half a Year: And whatever shall be attempted contrary hereunto, shall be null and void *ipso jure*; nor shall any one hold more than one Church in *Commendam**." Note, this is the last *Decretal*, which gives leave to *Commendams*. And in the Gloss on this Law, 'tis said, That the Consent of the Patron, and of all that may be injured thereby, must be had; and that he is not a *Rector*, but a Proctor, Administrator, &c. It does not make the Revenues his own, but points them out as a Provision for the Ministers of the Church, and the Surplusage was to be apply'd to the Benefit thereof, but it does not oblige him hereunto,

† Suar. de
Relig. Tract.
3. Lib. 4. c. 1.
& Dd. omn.

|| A. D. 451

* 21 Q. 1. 2.

† 21 Q. 1. 3.

|| 21 Q. 1. 3.

† X. 1. 6. 54.

* vi. 1. 6. 15.

unto, since the Pope cannot bind himself; and, therefore, says the Gloss, the Pope may grant a *Perpetual Commendam*.

Having thus given some Account of the Rise and Reason of a *Commendam*, I will next proceed to make some Observations thereon. And, first, 'tis to be remark'd, that a *Commendam* ought not to be granted (according to the first Intention of it) *unless some evident Necessity, or the Advantage of the Church requires it*; and even then it ought not to be extended *beyond Six Months**, and the *Patron's Consent was to be had too*†: For the Practice of granting *Commendams* beyond that Form, and without the Patron's Consent, was introduc'd first by Papal Usurpation; and as it was an Act of dispensing with the Law in that Behalf, no one could grant an *Intermediate* or a *perpetual Commendam*, but the Pope himself, though any Bishop or Chapter, *sede vacante*, could grant the *Commenda Semestris*. 2dly, That a *Commenda* cannot be made to any Church that is full, no more than a Presentation can: For there is no more difference betwixt a *Commendam* and a Presentation, but that in one Case the Patron presents the Clerk to the Church, and in the other the Church is committed to the Parson, both being incompatible when the Church has its proper Rector or Husband already, and therefore cannot be marry'd or betroth'd to another. And the *Canon Law*, when it speaks of *Commendams*, relies upon *vacant Churches*||, and on the *Necessity* and *Benefit* of a vacant Church, as aforesaid. 3dly, 'Tis to be observ'd, That *Commendams* were not in antient Times made in general Terms to any Churches uncertain, but to some certain Church then void. And, 4thly, 'Tis to be noted; that a *Commenda*, defective in the Grant or Constitution of it, cannot afterwards be made good by the Execution of such Grant: And, therefore, if a *Commenda* was granted for any longer Term than the Church was provided for, the same was void by the ancient *Canons*. But afterwards, the *Canonists* found out a new Distinction for the Benefit of the Pope, and such as desired Pluralities; which was that of *Commendam capere* and *Commendam retinere*, tho' the last is no *Commendam* in propriety of Speech, according to the first Design of *Commendams*: for the difference between a *Commendam capere* and a *Commendam retinere* is no more than holding and retaining that which is mine own already, tho' the first is commonly used to signify the taking of that, which is another Man's. And, therefore, take the Case, that I am already in a Benefice by Presentation, or according to the ordinary Form, and I would also take a Bishoprick, which of its own Nature would avoid the Benefice; and hereupon I obtain a Dispensation, that I may hold this Benefice for three Years together with the Bishoprick: This, I say, we call a *Commendam retinere* in respect of the Benefice, since I remain the same Parson still of the same Benefice, in no less a manner than I had it before. But surely this was contrary to the original Design and Nature of *Commendams*, however we may explain it away: And 'tis not in any Man's power to create new Natures in Law, according to new Inventions; unless they be consistent with *common Right*, which is an universal Nature. The first mention, that is made of the Word *Commendam* in the Books of the Common Law, according to *Hobart**, is in the 27th Year of *Henry the VIIIth*, where the Archbishop is said to be *Commendatory* of *St. Alban's*, which might either be in the *retinere*, or else by an absolute Taking. The next mention is in the 28 *H. 8.* cap. 16. where the Statute mentions divers Papal Bulls and Briefs, and (among other Things) speaks of *Commendams*; and enacts, That the Party shall enjoy the Benefit of such of them only, as the Archbishop might grant by the Statute of the 25 *H. 8.* as the Pope's Legate born.

* Lindw.

Lib. 3.

Tit. 5. c. 2.

v. *modum*

illum.

† Otho. con.

Tit. 30. v.

commendare.

|| Otho. ut

supr. v. v.

cantes Eccle-

siar.

* Hob. Rep.

p. 156.

born. And, therefore, in short, since *Commendams* came so lately into the Knowledge of the Common Law, being till *Henry* the VIIIth's Time matters entirely of spiritual Cognizance, (I think, with the utmost Submission to the Sages of that Law) the Exposition of them still remains with the *Canonists*, and ought to be founded on the true and original Nature of them, according to the best Times of the Church, and the Sense of the *Canon* Law in those Days: For though the Pope's Chair be no Court of Parliament with us here in *England*, to make Laws touching *Freeholds*; yet as there is no common or statute Law with us to define the Nature of *Commendams*, they ought surely to be understood, according to their first and purest Design in the Law, and not as a means of encouraging Pluralities so mischievous to the State of Learning, and the seeming Good of Religion itself. Our Parliaments, indeed, have wisely guarded against all these fraudulent and enormous Practices of the Pope's in respect of Collations, Provisions, Reservations unto Benefices, and the like; and shall we still, by far-fetch'd Constructions, be guilty of the same Collusion with the Law against Pluralities, under a colour of Dispensations, *Non-Obstantes*, and by granting *Commendams retinere*, even contrary to the Sense and Nature of a *Commendam* in former Ages? Which the more honest *Canonists* themselves did acknowledge to be a leaping over the antient Walls of the Church; and, therefore, (say they) the Business of *Commendams* ought to be interpreted in the strictest manner. I will not deny a dispensing Power to the Crown in this Respect, since the Pope (by Usurpation) had it before the 25th of *Henry VIII*. But if the King should use it no better than the Pope did, only to aggrandize covetous Church-men, it cannot be called a Jewel in his Crown.



Of Consecration of Churches, Bishops and the like.

Consecration, according to a Definition of the *Canonists*, is a Rite or Ceremony of dedicating and devoting Things to the Service of God with an Application of certain proper Solemnities, antiently introduced into the Church, and continued by the Institution of the Primitive Fathers *. The *efficient* Cause thereof (as they will have it) is not only the Text of the *Canon* Law †, but the Word of God itself: and the Person, that has the Power of Consecration, is the Bishop or Diocesan; and, by the *Canon* Law, the Pope. For no inferior Clergyman can exercise this Power, though it be by the Bishop's Commission or Delegation; because though a Bishop may delegate those Things to an inferior Clerk, which relate to Jurisdiction; yet a Clerk of an inferior Degree, is not permitted to do such Things as relate to Orders ‡, and the like. For the Subject of Consecration is either a Thing or a Person; as a Church, Church-yard, Bishop and the like*; and the contrary to Consecration is Pollution, which is said to happen in Churches by Homicide, even without Bloodshed, as well as by the effusion of human Blood, and the burying of an excommunicated Person in the Church or Church-yard †; and likewise by the shedding of human Seed therein: But this Pollution is purged and done away by Reconciliation ‡; the Form of which I shall hereafter consider. At the Time of Consecration, a Tax or *Census* is impos'd as a Token of Subjection to be paid and perform'd by the Church consecrated; so that nothing is to be done without Money, even in Consecration

* X. 1. 15.
c. unic. §. 2.
† Ut supr.

‡ Abb. in
c. 5 & 6.
X. 5. 6.

† X. 3. 40. 7.

‡ X. 3. 40. 4.

secration itself, tho' this be Simony also by the *Canon* Law, unless in the Case of a Procuration: And, as in the Church of *Rome*, no Consecration of a Church or Bishop can be perform'd without the Celebration of the Mass*; so, in the Church of *England*, symbolizing with that Church in this Respect, such Consecration ought not to be solemniz'd without the Celebration of divine Service, and receiving the holy Sacrament.

In the *Romish* Church, by the *Canon* Law, Churches and Altars cannot be consecrated without the Reliques of Saints†; and whenever this grand Ceremony is perform'd, the Corpses and Funerals of Persons deceas'd, and (especially) of Infidels, ought to be remov'd and cast out from thence, before the Consecration of any Church happens: For whilst the Corpse or Body of any Pagan or Infidel lies bury'd there, it defiles the Church-ground, according to the *Papists* ||; and the same ought not to be consecrated, till the Ground is purify'd. By the *Canon* Law likewise, a Church ought to be endow'd before Consecration thereof*, which (among some Men) seems to be the best Reason for the Consecration of it: And a Bishop ought not to consecrate a Church, which the Patron has built for filthy Gain and Lucre to himself, and not for true Devotion†: But if there be large Revenues settled thereon for the Maintenance of a sufficient number of the Clergy, it may be consecrated, whether divine Service be ever celebrated therein or not, according to *Popish* Divines as well as *Canonists*. If a Church be in any Case injur'd and damag'd by Dilapidations and the like, it ought not to be consecrated again, if the Walls thereof that were consecrated do remain standing||: But if a Church shall be consumed by Fire, it shall, in such a Case be re-consecrated*; and 'tis the same Thing, if the Walls shall be re-built and repair'd from the very Foundation thereof†. And so devout are the *Romanists* about this outward Shell of Religion, that if an Altar thereof be mov'd, or a Stone of it broken, it ought to be re-consecrated; but not on the Score of having the Edgings of it broken. If neither antient Writings, nor Witnesses can be found to prove the Consecration of a Church, in a doubtful Case it shall receive Consecration again||. And 'tis said, that a consecrated Thing ought not afterwards to be apply'd to profane and human Uses*: Nay, so great has been the Superstition of some Men, that Laymen were forbidden to touch the sacred Vessels, wherein the Eucharist is made and consecrated. See *Bellarmin* in his third Tome of Controversies†. But among us, there is no Sanctity ascribed to Things necessary unto divine Religion, when they are not in sacred Use: And, therefore, in *Holland*, and other *Protestant* Countries, Things of this kind are made Use of in the same manner as other Vessels, when they are not in the Service of Religion; and may be sold, if occasion be. Churches may be rightly and well enough consecrated upon Festivals and Holidays; and the Bishop may demand a Procuration for the Consecration thereof. And thus much of the Consecration of Things.

I come next to speak of the Consecration of Persons. And here 'tis first to be observ'd, that a Bishop ought to be consecrated on some Lord's-day, by three other Bishops (at least) with the Archbishop's consent being had thereunto||; for an Archbishop may delegate and commit the Consecration of a Bishop elect unto suffragan Bishops. 2dly, 'Tis to be remembred, that whenever any Bishop is consecrated, he be consecrated to some certain and determinate Church, to which he was betrothed, or became a Spouse at the Time of his Confirmation. Hereby it seems, that if any Person be consecrated a Bishop to that Church, whereunto he was not before betrothed, he shall not receive the Habit of Consecration, as not being Canonically promoted to it. 3dly, Every Bishop, before Consecration,

* X. 1. 6. 28.

† Con. 1. Dist. 24.

|| Con. 1. Dist. 27. & 28.
* X. 3. 40. 8.
16 Q. 7. 26
Con. 1. Dist. 40.

† 16 Q. 7. 26, 27, & 28.
Con. 1. Dist. c. 10.

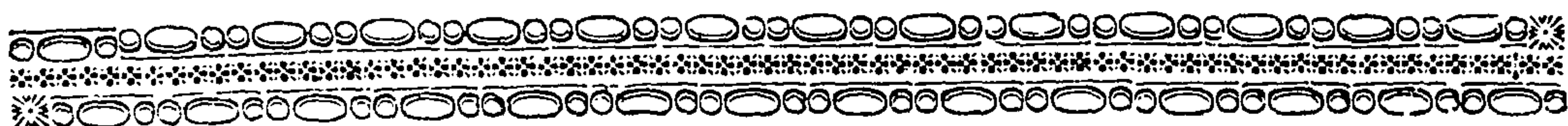
|| Con. 1. Dist. 19.
* Con. 1. Dist. 20.
† Con. 1. Dist. 24.

|| Con. 1. Dist. 16.
* Con. 1. Dist. 38.

† Lib. 3. cap. 16. Con. 1. Dist. 41.

|| X. 1. 11. 7. 75. Dist. 1.

secration, ought to oblige himself by Promise to keep and defend the Catholick Faith with a pure and sincere Heart, and that he will conform himself to the Discipline of the Church, and pay a Canonical Obedience to his Metropolitan * : But if a Bishop be consecrated by a Person that has not the Right of Consecration, he shall be consecrated again †, and otherwise he ought not to be re-consecrated. Yet some think, that a Bishop in such a Case as this ought not to be re-consecrated, but a Pennance ought to be enjoin'd him. A Person elected to be an Archbishop or Bishop, ought to receive Consecration within three Months after Confirmation ; and if he shall keep his Church a Widow more than five Months by his Negligence, he shall lose the Gift of Consecration then. At the Consecration of an Archbishop, all his Com-provincials ought to give their Attendance ||.



Of Contumacy, and the several Kinds thereof.

PERSONS *Judicially* cited, are sometimes wont, by a Non-Appearance in Court, to contemn the Judges Authority ; and thereby to render themselves *contumacious* : wherefore, I will consider these Persons under the following Heads. And *first*, Enquire what is necessary to render a Man contumacious. *2dly*, Examine how many *Species* or Kinds of *Contumacy* there are. And *3dly*, Consider the Punishments due by Law to contumacious Offenders. And *first*, In order to render a Man contumacious, he ought to be lawfully summon'd either by three *simple* Citations, or else by a *Peremptory* one * : And this is a Matter of *common Right*, as 'tis founded on the common Law. *2dly*, The Plaintiff on the Return of a *Peremptory* Citation ought to accuse the Contumacy of the Person summon'd, otherwise he shall not be adjudg'd contumacious †. But if the Plaintiff appears not on this *Peremptory* Summons, the Citation may be *circumducted* in Judgment, tho' the Defendant should not appear ; and the Defendant must be cited *de novo*, as a *Circumduction* requires ||. And the Practice is in the *Imperial* Chamber, as well as other Courts for the Defendant, if he appears, to accuse the Plaintiff's *Contumacy* on his Non-Appearance ; and, after three Court-days, from a Proclamation first made for the Plaintiff's Appearance, to pray a Discharge from any further Obedience to the Tenor of such Citation issued out and return'd * : for the Term is hereby *circumducted*, and a Discharge from the Force of the Citation ought to ensue. But the Citation, though *circumducted*, shall not be renew'd, if the Plaintiff shall, on the Lapse of three Court-days, then appear, and alledge just Causes of Impediment for his Non-Appearance : But the Citation being once extinct, there will be need of a new one ; because a *Judicial* Process ought not to be in a *pending* Condition †. For tho' a just Cause of Absence excuses a Man from Contumacy ||, yet it does not exempt him from a *Circumduction* of the Term, in such a manner, as the same should remain in suspense. But in Causes of Appeal, such a *Circumduction* is no Hindrance, when neither Litigant appears at the Term prefix'd, but that the Cause may afterwards be proceeded in without a new Summons : And thus a *Circumduction* of the Term, obtains not in Causes of Appeal, but in Causes of first Instance and

* D. 42. 1.
53.

† C. 3. 1. 13.
2. Bart. in 1.
8. c. 7. 1. 43.

|| D. 5. 7. 73.
1.

* Gail. lib.
1. Obs. 59.
N. 1.

† D. 22. 7.
1. 1.

|| D. 42. 1. 53.

and *simple Querele* only. If the Plaintiff has once, on a *judicial* Appearance, exhibited a *Libel*, and then before Issue join'd, through Contumacy, suffers the Suit to die, it shall, in that Case, be in the Defendant's power, after Proclamation made, and a Lapse of three Court Days, either to pray a Discharge from the Citation, or on the Plaintiff's Contumacy, to contest Suit *Negatively*; and to proceed in the principal Cause, even to a Sentence: For the Defendant may take the *onus probandi* on himself, and at the Defendant's Instance (tho' no Issue join'd) Witnesses may be examin'd, and a Sentence pronounc'd on the Merits of the principal Cause; and this Practice is admitted in pain of the Plaintiff's Contumacy. But 'tis otherwise on the Defendant's Contumacy; because then no definitive Sentence can be had without Contestation of Suit, or joining of Issue*: For the Plaintiff's Contumacy far exceeds that of the Defendant, as the Plaintiff is not bound to bring his Action, but the Defendant on a Citation, ought of Necessity to appear. Yet the *Imperial* Chamber, in point of Contumacy, makes no Distinction between Plaintiff and Defendant: But in each Case, on exhibiting of a *Libel*, Issue is join'd in *Panam Contumaciæ*, and a definitive Sentence is at length pronounc'd†. And this Practice likewise obtains in a Cause of Appeal in respect of the *modus procedendi*, on the Score of Contumacy.

* Marant. Spec. aur. par. 6. de Contum. N. 37.

† Gail. lib. 1. obs. 59. N. 4. &c.

But the Defendant shall not be deem'd contumacious, if the Court sits not on the Return of the *Peremptory* Citation aforesaid thro' the Judge's Absence, tho' the Defendant does not appear||: But yet he ought to appear the Court-day following, on the Judge's return and sitting without a new Citation. Again, a Man is also excused from Contumacy on the score of his Poverty, *viz* When he is so poor, that he cannot appear without shame and confusion of Mind for his naked and ragged Condition*, being, in such a Case, compar'd to a Person in Prison: But then (I think) he ought to send his Excuse and Readiness to appear upon mending his Habit. 3dly, When any one is hindred from appearing by some Indisposition of Health, it is such an Excuse as that he cannot be decreed contumacious†. In *Sicily*, a Person thus hindred ought, on a Citation, to send his Excuse by an *Affidavit* made on the Oath of some Physician or Midwife, if the Woman cited be big with Child, and near her time of delivery: and so it has been practis'd with us||. And the Defendant shall, in the like manner, be excused from Contumacy in respect of the Sickness of their near Relations and Kindred. And, lastly, 'Tis the same Thing when the Defendant is cited before a Superior or any other Judge; for then he is excused from any Contumacy to an inferior Court*. So that we may define Contumacy to be a wilful Contempt and Disobedience to any *lawful* Summons, or *judicial* Order; and 'tis the highest Crime that can be committed against the Judge's Authority and Jurisdiction.

|| Gloss. in l. 2. D. 2.5.

* Alex. in. l. 2. D. 2. 11. §. 3.

† X. 1. 3 §. 2.

| Clark. Prax.

* 14 Q. 5. 12 D. 42. 1. 54.

As to my second Consideration, it is of a twofold Kind or *Species*, *viz*. a *real* and a *feign'd* Contumacy*. He is said to be guilty of the first, who being cited either *personally*, or else at his House (as we say) *viis & modis* refuses to appear, tho' the Citation came to his Knowledge†. A Man is sometimes said to be guilty of a *real* Contumacy in an *existent* and *apparent* manner, sometimes in an *apparent* manner only; and sometimes in an *existent* manner only. A *feign'd* Contumacy is such by a Fiction of Law; and he is guilty thereof, who being cited at his dwelling House, it is a doubt, whether the Citation reach'd his Knowledge or not||: yea, some divide Contumacy into a threefold *Species*, *viz* *real*, *evident*, and *presumptive* Contumacy.

* C. 3. 1. 13. D. 5. 1. 73.

† 24. Q. 3. 6. X. 2. 6. 52. D. 42. 1. 53. Pd. ibi.

|| Cardin. in 9 Q. de dol. & cont.

In respect of my third Consideration, 'tis to be noted, that the Laws have introduced several Punishments against contumacious Offenders. By

the *Civil* Law, the Plaintiff may proceed three ways (at least) against such a Defendant, *viz.* either by Outlawry, which *Civilians* stile *Pena Banni*; or else by admitting the Plaintiff into Possession of the Defendant's Estate, otherwise called a *Sequestration*; and, lastly, by a Proceeding in the principal Cause even to a definitive Sentence, and a Decision of the Matter in Controversy. And in some Places, a Mulct or Fine may be impos'd on him for his Disobedience, and this is also agreeable to the *Civil* Law *. But then this Mulct or Fine is never impos'd on any one for Contumacy by a Fiction of Law, according to the receiv'd Opinion of the Doctors on the Law, quoted in the Margin †, but only for *real* Contumacy. And touching these several ways of punishing for Contumacy, the Plaintiff has his Option, as being agreeable to the Common Law: For whenever the Law introduces several Remedies *alternatively*, the Party, and not the Judge, may chuse which of them he pleases, even in that Case where the Words of the Law do not respect the Party, but the Judge. Some think, that if the contumacious Party comes of his own accord into Court, and offers himself ready to obey the Decrees thereof, before a Sequestration be decreed or made out against him, he shall not be fined for his past Contumacy, because Justice does not suffer by this means; and, therefore, the rigour of the Law ought not to be observ'd. But the Abbot is of another Opinion, since the Text quoted for the foregoing Doctrine relates only to a Case wherein Contumacy is already punish'd in Effect. For that a Person order'd to be admitted to the Possession of another's Estate, is deem'd as one admitted on the score of some Fraud or Resistance made by the adverse Party. By the *Canon* Law, the usual way of punishing Contumacy is by *Excommunication*, and sometimes by *Sequestration* ||, (of both which under their respective Titles hereafter) and sometimes by proceeding to Sentence *.

* Dd. in l. 1.
D. 2. 3.

† D. 2. 3. 1.

|| X. 2. 14. 2.

* X. 2. 14. 4.

A contumacious Person may be compell'd to give *Juratory* Caution *de parendo Juri*, tho' some Judges extort this Oath in the Beginning of the Suit without any reason: And tho' Clergymen are so privileged by the *Canon* Law, that they are not bound to give Caution *de Judio sistendo*; yet they shall be oblig'd to *Juratory* Caution, if they have been once guilty of Contumacy. A Person contumacious in one Point, ought not to be cited in another, unless his Contumacy has been often repeated: But he need not be cited in a condemnation of Expences, occasion'd by his Contumacy. He is in Law said to be a contumacious Person, who, on his Appearance afterwards, departs the Court without leave: but a Minor or Infant cannot be said to be contumacious*, because he cannot appear as a Defendant in Court, but must appear by his Guardian or Curator. Contumacy is sometimes said to be in respect of a Person's not defending himself; sometimes in respect of a Person's hiding himself, that the Citation should not reach him; and sometimes in respect of Persons appearing without being well instructed in the Merits of the Cause.

* D. 42. 1. 54.



Of Courts Ecclesiastical, and their Jurisdiction.

Ecclesiastical Courts, are Seats of Judicature founded and establish'd by Law for the Hearing and Determination of all Ecclesiastical Causes or Disputes among Men, and wherein matters of Ecclesiastical
Cog-

Cognizance are handled and discuss'd according to the *Canon* Law, and the Ecclesiastical Laws of this Realm: And these Courts are either stiled *Supreme*, *Intermediate*, or *Inferior* Courts. The *Supreme* Courts relating to the Church of *England*, are those which are immediately founded on the King's Authority, as the Court of *Delegates* from the King in *Chancery* now is, and the High-Court of *Commission* formerly was, when it had Jurisdiction here in *England*. For as Secular Courts have in all Ages been establish'd for the Decision of Temporal Causes, so in the like manner, by the Grant of Princes, Ecclesiastical Courts have been founded for the Determination of all Ecclesiastical Suits and Controversies whatsoever, which may happen among Men in the Church: And, therefore, as the King is the Head of the Church upon Earth, it is fit that he shou'd have the Highest Preheminence therein in Point of Judicature. And thus for the Execution of Ecclesiastical Laws, all Judges have their proper Tribunals assign'd them from the highest to the lowest, which in the Phrase of the *Canon* Law, are called *Consistories*; and to these, not only Clergymen, but even Laymen too are convened by Ecclesiastical Judges*, in all Causes which do of Ecclesiastical Right or Custom appertain to spiritual Cognizance†: For in *Feudal*, and other Causes, which do of *Common* Right, or by some Statute, belong to Secular Courts, they shall not be summoned by any Judge into an Ecclesiastical Court‡. Nor shall any one, by the Laws of *England*, be called out of the Realm to any Court whatsoever on pretence of any Ecclesiastical Cause. For 'tis enacted by Parliament*, That all Causes shall be heard and determin'd in the King's Ecclesiastical Courts within his Jurisdiction, and not elsewhere, according to the Nature and Quality of them, as often as they arise within the Realm, or any Part of the King's Dominions; provided, the Cognizance of such Causes does *ex Benignitate Principum*, and, according to the Laws and Customs of the Realm, belong to the Ecclesiastical Jurisdiction. And if any one shall procure a Citation, Inhibition, or Sentence in the aforesaid Causes, from the Court of *Rome*, or from any other Court out of the Realm, or endeavour to procure the same, he shall incur the Penalty of a *Premunire* inflicted by a Statute of *Richard* the Second†.

Among these Courts, that has the first Place, which depends on the King's Commission, as the Court of *Delegates* does, wherein all Causes of Appeal by way of Devolution from either of the Archbishops are decided. But in regard to the Jurisdiction of this Court, it has been enacted by Parliament‡, That no Appeal shall be made in Causes begun within the Realm to the Court of *Rome*, or out of the Kingdom, for want of Justice in the two Archbishop's Courts, but that the Party may appeal to the King's Majesty in his High-Court of *Chancery*: And after such an Appeal is made, a Commission is directed under the Great Seal to Persons specially appointed, who, by virtue of the said Commission, have Power to hear, and finally determine every such Cause of Appeal. But a Review of the Proceedings, by the King's special Grace, may be had hereupon. Then as to the *High-Commission* Court, which is now abolish'd by Parliament, it was ordain'd by the first of *Elizabeth**, That the Crown might by Letters Patents under the Great-Seal of *England*, whenever it thought fit, name certain Subjects at pleasure for the exercise of spiritual Jurisdiction throughout the whole Realm of *England*, and the King's Dominions thereunto belonging; and visit, reform, and correct all Errors, Heresies, Schisms, Abuses, Offences, and Contempts whatsoever, which might be corrected and reform'd by any Ecclesiastical Power; and that the Persons thus named, should have a full Power of Executing the Premises according to the Tenor of such Letters Patents. And tho' this

* X. 2. 2. 1, 2, 3, &c.
Nov. 119 & 120.

† X. 2. 2. 5.

‡ X. 2. 2. 6. & 7.

* 24 H. 8. cap. 12.

† 16 Rich. 2. cap. 5.

‡ 25 H. 8. cap. 19.

* 1 Eliz. cap. 1.

last

last Court was at first founded upon good Policy in the State, to strengthen her Majesty's Government against the *Romish* Incendiaries ; yet it much wanted a proper *Basis* to support it, and was afterwards made use of as a means rather to destroy the Protestant Religion than to keep out Popery ; and, therefore, it was abolish'd.

Intermediate Courts are those, wherein Archbishops and Bishops do exercise Jurisdiction by way of Appeal from inferior Ordinaries : for as the Court of *Delegates* now acts therein by virtue of the King's Commission and a delegated Power ; so under his Majesty, Archbishops and Bishops have the Power of Judicature, not only in Causes of the first *Instance* in their respective Diocesses, but also in Causes of Appeal by virtue of an ordinary Jurisdiction* ; though Archbishops, in whose Courts Causes of Appeal interpos'd from any Courts whatsoever within the Province (even *omisso Medio*) are determin'd, have a larger Jurisdiction † herein than Bishops ; and wherein upon Letters of Request ‡ obtain'd from the Ordinary, any Controversies whatsoever, and between whomsoever, may be originally commenced. And among the Courts of the Archbishop of *Canterbury*, the chief is the Court of *Arches* so called *ab Arcuatâ Ecclesiâ**, or from *Bow-Church* in *London* (which is dedicated to the Virgin *Mary*) by reason of the Steeple or *Clockier* thereof, rais'd at the Top with Stone Pillars in fashion of a Bow bent *Arch-wise* : And the Judge of this Court, being the most ancient Consistory of the Archbishop's Jurisdiction, is distinguish'd by the Title of *Dean* or *Official of the Court of Arches*, to whose *Deanery* or *Officialty* to the said Archbishop, is annex'd the peculiar Jurisdiction of thirteen Parishes in *London* exempted out of the Bishop of *London*'s Jurisdiction : Having all ordinary Jurisdiction in spiritual Causes of the first *Instance* within the Archbishop's Peculiars, and of Appeal too as the superior Ecclesiastical Consistory throughout the whole Province of *Canterbury* †. For my Lord *Coke* says ‡, That his Power to call any Person for any Cause out of any part of his Province within the Diocess of any other Bishop (except it be upon Appeal) is restrain'd by a Statute of the Realm. Next unto this Court is the Court of *Audience* held in *Paul's Church* in *London*, which Court, though of equal Jurisdiction with the former, yet it is inferior thereunto in point of Dignity as well as Antiquity ; and the Judge of this Court is stiled the *Auditor*, or *Official of Causes and Matters in the Court of Audience* of *Canterbury*. This was antiently held in the Archbishop's Palace, wherein, before he would come to any final Determination, his usage was to commit the Discussing of Causes privately to certain Persons learn'd in the Laws, stiled thereupon his *Auditors*. In the same Place, is also held the *Prerogative Court* of *Canterbury*, wherein all Controversies touching Wills, if the Probate of which does belong to the Archbishop's Jurisdiction, and likewise touching the Administrations of the Goods of Persons dying Intestate, which are of the same Cognizance, are examin'd and determin'd. But Bishops, in respect of their ordinary Jurisdiction, held their Courts in their Cathedrals, over which their Chancellors do or should preside ; and in remoter Places of their Jurisdiction, their Commissaries.

Inferior Courts, are those which belong to Persons that are inferior to Bishops, as Archdeacons, Deans and Chapters, and such as have peculiar Jurisdictions. For in regard of the great extent of some Diocesses besides those Courts which belong to Bishops, Archdeacons have also their Courts*, and do either by Grant or Prescription, some of them exercise concurrent Jurisdiction with the Bishop within their Archdeaconries. And thus likewise do Deans and Chapters take cognizance of Causes in exempt Jurisdictions granted to their Cathedral Churches. And among
such

* X. 1. 50. 1.

† Antiq. Brit. de Priv. Sed. Cant. 11 23 H. 8. c. 9.

* Lindw. Prov. lib. 5. Tit. 2. cap. 1. v. *Officialis*.

† 24 H. 8. cap. 12. 11 Inst. pt. 4. 23 H. 8. cap. 9.

* 25 H. 8. cap. 9.

such as have Peculiars in some certain Parishes, whose Inhabitants, within the Bounds of which, are sometimes exempt from the Archdeacon's, and sometimes from the Bishop's Jurisdiction *.

It was resolv'd in the Case of *Pickaver*, on the Statute of *Henry VIII.* † That if a Bishoprick within either Province becomes void, and so consequently the Jurisdiction devolves on the Metropolitan; such Metropolitan must hold his Court in the inferior Diocess, for such Causes as are, by the Ecclesiastical Law, to be try'd before the inferior Ordinary ||. The Style and Custom of particular Courts ought to be observ'd and had in great Consideration with all Judges: And, because there is no Place so proper to treat of it as in this, I will here conclude this Title with it.

Now that is properly called the *Style of Court*, when any Practice or Custom in relation to *Judicial* Matters is introduced by the Judge that has a power of so doing, that is to say, of making Rules and Orders of Court *: For it differs from Custom, strictly so called, in many Points †: because it respects not only the Order and Method of Writing, but also the Judges Method in Proceeding, and Way and Manner of interpreting of a doubtful Law; nor is it inferr'd from the Usage and Consent of the People, nor from a plurality of Acts, as a Custom is. And, therefore, the *Style of Court* is properly the Practice observ'd by any Court in its way of Proceeding, and is not a Law unto Causes and Persons, but a Mode of Proceeding, as it is in the City of *Bologna*, the Style of Court for the Notary to read the Sentence given, which is valid because so practis'd there: Because of *common Right*, the Judge ought to read the Sentence. But if a Judge, that has the power of making a Rule of Court, introduces a Style of Court contrary to Law, 'tis not valid *, unless the same be founded on the Knowledge and Consent of the People, and on Prescription as Custom is; or else is supported with the Approbation of the Prince, and respects the Order and Method of *Judicial* Proceeding alone. Again, regularly speaking, a *Style of Court* has a relation to such Things as are arbitrarily left to the Judge's Discretion: as that a Libel be exhibited in all but summary Causes; for of *common Right*, Causes of light Importance are arbitrary, in which last kind of Causes, a Judge may introduce a *Style of Court*; but he must be a Sovereign Judge to do it in such Things as are contrary to the Common Law or Custom †. But if the *Style of Court* be contrary to the Common Law, then it ought to be prov'd in respect of its Prescription as a Custom is. A *Style of Court* is introduced by such usual Clauses as the Court is wont to insert and make use of: and if the same be not observ'd in all Processes emitted from thence, such Letters of Process shall be deem'd surreptitious ||. For the *Style of Court* is in the place of a *Judicial* Form of Proceeding; and whenever we depart from this common Style, it infers a Presumption of Falshood or Forgery †. When the *Style of Court* respects the Decision of a Cause, it requires full Proof that it has the Usage and Consent of the People: And therein, a Judge cannot inform himself in his own Chamber, but must do it in open Court *. By a *Style of Court*, a Sentence may be pronounced without publishing the Witnesses, tho' such Publication was moved for: And such Sentence is not null and void, because the Party ought to appeal from the Grievance immediately. And thus the *Style of Court* makes a Law in such Cases as are not decided by Law †: And, therefore, we ought not easily to depart from antient Practice, and that which has commonly been observ'd for Law.

* X. 5. 33.
1 & 3. vi. 5.
7. 1.
† 23 H. 8.
c. 9.

|| Hob. Rep.
178.

* Cravet de
ant. temp.
† X. 5. 20. 6.

* Alex. Conf.
36. in fin.
lib. 4.

† Alex. Conf.
30. lib. 4.
N. 9.

|| bb. in
c. 51. X. 1.
6.

† X. 5. 20. 6.

* Socin.
Conf. 36.
N. 11.

† Anc.
Conf. 53.
N. 2.



Of Custom, and of the Nature and Force thereof, &c.

CUSTOM is defin'd to be a kind of immemorial Right, introduced by the *tacit* Consent of the People*, and establish'd by a long Course of Practice in such matters only as the People are inabled to do by expresly consenting thereunto†: And this Practice or Usage is in the place of a Law, when the Law is deficient in any Point. I say *by a long course of Practice*, because in all Customs diuturnity and length of Time is as much to be regarded as the Consent of the People, and Solidity itself. Now *Custom* is twofold, *viz. General** and *Special*†. The first is a kind of Right initiated by the Manners and Usage of the whole People of a State, or (at least) by the greater part of them upon the Principles and Foundation of Reason; and, it being of a settled and continued Duration, it has the Authority of Law in that State. I say, *by the Manners and Usage of the whole People*, or (at least) *by the greater Part of them*; because a Custom cannot be introduced by particular Persons: But 'tis otherwise in respect of a Prescription, which may happen between a private Person, and a private Person. And *Geminus* avouches this to be a substantial Difference between Custom and Prescription, as a Custom tends to introduce a general or universal Right; but a Prescription has only Respect to an Acquisition of Right in some particular Persons: And 'tis said in our Law Books, that the Publick acquires a Right by Custom, but only private Persons acquire it by Prescription; which, according to the *Civil* Law, is establish'd by a ten Years usage‡, and, according to the *Canon* Law, by forty Years continuance*. And thus a general Custom is an unwritten Law, which consists in the Usage of the People alone, and being not observ'd in any one certain Place alone, it is indiscriminately made use of by all Persons alike, or (at least) by the majority of them: but a special or local Custom is that, which, being restrain'd to some particular Place, has the Force of a municipal Law only in that Place†.

* X. 2. 20.
26.

† D. 1. 3. 32.

* D. 1. 3. 32.

† D. S. 4. 13.
1.

‡ Bart. &
Jaf. in l. 3.
D. 1. 3.
* X. 1. 4. 11.
X. 2. 26. 4.

† Cyn. &
Dd. in l. 2.
C. 8. 55.

‡ D. 1. 3. 32.
1.

To introduce a Custom, therefore, four things are principally required, *viz. First*, A lawful Prescription is necessary hereunto; for whenever any mention is made of a Custom, 'tis always by the *Civil* and *Canon* Law intended of a Custom prescrib'd. *2dly*, A frequency or repetition of Acts is required hereunto; and 'tis the common Opinion of the Doctors, that by the *Civil* Law, two *judicial* Acts concurring with a Lapse of ten Years, are sufficient to settle a Custom, tho' this (I think) ought to be understood with some Qualification of Law, and to proceed only when those two Acts are Acts so notorious, as in all likelihood they will come to the knowledge of the People; otherwise two Acts are not enough, but so many are required as may infer the *tacit* Consent of the People collected from those Acts. And 'tis a receiv'd Doctrine likewise among the Lawyers, that not only *judicial*, but even *extra-judicial* Acts are sufficient to introduce a Custom, provided they are such as the *tacit* Consent of the People may appear from thence. But the *third*, and chief Thing necessary for introducing a Custom, is the *tacit* Consent of the People‡, being the primary Cause thereof; and this Consent is collected from a frequent Usage and Re-

Repetition of Acts, as aforesaid. For Example; if the Acts be of such a Nature, that they may probably come to the Peoples knowledge. For 'tis not a Non-act, which introduces a Custom; a Custom being said to be as it were a common Usage: And, therefore, whenever such a Consent of the People may be had from Conjectures and the like, a Frequency of Acts is not regarded, since a Custom receives its principal Force and Vigour from this *tacit* Consent and Agreement. And hence I infer this Difference between a Custom and a Statute, *viz.* that a Statute has the *express* Consent of the People, whereas a Custom has only their *tacit* Agreement to it; and though it be reduc'd into Writing, yet it remains a Custom still. 4thly, 'Tis necessary that a Custom shou'd be adapted to, and founded on Equity; that is to say, it ought to be correspondent and agreeable to right Reason: For evil Customs cannot be confirm'd by any Length of Time, nor from a Continuance of such Usage; nor can a Custom be introduc'd through Error, so as to be valid*; because Error excludes this† D. 1. 3. 39. tacit Consent, as its efficient Cause. Some Persons indeed do absolutely affirm every Custom to be valid, if the Observance thereof does not induce a Sin: But the general Opinion is, that tho' the Authority of a long-liv'd Custom be of no mean Strength and Force in Law; yet it has not always that Validity, as that it ought to prejudice even a positive Right, unless it be a very reasonable Custom, and such as is founded on a legal Prescription at least. But since no certain Doctrine or Determination can be given touching the Reasonableness of a Custom, it must therefore be left to the Determination of a discreet Judge to declare, whether a Custom be founded on Reason, and whether it ought to be allow'd or disallow'd of or not, &c.

A Custom has several Effects. As first, it is an Imitation of Law; the Law saying, *Diuturni Mores (nisi legi sint adversi) consensu utentium approbati legem imitantur* *. 2dly, If it be introduc'd according to Law, *12 Dist. 6. it interprets and confirms a Law; for Custom, in this Sense, is the best Interpreter of all Laws †. 3dly, When a Law is written *in neutram Partem* † D. 1. 3. 37. X. 1. 4. 8. that is to say, neither permitting nor forbidding a Thing to be done, Custom has the Force of a Law, and is adjudged according thereunto ||; † D. 1. 3. 35. which is not only true in Contracts, according to the *Civil* Law, but even in Punishments too, according to the *Canon* Law; nor ought a Judge to recede from such a Custom. As the efficient Cause of a Custom is the tacit Consent and Usage of our Ancestors or Forefathers having a Power of making of Laws*; so the material Cause thereof are Things incorporeal, as the Rights of Jurisdictions, Elections, and the like, which have some Species or Shew of Law. It has been said, that Length and Diuturnity of Custom, if it be approved of by the Consent of such as make use of it, imitates a Law: And, therefore, ancient Custom (provided it be not contrary to good Manners, or the Decrees and Canons of the Church) has, in all Ecclesiastical Cases, the Force and Vigour of a written Constitution; and whatever is done contrary to Length of Custom, shall be revok'd †. Albericus observes, that a Custom may be *conceiv'd*, † 12 Dist. 7. *born*, *perfected* and *strengthen'd*. First, It is *conceiv'd* in Reason, as a Birth in the Womb of a Mother. 2dly, It is *born*, *viz.* when one or more Persons begin to do those Things, which right Reason advises and persuades to be done. 3dly, It is *perfected* by a multitude of the like Acts, whilst all Persons do by degrees imitate that which is begun by a few. And, 4thly, 'tis *strengthen'd* by a long Practice and Course of Time limited by the Laws.

He, who founds his Intention on a Custom, ought to prove that Custom; because a Custom is a Matter of Fact, and Facts are not presum'd

sum'd without due Proof thereof: And a Custom ought to be prov'd with all its Requisites, otherwise such Proof will be defective. Therefore Witnesses produc'd to prove a Custom, ought to depose touching the Truth of all the aforesaid Requisites, with the Reason of their Knowledge: because 'tis not enough to prove that such a Custom was extant, without saying, that they have seen it so observ'd in the like Cases and Acts for a long time together, and that they have frequently heard it from their Ancestors, in the publick Presence of many Witnesses, that it has been thus practis'd; so that from hence it appears, that the tacit Consent of the People, or (at least) of the greater Part of them, did intervene*. Moreover, the Witnesses ought to agree in point of Time, and about the Identity of the Acts repeated: For if they depose touching different Acts, and as single Witnesses, their Depositions are no Evidence to prove a Custom. But yet all this is otherwise in a general and notorious Custom, which wants no Proof; though every notorious Custom ought even to be alledg'd: Because tho' it be notorious, and relieves the Person *ab onere probandi*; yet it does not ease him *ab onere proponendi*; and that I call a *notorious* Custom, which is prov'd by the Inspection of many Authentick Instruments or Writings. But in proving a Custom, 'tis not necessary, that the Witnesses shou'd depose, in what Cases, and between what Persons such Custom was observ'd; but it is sufficient for them to say, that it has been thus observ'd of their own Knowledge for a long Course of Years ||, and they have thus heard it from their Ancestors, &c. But for a better Knowledge of this Matter, the Witnesses produc'd to prove a Custom alledg'd, may observe the following Rules; *viz.* *First*, If a Custom corrects a written Law, the Custom ought then to be fully prov'd: For 'tis not enough, in such a Case, to prove a common Observation thereof, contrary to such written Law; because such an Observance alone does not make a customary Law, according to *Albericus de Rosate**. *2dly*, If a Custom be to be prov'd by Witnesses, two Witnesses are sufficient to prove the same, according to some of the Doctors †: But others think, we ought to distinguish herein. For, when the Matter in debate is touching the Proof of the Beginning of a Custom, or if Witnesses depose touching the Fame of a Custom, then (say they) two Witnesses are sufficient ||. But if the Custom itself be in question, then (say they) it ought to be prov'd by all the Inhabitants where such Custom obtains*. But lest such a Proof shou'd be extended *in infinitum*, others say that the universal Term *omnes* is referr'd to the greater part of the People, according to the Law quoted in the Margin †; and, lastly, others will have Ten Witnesses to be sufficient, since such a Number makes a Multitude ||. But as a Custom in contra-distinction to a Prescription, is an immemorial thing, the beginning thereof cannot be prov'd by Witnesses. *3dly*, Witnesses produc'd to prove a Custom, must give Evidence of three Things, *viz.* Touching the Usage of the People; the Frequency of the Act; and the Length or Diuturnity of the Time. But, *4thly*, If a Custom be contrary to an Ecclesiastical Law, or the Good of the Church, which is sacred, then forty Years Prescription is requir'd*: as in Causes specially reserv'd to the Prince's Cognizance, an immemorial Custom is always necessary to establish a Right against his Prerogative and Jurisdiction. *5thly*, This *legal* Time, which gives Force of Law to a Custom, has, according to the Doctors ||, its Beginning from the first publick and notorious Act; which Acts ought either to be *Judicial*, or such as are sped in publick Places, or by publick Persons in the common Assemblies of the People. And, *6thly*, The Currency of Time to establish a Custom, ought to be with a *Continuando* from the beginning to the end of the Term prescrib'd, unless the *intermediate* Acts, or the greater part of them from the beginning to the end of the Time appointed, are conformable to the beginning.

* D. 1. 3. 34.
Dd ibi.

|| Guid. Pap.
Conf. 116.
164 & 171.

* In l. 2. C. 8.
53. N. 57.

† Guid. Pap.
Conf. 146 &
171.

|| D. 22. 5. 12.

* D. 22. 3. 28.

† D. 50. 1. 19.

|| D. 47. 8. 4. 3.

* X. 1. 4. 11.

|| In l. 32. D.
1. 3. 1.



Of Deacons, Sub-deacons, and their Offices.



HO' *Deacons* were heretofore introduc'd into the Church in the Infancy thereof by the Apostles themselves, in order to attend the daily Service and Ministry of the Tables; yet 'tis to be observ'd, they were elected and chosen both in Aid of the Presbyters and Apostles, that they might have the more Time and Liberty of applying themselves to the dispensing of of God's Word. But the Deacons had the Care and Management of such Matters as related to Temporal Concerns*. Therefore in those Times the Office of a Deacon was nothing else but to assist the Priest in such Things as requir'd Consecration. Wherefore, they were to be always ready at Hand to assist him in the Administration of Baptism and the Eucharist. And tho' the Council of *Arles* did forbid them to offer this Sacrifice themselves; yet by the Council of *Carthage*† they might distribute the Eucharist after it was consecrated by the Priest.

* Act. ch. 6.

† Can. 28.

Deacons were anciently, as Archdeacons are at present, the Bishops Eyes‡, to inspect and take Care of the Acts of the whole Church; and to report them to the Bishop: And, therefore, these Archdeacons, in respect of the Bishop's Person, to whom they are subservient, are look'd upon as Persons of greater Excellence than such Presbyters as do not discharge this Office; but all other Deacons are deem'd inferior to Priests; and being in Subjection to Presbyters, they ought to yield to them the Place of Honour and Dignity*. *St. Paul* in his first Epistle to *Timothy*† acquaints him very fully with the necessary Qualifications of these Deacons in respect of Life and good Behaviour. In the Christian Church the Office of Deacons succeeded in the Place of the Levites among the *Jews**, who were by God's Command to be as Ministers and Servants to the Priests in the Old Law†. And thro' a Necessity of the Churches, wherein they were ordain'd, and to which they might of Right be recalled by their Bishops as to their proper Churches, under the Pain of Excommunication. An Example whereof we have in the History of *Gregory of Tours*‡, commonly called *Turonensis*, touching *Theodolphus* a Deacon at *Paris*, excommunicated by *Ragnimundus* Bishop of *Paris*, because he refus'd to return to his own proper Church, being then in the Service of the Bishop of *Angiers*; which was adjudg'd in the first Council of *Arles**, during the Reign of the Emperor *Constantine*, and the Papacy of *Sylvester* the First; and likewise decreed in the Twenty third Session of the Council of *Trent*.

‡ 93 Dist. c. 6.

† 93 Dist. c. 5. 14. 15. 17. & 20.

‡ Chap. 3.

‡ 32 Dist. c.

11. X. 3. 2. 2.

* 20 Dist. c. 1.

‡ Num. Ch.

S. 9.

‡ Lib. 10.

cap. 14.

* Can. 2. &

22.

Besides that Part of the Deacon's Offices which he bears in assisting a Bishop or Priest in the most solemn Ministrations of Divine Worship, his Business was in a more particular Manner to take Care of the Poor; and he had the Dispensation of the Churches Treasure. He is to collect the Oblations of the People, and to dispose of them on the Altar, to adjust and lay the Cloth on the Communion-Table, to preach the Gospel, and *St. Paul's* Epistles; and if he be an Archdeacon, otherwise

called a Bishop's Deacon, he ought to assist the Diocess, and to make a Report of all Matters amiss unto the Bishop.

In the *Romish* Church they have a Sub-deacon, who is the Deacon's Servant; and succeeded in that Communion in the Room of the *Nathanims* * in the *Jewish* Synagogue: But as this Order was not reckon'd among the Sacred Orders in the Primitive Church even in Pope *Urban's* Opinion, that Pope decreed †, that no one from the Order of a Sub-deacon should be promoted to a Bishoprick of *Common-Right* ‡ and so did Pope *Innocent* the Third do the same Thing for the very same Reason †: Yet it is at this Day in that Church, for the Sake of increasing the Number of the Clergy, and of adding Strength to the Hierarchy, reckon'd among Holy Orders *. This Order of a Sub-deacon is a Degree or Step to that of a Deacon among the Papists; for no one among them ought to be a Deacon, till he has been a Sub-deacon; and the Sub-deacon's Office is to hold the Bason to the Bishops and Priests, whilst they wash their Hands †, and the like.

* 1 Efdr. c. 8.

† 65 Dist. c. 9.

‡ 31 Dist. c.

1. X. 1. 14. 9.

* X. 1. 18. 7.

† 25 Dist. c. 1.

A Deacon anciently was ordain'd in a different manner from a Presbyter; for he might be ordain'd by the Bishop alone, without the Assistance of Presbyters, and when ordain'd his Office was to take Care of the Ornaments and Utensils of the Church, to receive the Oblations of the People, to distribute the Bread and Wine, to read the Gospels in some Churches, to baptize in some Places, and to preach, tho' not without the Bishop's Leave. 'Tis true, the Qualifications for both these Offices are the same, but there is some Difference in respect to their Age: For a Deacon may have a Dispensation for entring into Orders before he is Twenty three Years of Age, and 'tis Discretionary in the Bishop to admit him to that Order at what Time he thinks fit; but regularly there can be no Faculty or Dispensation for entring into Priests Orders before Twenty four, tho' this is likewise done *Anno currante*, as they call it.

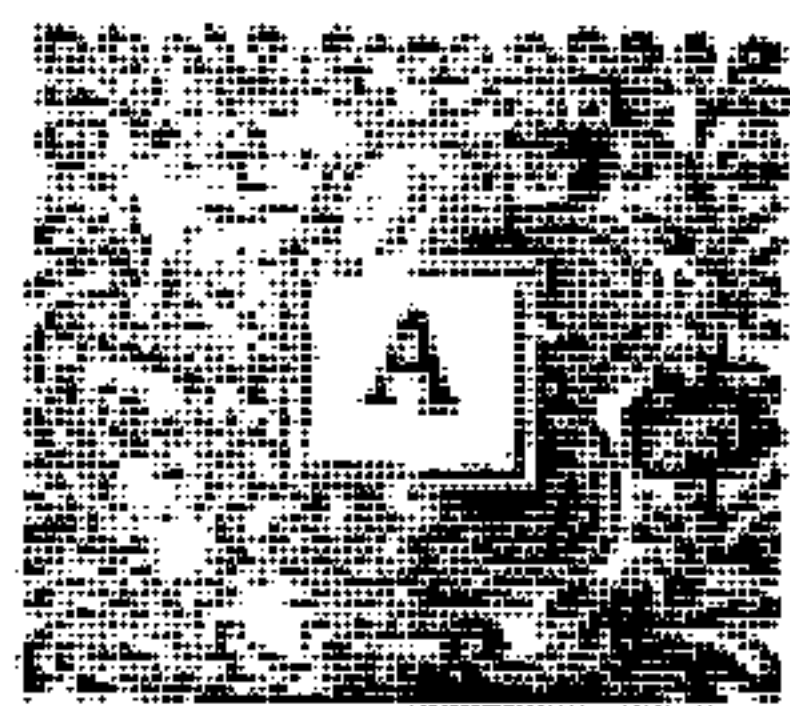
‡ 14 Car. 2. chap. 4.

As in the Primitive Times a Deacon was to read the Gospels, so with us his Office now consists in catechising Children, reading Divine Service, Baptizing, burying the Dead, Marrying; and before the Act of Uniformity ‡ he might be incumbent on a Living with Cure of Souls, but not since: And the very Form of ordaining expressly mentions, that it is his Office to assist the Priest in the Distribution of the Holy Communion. And from hence a Question has arisen, *viz.* That since by the Statute of *Charles* the Second, those who are not Priests by Episcopal Ordination are prohibited to administer the Sacrament of the Lords Supper under the Penalty of One hundred Pounds, one Moiety to the King, the other to be divided between the Poor of the Parish and the Prosecutor. But this Penalty does not extend to the Foreigners, nor Aliens of the Foreign Reformed Church allow'd, or to be allow'd by the King's Majesty, his Heirs and Successors: Nor to any Person dissenting from the Church of *England* (except *Papists* and *Popish Recusants*) in Holy Orders, or pretended Orders; nor to any Preacher or Teacher of any Congregation of Dissenting Protestants, taking the Oaths, and making the Declaration as by the Act directed.

It has been a Question, Whether a Deacon doth not incur that Penalty by distributing Wine to the Communicants: But (I think) the bare Act of giving the Cup to them, without consecrating the Wine, does not make him an Offender within this Law; because the Prohibition is, That no Person shall presume to consecrate and administer the Sacrament, &c. which Words comprehend the whole Solemnity of the Communion.



Of a Dean and Chapter, their Power, Rise, &c.



Dean and *Chapter* is a Body Corporate Spiritual, consisting of many able Persons in Law, *viz.* the Dean, who is the Chief, and his Prebendaries, who are his Collaterals, and they together make one entire Corporation or Body Politick: And as this Corporation may jointly purchase Lands and Tenements to the Use of their Church and Successors; so likewise every one of them may severally purchase Lands and Tenements to the Use of their Church and Successors; so likewise every one of them may severally purchase to the use of himself and his Heirs, according to the *Common-Law*, which he cannot do by the *Canon-Law* in this respect; for what he purchases he does by this Law only purchase to the Behoof of the Church. The Person presiding over this Ecclesiastical Body of Men is stiled a *Dean*, from the *Greek* Word *Δεσπότης*, which in *English* signifies *Ten*; because he was anciently set over ten Canons or Prebendaries (at least) in some Cathedral Church; and as such was Head of the Chapter, and in the Cathedral Church next unto the Bishop in Point of Degree, and by the *Common-Law* is a sole Corporation to some Purposes; since he represents a whole Succession, and is capable of taking an Estate as Dean, and of conveying it to his Successors: And, therefore, if Lands are given to him, the Inheritance passes without the Word *Successors*; because, in Construction of Law, such Bodies never dye. But *Chapters* are not capable to take by Gift or Purchase without the Dean*: Yet if a Bishop makes a Lease with a Reservation of Rent; and there is a *Proviso*, that in the Vacancy of the *See* the Rent shall be paid to the Chapter *in fure suo proprio*, this is good and valid, for they are Persons of which the Law takes Notice, and are capable of receiving Rent, tho' it may be a Question whether in their own Right or not.

*Mores Rep

The Word *Chapter* is sometimes put to signify the Place, where Collegiate Persons or Bodies Politick Ecclesiastical do usually meet and assemble together in common, in order to treat of and transact the Affairs of the Community; and sometimes this Word denotes the Place, where Delinquents receive Discipline and Correction according to the Orders of the Church; sometimes 'tis used to signify a *Decretal* Epistle, or any particular Distinction of Holy Writ; and sometimes the Word *Chapter* is put for a Collection of several Persons, that do not live together in common, but only gather together in some certain Place for the sake of debating Matters in common among themselves, as in the general Chapters of Monks and other Regulars †; according to which Sense of the Word a Collection of Rectors, Vicars, and other Ecclesiasticks, assembled together for that end, are also called a Chapter: And because these last kind of Chapters were commonly held in Places not very remarkable, *viz.* in the Country, they were called *Rural Chapters*. But, touching the several Acceptations of this Word

† X. 3. 35. 7.

Capitu-

Capitulum or *Chapter*, this Verse is made use of summing up the whole, *viz.*

Distinguit, Minuit, locat & collectio fertur.

* Anderf.
Rep. N. 167.

† X. 5. 7. 9.

The Chapter consists of Canons or Prebendaries, which are some of the chief Men of the Church ; and, therefore, are called *Capita Ecclesiae* ; and these, with the Dean, are the Bishop's Council, with whom he may consult in Ecclesiastical Affairs. They are a Spiritual Corporation aggregate, which they cannot surrender without the Bishop's Leave, because he has an Interest in them. 'Tis true, they might surrender their Lands, but they could not dissolve their Corporation as appears in the Case of the Dean and Chapter of *Norwich* *, who convey'd all their Lands to *Edward* the Sixth, and he by Letters-Patents incorporated them who before were a *Prior* and *Convent*, by the Name of the *Dean and Chapter of Trinity Church in Norwich*, ex *Fundatione*, Edw. 6. and regranted their Lands to them. Upon which they made a Lease by their old Name, leaving out these Words *ex Fundatione Edwardi sexti* ; and the Lease was adjudg'd to be good, because the Corporation was not dissolv'd by the conveying all their Lands ; for tho' they had none, they might still exercise Jurisdiction in confirming Leases, and the like. A *Dean and Chapter* as a Corporation may sue and be sued ; and if they commence an Action, the Defendant may challenge a Jury-man, who is of Kindred to a Prebendary, one of their own Body. They with the *Dean* are to consent to every Grant made by the Bishop in order to bind his Successors ; for the Law has not thought it reasonable to place that Authority in the Bishop alone. They are Guardians of the Spiritualties during the Vacancy of the Bishoprick of *Common-Right* † ; tho' the Usage of *England*, is, That the Archbishop is the Guardian of Spiritualties, during such Vacancy as to Matters of Jurisdiction : For as to Ordination (according to *Lindwood*) they may call in the Aid and Assistance of some Neighbouring Bishop. And according to the 25th of *Henry 8. Ch. 21.* they have Power as a *Dean and Chapter*, in the Vacancy of an Archbishop, to grant Dispensations.

As to the Original of a *Dean and Chapter* 'tis certain (I think) that anciently Ecclesiastical Bodies of Men did reside with the Bishop in his Cathedral, tho' under the present Denomination of a *Dean and Chapter* ; and those Men were Part of his Family ; and when he dy'd, they chose another in his Room, but they had no peculiar Jurisdiction with us here in *England* during the *Saxon* Times. But afterwards, when they got Possessions by the Endowments of Bishops and others, they then assum'd Titles of Dignity, and obtain'd peculiar Jurisdictions ; and so they were stiled *Prior* and *Convent* in most Places, till King *Henry* the Eighth transform'd them to a *Dean and Chapter* ; and, their legal Rights still remaining, they became a *Chapter to the Bishop*, or the *Bishop's Council*. For 'tis said in the Case of the *Dean and Chapter of Norwich* ; That in *Christian Policy* it was thought necessary (since Sects and Heresies arose in the Church) that every Bishop should be assisted with a Council, *viz.* a *Dean and Chapter*. First, To consult with them in deciding difficult Controversies in Religion, to which every Bishop habet Cathedram. And, Secondly, To consent to every Grant the Bishop shall make to bind his Successors, as aforesaid. At first all the Possessions were vested in the Bishop, but afterwards a certain Portion was assign'd to the Chapter : And, therefore, there was a Chapter, before they had any Possessions ; and of *Common-Right* the

the Bishop is Patron of all the *Prebendaries*, because their Possessions were anciently deriv'd from him. So that as long as the Bishoprick continues the Dean and Chapter (being his Council) remains and has a Being.

After the Death of a *Prebendary* or *Canon*, the Dean and Chapter shall have the Profits of his *Prebend* or *Canonry* *: And after the Death of a Dean of a Free Chapel belonging to the King, the King shall have the Profits of the Deanery; for 'tis at the King's Pleasure, whether he will collate a new Dean to it or not †. 'Tis likewise held in our *Common-Law* Book, That a *Deanery* is a *Spiritual Promotion* and not a *Temporal*, by all the Judges: And if the Nomination and Patronage of a Deanery be at the King's Appointment, or of his Heirs and Successors, and he appoints a Dean; yet it does not cease to be a Spiritual Promotion. The King makes all Corporations of Deans and Chapters here in *England*: And as there are two Foundations of Cathedrals in *England*, the Old and the New, the New being those which *Henry* the Eighth on the Suppression of the Abbies, transform'd from *Abbot* or *Prior* and *Convent* to *Dean* and *Chapter*; so there are two ways of creating these Deans. For those of the old Foundation were rais'd to their Dignity much like Bishops: The King first issuing and granting his *Conge d'Eslire* to the Chapter to chuse them; and upon the Election, and the Royal Assent had thereunto, the Bishop confirms him, and gives a Mandate for his Installation. But those of the new Foundation are by a much shorter Course install'd by Virtue of the King's Letters-Patents without either Election or Confirmation.

* 33 E. 3.
Ayd. del
Roy. 103.
per Thorp.

† Ibid.

The Chapter of a Cathedral Church may be consider'd in a Two-fold Respect, *viz.* either as such in the Bishop's Life, or else as such *sede vacante*. 'Tis certain, that the Chapter cannot during the Bishop's Life-time decree or ordain any Thing which has a Relation to any other Persons than to the Chapter itself; because, during his Life-time, the Chapter has no general Jurisdiction: But all the *Canonists* do agree, that the Chapter may during the Bishop's Life make Decrees and Statutes which shall bind the Chapter itself, and all its Members or *Capitulars*. But yet the Doctors have doubted, Whether Chapters can make such Statutes and Decrees of themselves without the Bishop's Concurrence. For as the Bishop is the Head of the Chapter, it does not seem according to Law, that the Body should do any Thing without the Head †. But in other Respects a Chapter seems to be a distinct Body, and to have the Dean as its *proximate* Head; and as such the Chapter may of itself make Decrees and Statutes. And thus the Chapter is sometimes in Law distinguish'd from the Bishop; and in this Sense the Bishop is not said to be a Part of the Chapter, tho' in other respects he is the Superiour *. But tho' by the *Canon-Law* a Chapter cannot introduce new Customs, or make new Statutes, nor alter the ancient Customs of the Church without the Bishop's Consent, if they relate to the whole Clergy of the Diocese, or the common State of the Church: Yet it is the receiv'd Opinion and Resolution of the Doctors that the Chapter may make Decrees to bind themselves, and do all other Things of less Moment, which relate only to the good Estate and Government of the Chapter without the Bishop's Confirmation †: But in all Matters of great Importance which do concern the Advantage and Well-being of the Cathedral Church itself, and the Observance of ancient Customs, 'tis necessary that the Chapter should have the Bishop's Consent, as aforesaid ‡. And to establish the Papal Power on a surer Foundation, some will have it the Confirmation of the Pope is requir'd. But to what has

‡ X. 3. 10. 4.

* Gloss. in c.
7. Clem 1. 3.

† X. 1. 2. 6.

‡ X. 1. 2. 8.

been here said in relation to the Power of the Chapter in making Statutes touching Matters of light Consequence, as after what Manner the Chapter ought to be assembled, or how their daily Distributions ought to be made, and the like, *Felinus* urges by way of Objection, that since a Chapter has no Jurisdiction either great or small, it cannot make any Law at all, a Law being an Act of Jurisdiction in a very essential manner. But then *Felinus* himself solves this Scruple by saying, 'That tho' the making of Decrees in the Decision of Causes and touching such Things as relate to Jurisdiction is properly a Matter of Jurisdiction; yet to make a Law or Statute is not a Matter of Jurisdiction, because all Corporations and Bodies Politick may make Statutes in relation to such Matters as do in a particular manner concern themselves.

A Dean is said to be of the Chapter, unless he be a Canon, or there be a Custom that makes him such; for otherwise only Canons and Prebendaries do make and constitute the Chapter. And the Dean and Prebendaries of a Cathedral Church ought diligently to preach the Word of God not only in their Cathedrals where they live, but even in other Churches of the same Diocess; and, especially, in those Places where they have yearly Revenues accruing to them; and if they shall neglect or omit to do this, they shall be punish'd by the Bishop *pro arbitrio*, according to a Book of Canons publish'd in the Year 1571. And by the said Canons every Dean ought to be Resident (at least) four times in the Year at his Cathedral Church, and keep an entire Months Residence every time (if possible) in preaching the Word of God, and maintaining Hospitality, unless he shall be hindred by great and urgent Causes to the contrary, of which he shall give Notice to his Bishop upon every Occasion and Time of his Absence. Tho' a Person be a Dean *de Jure* as well as *de facto*; yet neither he, nor any other of the Corporation has a negative Voice, but Confirmations and other Grants are good, if they are made by the major Part of the whole Chapter or Corporation. For the Dean and major Part of the Chapter do make the Corporation tho' the rest dissent*. Before the Act of Uniformity in *Charles* the Second's Reign, Laymen were made Deans, as the Dean of *Durham*, but this was not common: And it was for this Reason that some Men were of Opinion, that a Deanary was not a Spiritual Promotion; but now no Man is capable of that Dignity but a Clergyman.

A Deanery consists of two Parts, *viz. Officium & Beneficium*; and the *Officium* has two Parts, the one is Dignity and Jurisdiction, and the other is Administration: But some Promotions are mere Administrations, as that of Prebendaries and Parsons, which are not properly Dignities, because they have not Jurisdiction†, as an Archdeacon and a Dean has, to whom anciently (according to *Lindwood*‡) the Canons made their Confessions; and as to the Cure of Souls, they were Subject to him. A Dean may make a Substitute as to Matters of his Jurisdiction, *viz.* for Corrections, Visitations, and the like; but not as for the other Part of his Office, *viz.* the Administration: For which Reason he may not make a Deputy to confirm Leases, and the like*. So that in a *Cathedral Deanery* there seems to be first a Dignity and Jurisdiction. Secondly, an Office and Administration; and Thirdly, the Benefits and Profits thereof: Which seems very clear, for that a Parson, Prebendary or the like has not a Dignity, but only the Office or Administration with the Profits; but a Dean, who has Administration as others, has also Jurisdiction and Dignity. A Dean ought to visit his Chapter†; and if a Prebendary be made a Dean, the Prebend is void by Cession‡. The Dean is such a Dignitary in the Church, that the

And

* 33 H. 8. c. 27.
21 E. 4. 27.
15 E. 4. 2.
9 H. 6. 32.
14. H. 8. 29.

† 11 H. 4.
‡ Lib. 5. Tit.
16. c. 1. Gl.
in v. *Decano*
and in *Te-*
canum & Ca-
pitu.

* Latch. Rep.

† 5 E. 3. 7.
‡ 5 E. 2. F.
Brief. 800.

Canon-Law stiles him the *more Honourable Part of the Chapter* †. And in a large Sense a Dean may be rightly said to be the Chief of any that are of the same State and Order; and so the Canons of the Church of *Constantinople*, as being Men of greater Dignity, were by *Honorius* and *Theodosius* in *Latin* called *Decani* *.
 † X. 3. 8. 7.
 x. 1. 6. 18. 8.
 ibi Abb. 8.
 Gloss.
 * C. 1. 5. 4.

Whenever the Dean and Chapter confirm any Act, to the end that such Confirmation may be valid, the Dean must join with the Chapter in Person, and not in the Person of a Deputy or Sub-dean only, or in the Person of a Proctor, who is a Stranger and not one of the Chapter: For such a Person is incapable of being a Dean's Substitute or a Proctor to the Dean: And 'tis generally said, that the *Common-Law* will not suffer the Members of a Corporation to give their Assents by Proxies or Substitutes †. In a Composition for Tithes a Parson granted an Annuity to *Battle-Abbey*, and this Grant was confirm'd by the Bishop, and the Dean and Chapter being Patrons: But by the Deed of Confirmation it appear'd, That the Dean was absent, and did not put his Seal thereunto, but that the Chapter as his Commissary did it for him. And herein it was held, that tho' the Dean might have a Deputy to exercise his Jurisdiction, yet that such a Deputy cannot charge the Possession of the Church ‡. And when the Case was that a Lease was made by the free Chapel of *Windsor* under the Common Seal, yet the Dean himself was not Party to the Lease, but in his Absence the Deputy: And, to avoid the Lease, the Statute of the College was shewn, authorizing a Deputy to perform and exercise the Dean's Office in all Things; yet the Judges held the Confirmation to be void, because the Deputy had no Authority to confirm the Lease as shewn by the College Statutes; and this was chiefly on the Exposition of the Word *Collegium*. For thereby all the Possessions of the College are not to be understood, but only the Scite and Circuit of the College, or the Place of its Situation *. From which Case it seemingly follows, that if by the Statutes of a Church the Deputy-Dean may confirm Grants, and join in the making of Leases, as if the Dean himself was present, and did the same, such Grants and Confirmations shall be good.
 † 11 H. 4. 64.
 ‡ Dan. Rep. 47.
 * Dyer Rep. 233 b.

As a Deputy-Dean generally speaking cannot confirm, so neither can he that is but a meer Commendatory Dean, tho' he may with the Chapter chuse a Bishop; because he is only a *Depositary*: Yet such Commendatory Dean may be sued by that Name, and may take the Profits, and exercise the Jurisdiction of a Dean; and yet he is not a Dean compleat †. But if a Dean be elected, and before his Consecration obtains a Dispensation to hold his Deanery *in Commendam*, such Dean may well confirm, &c. And if he be translated to another Bishoprick, and after his Election, and before Confirmation obtains a Dispensation to hold the same Deanery *in Commendam* with his second Bishoprick, his old Title remains; and Confirmations and other Acts done by him as Dean are as good in Law, as if he had never been made Bishop ‡. *Jones Rep.* 158 & 187.
 † 27 H. 8. 15.
 22 Jac. B. R.
 Noy Rep. 93.
 ‡ Palm. Rep. 460.

Tho' one that is Dean, be Dean *de Jure* as well as *de Facto*; yet neither he, nor any other of the Corporation has a Negative Voice in the Chapter, but Confirmations and other Grants are good if made by the major Part of the whole Corporation, as aforesaid: For the Dean and major Part of the Chapter makes the Corporation, tho' the rest dissent *. See the 23^d of *H. 8. ch. 7.* But tho' it is here said, that Confirmations and other Grants are good, if they are made by the major Part of the Dean and Chapter; yet as well the other Members consenting as the Dean must be Personally present to give their Consents: For 'tis generally said

* 14 H. 8. 29.
 21 E. 4. 27.
 15 E. 4. 2. a.
 9 H. 6. 32.

* 21 E. 4. 26.
27 Aff. 23.
Dav. Rep. 48.

† Dav. ut sup.

‡ Fitz. N. B.
Tit. *sine Af-*
sens. Capituli.

* 17 E. 3. 40. b.

† Fol. 124.

‡ Dyer Rep.
40. 273. 349.
Plowd. 538.

said, That when a Corporation passes any Interest, the *Common-Law* will not suffer the Members of the Corporation to give their Assent by Proctors or Substitutes, but that they ought to be *Capitulariter Congregati* in one certain Place; otherwise if they be scatter'd in several Places, that which they shall do, shall not be said to be the Act of the Corporation, but the Deed of them in their single and private Capacity, and shall not bind. Yet it was agreed, that the Dean and Chapter are not confin'd to the Chapter-House, but may assemble and make their Acts in any other Place, provided it be a Place certain *. And as the major Part of the Corporation must give their Consents to Confirmations and other Acts in one and the same Place, so they must do it at one and the same Time, and not scatteringly, or on several Days: For the Consent of the Chapter or Corporation being expressed by their putting their Seal to the Deed of Confirmation or other Act, it ought to be set in the Presence of the major Part; and if the major Part be not then present when the Seal is thus put, what is then done is void for want of the Consent of the major Part of the Chapter; and in such a Case the particular Consents of their Members given after shall not make it good. Also the Majority of their Members being assembled, they ought to give their Voices and Consents singly and distinctly, and not in a confus'd and uncertain manner; and when such Consent is given, it ought to be express'd by setting their Seal to the Deed of Confirmation or other Grant †.

When a Dean of a Cathedral makes a Grant or Lease of any of his Possessions, of which he is solely seiz'd, to bind his Successors, which wants Confirmation, this (as aforesaid) must regularly be confirm'd by the Bishop and Chapter of the same Church, and not by the King, tho' he be Patron of such Deanery. But there is some Doubt, Whether the Bishop's Confirmation be necessary to such Grants? And I find it laid down as a Rule in Law, that both the Bishop and Chapter's Confirmation is necessary in all Leases and Grants by the Dean, as above-mention'd; and what *Fitzherberts* says ‡, That the Bishop and Chapter are in Law look'd upon but as one Body, seems to favour this Opinion: For 'tis reasonable, that the whole Body ought to consent to the granting their Possessions, and not the Bishop, who is the Head of the Body, should be unconcern'd therein. And likewise because the Possessions of the Dean are said to be derived from, and carv'd out of the Bishoprick; and the Bishop *de Jure* is said to be the Patron of the Deanery *, which are all strong Arguments for the Bishop's Confirmation. Yet I have not met with any Book-Case, that expressly warrants this Opinion laid down by the *Parsons Counsellor* †, but rather the contrary, *viz.* That the Confirmation of the Chapter without the Bishop is sufficient to make good the Dean's Grants or Leases that need Confirmation ‡: Therefore *Quare*, and see *Regist. Original.* 230. But if such Deanery be *merely* Donative, then the King's Consent and Confirmation is to be obtain'd: But whether the King's Confirmation without the Chapter in such Case be sufficient, *Quare*.

The Dean of *Wells* might anciently have passed his Possessions belonging to his Deanery with the Assent of the Chapter, without the Bishop's Confirmation; and after this the Deanery of *Wells* was surrender'd by the Dean thereof, with all the Possessions thereunto belonging, and so dissolv'd: And by Act of Parliament this Dissolution was confirm'd, and a new Dean erected; and the Nomination (by Letters Patents) of a new Dean and his Successors given to the King and his Successors. And it was also thereby enacted, That the new Dean and his

his Successors might grant, demise and part with their Possessions in the same Manner and Form as the ancient Deans might, and used to do : And in this Case it is not needful to have the Bishop's Confirmation of a Grant made by the new Dean, but of the Chapter only ; for that his Confirmation of the Grants of the old Dean was not necessary ; neither is the King's Confirmation of the new Dean's Grants necessary, because this Deanery (it seems) was not a meer Donative before the Dissolution thereof, and by the Statute the new Deanery is made to be of the same Nature as the old Deanery was *.

The *Civil* and *Canon-Laws* chiefly take Notice of three Sorts of Deans only. The first were those that were in the Army set over ten Soldiers † ; and were by another Name, according to *Vegetius* and *Modestinus*, in *Latin* stiled *Caput Contubernii*. Afterwards the Word *Decanus* was extended to an Ecclesiastical Dignity ‡, which included the Arch-Priests ; who (perhaps) according to their first Institution, were ordain'd and appointed to preside over ten Clergymen, and retain'd the same Name, tho' the Number of Clerks in a Cathedral Church was afterwards augmented and increas'd * ; and this was called the Dean of a Cathedral or Collegiate Church, as aforesaid. The third Sort of Dean was he, whom we stile a *Rural Dean* †, of whom I shall treat under the next Title. There are also some Deans in *England* without any Jurisdiction ; only for Honour so stiled ; as the Dean of the *Royal Chapel*, the Dean of the Chapel of St. *George* at *Windsor* : And some Deans there are without any Chapter, yet enjoying certain Jurisdctions, as the Dean of *Croydon*, the Dean of *Battel*, the Dean of *Bocking*, &c. In the Cathedral Churches of St. *David* and *Landaff* there never has been any Dean, but the Bishop in either is Head of the *Chapter* ; and in the Bishop's Absence, in the Chapter at St. *David's* and *Landaff*, the Archdeacon.

* Dyer Rep.
273. 1. Rolls
Abr. 478.

† C. 12. 27
per tot.

‡ X. 2. 28. 55.

* 50 Dist. c. 68.

† X. 3. 37. 6.



Of Rural Deans and their Offices.



RURAL Deans, according to *Innocentius*, are said to be such Persons as have some certain Offices and Employments in the Church under Bishops and Archdeacons, and commonly belonging to them in respect of Nomination and Appointment ; and, therefore, the Admission and Amotion of them do usually belong to the Bishop and Archdeacon both, and their Office is Temporary and not Perpetual. But *Joh. Anan.* is of another Opinion, saying, That Rural Deans are call'd Arch-Presbyters, or Arch-Priests ; and being Perpetual, cannot be remov'd without sufficient Cause shewn * : And he calls some of them by the Name of *Testes Synodales*. It was the Business and Office of Rural Deans to execute and transmit the Citations in Ecclesiastical Causes, as we may fully read and observe in *Lindwood's* Provincial Constitutions ‡ ; and they were to take an Oath every Year, That they would not give a Certificate to any one, unless it were on a Citation of the Adverse Party rightly and duly made at the proper Time and Place.

* 35 Q. 6. 7.
x. 2. 21. 7.

‡ Lib. 2. Tit.
1. Cap. 2.

'Tis likewise provided by a Provincial Constitution, That for the future no Rural Deans shall presume to hear or take Cognizance of any Matrimonial Cause, either in order to join or dissolve a Marriage, on Account of their Office or under a Pretence of any Custom whatever; because the Plea in both Cases is *de Fodere Matrimonii*, and concerns the Validity of it †: And, consequently, they cannot hear Incident Causes or such Matters are as Accessary thereunto ‡. And as they cannot hear or examine such a Cause: So, consequently, they cannot decide the same; because if that is prohibited which is less, that is likewise *a fortiori* prohibited which is greater *. By the *Canon-Law* Rural Deans cannot prescribe to have Jurisdiction in Matrimonial Causes, either in Regard of their Office, or under any Pretence of Custom, for as they are not Perpetual; and as whatever they do is not done in their own Name, they cannot prescribe to have Jurisdiction on the Foundation of Custom: Nor have they any Jurisdiction from such as do make or constitute them Rural Deans; since they do not design to give this Power to them. And another Reason is, because these Rural Deans are generally ignorant and unskilful in the Law.

† X. 4. 24. 1.

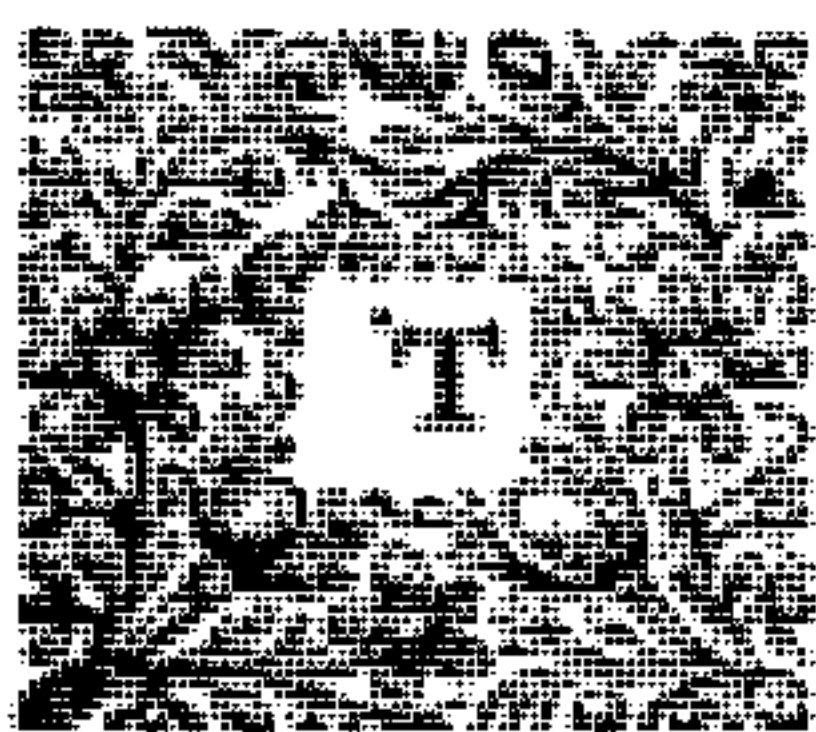
‡ X. 4. 20. 3.

* X. 1. 6. 7.

X. 1. 29. 27.



Of Degradation, Deposition, and Deprivation, &c.



IS a great Scandal and Disgrace to the Church to have wicked and incorrigible Ministers belonging thereunto; and, therefore, all such Persons ought deservedly to be remov'd from thence *, as the unjust Steward in the Gospel was from his Stewardship†: And this kind of Punishment the *Canonists* stile by the Name of *Deposition*, *Degradation* or *Exauكتورation*; which is nothing else but the removing of a Person from some Degree, Dignity or Order in the Church; and the depriving him of his Ecclesiastical Preferments. But the *Canonists* in Strictness of Speech make a Distinction between Degradation and Deposition: For the Word Degradation is commonly used to denote a Deprivation and Removing of a Man from his Degree; but the Word *Deposition* properly signifies a solemn depriving of a Man of his Clerical Orders by the way of a Sentence; and this Punishment of Degradation or Deposition, is sometimes inflicted by an Ecclesiastical and sometimes by a Lay Judge, according to the *Civil-Law*, tho' only by an Ecclesiastical Judge according to the *Canon-Law*.

* X. 5. 1. 24.

† Luk. ch. 16.

‡ X. 5. 34. 15.

* X. 3. 41. 14.

† X. 5. 40. 27.

"

Now Degradation or Deposition in the general Sense of these Terms is Twofold, *viz.* *Actual* and *Verbal*. The first is, when a Man is depriv'd of his Orders, and this is properly called *Exauكتورation* or *Degradation*; and, therefore, this can only be executed against a Clerk in Holy Orders‡: But a *verbal* Deposition, in other Terms called a *real* Degradation, is a Deprivation or Removing of a Man from his Office and Benefice, together and at the same time *, or else separately †, which (according to the *Canon-Law*) no one can do but the Bishop alone, and that not without some Crime or other alledg'd and prov'd

or

or (at least) confess'd. For if a Man cannot discharge his Office, or supply his Benefice as he ought to do (on the Score of some Supervening Infirmary) in his own Person, he ought to have a Coadjutor assign'd him, and shall not be depriv'd or depos'd for this*. *Cyrl* in his Letter to *John of Antioch*, quoted in *Gratian's* Epitome, gives us several Instances of Bishop's depos'd, and afterwards reconcil'd or restor'd to their former Churches. It has been a Question among the *Canonists*, How many Bishops ought to be present and assisting at a Degradation? And 'tis said, That if the Person to be degraded be a Bishop, twelve Bishops ought to be present and intervening thereat: But if he be only a Presbyter, then six are sufficient; and if he be only a Deacon or Sub-deacon, three are enough; and if he be merely a Clerk in the lesser Orders, then his own proper Bishop may degrade him. And 'tis to be observ'd, That if such Bishop's disagree among themselves in pronouncing Sentence, the major Part of them shall be sufficient to do it, according to the common Opinion of the Doctors. What I say of the Number of Bishops ought to be understood, That they only proceed, when, after a *verbal* Deposition of this Kind, they come to an *actual* Deposition: But when a *verbal* Deposition is not made, to the end that an *actual* Deposition or Degradation should ensue, then his own proper Bishop alone may *verbally* depose or degrade a Clerk. Nay, at this Day by the Council of *Trent*, when the Process tends to an *actual* Degradation, a Bishop alone, with the Advice of his Parochial Clergy, may degrade him.

* 7 Q. 1. 1.
13. 17. & 18.

By the Papal Law a Leprous Person is depos'd from the Administration of his Benefice, but not from his Benefice it self, on the Account of *grave Scandalum*†: But Abbots render'd unprofitable, and who can not execute their Office according to their Duty, ought to be remov'd entirely from thence, according to the Imperial Constitutions of *Valentinian*, *Theodosius* and *Arcadius*, touching Judges and such as have the Administration of the Commonwealth*. And the Papal-Law carries this Matter of Deposition so far, That the Pope may, according to that Law remove even the Emperor himself from his Imperial Dignity, if he becomes unprofitable to Church and State, and another shall be substituted in his Room: And he may do the like, if the Emperor be a Tyrant, or an incorrigible Person, or a Pagan, a Persecutor of the Church, or a Person guilty of Heresy, Perjury, and the like Crimes†. Pope *Alexander* the Third lays it down as a Rule in Law, That Clerks making a Judicial Confession, or convicted by legal Proof of certain Crimes, that deserve Suspension or Deprivation, may be suspended from their Office, remov'd from their Orders, and depriv'd of their Benefices by their own proper Bishop: And the Abbot observes, that such a Suspension or Removal is a perpetual Deprivation. This is the greatest Punishment that can be inflicted in the Ecclesiastical Court; and, therefore, it is never inflicted but in Cases directed by Law‡, or for some very grievous Offence*, which we call *enormous*.

† X. 3. 6. 4.

* C. 1. 26. 3.

† X. 1. 6. 34.
VI. 2. 13. 2.
15 Q. 6. 3.

‡ 50 Dist. c.
6. & 28.

* X. 5. 37. 6.
X. 1. 11. 4.

Degradation according to the *Canon-Law* may be effected two ways, *viz.* either *summarily*, as by Words; or *solemnly*, as by devesting the Party degraded of those Ornaments and Rites, which were the Ensigns of his Order or Degree. But in Matters Criminal Princes have anciently had such a tender Respect for the Clergy, and for the Credit of the whole Profession thereof, that if any Man among them committed any Thing worthy of Death or open Shame, he was not executed or expos'd to publick Disgrace till he had been degraded by the Bishop.

* Ridley's
View, &c. p.
2. c. 2. Sect. 3.

Bishop and his Clergy; and thus he was executed and brought to Shame not as a Clerk, but as a Lay Malefactor: Which Regard towards Ecclesiasticks in respect to the Ministry, *Ridley* observes to be much more ancient than any *Popish* Immunity*; and is such a Privilege as the Church in respect of such as once waited on the Altar, hath in all Ages been honour'd with.

† X. 1. 6. 12.
X. 1. 11. 4.

‡ Dyer Rep.
293. 1. And.
16. 5. Cok.
102.

* 31 Eliz. c. 6.

2 H. 4. 37.

† Pasch. 13.

Car. 1. B. R.

‡ Crok. Jac.

37.

* 1 Eliz. c. 2.

† 13 Eliz. c. 12.

* 14 Car. 2. c. 4.

‡ X. 3. 1. 14.

Brownl. Rep.

37.

† 29 E. 3. 16.

20 H. 6. 46.

2 H. 4. 3.

‡ Mich. 12.

Jac. B. R.

‡ Dyer Rep.

p. 292.

* 16 H. 8. c. 3.

As to *Deprivation*, or what the Canonists term a *verbal* Deposition, it is a Discharge of the Incumbent of his Dignity or Ministry, on sufficient Cause against him alleg'd and prov'd (as aforesaid); for by the *Canon-Law* this Punishment is also extended to Dignitaries as well as benefic'd Clerks, that deserve the same†: And 'tis sometimes in Law call'd a Privation or loss of the Military Girdle. All the Causes of Deprivation may be reduc'd to these three Heads, *viz.* To a Want of Capacity, Contempt, and Crimes. But more particularly 'tis evident, that the more usual Causes of this *Deprivation* are such as these, *viz.* a mere Laity or want of Holy Orders‡, according to the Church of *England*, Illiterature, or Inability for the Discharge of that Sacred Function, Irreligion, gross Scandal; some heinous Crime, as Murther, Manslaughter, Perjury, Forgery, &c. Villany, Bastardy, Schism, Heresy, Miscreancy, Atheism, Simony*, illegal Plurality†, Incorrigibleness and obstinate Disobedience to the approv'd Canons of the Church, as also to the Ordinary‡, Nonconformity, Refusal to use the Book of Common Prayer, or administer the Sacraments in the Order there prescrib'd; the Use of other Rites and Ceremonies, Order, Form, or celebrating the same, or of other open and publick Prayers; the preaching or publishing any Thing in Derogation thereof, or depraving the same, having formerly been convicted of the same Offence*; the not reading the Articles of Religion within two Months next after Induction, according to the Statute†; the not reading publickly and solemnly the Morning and Evening Prayers appointed for the same Day according to the Book of Common Prayer within two Months next after Induction on the Lord's-Day; the not openly and publickly declaring before the Congregation there assembled his unfeign'd Assent and Consent (after such Reading) to the use of all Things therein contain'd, or in Case of a lawful Impediment, then the not doing thereof within one Month next after the Removal of such Impediment*; a Conviction before the Ordinary of a wilful maintaining or affirming any Doctrine contrary to the Thirty nine Articles of Religion; or a persisting therein without Revocation of his Error, or a Re-affirmance thereof after such Revocation; likewise Incontinency, Drunkenness after Monition‡, and forty Days Excommunication: To all which we also add, Dilapidation; for Dilapidation was anciently a just Cause of *Deprivation*, whether it was by destroying the Timber-Trees, or committing Waste on the Church-Lands, or by pulling down or suffering to go to Decay the Houses or Edifices belonging to the same‡, as appears by *Lyford's Case* in *Coke's Rep. pt. 11. p. 40 & 49.* as also in the Bishop of *Salisbury's Case*‡. Conviction of Perjury in the Spiritual Court according to the Ecclesiastical Laws, which tho' it be (as aforesaid) a just Cause of *Deprivation*, must yet be signified by the Ordinary to the Patron: So likewise must that *Deprivation*, which is caus'd by an Incapacity of the Party instituted and inducted for want of Holy Orders‡. It is also a just Cause of *Deprivation*, if an Incumbent neglects or refuses to take the Abjuration-Oath for three Months after Institution and Induction into a Benefice or Dignity in the Church, Non-payment of Tenths demanded at the Church, or Parson's House by the Collector*, and not paid then, or

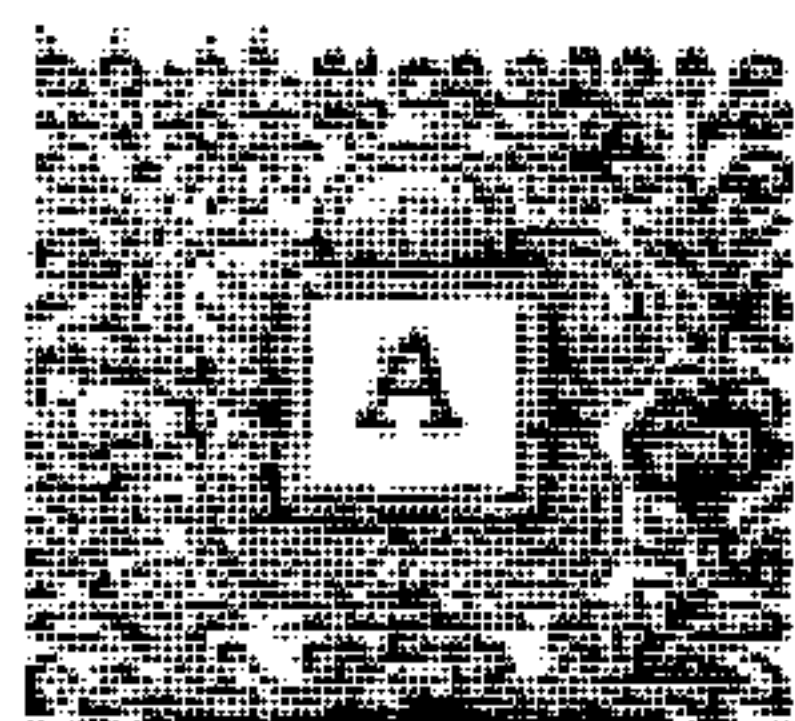
or within forty Days after, and the Bishop certifying this Default into the Exchequer.

But no one ought to be depriv'd of his Benefice, or depos'd of his Orders in the Church, till such Time as Cognizance has been had and taken of the Cause before some competent Judge *; nor ought any one to be depos'd, unless it be for notorious Offences, and enormous Sins †; nor ought any one to be depriv'd or depos'd, if the Witnesses produc'd against him for his Conviction do only depose touching their Credulity ‡. But if a Person shall, after such Deposition, Suspension or Degradation, celebrate Divine Service in the Church, and shall not desist on an Admonition to the contrary, he shall be excommunicated, and cut off from the Body of the Church *. In the Times of *Popery* here in *England* Marriage in the Incumbent was held to be a just Cause of Deprivation, which I had forgot to mention in the foregoing Paragraph. * X. 2. 1. 1. † X. 5. 1. 18. ‡ X. 5. 1. 27. * X. 5. 27. 2.

In all Causes of Deprivation, where a Person is in actual Possession of an Ecclesiastical Benefice, these Things must concur, *viz.* *First*, The Person must be cited or admonish'd to appear. *Secondly*, A Charge must be given against him by way of Libel or Articles, to which he is to give an Answer. *Thirdly*, A competent time must be assign'd for Proofs and Interrogatories. *Fourthly*, The Person accus'd shall have the Liberty of Council to defend his Cause, to except against Witnesses, and to bring legal Proofs against them: And, *Fifthly*, There must be a solemn Sentence read by the Bishop, after hearing the Merits of the Cause, or Pleadings on both sides. And these are the Fundamentals of all Judicial Proceedings in the Ecclesiastical Courts, in order to a Deprivation: And if these Things be not observ'd, the Party has a just Cause of Appeal, and may have a Remedy in the Superiour Court.



Of Degrees of Kindred.



Degree in respect of Kindred is nothing else but that Distance of Relation which one of the Kindred bears unto another; or according to *Joh. Andreas* it is said to be a Habitude or Measure of the Distance of Persons, whereby we know in what Distance of *Agnation* or *Cognition* (for thus the *Civilians* and *Canonists* distinguish Kindred) two or more Persons differ from each other. And they are called Degrees *ad similitudinem* *Scalarum*, that is to say, after the manner of Steps or Rounds of a Ladder, whereby we climb up to high Places, and go down again by this Means, as from one Step to the next. By the *Civil* and *Canon-Law* there are so many Degrees in the Line of *Ascendants* and *Descendants* as there are Persons, except one. Therefore the Son is ally'd to the Father in the first Degree, the Nephew, or Grandson, to the Grandfather in the second Degree, and the Great Grandson to the Great Grandfather in the third Degree, and so onwards *ad infinitum*. But in an equal Collateral Line, that is to say, when each Person is distant from the common Stock in the same Degree; then in whatever

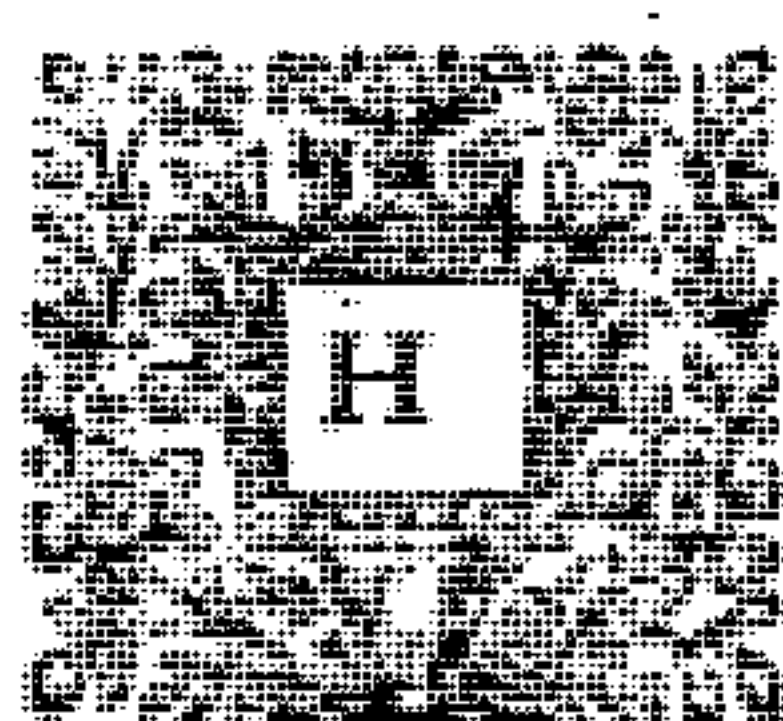
Degree the one is distant from the common Stock, in the same Degree of Kindred they are both equally distant from each other. But in the unequal Collateral Line, that is to say, when one is distant from the common Stock in a more remote Degree than the other; then in what Degree soever he is remoter distant from the common Stock, in the same Degree they are distant from each other: Nor is there any Dispute in respect of these Rules among the ancient Professors of the *Canon-Law*, tho' *Hostiensis* seems to depart from this third Rule in a certain Case; and *Duaren* endeavours to defend his Opinion. But notwithstanding what is said, Degrees are computed one way by the *Civil-Law* and another way by the *Canon-Law*; the *Civil-Law* only establishing one Rule for these Lines, viz. *Quod quot sunt Personæ, demptâ unâ; tot sunt Gradus*. But in *Popish* Countries, where the *Canon-Law* prevails more than it does here in *England*, the Computation of Degrees in all Matrimonial Causes is wont to be made according to the Rules of that Law, because it brings Grist to the Mill by way of Dispensations. But between Ascendants and Descendants neither the *Civil* nor *Canon-Law* make any Difference in the Computation of Degrees. Thus far of Degrees in Point of Matrimony and Succession to an Intestate's Estate.

But there is another Distinction of Degrees, which we call *Ecclesiastical* and *Scholastical* Degrees: The first is said to be in the Church, and the second in some University or School of Learning. And in this respect a Degree is defined to be a State or Dignity therein; because the Persons do Step by Step proceed and ascend unto such State or Dignity*: And among *Ecclesiastical* Degrees in the *Romish* Church there are the greater and lesser Degrees of Orders, as hereafter mentioned under the Title of Orders.

*D. 50. 4. 11.
59. Dist. per
tot.
C. 2. 7. 13.



Of Denunciation, and the several Kinds thereof.



HAVING already under the Title of *Accusation* observ'd, That there are three Ways of Proceeding in Criminal Causes, viz. By Accusation, Denunciation and Inquisition, according to the *Civil* and *Canon-Law*, I shall here under this Title treat of the second Method of Proceeding *Judicially* in Criminal Causes, viz. By *Denunciation*. Now *Denunciation* is Threefold, viz. *Judicial*, *Evangelical* and *Canonical*. And again *Judicial* Denunciation is distinguish'd into two Parts, viz. *Publick* and *Private*. *Publick* is that, when some Crime is deduc'd and brought into Court *ad Publicam Vindictam* on the Report and Presentment of some Officer or other Private Person; and the Judge on such previous Report or Denunciation afterwards makes an Enquiry into such Crime; and, according to *Andreas de Iserne**, this Kind of Denunciation is like unto Accusation, only with this Difference, viz. That the *Denunciator* does not inscribe himself, nor make himself a Party in Judgment as the *Accuser* does†; nor is a Motion required in this Denunciation, according to *Speculator*‡. *Private Judicial Denunciation* is that, which is made *ad Privatum Interesse*, and

* In Constit.
v. literas.

† Salyc. in l.
7. C. 9. 2.
prin.
‡ Tit. de Denunc.

and for the Advantage of a Private Man ; as when any Child or Servant is under Oppression from his Father or Master ; and it is the same Thing in every other Person oppress'd by one that is more Powerful than himself, and in miserable Persons aggriev'd : For they may denounce or present this Matter *Judicially* in order to have Relief from the Judge.

The second Kind of Denunciation whereby we come at Judicature in a Criminal Cause, is that which the Lawyers call *Evangelical* ; and this is very remarkable, because many Inconviencies are thereby repair'd, which are destitute of the Aid of the *Civil-Law* ; and according to the *Abbot*, it is so stiled, because it had its Rise and Beginning from the Gospels of St. *Matthew* * and St. *Luke* †. “ If thy Brother shall
“ trespass against thee, go and tell him his Fault between thee and
“ him alone ; and if he shall hear thee, thou shalt gain thy Brother.
“ But if he will not hear thee, then take with thee one or two more,
“ that in the Mouth of two or three Witnesses every Word may be
“ establish'd. And if he shall neglect to hear them, tell it unto the
“ Church,” And this is *Evangelical* Denunciation, whereby we come at the Church, or the Evangelical Judge, by setting forth in a Libel or Articles, after what manner he has offended, and acted contrary to good Conscience, whereupon after two Admonitions let him denounce him to the Church, that the Church may correct and reform him from his Sin ; and, consequently, compel the Restitution : And he ought to declare in his Articles, that the Offender has had two previous Admonitions according to the Gospel, because otherwise according to *Speculator*, this Denunciation is not valid. To this kind of Denunciation every Person is admitted, tho' he be infamous ; unless he perseveres and continues in his Crime. But yet no Person is oblig'd to this kind of Denunciation, but as he is bound to other Acts of Piety : For the principal Effect thereof is the Salvation of a Man's Soul ; and as such it does require a solemn Order and Form of Law.

* Ch. 18. v.
15 16. 17.
† Ch. 17. v.
3. 4.

The third Kind of *Denunciation* is what we call *Canonical*, because it was introduc'd by the Canons of the Church ; and this is also Two-fold, *viz.* *Special* and *General*. The first is that which is made by him, whose Interest it is to have a good Parson of his Parish, a good Subject, Parishioner, and the like, and this is only made *propter proprium Interesse*, *viz.* to the end that some Person or other be remov'd *a Beneficio* * ; because a Right accrues to me in such a Benefice ; and herein three Monitions, or a peremptory Citation, is required. A
general Canonical Denunciation is that which is made touching such a Matter as properly belongs to the Ecclesiastical Court, *viz.* For that a Subject denounces his Superiour or some criminal Prelate for Male-Administration, a wicked Life, and the like ; or some that have been lawfully join'd together in Matrimony †. And herein a *trina Monitio*, or a peremptory Citation is necessary ; and the Judge herein does not proceed, unless it be made in an Ecclesiastical Matter or Cause. As when two Persons are willing to contract Matrimony, and a third Person denounces an Impediment of Consanguinity to the Church, or any other the like Impediment ‡. But no one is obliged to denounce another to his own Disadvantage, unless the Good of the Community be like to suffer by concealing his Crimes ; as in the Case of High-Treason, and the like. For a Son is not bound to denounce his Father ; nor a Wife her Husband, unless the Necessity of the State requires, or the Person has taken an Oath to denounce all Crimes committed within such a District, as Churchwardens swear to do.

* X. 1. 27. 1.
X. 5. 3. 31.

† X. 4. 2. 13.
X. 4. 3. 3.

‡ X. 2. 1. 13.



Of Diffamation or Defamation, and the Cognizance thereof.

Diffamation, or Defamation, properly so called, is the uttering of reproachful Speeches, or contumelious Language of any one, with an Intent of raising an ill Fame of the Party thus reproached; *Defamare est in malâ famâ ponere*, according to *Bartolus* *: And this extends to *Writing*, as by defamatory Libels; and also to *Deeds*, as by reproachful Postures, Signs and Gestures. See *Lindwood* †. And for the most Part it proceeds of *Malice*, implying either Matters of *Crime* or *Defect*; so it generally aims at some Prejudice or Damage to the Party defam'd. Whatever Cognizance the Temporal Laws of this Realm do take of Defamations by Virtue of Prohibitions and Actions on the Case; yet it will not be deny'd, but that the Cognizance, when they are duly prosecuted, properly belongs to the Ecclesiastical Court; especially, where the Matter of the Defamation is *merely Ecclesiastical*. For 'tis recorded by an ancient Statute of the Realm ‡, that Defamation shall be try'd in the Spiritual Court. And again it is said *, *That Prelates shall correct this Crinze by Corporal Pennance, the King's Prohibition notwithstanding*: But if the Offender will redeem the Pennance with Money, the Prelate may receive the Money, tho' the King's Prohibition be shown.

By the Preamble also of the Statute for Citations †, 'tis plainly infer'd, That Defamations belongs to the Cognizance of *Ecclesiastical Jurisdiction*; provided they be duly prosecuted according to Law. It likewise appears by the Books of the Common-Law throughout the Arguments made in the great Case of *Prohibitions*, in the Time of King *Henry* the Seventh ‡, That the Suit of Defamation does hereunto belong. For there both by the *Serjeants* that oppos'd the *Consultation*, as well as others, and by the *Judges* that granted the *Consultation*, it was yielded that the Punishment of *Slander* or *Defamation* did appertain to the Spiritual Law, if the Original Cause was Defamation. And whereas there is a Provincial Constitution in *Lindwood*, that decrees a Slanderer or Defamer of another to be *ipso facto* excommunicated, this is allow'd by a *Constitution* in the Register *, to belong to the Ecclesiastical Court: And 'tis there added to this effect, *viz. Si in Causâ Diffamationis ad pœnam Canonican imponendam agatur, tunc ulterius licitè facere poteritis, quod ad forum Ecclesiæ non eritis pertinere, prohibitione nostrâ non obstante.*

A Person sued another in a Cause of Diffamation in the Ecclesiastical Court †, and failing in his Proofs, the Defendant was absolv'd, and the Plaintiff condemn'd in Expences of Suit to him. But the Plaintiff to hinder the Execution of the Sentence, and to escape without the Payment of those Expences, procur'd a Prohibition: Yet, upon debating the Matter, a *Consultation* was herein also awarded. So we see, that both the *Principal* and

* In l. 5. D. 30. 1.

‡ Lib. 5. Tit. 17. C. 1. v. *Quoniam in Gloss.*

‡ Circumsp. agat. 13 l. 1. 7. Artic. Cler. 9. Edw. 2. cap. 4.

† 23 H. 8. c. 9.

‡ F. 12. 11 fol. 22.

* Reg. p. 49. a.

† Reg. p. 51. a.

and the *Accessory* Cause to be of Ecclesiastical Cognizance: But touching Diffamation, for which a Suit is commenc'd in the Ecclesiastical Court, it was resolv'd, That the Matter must be merely Spiritual; and determinable only there: For if it concerns any Matter, which is determinable at the Common-Law, the Ecclesiastical Judge has not Cognizance thereof. *Brook* in his Abridgment of the Law * seems to say, That no Diffamation at all is of Ecclesiastical Cognizance, and a Book-Case in *Henry* the Fourth's Reign not thoroughly consider'd gave Occasion to this great Mistake: But the Truth is, that by that Case it is only meant, That such Diffamation as arises on a Temporal Matter is not of Ecclesiastical Cognizance; which is the first Exception of the General Rule set down in the Statute of *Circumspecti agatis*; where 'tis said, That Diffamation shall be try'd in the Spiritual Court. And that the said Case is to be restrain'd to such Diffamation, will plainly appear to him that considers the Scope of *Hangford's* Argument †. The Vicar of *Saltaſh* had given an Oath before the Pope's *Collector* in Confirmation of an Obligation made by him. The Dean of *Windsor* sued the Vicar before the *Collector*, *pro Læsione fidei*; and hereupon the Vicar purchas'd a Prohibition. *Hangford* in Maintenance of this Prohibition argued, *That the Perjury could not be sued in the Ecclesiastical Court, because it arose on a Temporal Matter*: Adding, for Proof of his Argument, *That he himself had a Prohibition on the like Reason ruled for him, and against the Archbishop of Canterbury*‡, *par Attachment sur Prohibition. &c. de ceo que il suist en Court Christian, pur Diffamation.* But the Matter was not then ruled against the Archbishop *simply* for suing Diffamation there, but for suing of such a kind of Diffamation. For else this would not have fitted the Purpose of *Hangford's* Argument: Because it being his Business to prove that a *Læsio fidei* arising on a Temporal Cause might not be sued in an Ecclesiastical Court, he could make no Colour of that Assertion or Argument of his, by alledging of a Judgment, that no Diffamation at all might be prosecuted there, since there is not the like Reason. And, therefore, as the *Læsio fidei* arose upon a Temporal Cause, so did the Diffamation there mentioned; for which a Prohibition lay without a Consultation.

‡ Cok. 4. Rep. p. 20.
* Tit. Consultation. n. 2. & alibi.

† M. 2. H. 4. fol. 15.

‡ H. 14. E. 3.

That Diffamatory Words touching a Temporal Cause may not be sued in the Ecclesiastical Court, we have also Prohibition in the Register *, without any Consultation granted. For whereas one gave Evidence in an Inquisition made by the King about his Exchange at *York*: And the Party being affected therewith, sued the Witness (for diffaming him) in the Ecclesiastical Court; and hereupon the Witness brought a Prohibition, because the Matter was a Temporal Cause. And 'tis likewise enacted by a Statute of the Realm †, that a Prohibition shall lye, if a Man be sued in the Ecclesiastical Court for Diffamation; because he has indicted another. There is also another Reason, why some Diffamation may not be sued in an Ecclesiastical Court, *viz.* when an Action lies at the Common-Law for it: As where a Man brings an Action of Trespass for Goods taken away ‡; and the Defendant hereupon sues him in the Ecclesiastical Court for Diffamation. Here the Plaintiff may pray a Prohibition; because the Plea in Court Christian was commenced, whilst the Suit is pending at Common-Law; and a Prohibition lies. So if I am robbed, and do speak of him that robbed me before others, whereupon he sues me in the Spiritual Court of Diffamation, I may have a Prohibition, because I may have an Appeal of Robbery at the Common-Law. And thus in the Book of *Entries* * we have several Presidents of Prohibitions granted in favour of such as are

* Fol. 42. b.

† 1 F. 3. Stat. cap. 11.

‡ P. 18. E. 4. fol. 6.

* Tit. Prohibition.

prosecuted in the Ecclesiastical Court for Diffamation, when they have sued Men in the Temporal Courts for forging of Evidences, *Mayhem, &c.*

One libelled against another in the Ecclesiastical Court, for saying, *That he was a Drunkard, or a drunken Fellow, &c.* And by the Opinion of the whole Court, a Prohibition was granted for such Words †. *Cuckow's Case*. So if a Man be called *Thief, Traytor*, or the like, whereon no Suit lies for the Principal in the Ecclesiastical Court, but at the Common-Law, and the Slanderer be sued for the same in the Ecclesiastical Court, a Prohibition lies. But if a Man calls a Woman *Bawd*, for which a Suit lies in the Spiritual Court, and also at the Common-Law; there if the Suit be for Slander or Diffamation in the Ecclesiastical Court, no Prohibition lies, because the Party has the Election to sue in which Court she pleases. Again, if a Woman be defamed in her Reputation, whereby she is hindred in her Marriage *, she may either sue at the Common-Law for Damage †, or in the Spiritual Court for Recantation, provided the Diffamation be of a Spiritual Nature ‡. Thus if a Man calls a Woman *Whore*, or defames her in like Manner, for which a Suit lies against the Party in the Ecclesiastical Court, no Prohibition lies in the Case, because the Suit there is for a Diffamation, of a Spiritual Kind. But it is, *lastly*, to be observ'd, That if a Man speaks any Words, for which no Suit lies at the Common-Law, and the Words are not such as concern any Thing whereof the Ecclesiastical Court takes Cognizance: I say, that it seems in such a Case, if the Suit be in the Spiritual Court for Slander, as for Reproachful Words, and the like, a Prohibition lies; as for calling a Man *Knave, Rogue*, and the like; or Woman *Queen* *, *Fade*, and the like, thro' the Uncertainty thereof †. But it has been resolv'd at the Common-Law, that a *Consultation* should be awarded on a Prohibition brought in a Case, where a Woman was called a *Welch Fade*; because in the Spiritual Court a *Fade* is known and taken for a *Whore*; and that the Common-Law will give Credit unto the Spiritual Court, especially after two Sentences in that Court ‡.

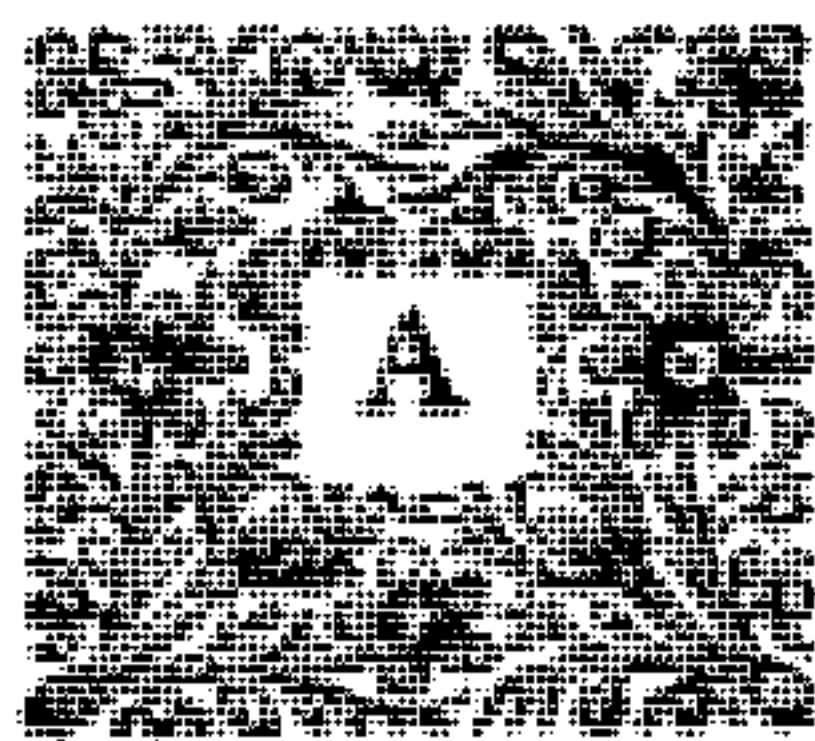
By the *Civil-Law* the Person defam'd had his Election in all Causes; whether he would prosecute the Defamer *ad vindictam publicam*, or *ad privatam Interesse*: The former whereof was made Choice of, when the defam'd aim'd more at the Defamer's Shame than his own Interest; and chose rather to reduce him to a Recantation, than augment his own Cash by the Diminution of his own Credit *. The other way of Proceeding, *viz. ad privatam Interesse* was chosen by such defam'd Persons as valu'd their Credit at a certain Rate, and chose rather a Pecuniary Compensation, than an unprofitable Recantation, aiming more at their own private Satisfaction than the Defamers Publick Disgrace †. But both of these the Person defam'd could not have; for having determin'd his Election, he was to content himself therewith: But having obtain'd a Sentence against the Defamer for his Recantation in a Suit *ad vindictam publicam*, he might possibly have in lieu thereof a Pecuniary Recompence by way of *Commutation*. The Prosecution *ad vindictam publicam* was left to the Determination of the Ecclesiastical Jurisdiction; and the other to the Cognizance of the Temporal: Much in conformity to what the Laws of this Realm seem to say, *viz.* Where the Prosecution is merely for punishing Sin and ill Manners, and no Money demanded, there the Spiritual Court shall take the Cognizance of Diffamation: But when Money is demanded in Satisfaction of the Wrong, there the Temporal Court shall have Juris-

Jurisdiction, especially if the Defamer undertakes to justify the Matter, or the Words do express or imply a Crime belonging to the Cognizance of the Common-Law. These Actions of Diffamation are of a higher Nature than *primo Intuitu*, they seem to be (a Man's good Name being Equivalent unto his Life) the *Civil-Law* therefore styles them *Actiones Prajudiciales*, that is to say, such as draw lesser Causes to them, but themselves are drawn of none.

The Method of Proceeding in a Cause of Diffamation, when the Person defamed sues for Defamatory Words contain'd in a famous Libel is as follows, *viz.* In this Case not only the general and usual Article is to be inserted in the Libel, which is common in a Cause of Diffamation, *viz.* That the Defendant on such a Day, and in such a Place utter'd such Words, *viz.* the Words contain'd in such famous Libel, &c. but also another special and particular Article, *viz.* That the Defendant did on such a Day, and in such a Place, write and publish, or procur'd to be written or published a certain infamous Libel to these Presents annex'd, if the Plaintiff has the said Libel in his Possession; if not an Article containing the Words following, or other Words in effect like unto them, and in this Place the Defamatory Words ought to be inserted, which are contain'd in such famous Libel: Or if the Person has a true Copy of the said famous Libel, then this Copy is to be annex'd to the Libel given, exhibited in this Cause of Defamation (these Words being added, *viz. Tenoris Schedulae presentibus annexa, quam pro hic lect' ad insert' haberi petit, &c.*) And if the Plaintiff shall prove his Intention, such as defame Persons after this manner shall be punish'd in a more grievous way than such as only defame Persons by Words.



Of Dignities in the Church.



DIGNITY is taken in a Twofold Sense, *viz.* largely and strictly. In a large Signification of the Word it is a kind of Preheminence in Point of Degree; and in the *Canon-Law* it includes a *Personatus*: But when strictly taken it is used for a Bishoprick, or any other Superiour Promotion in the Church; and the ensuing Persons are said to have a Dignity therein, *viz.* Archbishops, Bishops*, Archdeacons, Abbots†, Priors Conventual‡, and Bishop's Officials§; and in this Sense a Dignity is understood according to its Primæval Institution, and according to a Custom observ'd in that Behalf. A Dignity is first known from the Administration of Ecclesiastical Affairs, as being cloath'd and vested with Jurisdiction*; and this is true, when the Administration is assign'd to the Dignitary *in perpetuum*; but 'tis otherwise, if it is only assign'd and granted to him for a Time. Secondly, It is known from the Name and Preference which the Dignitary has *in Choro & Capitulo*†, as Archdeacon, &c. For of *Common Right* an Archdeacon has no Jurisdiction, nor has he any Administration in the Affairs of the Church. And, Thirdly, From the Custom of the Place where such Dignity subsists.

* 54 Dist. 20.

ordo Episcopa.

† X. 1. 7. 2.

‡ Inn. in c. 28.

X. 3. 5.

§ Clem. 1. 2. 2.

Ibid.

* 89 Dist. c. 2.

† X. 1. 4. 6.

12 Dist. c. 7. subsists † : Since Ecclesiastical Dignities are for the most Part according to the Custom of the Place, which ought to be regarded. *Innocentius* observes, that a *Dignity* and a *Personatus* do not differ in Substance, unless there be a local Custom to the contrary : But the Archdeacon is of a contrary Opinion, saying, That a Dignity is the Administration of Ecclesiastical Affairs, as such Administration is vested with Jurisdiction ; but that a *Personatus* is a certain Kind of Prerogative in the Church without any Jurisdiction at all belonging to it ; as because the Person has an Honourable Seat or Stall belonging to him in the Choir above others, or something like unto this. In the

* X. 1. 2. 8. *Decretals* * the Words *Personatus*, *Dignitas* and *Officium* are all of them sometimes taken for Synonymous Terms † ; whereby the same Office is called a Dignity and a *Personatus* : But an Office, according to the Archdeacon, is the Administration of Ecclesiastical Affairs without any Jurisdiction or Stall in the Choir, as we find by an Example in a Sacrist or Treasurer, which are not Dignitaries in the Church of *Common Right*, but only by Custom. But these Distinctions (I think) are not prov'd by any certain Law ; and, therefore, we ought to believe, that these different Terms have had their Rise rather from a Variety or Diversity of Places than any Thing else : For in many Places a Dignity is called a *Personatus* ; and in some Places every Benefice with a Cure of

† VI. 1. 6. 1. Souls is in *Latin* stiled *Personatus* ‡. Now for further Explication of the Premises 'tis to be observ'd, That where a Name is impos'd on a Benefice by Law, which sounds as a Name of Dignity, such Benefice shall be deem'd a Dignity ; and in Persons Inferiour to a Bishop the Law does not impose the Name of a Dignity in Point of Sound, unless it be on Archdeacons and Arch-Presbyters by reason of the Jurisdiction and Preheminence, which they have over other Persons ; and especially over their Subjects and Ecclesiastical Persons, as it expressly appears in the Titles quoted in the Margin *. Yea, tho' Archdeacons should have no Jurisdiction according to Custom ; yet in respect of the Name, it has the Sound of a Dignity.

* X. 1. 23. X. 1. 24.

Whenever the proper Name alone of a dignify'd Person is *simply* express'd in any Grant or Legacy given, such Grant or Legacy is deem'd to be made to his own proper Person in an individual Capacity : But 'tis otherwise, according to some Men's Opinion, if his proper Name and the Name of his Dignity be therein expressed together ; or if the Name of the Dignity be therein express'd alone †. As when 'tis said *I give or grant to A. B. all my Estate in London*. Nothing passes hereby to him as a Bishop, tho' he be Bishop of *London* : But if I say, *I give or grant unto A. B. Bishop of London, all my Estate in London*, some think that the Bishop of *London*, as Bishop of *London*, and his Successors, have hereby a Grant made to them. But I think, that in this Case these Words, *Bishop of London*, are only Words of Demonstration ; and do not give him any Thing as Bishop, without the Addition of *his Successors*. But when 'tis said, *I give or grant to the Bishop of London, all my Estate in London*, according to the *Civil* and *Canon-Law* these Words *his Successors* need not be express'd. All the greater Dignities in the Church, as Bishopricks, Archbishopricks, Abbacies, and the like, ought upon a Vacancy to be full of a Pastor within three Months, otherwise the Power of chusing devolves from the proper Electors unto the next Superiour ‡ : But according to the *Lateran Council*, 'tis well enough, if other Benefices and inferior Dignities be conferr'd within six Months, whether it be by

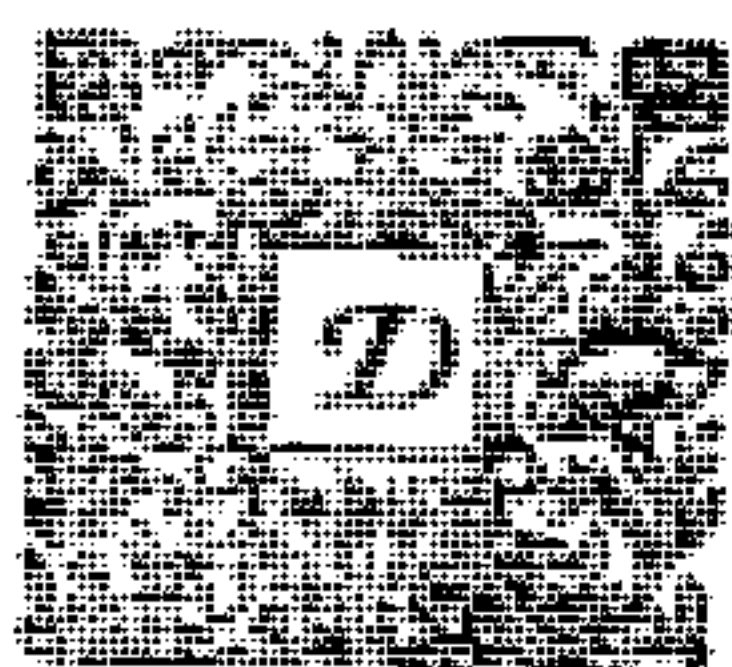
† Bald. Conf. 121. N. 7.

‡ X. 1. 6. 41.

* X. 3. 8. 2. Election or Collation *.



Of Dilapidation, and the Punishment thereof.



DILAPIDATION is the Incumbent's suffering the Chancel or any other Edifices of his Ecclesiastical Living to go to Ruin or Decay, by neglecting to repair the same: And it likewise extends to his committing or suffering to be committed any wilful Waste in or upon the Glebe-Woods, or any other Inheritance of the Church. Against which the Provincial Constitutions in *Lindwood* * do make some Provision, tho' in Truth the Canon there rather provides as to a Satisfaction for, than a Prevention of such Dilapidations. But the *Canon-Law* is express and full in all respects relating to this implicit Sacrilege; nor does the Custom of *England*, or the Common-Law, leave the Church without sufficient Remedy in this Case, tho' it postpones the Satisfaction of Damages for Dilapidations to the Payment of Debts, as the *Canon-Law* prefers it to the Payment of Legacies. By a *Legatine* Constitution also in *Lindwood* † it is enacted, That all such Ecclesiastical Persons as are Benefic'd do take especial Care that from Time to Time they sufficiently repair the Dwelling Houses and other Edifices belonging to their Benefices, as often as Need shall so require: Unto which Duty they were frequently and earnestly to be exhorted and admonish'd, as well by their Diocesans as Archdeacons. And if they shall for the Space of two Months next after such Admonition neglect the same, the Bishop of the Diocess may from thenceforth cause it to be done effectually at the Parson's Charge, out of the Fruits and Profits of his Living, taking only so much, and no more, as may suffice for such Repairs. And the Chancels of Churches are to be repair'd in the like manner by such as are oblig'd thereunto. And as to Archbishops, Bishops, and other Inferiour Prelates, they are by the said Constitution enjoyn'd to keep their Houses and Edifices in good and sufficient Repair *sub Divini Judicii attestatiōi*, that is to say, under a Sentence of eternal Damnation at the last Day of Account ‡, when the Sheep shall be separated from the Goats.

* Lib 3. Tit. 27. C. 1. Gloss.

† Othobon. Tit. 17.

‡ Gloss. in v. *fil Divini*. Othobon. Tit. 21.

An Inhibition was issued out of the Court of *Chancery* to the Bishop of *Durham*, by Order of the Parliament in *Edward* the First's Reign, for wasting the Woods belonging to that Bishoprick: And we read, that the Archbishop of *Dublin* was fined Three hundred Marks for disforesting a Forest belonging to his Archbishoprick. And we likewise find by several Books of the Common-Law, that a Bishop, and the like, wasting the Lands, Woods or Houses of his Church may be depos'd or depriv'd by his Superiour *. And if any Parson, Vicar, &c. shall make any Conveyance of his Goods, in order to defraud his Successor of the Remedy in case of Dilapidations, it is provided in that Case by a Statute of the Realm †, that the Spiritual Court may in like manner proceed against the Grantee, as it might otherwise have done against the Executors of the Incumbent decess'd, or his Administrators: And such Grants made to defraud any Persons of their just

* 20 H. 6. 46. a.

† 13 Eliz. c. 10.

‡ 15 Eliz. c. 5. Actions are also render'd Void by a later Statute ‡. It is also enacted by a Statute of the 14th Eliz. Cap. 11. That the Moneys recover'd upon Damages for Dilapidations shall be expended in and upon the Houses, &c. dilapidated: So that it seems, that Actions on the Case grounded on the Statute as well as Common Law of *England* have been brought in this Case at Common Law; and Damages recover'd thereby.

By the Gloss on the aforesaid Constitution it is inferr'd, That a Parson may be guilty of Dilapidations, or of a Neglect in that Kind, two several ways, *viz.* either by not keeping the Edifices in good Repair; or else by not repairing them when they are gone to Ruin and Decay. But that Constitution chiefly relates to the Mansion-Houses of all Ecclesiastical Benefices, and that not only of all Parsonages and Rectories, but also of all Bishopricks and Prebends, and likewise to the Houses of all other Persons having Ecclesiastical Livings; but not specially (by the Words of this Constitution) to their Farm-Houses, tho' they are also by the *Canon-Law* provided for in Case of Dilapidations. And such as neglect the Reparations aforesaid may be presented and convicted thereof before the Diocesan, who has Power to sequester the Fruits of such Benefice for the Reparations aforesaid *. For the Fruits thereof are in Construction of Law as it were tacitly mortgaged by a kind of Privilege for such Indemnity†; and for that Reason the Bishop may in some Cases sequester the same for that end.

* Gloss. in v. *Cessaverit.*
dict. Tit. 17.
† Gloss. in 17.
Othob. v.
Fruclibus.
|| Cap. 97.

‡ 29 E. 3. 16.
2 H. 4. fol. 3.
9 E. 4. 4.

* A.D. 1547.

My Lord *Coke* in the third Part of his Institutes || having treated of the erecting of Houses and Buildings, &c. tells us, what he finds in the Books of the Common Law and Records thereof ‡, touching Dilapidations, saying, That Dilapidations of Ecclesiastical Palaces (for so Bishops are pleased to call their Houses) and other Buildings is a good Cause of Deprivation. By the Injunctions of King *Edward* the Sixth * to all his Clergy, it is required, “ That the Proprietors, Parsons, Vicars and “ Clerks, having Churches, Chapels or Mansions, shall Yearly bestow “ on the said Mansions or Chancels of their Churches, being in Decay, “ the fifth Part of their Benefices, till they be fully repair'd; and the “ same being thus repair'd, they shall always keep and maintain them “ in good Estate.” See the Thirteenth Article of Queen *Elizabeth's* Injunctions † to the same End and Purpose.

† A.D. 1559.

My Lord *Coke* observes, That a Bishop is only to fell Timber for Fewel, Building, and other necessary Occasions: The Woods of the Bishoprick are called the Churches Dower, and these are always carefully to be preserv'd; and if he fells and destroys them, the Common Law will grant a Prohibition. The Bishop of *Durham*, who had divers Coal-Mines, would have cut down his Timber Trees for the Maintenance and upholding of his Works: And upon a Motion in Parliament concerning this Matter, in the King's Behalf, as being the Founder of all Bishopricks in *England*, an Order was made, That the Judges should grant a Prohibition for the King; and a Prohibition was thereupon awarded. In *Saker's Case* ‡ a Prohibition was likewise granted for committing great Waste in pulling down the Glass Windows, and plucking up of Planks, after he was convicted of Simony. And thus a Prohibition lies in every Case of Waste or Dilapidation committed on the Estate of the Church by the Incumbent; and the Churchwardens and any of the Parishioners may as well as the Patron pray the same.

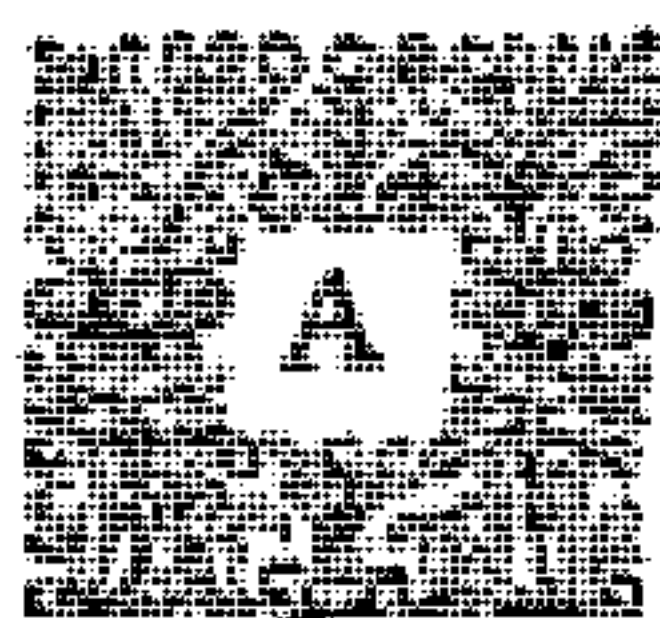
‡ Bulstr. Rep.
pt. 3d.

When a Parson on his Induction finds the Buildings in Decay, and that his Predecessor did not leave a sufficient *Personal* Estate to repair them, he may have the Defects survey'd by Workmen, and attested under their Hands

Hands in the Prefence of two or more credible Witnesses ; which may be a Means to secure him from that Charge, which might otherwise ensue for the Fault or Neglect of his Predecessor.



Of Dispensation.



DISPENSATION is defined to be a Relaxation of the Common Law made and granted by one that has the Power of granting the same * ; and as it is in some Measure a certain Decree or Sentence, so it has the Force and Effect of a Decree or Sentence † : And as 'tis a Relaxation of the

* Goffr. in c. 1. Q. 5. 3.

† Oldr. Conf. 326 & 327.

† Conf. ut sup.

‡ Oldr. Conf. 327.

Common Law ; it is always accounted Odious in the Eye of the Law, and ought to be restrain'd as much as possible ‡. 'Tis in our Books sometimes stiled a *Legitimation*; because it renders that lawful, which was before such Dispensation unlawful † ; And sometimes it is in *Latin* called *Gratia*; because it depends on the Grace and Favour of him that grants it. For tho' the Superiour may sometimes do ill in not granting a Dispensation in a due and proper Case ; yet the Law does does not compel or require him to grant the same contrary to his own Will and Inclination, nor can it be thus demanded by any Right of Action *. But (I think) the better Opinion is, That where a Dispensation is refus'd, the Superior of the Person refusing the same may be apply'd to in a due and lawful Case, in order to compel him to grant a Dispensation, where the Law allows of such ; and in such a due and lawful Case it is rather stiled *Justice* than *Grace* †. So that in such a Case we ought by a Distinction to say, that it is stiled a *Grace* in respect of the Person dispensing, and *Justice* in respect of the Person dispens'd withal ‡.

* Oldr. Conf. 203. Fed. de Sen. Conf. 40.

† Oldr. Conf. 203.

‡ Gem. Conf. 38.

Now a Dispensation is a solemn Act, which ought to be sped and executed in a solemn manner ; so that it may be reckon'd among Matters of great and arduous Importance in the Church : And, therefore, a Bishop ought not to speed and execute the same without the Consent of his Chapter *. And in every Dispensation granted by a Person that acknowledges a Superiour, there ought to be exprefs'd the Cause of granting the same, otherwise the same shall not be granted or introduced as valid. As for Instance, when a Dignity is granted to a Person under Age, and the like, the Dispensation is null and void, if the Cause of such Dispensation be not exprefs'd ; for it is not enough that it be therein tacitly imply'd and understood. And the Cause therein exprefs'd ought to be truly and really subsisting, and not a feigned Cause. And a summary Account thereof ought to be premis'd and set down in the Beginning of the Dispensation, to the end that such a Dispensation should be valid from the Cause and Reason thereof : As that the Man dispens'd with is a Person of eminent Dignity, Learning, and the like †. But when an absolute Superiour, or (as the Law phrases it) one that is *supra Jus*, grants a Dispensation, an inducing Cause is presum'd ; and, therefore, need not be exprefs'd. Now a just and sufficient Cause for granting a Dispensation ought to be such a one as administers

* Oldr. Conf. 326 & 327.

† Fed. de Sen. Conf. 203 & 206.

to

to the Advantage and Behoof of the Publick Weal, and ought (at least) to be probable, and not contrary to the Law of God or of Nature.

A Dispensation in the *Canon-Law* is said to be *arida & arcta*, when 'tis granted to dispense with illegitimate Persons on their Promotion to Church-Benefices: But then such a Dispensation does not include Benefices in a Cathedral Church. Thus a Dispensation *ob Beneficia obtinenda* does not include a Canonry or Prebend; nor does a simple Dispensation *ad Beneficium Curatum habendum* comprehend a Dignity, because these are distinct and different Things. A Dispensation is not extended beyond the Case therein express'd: And, therefore, if a Person be dispens'd with in the Point of Absence on the Account of Study, he shall not, according to the *Canon-Law*, receive the Fruits and Profits of his Benefice, unless it be thus expressly said and provided in such Grant: And 'tis to be noted, that when a Bishop has granted such a Dispensation, if it be for a Term of Years, and not *ad Bene Placitum*, he cannot revoke the same. By the Papal Law a Bishop may dispense with Clergymen after the Performance of Penance for Adulteries committed, and other Crimes of an inferiour Nature *.

Tho' a Dispensation be in its own Nature an odious Thing, as being granted against the Common Law (as aforesaid) and, therefore, ought to be restrain'd and interpreted strictly; yet this is chiefly to be understood of such a Dispensation as is granted in an odious Case; as where Ambition, and the like, is the Foundation and End for which it is desir'd; or in a Case where another Person may receive any Prejudice or Inconvenience thereby. For the Power of Dispensing is a Matter of a Favour; and, therefore, in a Case that admits of Favour, it ought to be interpreted in a large Sense, according to the Propriety of the Words and the Intention of the Law: So that a Person that is Dispens'd with to hold two Benefices with Cure of Souls, or a Dignity with a former Benefice or Dignity obtain'd, or with any other Preferment already purchas'd, may hold even a principal Dignity in a Cathedral Church. But tho' a Dispensation be a Matter of strict Law generally speaking; and, therefore, ought not to be extended *ad Casum separabilem*: Yet whenever it is granted *Motu proprio*, and not at the Instance of the Partry Dispens'd with, it admits of a large and favourable Construction.

Whenever a Prince on his being consulted by any one rescribes or writes back in this manner, *viz. Toleramus*, he seems to dispense with that Act, which had been otherwise unlawful for a Man to do †: But 'tis otherwise, where the Prince only *de facto* tolerates the same to be done by not resisting and coercing of it; for then a Dispensation is not introduc'd ‡. But the Toleration or Sufferance of a Superiour does not dispense with such Things as are contrary to Moral Right and Honesty; tho' the Pope by his great Plenitude of Power in the Church, does sometimes dispense with even these immutable Laws for the Sake of Gain to the Apostolick Chamber; as he likewise does with the Laws of God. He that can limit and interpret a Law, may in a particular Case by way of Dispensation repeal or take away the Force of such a Law for a Season; but he cannot do it entirely and *in totum*, tho' it be on a lawful Account: But whenever this is done, 'tis necessary that the Dispensation should mention that Law, against which it is granted. A Bishop cannot grant a Dispensation contrary to the Common-Law of the Church: For by a Dispensation the Laws are violated; and it is not lawful to violate the Laws of his Superiour.

A simple Licence cannot properly be called a Dispensation; since a *simple* Licence is not contrary to Law as a Dispensation is, but is a Matter founded on some Law, and agreeable thereunto: For I call that a *simple* Licence or Faculty, which does not in reality suspend or toll the Obligation of a Law, but gives an Operation thereunto, in order to render it effectual according to a certain Mode or Method prescribed by Law. For 'tis to be observ'd, That a Person may in several Laws grant a Faculty, who cannot dispense with them; and the Reason required for granting a Faculty and a Dispensation is very different. And there are several Laws and Statutes, which do not *simply* forbid a Thing to be done; but that it be not done without such a Faculty granted in such a manner: Wherefore the granting of a Faculty or Licence is not a dispensing with the Law, but an Execution and Observance thereof. And, therefore, tho' a Licence or Faculty be not a Matter of so strict Law as a Dispensation is; yet it ought to be accommodated to the Intention of the Law. Yea, a Licence or Faculty is not so much an Act of some Jurisdiction, as a Dispensation is, but rather an Act of some Superiority; and, therefore, it has a wide Difference from a Dispensation. The use of this Word *Dispensation*, was first introduc'd by the *Canon-Law**: For we do not meet with it in all the Books of the *Civil-Law*; the *Civil-Law*, according to *Bartol-dus*†, calling it by the Name of a *Grace*, or an *Indulgence*. But now because the Word *Indulgence*, according to the Use of the *Roman Church*, has another Acceptation, I shall refer the Reader to that Title for the meaning thereof.

* Dec. in c. 4.

x. 2. 1. 2.

† Ind. cap.



Of Distributions Ecclesiastical and Civil.

DISTRIBUTIONS, which borrow'd their Name from the *Latin Verb Distribuo*, are in the Sense of the *Canon-Law* that Portion of Profits which in the *Romish Church* ought every Hour to be divided and given *pro Ratâ servitii præstiti* unto such as are present at Divine Service. But commonly they are called *Daily Distributions*, either because such Persons acquire them as are daily present at Divine Offices, or else because they are distributed to each individual Person *juxta quotam Officii*, which he daily attends, that is to say, in other Terms, according to the Merits of each Person that assists every Day at Divine Service, which is publickly perform'd in some appointed Place*. Sometimes these Distributions are in *Latin* called *Vestuaria* or *Viſtualia*; because they conduce to the Apparel and daily Subsistence of such as attend Divine Service†; tho' this Name strictly speaking seems rather adapted to the Fruits of a Benefice than to Canonical Distributions, which are often by another Name called *Daily Portions*. And sometimes they are in *Latin* stiled *Sportulæ* or *Diaria*, taking their likeness from the Gifts and Presents which are as it were made every Day to Judges on the Account of their Office‡. And sometimes they come under the Name of an *Emolument of Benefices or Prebends*;

* X. 3. 5. 19.

† X. 3. 4. 7.

‡ Dur. de Rir. lib. 3. C. 25. N. 4.

as being a certain Kind of Profit which arises from Benefices and Prebends; and sometimes they are couched under the Style of *Reditus Ecclesiastici*, not only because they arise from Ecclesiastical Benefices, but because the Word *Reditus* may sometimes be adapted to them, tho' the Style *Fructus Beneficii* properly taken is not suitable to Distributions*. But it has been a Doubt with some, whether Distributions are distinguish'd from Fruits, or are couch'd under the Word *Fructus*. To which I answer, That regularly speaking Distributions are in their own Nature distinct from Fruits; and it plainly appears from the Council of *Trent*; because the Fruits of a Benefice are stiled the *Yearly Rents*, which are usually collected from certain Estates belonging to the Church; but Distributions are a certain Portion, which arises from the Profits of a Benefice; and shall be conferr'd (as aforesaid) on such as assist at Divine Service, *juxta quotam Officii, &c.*

And hence it is we may first infer, That a Person who is depriv'd of his Distributions on the Score of a Crime committed, is not for that Reason deem'd to be depriv'd of the Fruits of his Prebend or Benefice, because the Fruits of a Prebend or Benefice do not come under the Name of Distributions properly speaking, unless something else be express'd; for that we are herein concern'd in a Penal Matter, wherein the more benign Interpretation ought to be made: But this ought only thus to be understood, when such Prebend or Benefice yields both Fruits and Distributions. Secondly, A Pension impos'd on any Benefice is not deem'd to be laid on Distributions, but only on the Fruits of such Benefice, unless the Benefice consists in Distributions alone, or unless something else be express'd: Because a Pension, when nothing else is express'd, is wont to be laid on the Fruits of such Prebend or Benefice. But since this Kind of Distributions is not well known here in *England*, it being only common in *Popish* Countries, I will add nothing more of them; but proceed to speak of a *Civil* Distribution, which is made by the Ordinary of the Intestate's Goods and Chattels, according to the Laws of this Realm†, and the *Civil* and *Canon-Law* on this Head.

† 22 & 23
Car. 2. c. 10.

For according to a Statute of the Realm, the Ordinary may call Administrators to an Account, and order a Distribution to be made of what remains in their Hands after Debts, Funerals, and just Expences of all sorts allow'd, according to the Laws in such Cases, and the Rules hereafter set down; saving to Persons aggriev'd, their Right of Appeal. And the Surplusage shall be distributed as follows, *viz.* one Third to the Intestate's Wife, and the Residue among his Children, and such as legally represent them, if any of them be dead, other than such Children (not Heirs at Law) who shall have any Estate by Settlement of the Intestate in his Life-time, equal to the other Shares: Children, other than Heirs at Law, advanc'd by Settlements or Portions not equal to the other Shares, shall have so much of the Surplusage as shall make the Estates of all to be equal. But the Heir at Law shall have an equal Part in the Distribution with the other Children, without any Consideration of what he has by Descent, or otherwise, from the Intestate. If there be no Children, or legal Representatives of them, then one Moiety shall be allotted to the Wife, the Residue to be equally distributed among the next of Kindred to the Intestate in equal Degree, and those who represent them. But no Representatives shall be admitted among Collaterals after Brothers and Sisters Children. And if there be no Wife, all shall be distributed among the Children; and if no Child, then to the next of Kin to the Intestate in equal Degree, and their Representatives, *ut supra*‡. No such Distribution shall be made till

‡ 22 & 23. ut
supra.

till one Year after the Intestate's Death; and every one to whom any Shares shall be allotted, shall give Bond with Sureties in the Spiritual Courts, That if Debts shall afterwards be made to appear he will refund his ratable Part thereof towards the Payment of such Debts, and of the Administrators Charges: And in all Cases where the Ordinary has used to grant Administration, *cum Testamento annexo*, he shall continue so to do. But by a subsequent Act of Parliament *, this Act of the 22 & 23 Car. 2. cap. 10. shall not extend to the Estates of *Feme Coverts* that dye Intestate; but that their Husbands may have Administration of the Personal Estates, as before the making of the said Act: Both which Acts of Parliament were made perpetual by the first of King *James* the Second †, tho' at first they were only enacted for the Continuance of seven Years, and from thence to the End of the next Session of Parliament. † Cap. 17.

One *Elizabeth Smith* dying Intestate left behind her two Brothers, one of the whole and the other of the half Blood ‡; and in the Ecclesiastical Court they would admit the half Blood to come in for Distribution with the whole Blood on the aforesaid Statute *; upon which a Prohibition was granted; and hereunto there was a Demurrer. And the Question arose on these Words in the Act, *viz. That Distribution is to be made to the next of Kin to the Intestate, who are in equal Degree, and such as legally represent them.* It was urged for the Plaintiff, that Statutes ought to be expounded by the Common-Law, which considers not the half Blood, insomuch, that an Estate shall rather escheat than descend to the half Blood. On the contrary 'twas argued, That tho' the half Blood was rejected in Descents, yet 'tis regarded in other Cases; as that Letters of Administration may be granted to the half Blood, and the half Blood may be Guardian in Socage †. Again, there cannot be two Degrees made of the whole and half Blood; nor does the Common-Law distinguish when it wholly excludes it. The Court said, That the Intent of this Act was to give the Ecclesiastical Court Jurisdiction in this Matter, and to provide for the Distribution of Intestate Estates; which they had a long time attempted and contested, but were still prohibited: But this Act permits them to proceed. The Court, being inform'd by *Civilians*, was entirely of Opinion, That the half Blood should come in for the Distribution of Intestate Estates on this Act: For as to the granting of Administrations, the Being of a Guardian in Socage, and the like, a Brother of the half Blood may be taken to be nearer of Kin than a more remote Kinsman of the whole Blood ‡. ‡ Ventr. Rep. pt. 1. p. 323.

Upon an Appeal to the House of Lords, the Lords by the Advice of several Judges, decreed, That upon the Statute giving Distribution of Intestates Personal Estates, the half Blood should have equal Share with those of the whole Blood, being of Kindred of the same Degree or Representation *. * 22 & 23 Car. 2. c. 10.

On the 10th of May, 1681. *Wiseman, Eston, Lloyd, &c.* all Doctors of the *Civil-Law* certify'd to the Lord Chief Justice *North*, That as to the Distribution of Intestates Estates among the Collaterals, the *Civil-Law*, and the Practice of the Ecclesiastical Courts, has constantly observ'd these two Rules, *viz. First*, That Representation has only Place as to Brothers and Sisters Children. *Secondly*, If there be no such Representation, then the Collaterals next of Kin to the Intestate (whether one or more) shall have Distribution only †. † Raym. Rep. p. 506.



Of Divination, and the Invention thereof.



DIVINATION is a Prediction or Foretelling of future Things, which are of a secret and hidden Nature, and cannot be known by any Human Means: And as this is said to be made by the Help of the Devil, the *Canon-Law* disallows thereof. For tho' the Devils have no certain Knowledge of such future Contingencies as have not a determinate Cause, but depend on our Will alone; yet they may have a far greater Knowledge of future Things, and other Secrets of Nature than Men have. For *First*, They know our Affections and Inclinations. *Secondly*, They have a Knowledge of Natural Causes, and of the Powers and Virtue of them, as of the Sun, Moon, Elements, and the like. *Thirdly*, They know the Scriptures much better than Men. *Fourthly*, They have a much greater Experience of Things than Men have. And, *Fifthly*, They know what they themselves and other Devils, that are the Authors of Mischief, intend to do by God's Permission.

Divination is usually made two Ways. *First*, By an exprefs Invocation of the Devil, putting up Prayers to him that he would instruct them in what shall hereafter happen and come to pass; and for this they before Hand promise to yield him due Obedience. And, *Secondly*, It is made by a tacit Invocation of him alone; and this happens, when any one does, by vain and wicked *Mediums* common unto the Devil, procure unto himself the Knowledge of such latent Things, as are above the Force of Human Understanding. Divination is sometimes perform'd by Natural Astrology, whereby we guess at Natural Effects by a Sight and Contemplation of the Stars, over which Effects the Heavens have an Influence: And the *Canonists* hold, That Men are well enough excus'd when they only practice this Kind of Astrology for searching into the Inclinations of Men thereby, tho' this Kind of Astrology is very uncertain. But they condemn *Judicial* Astrology, whereby on the Sight of the Heavens we guess at fortuitous Events, which depend on the Free-will of Man, as entirely Superstitious: As the contracting of Marriage with a Person of such a Condition, or that Wars shall ensue at such a Time, and the like.

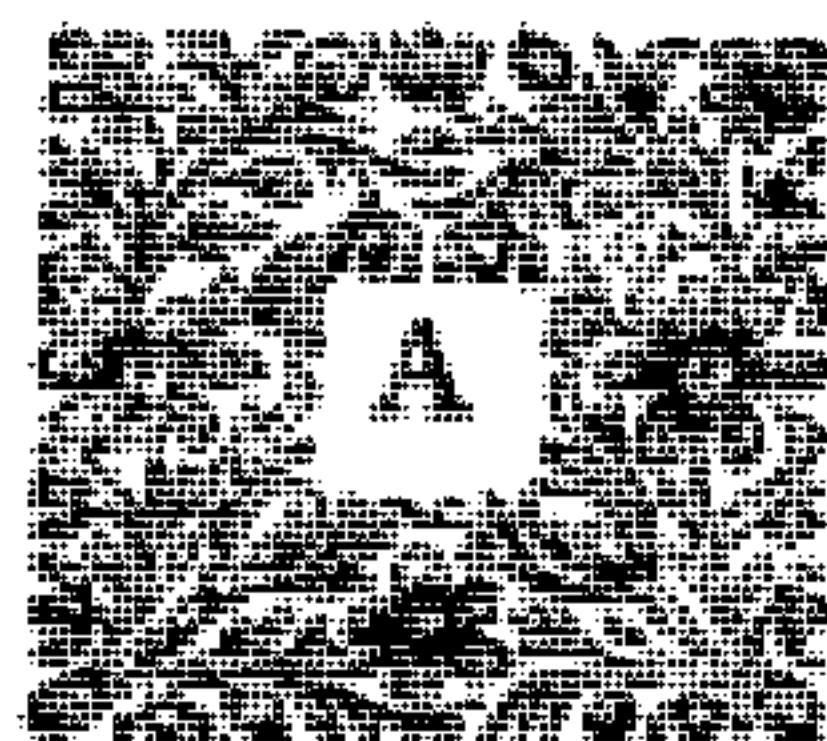
Divination was invented by the *Persians*; and is seldom or never taken in a good Sense. According to some Persons, and (particularly) it was *Varro's* Opinion, That there are four Kinds of Divination, *viz.* *First*, By Water, called *Hydromancy*. *Secondly*, By Fire, commonly stiled *Pyromancy*. *Thirdly*, By Air, termed *Acromancy*. And, *Fourthly*, By Earth, usually named *Geomancy*.

Diviners are in *Latin* called *Divini*, because they (as they boast) are full of Divinity; and by a certain Kind of fraudulent Cunning pretend to foretel what shall happen to Men. Among these Diviners there are some Persons that perform this Art by the Help of Words; and these are properly called Enchanters: As those
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are in *Latin* stiled *Arioli*, who put up nefarious Prayers *circa* *Aras*, about the Altars; and in offering deadly Sacrifices, do, by such Celebrations, receive the Devil's Answers. But the South-sayers, in *Latin* called *Haruspices*, *quasi* *Horarum Inspectores*, were such as did observe Days and Hours in performing the Business of their Office, and had the Oversight of what Men ought to do at particular Times and Seasons. These did also inspect the Entrails of Cattle, and from thence foretold what should happen hereafter.



Of Divorce, and the several Causes thereof.



DIVORCE is a lawful Separation of Husband and Wife made before a competent Judge, on due Cognizance had of the Cause, and sufficient Proof made thereof *. And 'tis in *Latin* called *Divortium*, according to the Lawyer, *Caius*, from the Diversity of the Minds of the Parties in Wedlock; or (as others say) because the Parties, who separate their Marriage, do go in *diversas Partes* †. Now a Divorce, according to the *Canon-Law*, is Twofold: The first being only a Separation *a Thoro*; and the other *a Vinculo* or *a Fœdere Matrimoniali*. A Divorce *quoad Thorum* happens when mutual Cohabitation or Conversation is forbidden to the Parties either with a Time, or without any Time prefix'd for their coming together again ‡: But by a Divorce *quoad vinculum* or *Fœdus Matrimoniale*, the Marriage is entirely dissolv'd; and as to the Substance of it for ever rescinded *.

* Abb. in c. 10. x. 2. 13.

† D. 24. 2. 2.

‡ 32 Q. 1. 2.

* 33 Q. 2. 5.

By the *Civil-Law* the Will of the Person that sues out and makes a Divorce is the *efficient Cause* thereof: But by the *Canon-Law* the Judge's Decree is its *efficient Cause*. For by the *Canon-Law* a Divorce is not permitted without *sufficient Cognizance* had of the Cause; and the Judge's Decree is necessary to declare that Dissent of the Parties whereon such Divorce is founded; and such Decree ought to be publish'd and made known to the World: Whereas by the *Civil-Law* Divorces were often made thro' Heat of Anger, when the *Romans* had a Mind to put away their Wives by sending them a Bill of Divorce by one of their Freedmen, who was to acquaint the Wife with the Purpose and Intention of her Husband †. The Object of a Divorce is Matrimony itself, which the Party desires may be rescinded either on some Impediment of Consanguinity or Affinity, or on some Defect and Crime committed: Tho' I think a Marriage founded on any unlawful Impediment of Consanguinity or Affinity is null and void *ab initio*, and need not be rescinded, but only declar'd so.

† D. 24. 2. 3.

By the ancient *Civil-Law* the Reasons or Causes for rescinding Matrimony were various and several: So that a Wife might be divorc'd and put away from her Husband even for evil Manners, *viz.* If she got Drunk every Day, piss'd a Bed every Night, or committed any other filthy Actions. But, this Case of a Divorce for ill Manners being repealed, *Justinian* introduc'd several Causes of a Divorce less arbitrary: But, these being also slight and frivolous, they are not now deem'd with us a suffi-

cient Cause for rescinding of Matrimony lawfully contracted. By the Papal *Canon-Law* there are only five Causes of a Divorce approv'd of, viz. *Adultery, Impotency, Cruelty, Infidelity, and Ingressus Religionis.*

The first of which is for Fornication or Adultery, properly so called; on which Account the Parties in Wedlock are so separated, that the Husband shall not be oblig'd to receive his Adulterous Wife again, tho' she be corrected and amended thereby: Nay, according to some, tho' he himself had given her Occasion of committing Adultery *. For she ought not to behave herself in a filthy and dishonest Manner on any Pretence of Poverty or other Inconvenience whatever †. But if the Husband himself shall after such Divorce commit Fornication, the Marriage shall be restor'd on the Score of his Lewdness, and the Husband for a Punishment thereof shall be oblig'd to receive his Wife again. Nor can the Husband during his Wife's Life-time make use of any Hand-Maid to beget Children on, upon the Account of the Barrenness of his Wife; because 'tis better to dye Childless, than to get an Issue or Offspring by an unlawful Bed ‡. And the Example of *Abraham* is no Objection hereunto, who thro' the Barrenness of his Wife *Sarah* joyn'd himself to *Hagar* the *Egyptian* Woman for the sake of raising an Issue to himself*; nor of *Jacob*, who, when he could not have Children from *Rachel*, rais'd Children to himself from his Hand-Maid †. For before the Law of *Moses* Adultery was not expressly and specially forbidden, since there was no Sentence of Condemnation against it till that Time. For *Abraham* and *Jacob* did not prefer lying with Hand-Maids unto the Marriage-Bed for the sake of gratifying a vagous Lust and Appetite, but for the end of propagating Posterity and acquiring an Offspring ‡.

There are five Cases, wherein a Divorce cannot be made on the Account of Adultery. *First*, If both the Persons in Wedlock are convicted of Adultery; for since there are some Misdemeanours, that are taken away by mutual Compensation, of which Adultery is one, a Compensation may be made of this Crime *. For it is unjust for one Person to judge of another, and not give another leave to judge of himself. *Secondly*, If the Husband himself prostitutes his own Wife: For in such a Case an Exception of Bawdry lies against such a Divorce †. *Thirdly*, If the Wife be free from any Fault, as not having an Intention of committing Fornication or Adultery: As when the Wife marries another Man, through a Belief that her former Husband is dead: For, upon the Return of her former Husband, she is bound to forsake her second Husband, and to return to her first ‡, unless, after his Return, she does with his Privy and Consent remain with the second*; or unless another Person had carnal Knowledge of her thro' Error and Mistake, she believing him to be her own Husband †. *Fourthly*, If she be forc'd or ravish'd hereunto ‡. And, *Fifthly*, If the Husband has reconcil'd himself to her after the Adultery committed by her, or knowingly retains her after she has committed Adultery *. But it is to be observ'd, that by the *Canon-Law* the Bond of Marriage is not dissolv'd on the Score of Adultery or Fornication, but it only operates a Separation of their Conversation at Bed and Board †: Nor can this Law grant a Power unto either of the Persons in Wedlock of passing to a second Marriage ‡.

I shall conclude this first Cause with the famous Case of the Marchioness of *Northampton* here in *England*, who was convicted of Adultery in the Reign of *Henry* the Eighth, and the Marquis was thereupon divorced from her in the Beginning of King *Edward* the Sixth's Reign

Reign, and thereupon a Commission was granted, directed to Archbishop *Cranmer*, and nine other Divines, to certify whether she continued his Wife, notwithstanding the Divorce *a Mensa & Thoro*; and whether by the Word of God he might marry again. But before this Matter was determin'd, he married again, at which the Privy Council were offended; because, according to the *Canon-Law*, the first Marriage continued good even after such a Divorce. The Marquis insisted, That by the Law of God the very Bond of Marriage was dissolv'd for Adultery; and that Marriage was never thought to be indissoluble till the *Romish* Church made it a Sacrament: But yet that Church, by the Help of the *Canonists*, had invented such Distinctions, which made it easy to be avoided. That it would be very inconvenient, if a Marriage should not be dissolv'd on the Account of Adultery; because then the innocent Person must live with the Guilty, or be tempted to commit the like Sin, if the Bond of Marriage still subsisted. Soon afterwards the Delegates gave Sentence in favour of the second Marriage, and, amongst other Things, they founded it on *Christ's* Definition of Marriage, *viz. That two should be one Flesh*: So that when that was divided, as it must be by Adultery, the Marriage itself was dissolv'd. 'Tis true, the Sentence given by these Delegates was about four Years afterwards confirm'd by a private Act of Parliament, to which two Peers and two Bishops dissented; and the second Marriage was declared to be good by the Law of God, any Canon or Ecclesiastical Law to the contrary notwithstanding. But in the very next Year*, that Act was repealed, and the Reason mention'd in the Preamble was, because it was obtain'd upon Private Views, and that it was an Encouragement for licentious Persons to procure Divorces on false Allegations. † A.D. 1553.

The second Cause of a Divorce is what the Lawyers call *Impotentia coeundi* †, or an Impotency in Point of carnal Copulation; which in the Man is said to be an Excess of Frigidity; and in the Woman *Arctatio*, or too great a Straitness in her Genital Parts. Therefore if any one shall thro' Ignorance marry a Virgin that is so narrow that the Man cannot enter her Body; or if she shall have contracted such a natural Imperfection, that it cannot be cur'd by the Aid of Physick. Or if a Woman shall marry a Man that is of so frigid a Nature that he cannot have carnal Knowledge of his Wife, they may be separated, and the Person that is qualify'd for Matrimony, may freely pass to a second Marriage*. If there be a *Constat* of natural Impotency in either of the Persons in Wedlock, the Marriage may be immediately separated: Otherwise the said Persons ought to live and cohabit together for the Space of three Years from the Time of the Solemnization of Marriage, for the Tryal of Nuptial Copulation; for so long a Time the Law appoints, if the natural Frigidity cannot be prov'd before. And after this Time is expir'd, if they are unwilling to live together any longer; and the marry'd Woman can prove, that the Man cannot have carnal Knowledge of her, she may, on a Judicial Sentence, take another Husband; and if he shall marry another Wife, his Marriage shall be dissolv'd as null and void. But if both the Parties shall consent to live together, the Man may retain her as his Sister, tho' not as his Wife. But if they both confess upon Oath, they never carnally knew each other, thro' the Husband's Inability (for so they ought to do, if they cannot have the Testimony of seven of their Neighbours or Kindred of good Credit hereunto) the Woman may then betake herself to a second Marriage on the Judges Decree. But if the Husband shall marry another Wife and have Children, they, who have thus sworn, shall be deem'd Guilty of

† A.D. 1553.

† C. 5. 17. 10.

* X. 4. 15.
per tot.
33 Q. 1. per
tot.

of Perjury; and, upon doing Pennance, be compell'd to return to the first Marriage †. And thus if it shall appear, that the Woman is so strait and narrow in her Genital Parts, that she cannot be render'd *Habilis* and fit for Copulation without Bodily Danger, (barring a Divine Miracle) it is the same Thing; for the Marriage shall be separated: But yet it shall be renew'd again, if it afterwards appears, that the Church was deceiv'd herein. This Matter ought to be ry'd by the careful Inspection of grave and honest Matrons of her Parish; and to be well attested by them upon Oath, viz. That she can never be a Mother or proper Wife, because she is *nimis arcta*, and unfit for Generation. But this Inspection ought not to be, till the Parties in Wedlock have liv'd together for three Years (at least) and have used their best Endeavours to know each other ‡.

As to this Matter, there happen'd a very remarkable Case in the Reign of Queen *Elizabeth* *, which was thus. The Wife of one *Bury* was divorc'd from him upon the Score of *Frigidity*; it appearing that for three Years after the Marriage she remain'd *Virgo intacta* on the Account of the Husband's Impotency. Her Husband afterwards marry'd again, and his Wife had Children: And hereupon it was a Question, Whether they were legitimate or not? And it was adjudg'd they were, because born during that Coverture, and before any Divorce had in respect of the second Marriage, which they agreed to be voidable, but that it continued a Marriage till it was dissolv'd †.

My Lord *Coke* tells us, that a Writ of Error was brought upon this Judgment; and it was affirm'd in the *Queens-Bench* upon great Deliberation: But yet it seems to be a very hard Judgment; and the Distinction which is there made, viz. That a Man may be *habilis* and *inhabilis* at different Times, is not applicable to the Circumstances of that Case. 'Tis true, a Man may be so, where the Inability is *ex Maleficio*: But if a Man has a perpetual and natural Impotency, 'tis impossible for him to be *habilis* at any Time; and the Marriage in such Case is not voidable, but void *ab initio*. To the like Purpose was the Lady *Essex's* Case, who, on her Petition to King *James* the First, obtain'd a Commission under the Great Seal, directed to the Archbishop of *Canterbury* and five other Bishops, &c. to proceed in a Cause of Nullity of Marriage, between the Earl of *Essex* and herself, by reason of his *Frigidity*. And the Libel against him was, That for three Years after the Marriage they did cohabit as Man and Wife, but that before and since the Marriage, he had a perpetual Impotency (at least) in respect of her. The Earl reply'd he was frigid *quoad illam*, but not as to any other Woman; for he found that she was not *apta* to have Children. Thereupon the Commissioners appointed three Ladies and two Midwives to inspect her, who return'd, that she was *apta & habilis*: And because the Law presumes, that where there is three Years Cohabitation after Marriage, and nothing done towards the Act of Copulation, there must be *Impotentia coeundi in viro*; which Disability, whether it proceeds from any natural Defect, or by any other Accident whatever, it matters not; yet if it precedes the Marriage, it shall convict the Man of Impotency, and consequently renders the Marriage void.

The third Cause of a Divorce is a Machination of the Wife's Death, or any other Act of Cruelty: For if the Husband does by Poison, or any other severe Usage, lay Snares against his Wife's Life, she may sue out a Separation *quoad Thorum & Mensam* *. For some of the *Canonists* will have a Divorce to be taken in a Threefold Sense, viz. First, For a Separation of Marriage *quoad Thorum* only, that is to say, in respect

† X. 4. 15. 5.
& 7.

‡ X. 4. 15. 6.
& 7.

* 40 & 41
Eliz.

† Dyer Rep.
179.

* X. 4. 19. 1.
& 2.

Respect of carnal Copulation. *Secondly*, For such a Separation *quoad Thorum & Mensam*, which in *English* is called *Bed and Board*. And, *Thirdly*, For a Dissolution of Matrimony *quoad Vinculum Matrimonii*. A Divorce on the Account of Cruelty seems to be grounded on the Law of Nature: For as Marriage was instituted by God in a State of Innocence, it must of Consequence be for the mutual Comfort and Help of each other; and, therefore, a cruel and severe Usage frustrates one of the Ends of that State. The Spiritual Court has a proper Jurisdiction in Cases of this Nature; and we have several Instances of Suits brought there by the Wife for a Separation upon the Score of Cruelty: And tho' in one Case Sentence was given for the Husband against the Wife; yet he was forced to pay all the Expences of Suit for her*. Afterwards the Wife brought an Appeal, and because the Husband would not appear and answer, and pay for transmitting the Process, he was excommunicated: And, a Prohibition being pray'd hereupon, the Court of Common Pleas doubted whether they should grant the same; because the Proceedings were according to the Course and Practice of the Ecclesiastical Courts. The Wife of one *Porter* was divorced from him on the same Account†, but it was only *a Mensa & Thoro*: For this Kind of Divorce gives the Wife Liberty to live separately from her Husband, which otherwise she could not do; and 'tis no more than a Provision for her Safety, and to avoid his cruel Treatment of her; since she cannot marry again during his Life, without incurring the Danger of Felony‡. In the Twelfth Year of King *Charles* the First*, a Divorce was *propter Sævitiā* of the Husband, and the Woman married again in the Life-time of her first Husband; and it was doubted, whether this was Felony: But no Reason was given for this Doubt, only that many Inconveniencies might ensue upon such a Pretence; and, therefore, they advised the Woman to get a Pardon, tho' the Divorce in this Case is grounded on Natural Right; and like a Divorce (for Adultery) is never to be allow'd on the Confession of the Parties, but only upon plain Proof.

* Crok. Rep. Pt. 3. p. 16.

† Crok. Rep. Pt. 3. p. 461.

‡ 1 Jac. 1. c. 11.
* Crok. Rep. 461.

The two last Causes of a Divorce, according to the *Canon-Law*, being not admitted here in *England*, I shall omit to handle them under this Title Specially; and, therefore, I shall proceed to speak of a Divorce *a Vinculo Matrimonii*. In all those Cases where such a Divorce was, the Marriage was not *de Jure*, according to the *Canonists*; because it was void *ab initio*: For where the Incapacity arises from any Matter precedent to the Marriage, there the Marriage is only *de facto*; and a Sentence of Divorce in such Case is only Declaratory, that the Marriage is dissolv'd; for it was absolutely void before, and either of the Parties might marry again, tho' the other was living. But 'tis otherwise, where the Divorce is occasion'd *ex Causā subsequenti*, as in Cases of Adultery, Cruelty, and the like. For there the Marriage being once good, it can never be dissolv'd *a Vinculo*; because such subsequent Cause cannot effect the Bond of Matrimony, tho' 'tis sufficient to separate the Parties *a Mensa & Thoro*; which is in the Nature of a Temporal and not a Perpetual Divorce: And if either of the Parties shall marry again in the Life-time of the other, such Marriage is void; and so it was adjudg'd in the Case of *Rye* and *Fulcomb*†. And as a further Confirmation of the Law in this Matter, it was afterwards adjudg'd, That a Divorce *Causā Adulterii* is no Bar of Dower; which shews that the Marriage is not dissolv'd‡.

† Noy. Rep. p. 103.

‡ Noy. Rep. p. 103.

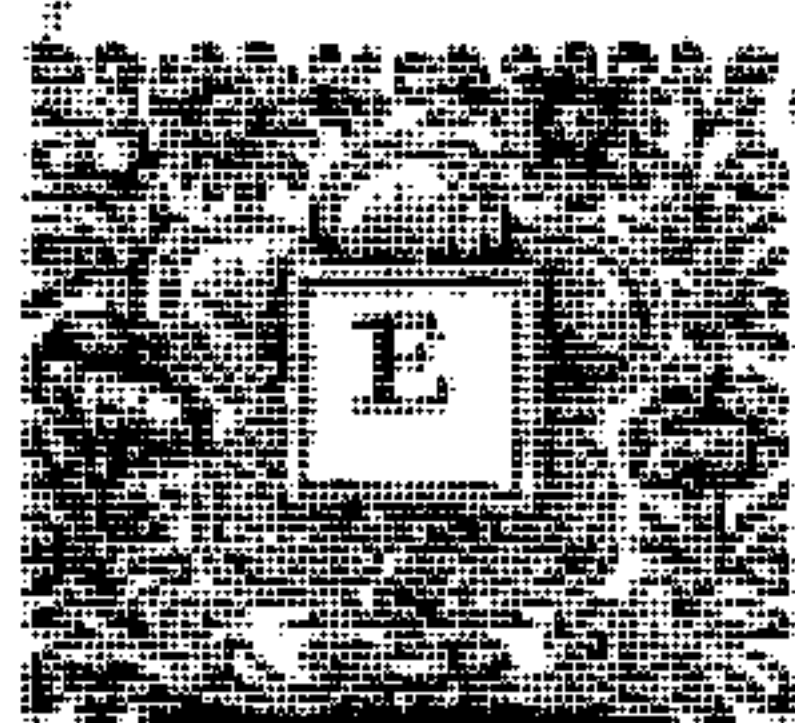
The Husband may be compelled by an Excommunication to receive his Wife, if he has rashly and incautiously put her away from him; and

*Abb. in c. l.
x. 4. 15.

he shall not only be oblig'd to return to her, but in such a Case shall be forced to treat her with a Marital Affection. But a Husband may leave his Adulterous Wife, without expecting any Sentence of Divorce, when the Adultery is evident and notorious. The Husband may pray a Separation of Matrimony on the Account of a Matrimonial Impediment, tho' such Impediment proceeds and arises from himself; as from his own Impotency and Frigidity*: But if he knowingly marries a Woman that cannot render him his Due, he is (notwithstanding) bound to maintain her, and shall not be divorced from her; for he ought to impute it to himself.



Of Donatives, and the Original thereof.



ECCELESIASTICAL Benefices are commonly distinguish'd into such as are *Donative*, and such as are *Presentative*: I shall here treat of such as are Donative; since a Parochial Church may be a Donative, and exempt from all Ordinary Jurisdiction, as *St. Martins le Grand* in *London* is, as well as many other Churches in *England*. Now a Donative is

*Cow. Interp.
v. *Donative*.

an Ecclesiastical Benefice not subject to the Right of Presentation, Institution or Induction, and, consequently, not liable to a Lapse; nor is it subject to the Bishop's Visitation as Presentative Churches are. The Original of Donatives in *England* is suppos'd to be from what Mr. *Gwin* mentions in the Preface to his Readings, viz, That as the King might anciently found a free Chapel, and exempt it from the Diocesan Jurisdiction: So he might also by his Letters Patents licence a common Person to found such a Chapel, and to ordain that it should be Donative and not Presentative; and that the Chaplain shall only be deprivable by the Founder and his Heirs, and not by the Bishop*. There have also been peculiar Privileges granted to Lords of Mannors, who had several Tenants living remote from the Church, to erect Chapels for them, and some for the Conveniency of such Lords and their Families, (as already remembred under the Title of *Chapels*) with Liberty to put in whom they pleased, provided he was a Person in Holy Orders: And the Bishops in those Days granted these Privileges to encourage so good an Undertaking: which having been continued Time out of Mind, do now turn to a Prescription. So that there are some Donatives by Royal Licence, and some by Prescription.

† De Benefic.
cap. 11. n. 10.

‡ Guid. Pap.
Decif. 187.

* Lib. 3. Tit.
2. C. 1. v.
Beneficiati.

But it has been a Question, Whether such Donatives are properly *Benefices Ecclesiastical*? For *Pet. Gregorius* speaking of Chapels founded by Laymen, and not approv'd by the Diocesan, nor as it were spiritualiz'd by him, plainly says †, That they are not accounted Benefices, nor can they be conferr'd by the Bishop; but the Founders and their Heirs may give such Chapels, if they please, without the Bishop's Consent ‡. And *Lindwood* is very prolix on the very same Head, viz. Whether *St. Martins le Grand* in *London* be an Ecclesiastical Benefice or not*, arguing *Pro* and *Con* on this Subject: But he at length concludes in the Affirmative; for a Benefice may be obtain'd either by way of

of Title, or else by Canonical Institution. And thus a Church being a Donative, it begins only by the Foundation and Erection of the Donor; and he has the sole Visitation and Correction of it, and the Ordinary has nothing to do therewith: For if the King founds a Chapel or Church, he may exempt it from the Jurisdiction of the Ordinary, and in this Case the Lord Chancellor or Lord Keeper shall visit the same †. And if the King does by his Letters Patents licence a common Person to found a Church or Chapel exempt from the Jurisdiction of the Ordinary, the same shall be visited by the Founder and his Heirs, and not by the Ordinary ‡. And as the Clerk comes in by the sole Act of the Donor; so he may restore and resign it to him: For *unumquodq; eodem modo quo Colligatum est dissolvitur*. For tho' the Clerk, when he is invested, has the Freehold; yet he may divest himself of it by Resignation, without any other Ceremony, and the Ordinary has nothing to do therein. In a Donative a Resignation made to one of the Founders, where there are more than one, is sufficient; for it enures to them all, as a Surrender shall more especially, when they all consent thereunto and grant it *de novo*.

But tho' Admission, Institution and Induction be not requisite in the Case of a Donative, as afore said; yet if the Patron does in respect of a Donative present a Clerk to the Ordinary, and suffer Admission and Institution thereupon, he has thereby made it always Presentative: For, as my Lord Coke * and others † do positively aver, the very Admission, Institution and Induction takes away the Nature of a Donative. And then the Ordinary shall visit the same, Procurations shall be paid, and a Lapse shall incur to the Ordinary, as in all Benefices Presentative: But as long as it remains a Donative, it is exempt from the Jurisdiction of the Ordinary. If a Clerk, that has a Donative, be disturbed in his Incumbency, the Patron or Founder shall have a *Quare impedit presentare*, and declare upon the Special Matter. All Bishopricks were anciently Donative by the King ‡: And 'tis said there are certain *Chauntries*, which may be given by Letters Patents*.

† 20 E. 3. 9.
21 E. 3. 60.

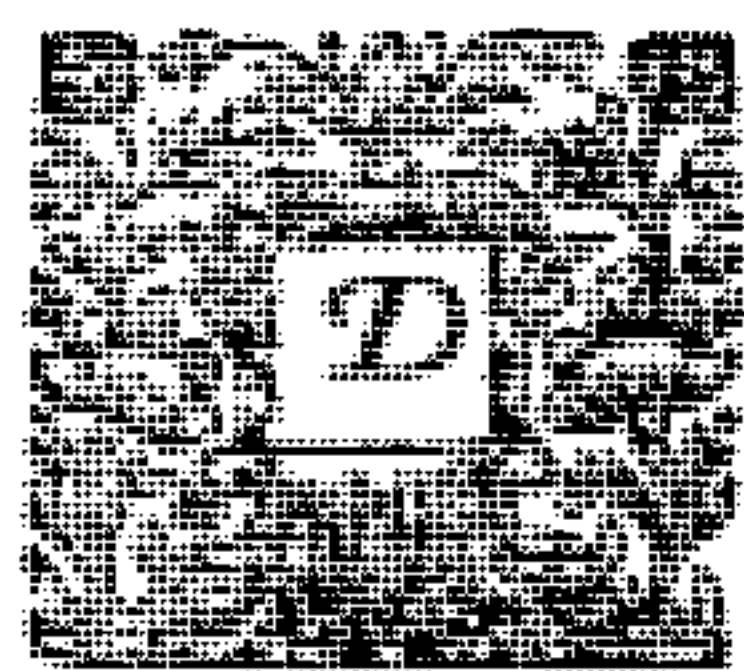
‡ 6 H. 7. 4.
F. N. B. 42.

* Institut. 1
P. 344.
† Crok. 2.
Rep. p. 63.

‡ Cok. Rep.
3. fol. 75. b.
* F. N. B. 33.



Of Drunkenness and Gluttony.



DRUNKENNESS, in *Latin* called *Ebrietas*, from the Preposition (*E.*) which is the same as *extra* or *sine*, and *Bria* signifying Measure, that is to say, *without Measure*. There are many Evils and Inconveniencies that flow from Drunkenness: For it obscures the Understanding, hinders Sensation, disturbs the Brain, debilitates the Natural Vigour of the Body, engenders Forgetfulness, and injures all the five Senses, by which the whole Operation of the Body is govern'd; it expels the Appetite, weakens the Joints of the Body, causes a Trembling in all the Members, kindles a Heat about the Liver, and renders the Blood thereof gross and grumous, and denigrates the Colour of the Body: And from hence a Fear and Horror, and a Talking in our Sleep, and fantastical Visions arise, a Foulness of the Mouth, a Debilitation of the Genitals, and the like;

like; and these Things distemper a Man so much, that they often cause a Grossness of Body, and sometimes a Decay of Nature, and a Leprosy itself. And so great a Detestation had St. *Austin* of this Vice of Drunkenness, that speaking thereof, he says, *Ebrietas cum absorbet, a vino absorbetur, abominatur a Deo, despicitur ab Angelis & deridetur ab hominibus*. And, again, he says, That it takes away the Memory, confounds the Understanding, dissipates the Senses, excites Lust*, hinders the Speech, corrupts the Blood, debilitates all the Members, exterminates Health, and shortens Man's Life. But I will not here treat of this Vice as a Physician, or a Moralist, but as a Lawyer; shewing how all *excessive Drinking* has at all times been forbidden to the Clergy by the Laws of the Church.

And here I shall first observe, that all Drinking (*ad Potus aequales*) was absolutely forbidden to Clergymen, on Pain of Suspension after *Admonition*†; not only by a *Synodical*, but by a *Provincial* Constitution under *Edmund* Archbishop of *Canterbury*. *Prohibeantur Presbyteri, ne ad potationes eant, nec bibant usq; ad Pinnas*, says an ancient Constitution of a Council held at *London**, when the Clergy grew Scandalous to the People for this loose and wicked way of living. The *Canon-Law* punishes this Crime of Drunkenness with a Suspension *ab Officio vel Beneficio*‡: But our Constitution is more severe, and says, *a Beneficio & Officio*. The Council of *Oxford* not only strictly forbids all Clergymen from whatever tends to Gluttony and Drunkenness, but it requires the Bishops to proceed strictly against those who are Guilty hereof, according to the Form of the General Council; that is to say, the fourth Council of *Lateran*, viz. by *Admonition* first; and then by *Suspension*. *Lindwood* complains, *That this was not so much look'd after as it should be, because it brought no Profit to the Prelates**. I hope this Reason will not hold among such as pretend to a Reformation of Religion, which will be very defective, if it extends not to our Lives as well as our Doctrines: For there can be no greater Reproach than to see those loose and dissolute in their Conversations, who think it their Honour to be Ministers of a Reformed Church. It was a stinging Reflection on our Church by the Archbishop of *Spa'ato* (who was no very strict Man himself) *That he saw nothing reform'd among us but our Doctrines*. I hope there was more of *Satyr* than of *Truth* in it: For, doubtless, there were many then (as there are now) of exemplary Lives, and unblameable Conversations among the Clergy. But if there be any others, it will be the more Shame to the Bishops not to proceed against them, since even before the Reformation the Canons were so strict and severe in this Matter.

In the Council at *Westminster* in *Henry* the Second's Time, under *Richard* Archbishop of *Canterbury*, all Clergymen are forbidden going into *Taverns* to eat and drink, unless upon Travelling; and the Sanction of this Canon is, *aut cesset aut deponatur**. See also the *Canon-Law*‡. The same was forbidden in the Council at *York* in *Richard* the First's Reign, in the Council at *London* under *Hubert*, in King *John*'s Time; and since the Reformation the same Constitution is renew'd among King *James*'s Canons†. And there have been several Instances of the Severity of our Ecclesiastical Punishments against Drunkenness in Clergymen. In the Eighth Year of King *James* the First's Reign one *Parker* was depriv'd of his Benefice for Drunkenness‡; and tho' he pray'd a Prohibition, yet it was deny'd him: And in the next Year another was depriv'd for the same Crime; and the Judges at Common-Law allow'd the Sentence to be good. And no doubt there are other Instances of this Kind,

† Concil.
Angl. Vol. 2.
140. 200.

* A. D. 1102.

‡ X. 3. 1. 14.

* Lib. 3. Tit.
1. C. 1. v. Vi-
gilanter.

* Concil.
Angl. Vol.
2. 104.

‡ 44 Dist. 4.

† Can. 78.

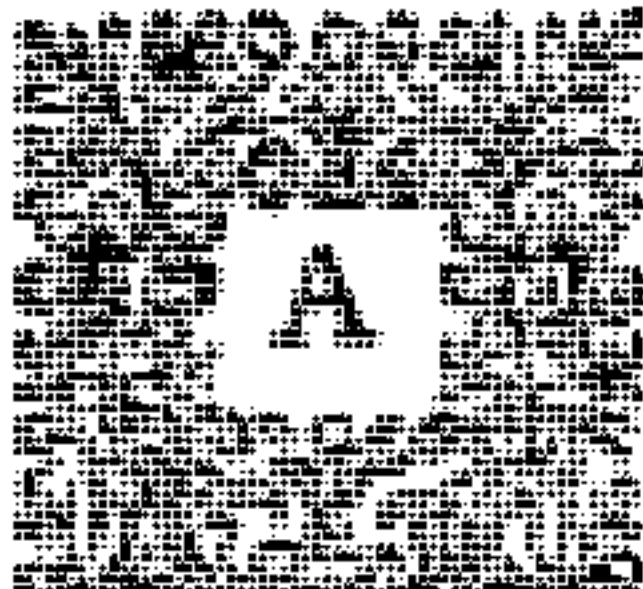
‡ Brownl.
Rep. p. 37.

* Lev. ch. 10.
v. 9. 10.

Kind ; but we had not known of these if they had not been preserv'd to us in the Law Reports. By the old Law † it was Death for the Priests to drink Wine or strong Drink, when they went into the Tabernacle of the Congregation ; and the Reason given is, That they may put a Difference between Holy and Unholy, and between Clean and Unclean, and that they may teach the Children of Israel all the Statutes which the Lord hath spoken to thee by the Hand of Moses. Which implies, that those who are given to drinking Wine or Strong Drink are unfit to instruct others in the Law of God. And God looked on them as such a Dishonour to his Worship, that he threatens immediate Death to them that approached his Altar when they had drank Wine : And the Jews say, that this was the Reason why Nadab and Abihu were destroy'd. In short, all Nations have abhorr'd a sottish and drunken Priesthood, as most unfit to approach unto God, or to offer Sacrifices for others, when they have made Beasts of themselves. I hope, this Charge is not lying upon any of our present Clergy ; for who would not rather run into a Wilderness, or hide himself in a Cave, than take such a Charge upon himself, if he could not refrain from this abominable Vice ?



Of a Duplex Querela, and the manner of proceeding therein.

 S the Patron has a Remedy at the Common-Law by a *Quare Impedit*, where the Bishop refuses to institute a Person presented ; so likewise has the Clerk a proper Remedy in the Ecclesiastical Court : For he may complain to the Court of *Arches*, if he be refus'd by the Bishop ; and to the Court of *Delegates*, where the Refusal is by the Archbishop : And, upon this Complaint, the Dean of the *Arches* writes to the Bishop in Form of Law, which Writing is in *Latin* called *Duplex Querela*. But because by the Canon * the Bishop has Twenty eight Days allow'd him to inform himself touching the Sufficiency of the Clerk after the Presentation is tendred to him : Therefore, the said Canon enjoins, that a *Duplex Querela* shall not be granted till that Time is expir'd, and Oath made thereof, and that the Bishop refus'd to grant Institution, or enter into Bond, with Sureties, to prove the same to be true : And this under Pain of Suspension of the Grantor from the Execution of his Office for half a Year, to be denounced by the Archbishop ; and that the *Duplex Querela* shall be void. In which Canon there is a *Proviso*, that the Bishop shall not institute another in the mean time with Prejudice to the Person presented *sub Pœnâ nullitatis*.

* Can. Jac. 25.

As to the Form of this Rescript, and the Proceedings on it, it is as follows, *viz.* It ought to contain a Monition, that within five or nine Days the Bishop should admit the Party complaining, and also a Citation for him to appear either by himself or his Proctor at another Day, in Case he should refuse so to do ; and then to shew Cause of his Refusal. And there is also an Inhibition served on him pursuant to the

Canon above-mention'd, not to admit another *Pendente lite*. The Proceedings on it are thus, *viz.* The Clerk, who has got the Presentation, must procure some Person to admonish the Bishop to admit him within the time mention'd in the *Duplex Querela*, and three Days afterwards the said Clerk ought to apply himself to the Bishop and pray Institution, and tender himself ready to subscribe the Thirty nine Articles, and to take the Oaths of *Supremacy* and *Canonical Obedience*. And this he ought to do twice more within the Time prescribed in the *Duplex Querela*; and if he cannot be admitted to the Bishop's Presence, then he ought to make Protestation in the Presence of some credible Witnesses.

The Bishop, after such Admonition, refusing to admit the Clerk, may be cited by a Messenger to appear; and if that cannot be done Personally, then the Messenger may acquaint the Bishop's Servants, that he has a Citation *ad Instantiam* R. B. to institute him to such a Benefice. Then after the Day on which he should have appear'd, if he had been Personally cited, the Court will decree a Citation *Viis & Modis*, which must be Personally executed if that can be done; if not, then it must be fix'd to the outward Door of his House or Cathedral. Afterwards the Day of executing the Monition and the Inhibition, the several Days on which the Clerk pray'd Institution, the Day of his citing the Bishop, and of his Refusal to admit, &c. are to be certify'd by the Person citing; and this is to be on the Back of the *Duplex Querela*. Then the Bishop, after three Proclamations, is declared *Contumacious*, and the Judge pronounces the Right of Institution to be devolved on him, and decrees that the Clerk shall be instituted, and that he will write to the Archdeacon to induct him. Then the Clerk must apply to the Archbishop to examine him, and if he approves him, then he writes to the Judge *Fiat Institutio*: But before he is instituted, 'tis usual for the Clerk to give Bond to indemnify the Judge. But,

If the Bishop appears, and alledges a Cause of his Refusal to admit the Person, as that the Church is full, or that the Person presented is a Simoniac, unlearned, and the like, then they are to proceed to Tryal; and if the Bishop fails in his Proof, the Judge then pronounces Sentence for his own Jurisdiction, and condemns the Bishop in Expences of Suit. But if the Bishop will not defend the Suit, the pretended Incumbent may do it, and alledge that the Church is full of himself; but then the Judge will first pronounce Sentence for his own Jurisdiction, because the Bishop has alledg'd nothing to oppose it. But if the Bishop will allow such Incumbent to defend the Suit in his own Name, then the Judge cannot decree for his own Jurisdiction till the Cause is determin'd. And in this Case, where the Bishop appears and refuses to institute, 'tis not a sufficient Cause to alledge, that two Persons are presented to the same Living; and so the Church is become *Litigious*: Because, if it was so, he ought to proceed upon a *Fus-Patronatus* to try the Right. But if not, and one of them appears to be incapable, or otherwise deficient, he may admit the other without any Inquisition upon a *Fus-Patronatus*; because the Right of Institution *pro hac vice* is devolv'd on him thro' the Negligence of the Bishop.

There are not many Instances of this Way of Proceeding in our Books and Records; but some there are. Sir *Tim. Hutton's* Clerk was instituted by the Archbishop of *York*, and inducted by his Warrant or Mandate, upon the Refusal of the Bishop of *Chester* to admit him*. 'Tis true, there was another presented to the Church, who sued the Incumbent

* Hob. Rep.
p. 15.

bent in the Court of Delegates, suggesting that his Institution was void; because it was done by the Archbishop out of his Province in Time of Parliament at *Westminster*; and by Consequence the Induction must be void: But a Prohibition was granted, because the Church was full by Induction, which is a Temporal Act; and which shall never be made void but by a Suit in the Temporal Courts. Therefore, a *Duplex Querela* will not be a proper Remedy, where another Person is inducted. But if two Patrons pretending a Title to present, do each of them grant a Presentation to his Clerk, and the Bishop refuses one who brings his *Duplex Querela*, and upon that obtains Institution and Induction, and afterwards the Bishop grants Institution to the other, the Suit shall still go on in the Spiritual Court to punish the Bishop for a Contempt in granting Institution after an Inhibition, and *Pendente lite*; but in Respect of the Incumbency a Prohibition was granted*. But in such a Case if the Bishop had refus'd both their Clerks, and then one of the Patrons had brought a *Quare Impedit* against him; and (pending that Writ) a *Duplex Querela* had been brought by the other: And upon the Bishop's Neglect to appear, the Archbishop had granted Institution to the Patron's Clerk, tho' he had been Incumbent for six Months, yet he should be remov'd, if the other Patron recover'd in the *Quare Impedit*, because he came in *Pendente lite*†.

* Moors Rep.
p. 879.

† Roll. Abr.
391. Moors
Rep. 572.

Note, This way of Proceeding against the Bishop is very proper, where the Refusal is for Incapacity, or any other Personal Defect in the Clerk; because these are Causes, which the Spiritual Judge may try. So if the Refusal be upon a Pretence, that the Church is full; because the Plenary arising upon Institution shall be try'd by the Bishop's Certificate.



Of Easter, and the Celebration thereof.

TH E Churches of all the Provinces of *Asia*, which in the Time of the *Romans* were govern'd by a Pro-Consul, did suppose, as from a very ancient Tradition, that the fourteenth Day after the Appearance of the New Moon, to be reckon'd from the Time of the Vernal Equinox, ought to be observ'd in the Church as the Salutory Feast of *Easter*, viz. The same Day whereon the *Jews* were commanded to kill the Lamb: And that they ought always on that Day, (on what Day of the Week soever it should fall) to put an end to their solemn Fastings. Whereas it was (notwithstanding this Custom of the *Asiatics*) the general Practice of the Church all over the rest of Christendom to act after another Manner: For other Christians did not end their Fastings on any other Day than that of our Saviour's Resurrection: And as they receiv'd this Usage from Apostolical Tradition (as is pretended) it still prevails in the Church. And the *Asiatick* Churches (upon this Account) differing from all others, especially the *Latin* Church, in their Celebration of *Easter*, divers Synods and Assemblies of Bishops were conven'd, which condemn'd the Practice of these Christians, who were by the

the *Latins* called *Quarto-Decumani*, and censur'd as Hereticks: And *Easter* was by the common Consent of these Synods ordain'd to be celebrated on the *Sunday* following the first Full-Moon after the Vernal Equinox; and thereupon they sent Circular Letters to inform the Brethren in all Places touching this Decree of the Church for the Uniform observing of *Easter* on the Day of our Lord's Resurrection; and that the solemn Fasts of the Church should not be concluded till that great Day; for so 'tis called by the sixth Canon of the Council of *Ancyra*. For we read, That at the latter end of the second Century, there were several Councils held concerning this Affair in the Western Church, as at *Rome* and in *Gaul*; and in the Eastern Church at *Pontus* and in *Palestine*.

*Con. 3. Dist.
21 & 22.

And thus the Lords Passover, which we commonly call *Easter*, was order'd by the *Canon-Law* * to be celebrated every Year on a *Sunday*, otherwise stiled the Lord's-Day; because our Lord on that Day of the Week, rose from the Dead, and appear'd among his Disciples: And 'tis said by the fifth Apostolical Canon, "That if any Bishop, Priest or Deacon shall celebrate the Holy Feast of *Easter* before the Vernal Equinox, as the *Jews* do, let him be depos'd." But 'tis to be observ'd, That this Canon does not condemn those who kept it on the fourteenth Day of the first Month regularly calculated, but it seems to be directed against them only, who follow'd the Erroneous Calculation * of the *Jews*: And, therefore, it is probable that it might be fram'd by those that observ'd it as the Eastern Christians of the first Ages generally did. *Platina*, in his Lives of the Popes, says, That this Feast of *Easter* was first settled on a Sunday by Pope *Pius* the First at the Instance of one *Hermes*, with whom he had cultivated a strict Amity and Friendship: For to confirm the wavering Minds of some Men in this Respect, the Angel of the Lord appear'd unto *Hermes* (as the Papists pretend) in the Habit of a Shepherd, and declar'd to him, by way of Command, that all Persons were to celebrate the Lord's Passover on the Lord's-Day; and this Message, or Order, he communicated to the said Pope. See the Law above-quoted in the Margin out of the third Part of the *Decretum*. But tho' there have been several Critical Disputes concerning the very Day on which *Easter* was to be kept, yet all unanimously agreed in this, That this Feast was to be observ'd in the Church; and, by the *African Code*, it is made use of as a Date. For says the 106th Canon of that *Code*, "Whatever Formal Letters are granted, let them mention the *Easter-Day* of that Year. But if that happens not to be known, let the *Easter-Day* of the precedent Year be inserted, as sometimes in publick Dates 'tis said, *After the Consulship of A. C. &c.*"

In the early Ages of the Church the Baptism of Catholics was usually celebrated at the Time of this Feast; but if the Parties were threaten'd with any imminent Danger, or any other Necessity requir'd, Baptism

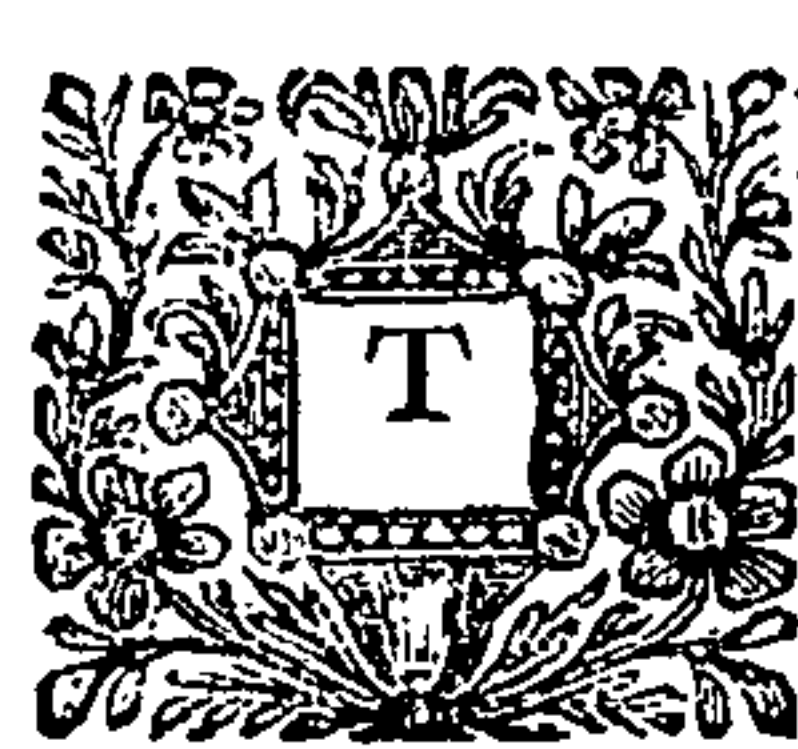
* The *Jewish* Calculations were very Faulty; for their ordinary Year consisting only of 354 Days, their Passover, which they kept on the 14th Day of the Month *Nisan*, must often fall a considerable Time before the Vernal Equinox; which the Primitive Christians justly looked upon as the Beginning of the Natural Year. Once indeed in 84 Years they intercalated one Month of 30 Days, but this was not enough, for in 84 Years they lost 32 Days, as Bishop *Beveridge* has observ'd: So that when their Account was at the best, it was two Days (at least) too soon, and sometimes a Month. *Victorinus*, a famous Arithmerician of *Aquitain*, in Pope *Hilary* the First's Time rectify'd the Cycle or Golden Number for ascertaining the Feast of *Easter*, far beyond what *Eusebius* and *Theophilus* had done: And some will have it, that *Victor* Bishop of *Capua*, in the Papacy of *Pelagius* the First, did also rectify the Mistakes of the Roman Abbot *Dionysius* touching the *Paschal Cycle*.

Baptism might be perform'd at any other Time: For if any of the *Gentiles* were converted by coming over to the Faith, they might be baptiz'd at any Time, and in any Place whatever, either in the River, Sea, or in Springs and Fountains*. And such as became Sponsors or Sureties for them in Baptism, promis'd to take Care, that they were not afterwards found to be Infidels. By the 66th of the *Trullan Canons*, now only receiv'd by the *Eastern Church*, all Horse-Races and Publick Shews were forbidden from *Easter-Day* to the *New Lord's-Day*, commonly with us called *Low-Sunday*; during which intermediate Time all Persons were to attend singing of Psalms, reading the Scriptures, and enjoying the Holy Mysteries. *Con. 3. Dist. 22.

It was heretofore a Traditional Custom among the *Jews*, at the Time of their Passover, to set at Liberty one Person or other under Confinement in Bonds, and to release him from his Imprisonment, in Memory of the People deliver'd from *Egyptian Bondage*†; and this Custom they observ'd, together with their *Αυτονομία*, after they were reduc'd to a Province by the *Roman Arms*; doing this (perhaps) that they might curry Favour with the Provincial Presidents, and by this Means procure Mercy and Compassion to the People. The Christian Emperors after their Conversion, lest they should seem less Merciful to the Heathens than the *Jews* were, and as well in Remembrance of *Christ's* Resurrection, as to testify a Common Joy, which all Christians receiv'd on the Score of their Deliverance from the Bondage of Sin hereby, ordain'd, That whenever the first Day of *Easter* came, all Prisoners and Captives should be set at Liberty, and their Punishments forgiven them, unless it were such as were charged with Crimes of a very heinous Nature‡. And this, we read, they did on the Account of Piety and Religion towards God. †Mat. cap. 18. Joh. cap. 27. ‡C. 1. 4. 5.



Of Ecclesiastical Crimes in General, and the Distinction thereof.

 HE Church having a Jurisdiction by the Grant of the Civil Power in divers Crimes, which are of a Spiritual Nature, and punishable in the Ecclesiastical Court, I shall here treat in general of such Crimes as are of Ecclesiastical Cognizance; as *Heresy**, *Incest*, *Adultery*, *Whoredom*, *Sacrilege*, *Blasphemy*, *Usury*†, *Simony*‡, *Perjury*, and such others as are compriz'd under the Sin of *Luxury*; and under their proper Titles handle them in particular. Among these there are some that are merely of Ecclesiastical Cognizance; and others, that are of a mix'd Nature, that is to say, such as are cognizable both in the Ecclesiastical and Secular Courts: And first, of such as are merely Ecclesiastical; and, therefore, only Cognizable in the Ecclesiastical Courts. * X. 5. 7. per tot. † X. 19 per tot. ‡ X. 5. 3. per tot.

Among these by the *Canon-Law* the first is *Heresy*, which being a Crime merely of an Ecclesiastical Nature, the Secular Judge cannot by any Means intermeddle therewith in Point of Cognizance, but has only the

* Abb. in c. 8.
x. 2. 2. n. 19.
& 31.

† Abb. sup.
n. 20.

‡ Abb. sup.
n. 25.

* Abb. in c. 8.
x. 2. 2. n. 1.
† Abb. ut sup.

the Power of executing the Punishment inflicted thereon by the Ecclesiastical Judge *, at his Request and Petition, or (we commonly say) at the Request of the Church: And as this is a Crime merely Ecclesiastical; so does the Punishment and Declaration, of what is *Heresy*, belong to the Ecclesiastical Judge. *Secondly*, By the *Canon-Law* *Simony* is a Crime merely Ecclesiastical, and, consequently, punishable by the Ecclesiastical Judge alone †: For it had its Original Prohibition from the Church; and (in Popish Countries) is regulated according to the strict Rules and Institutions of the *Canon-Law*; but with us in *England* it admits of some Temperament and Restriction, as I shall shew hereafter under that Title. But tho' the Crimes of *Heresy* and *Simony* are both by the *Canon-Law* equal unto the Crime of Treason; yet even by that Law the Crime of *Simony* is not of so enormous a Kind as that of *Heresy*. *Thirdly*, We may reckon *Concubinage* ‡, (or what the *Canon-Law* stiles *Whoredom*) to be a Crime merely Ecclesiastical, since 'tis deem'd no Crime by the *Civil-Law*, but had its Original Prohibition from the Laws of the Church; and, therefore, the Church has only Cognizance thereof. Tho', according to *Hostiensis*, *Concubinage*, or the keeping of Concubines, was prohibited and condemn'd even by the *Civil-Law* itself: But, I think, the *Civil-Law* only prohibited *Concubinage* or *simple Fornication* indirectly, and not directly, And, *lastly*, In one Word, we may reckon all such to be Crimes merely Ecclesiastical, which are not Crimes according to the Prohibitions of the Temporal or Civil Law; as *Usury*, *Blasphemy*, *Sacrilege* *, *Perjury* †, and the like are: For these are not merely Canonical; because, according to *Hostiensis*, the Cognizance thereof (at least) in Respect of some Pecuniary or Corporal Punishment does also belong to the Secular Judge: But 'tis otherwise in Respect of Ecclesiastical Censures to be fulminated against such Criminal Persons.

‡ Tit. cap. 2.
v. 12.

* 5 & 6 E. 6.
cap. 4.

Among such Crimes and Offences as are claim'd to be Punishable by Ecclesiastical Jurisdiction some are of a publick, and others of a private Nature. The first are those that may be prosecuted by any Accuser or individual Subject whomsoever. As for Example, an Offence against God is reckon'd a Crime of a publick Nature, and any one of the People may be an Accuser herein; because what is committed or done as an Offence against God, seems to be an Offence against Men, as God is the Lord and Father of us all: And such are the Crimes of *Blasphemy*, *Idolatry*, *Heresy*, *Apostacy* from *Christianity*, *Schism*, *Perjury* in an Ecclesiastical Court, *Polluting* and *Defiling* of Churches, *Disturbing* of *Divine Service*, *Violating* and *Prophaning* the *Sabbath*, *Neglect* of the *Sacraments*, *not frequenting* *Publick Prayer*, and the like. For *St. Paul* has reduced all Ecclesiastical Offences (I think) to some one of these three Heads, as either being *contrary to Piety towards God*; *to Justice towards our Neighbour*; and *to Sobriety towards our Selves* ‡. That, which is against God, the *Latinists* stile *Impietas*; that, which is against our Neighbour, they term *Facinus*; and that, which is against a Man's Self, they call *Flagitium*; tho' the two last are often confounded without observing the true Propriety of Words. Under such Offences as are contrary to Justice the Church reckons *Simony*, *Usury*, *Diffamation*, *Subornation* of *Perjury* in an Ecclesiastical Court, *Sacrilege*, *Dilapidations*, *not building* of a Church enjoin'd by a *Testator*, *not fencing* the *Church-Yard*; *not repairing* the *Church* or *Chancel*, and *not keeping* of it in a decent Manner; *Violence done to a Minister*; *Violating* of a *Sequestration* made for *Tithes* *not paid*; and *Fighting* or *Brawling* in the *Church* or *Church-Yard* *, and the

the like. And against Sobriety the Law reckons such Crimes as these, viz. *Adultery, simple Fornication, Incest, Polygamy*, and all manner of *Incontinency*, which is not made Death by the Law of the Realm; *Sollicitation of a Woman's Chastity, Drunkenness, Filthy Speech*, and the like. But some of these, I think, are rather Crimes of a private Nature. I find in the Writers of the *Civil* and *Canon-Law* several Offences affirm'd to be of Ecclesiastical Cognizance, which may seem (even in this Realm) to be such, tho' I do not expressly read of them to be so accounted either in the Statutes or Reports of the Common-Law: As for *violating* or *disturbing* the Liberties of the Church; for *admitting* Excommunicated Persons to an Action, or to give Evidence in a Temporal Court; *forging* Letters*, and other Matters Ecclesiastical, as Testimonials for Ordination, &c. *digging up* of bury'd Corpses; *burying* of Excommunicated Persons or notorious Hereticks in the usual Places of good Christians†; and, *lastly*, *Abettors* and *voluntary Company keepers* with Excommunicated Persons.

* X. 5. 20. per tot.

† Abb. inc. 5. x. 5. 33. n. 1. v. in cap. Cl. 3. 7. n. 11.

According to Criticism, there is this Difference between what we in *Latin* call *Peccatum*, *Delictum* and *Crimen*: For a *Peccatum* is the same with what we in other Words call an *evil* and *wicked Act*: But a *Delictum*, according to *Andreas*, is a forsaking or departing from a good Action, that is to say, *Derelictum*. But what we call a *Crime*, is a heinous or heavy Sin or *Peccatum*; and deserves Accusation and Condemnation. Or in other Terms a *Delictum* is what the *Logicians* call *Genus Generalissimum*, whether it arises and proceeds from the Mind or not: But that which we call a *Crime*, is what they stile *Genus Sub-alternum*; and under the same is comprehended Theft, Adultery and other Sins; which proceed *ex Animo*, and from an evil Conscience, according to the Archdeacon's Comment thereon*. A *Crime* or Sin is said by the *Canon-Law* to be greater or lesser, as it more or less draws us from the Favour of God; and as it recedes in like manner from the Rules of the Holy Scripture: And when it may be said to recede more or less from the Rules of Holy Writ, shall be measur'd by the Standard of that Contempt which it carries along with it. But 'tis to be observ'd, That every Crime committed by a Clergyman does not immediately deserve Deposition: For there are some Crimes that deserve a Suspension only; and others, that deserve Deposition or Degradation (as aforesaid) which is a perpetual Removal of him from the Ministry and Service of the Altar; but Suspension is only a Removal of him from thence for a Season; and of Suspension there are several Species, as will afterwards appear under that Title.

* In c. 1. V I. 5. 2. v. *Le-lis*.

Both by the *Civil* and *Canon-Law* a Delinquent, on the Account of a Crime committed by him, is subject to that Judge's Court or Jurisdiction where such Crime or Offence was committed or begun; because by the Act of offending he has in that Point made himself a Subject to the Court or Territory of such Judge, and has oblig'd himself *Ratione pænæ*†: And this is true, whether he be sued there *Civilly* or *Criminally* for the said Offence; for *Symmachus* in his *Decretal Epistles*, writes to this Purpose, viz. *Facinus, ubi admissum est, debet expiari*. And the Emperor *Constantine* says, That he who commits any Crime, shall be Subject to the Publick Laws of that Province, within which the Crime was committed; and that he shall not plead any Privilege or Prescription to the Court. And he assigns a Twofold Reason for this. *First*, Because the Plaintiff should be the better enabled to prove his Charge, as having his Evidence in a greater Readiness in the Province where the Offence was done: And, *Secondly*, That by not going out of

† Abb. inc. 20. x. 2. 14. n. 15.

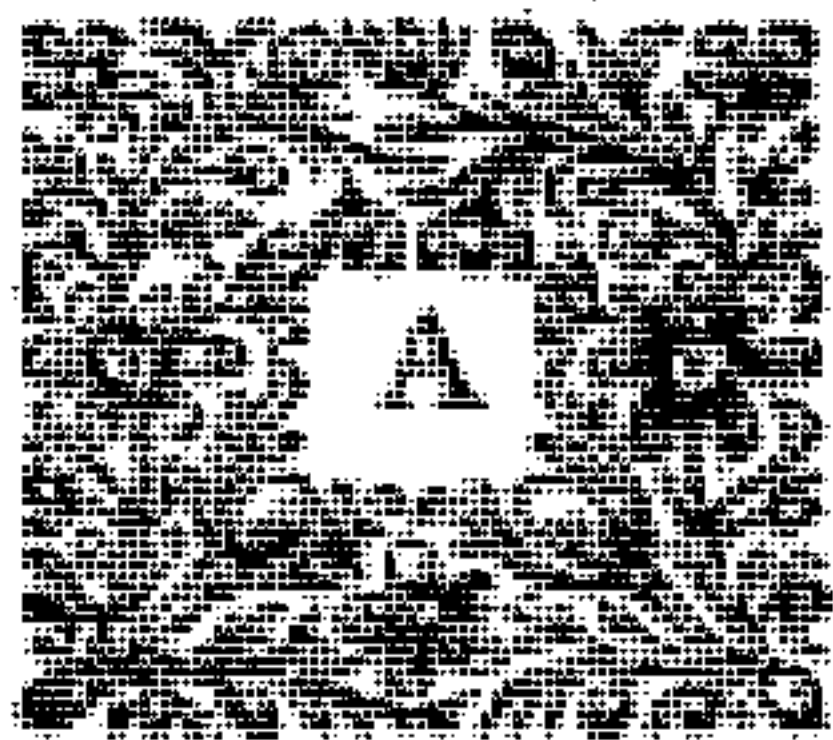
of the Province, he should not be subject to greater Expences than the Matter would bear. And as each of these Reasons do favour and respect the Plaintiff, he may surely renounce this Favour, if he pleases; and convene the Defendant into any other competent Jurisdiction.

* X. 5. 1.

An Ecclesiastical Crime or Offence is brought into Judgment either by the Promotion of some Party; or else by the Inquisition or Enquiry of the Judge. The first is when any one does in a voluntary Manner impeach or accuse another of some Crime committed*: And the second is, when the Judge proceeds against and prosecutes Delinquents *ex mero Officio*. And this Enquiry is either Special or General. The first is, when the Judge does by Virtue of some probable and well-grounded Fame, or else on the Information of Credible Witnesses, enquire touching some certain Crime or other committed: And the second is, when the Churchwardens and Sidesmen of any Parish, which in our Books are called *Testes Synodales*, do upon Oath in a Visitation denounce all manner of Crimes committed within their District to the Judge, who imposes this Oath on them; for after they have taken this Oath the Judge demands their Presentments in Writing.



Of Ecclesiastical Elections, and of the Form and Confirmation thereof.



M O N G all the legal Methods, whereby Ecclesiastical Benefices were conferr'd on Clergymen, that of Election was anciently held the chiefest, and best adapted to the end of their Function, as long as Elections were made without Strife, and were pure and undefiled in the Church: For 'tis to be observed, That no one ought to take this

* X. 1. 6. 17.

† In Sum. x. 1. 6. Sect. 1. prin.

‡ Abb. in Rub. x. 1. 5. Gloss. in c. 1. vi. 1. 5.

Honour unto himself, unless he be called of God, or by God's Commission, as *Aaron* the High-Priest was*. Therefore an Ecclesiastical Election, according to *Goffredus*†, is nothing else but a Canonical Calling of some fit Person or other unto some Sacred Dignity or Preferment in the Church, or else into some Religious Fraternal Society therein‡. For Clergymen do by way of Election ascend unto several Degrees of Dignity in the Church, and being there placed, do not only exercise such Things as relate to Orders, but to Jurisdiction also, after they have received Confirmation and Consecration in their Office. And, in this Definition, I call it a *Canonical* Calling; because every such Election ought to be made according to the Form of the *Canon-Law*, that is to say, by such Persons as have the Right and Power of chusing according to the Form prescribed in the Canons of the Church. For a Canonical Election, in Respect of its Form, is not only taken in a *large* Sense, but also in a *strict* and *more confin'd* Acceptation. That I call a Canonical Election in a *large* Sense, which intervenes and is made according to the Law of right Reason, where there is no Form at all observ'd and practis'd; but only the Consent of the Persons electing and the Person elected is necessary*. And that I term a Canonical Election in a *strict* Sense, which is made by the Intervention of all Things, which do not

* X. 1. 6. 10.

not carry so much of a Solemnity along with them, as they do a Substance *. And, *lastly*, I stile that a Canonical Election in a *more confin'd* * X. 1. 6. 42. Acceptation, when all Things intervene, which not only carry Substantials, but even Matters of Solemnity too along with them †.

† 63 Dist. c. 1.

From what has been premis'd, it then appears, That an Ecclesiastical Election properly is when the Canons of any Church meet and chuse a Prelate or Head to preside over it, and it transfers or gives a kind of Right to the Person thus elected: And this Right is compleatly finish'd ‡ 50 Dist. 11. by Confirmation. But if an Election be not made within three Months by such Persons as have the Power of electing Bishops, the Right passes by Devolution to the next Superiour in Point of Order; and thus from Superiour to Superiour, till such Election is fully made; and if it be not made within six Months, the Electors shall be punish'd according to the Canon *; as from a Bishop to the Archbishop, and so onwards. In all * X. 1. 6. 42. Elections, as well as in other Respects Men ought to be honour'd, re- X. 3. 8. 6. garded and esteem'd according to their Merits and Virtues; and not according to their Age and Riches: And thus according to the *Canon-Law* an Abbot ought to be elected and ordain'd according to his Vertuous Merits; and not according to Order, or the Time that he has been in a Religious House. And this generally holds true in all Men: For a Doctor of lesser standing ought to be preferr'd and honour'd in his Election, if he be more learned and vertuous, and ought to have the Preference to one more ancient than himself, if such a Person be a vicious and illiterate Man: But if a good Man be elected to any Dignity, and a better than himself be found; yet such a Election shall not be vitiated from hence †. *Note*, The six Months just now mention'd re- † X. 1. 6. 32. spects inferiour Clerks, and not Bishops and upwards.

In the Business of an Election to an Ecclesiastical Benefice, 'tis not only necessary to cite all such Persons as have a Concern and Interest therein ‡; but the Business of an Election ought also to be discuss'd and examin'd in Point of its Merits, otherwise the Confirmation thereof shall not be valid. And hence it also appears, that in the Business of a Presentation to a Living, which is Equivalent to the Affair of an Election, it is not enough to cite the Parties; but the Matter itself ought to be discuss'd and examin'd. But tho' the Confirmation of an Election made without a Citation be null and void; yet the Election stands good in its full Strength and Vigour, in such a manner that no Enquiry can be made touching the Validity of the Election itself ‡, if it has ‡ VI. 1. 6. 39. been made according to the Substantial Form thereof; and the greater Part of the Chapter has consented thereunto. In an Election a Verbal Choice is requir'd as a substantial Form thereof. And hence it is, that a Fact which *tacitly* imports the Choice of the Persons electing, and is called a *simple* Fact, is not sufficient hereunto: But in an Election, wherein it is not necessary to observe a Form, Words are not requir'd; provided there be a *Constat* of the Elector's Consent by the Fact itself, as it happens in carnal Matrimony. Therefore, whenever the Form of an Election is not observ'd, the Act of Election is null and void *ipso Jure*.

A legal Election subsists under a Threefold Form; as it is or was made after one of these three ensuing Ways or Methods *, *viz.* *First*, * 42 Dist. c. 2. The more ancient Way or Form of Election was by the Inspiration of X. 1. 6. 42. the Holy Ghost, which was the Way and Method whereby *Christ's* Disciples and Apostles were chosen, as we may read in the Holy Scripture †, and which the eleven Apostles themselves made use of in chusing † Mat. cap. 10. *Matthias* the twelfth Apostle, in the room of *Judas Iscariot* ‡. And Luk. cap. 9. this Form of Election seems to be that, wherein all the Electors did ‡ Acts cap. 1.

with one Voice and common Consent pitch on some one in their Elections, which in the first Ages of Christianity were made without any Corruption or Disturbance whatever ; because their Elections were then govern'd and directed by the Holy Spirit indeed *. And in this same unanimous manner the first Christians chose the seven Deacons in the Time of the Apostles †: And they themselves chose *Paul* and *Bar-nabas*, *Silas* and *Judas* as Chiefs of the Church: But thro' the Broils and Contentions of the Clergy, whom the Holy Ghost had forsaken, this Form of Election lasted but very little longer Time than that of the Apostles. For soon after their Deaths Corruptions got into the Church ; and Elections were seldom made with any Unanimity, but with much Strife and Hatred ; which plainly shews, they were not govern'd by the Spirit of God. And, therefore, a second Form of Election was found out, and made use of in the Church, which was by way of Scrutiny ‡: Wherein 'tis usual for all the Electors assembled together to chuse three Persons of the Chapter or College to take the Poll or Scrutiny of such who have Votes in the Election, which ought to be given Separately and in a secret manner. And then either the *Scrutators* themselves or else some Notary in their Behalf ought to reduce the Electors Names into Writing, as they come to vote, together with the Names of the Persons they poll for : And when they have counted the Number of Votes given for each Person nam'd, and compar'd them well together, they ought to publish the Election by the Mouth of one of the *Scrutators*, whom the other *Scrutators* have pitch'd on for this Purpose * ; declaring the Number of Votes given in Favour of each of the Persons named at such Election, commonly called *Candidates* ; and then he shall pronounce for the Person, whom the majority of the Chapter or College has chosen. The third Form of an Election was that of a *Compromissum* †, viz. When some certain Clergymen qualified by Law had a Power granted to them of electing by a *Compromise* either *Determinately*, viz. on this Condition, That the *Compromissarii* should chuse according to the Votes of such, whose Votes they were oblig'd to *scrutinize*, or else *absolutely* by a *Compromise* made by them. And these Persons were likewise bound by the Mouth of one Person to declare the Election of him that has a majority of Votes ‡. But as the Method of Electing by Inspiration has been long since departed from the Church, tho' some Men vainly boast of it still ; so the Form now is only said to be Twofold, viz. by *Scrutiny* and *Compromise*.

The Election of a Bishop ought (if possible) to be made in the Cathedral Church, and if the same be made in any other Place (unless it be on a good and lawful Account) it is not valid *: But if Custom has order'd any other certain Place, we ought to abide by such a Custom : But tho' the Canonical Constitution does not strictly require it to be made in the Cathedral, yet it matters not where it be made either in the Choir or Chapter-House, or in any other the like Place fit for Clergymen to meet in ; provided it be made within the Verge of the Church. An Election made by the lesser Part of the Chapter does not hold good, nor can it be ratified and confirm'd by any subsequent Consent whatever †: Nor can it be said to be made by the Community, if all Persons belonging to the Chapter do separately and singly give their Consent without being assembled as a Chapter ‡: For their Consent ought to be given in Common as a Body Politick, and in a Collegiate manner,

It has been already said, that an Election ought to be solemnly publish'd, but the Lawyers are not well agreed among themselves in

in what manner this Publication ought to be made: For some will have it, that this Publication ought twice to be made, *viz.* once to the Chapter in the Presence of the Canons, and a second time to the Laity and Clergy being called together by the ringing of a Bell, if the Person elected be an Archbishop, Bishop, and the like.

But, I think, it matters not in what manner this Publication is made, since the Publication of an Election is not a Matter of Substance therein, and 'tis sufficient if it be not a clandestine Election: And, according to *Hostiensis*, such Publication is of so little Essence thereunto, that an Omission thereof shall not vitiate the Election, tho' such Omission be made on Purpose to prejudice the Person elected. After this they ought to sing the Hymn, *We praise thee, O God*: And after this Hymn sung, the Bishop, if he be there present, ought to be carried to the Cathedral Church, and there placed on his Throne, or in his Episcopal Chair, unless the Person thus elected refuses to consent to such Election*, which he seldom does; or after such Election waves and renounces his Right; for he may renounce his Election, before the Examination thereof is referr'd to his Superiour for the Confirmation of it. The Act of Election is one individual Act, tho' such Election has several Parts in it, *viz.* The Beginning in a *Scrutiny* or *Compromise*; the Middle Act consists in the casting up of the Poll; and the end in the Publication of the Election.

* X. I. 6. 23.

The Election of Canons may by Custom belong to the Chapter alone without the Bishop †, as the Case of the Chapter of *Volturmo* was, which refus'd to admit and receive certain Canons, which the Bishop of that Church had chosen and instituted therein; saying, That such Election was attempted in Prejudice of them and their Right. On which Account the Bishop sued out Apostolick Letters to the Bishop of *Florence* against these Canons, praying the said Bishop, that he would prohibit these Canons the doing him an Injury in his Election of them; and that for the future they would suffer him freely to exercise this Right of Choice. The Bishop of *Florence*, after Contestation of Suit, and Proofs receiv'd on the Articles exhibited, doubting which way to proceed, consulted the Pope by remitting the Process to him: Who gave for Answer, That he should absolve the Canons from the Bishop of *Volturmo's* Charge; because he seems to do no Injury, who makes use of his own Right; and this being the Right of the Canons from an Immemorial Enjoyment of it, they did the Bishop no Injury. And 'tis notorious, that in *Tuscany* it is a general Custom observ'd in all Cathedral Churches for the Canons to chuse their Canons without requesting the Bishop. By the *Canon-Law* an Ecclesiastical Election, wherein Laymen intervene with Clergymen, is entirely null and void, because the Form thereof is not observ'd: For in Hatred hereof the Law has formally introduc'd itself; saying, That Laymen shall not be present, and if they are, the Act shall be totally annull'd. But 'tis otherwise if no such Form be introduc'd; as in other Corporation-Acts, wherein the Act is not vitiated and made void, tho' unqualified Persons be admitted thereunto, if the Majority be qualified, and do elect as they ought to do.

† Abb. in c. 31. x. I. 6. n. 1 & 2.

Tho' a Canonical Election ought to be confirm'd by the Superiour ‡ (as aforesaid) yet such Superiour before such Confirmation ought to enquire touching the Life and Conversation of the Person elected, in the Place where he had his Residence and Abode, and if on such Election he shall be thought worthy in respect of Life and good Manners, his Election ought to be confirm'd without Delay*; for Confirmation

‡ X. I. 6. 31.

* Abb. in c. 31. x. I. 6. n. 1.

immedi-

* X. 1. 6. 3. immediately follows Election *, and gives Power of Administration to the
 † X. 1. 5. 16. Elected †. And here 'tis to be observ'd, that Confirmation is a Matter of
 Necessity, tho' the Election itself be a Matter of Will and Pleasure; for
 ‖ Abb. in c. 14. x. 1. 6. n. 3. the Canons of a Church are not bound to elect any one certain Person ‖;
 since that would be *Hopson's Choice* (as we say in *English*) but may
 chuse whom they please, provided he be a Person fitly qualify'd: And
 then the Superiour, to whom Confirmation belongs, ought *ex debito*
Justitie to confirm the Election, if nothing hinders the Person elected
 from being confirm'd. And hence it is, that the Power of confirming or
 instituting the Person elected or presented to a Living, which of *Common*
Right belongs to the Bishop, does on a Vacancy of the See pass to the
 Chapter ‡: But 'tis otherwise in the Business of a Collation, or an Elec-
 tion properly so called *. And the Reason of this Diversity is, because
 Institution and Confirmation is a necessary Act; and the Superiour is not
 at liberty herein, as exercising a necessary Point of Jurisdiction. And
 Secondly, from hence it appears, That Election does not give a Plenary
 of Right, before the Superiour has confirm'd the same: And, there-
 fore, the Election ought of Necessity to be confirm'd; and by Confir-
 mation the Person elected acquires the Exercise of the Right accruing to
 him in his Office of Prelacy, if such Election be not null and void;
 since before Confirmation he has only a Right in *Habitu* and not in
 † Gloss. in c. 10. Dist. 63. & inc. ‡ Gloss. ut
Actu †. And 'tis the same Thing in an Election made by a Secular
 College or Corporation: For the Election ought, according to Law, to
 be confirm'd by the Visitor or Superiour Power‡. Thus when a Rec-
 tor of an University of Scholars is chosen by the Corporation or Uni-
 versity, the Election ought to be confirm'd by the Superiour of such
 University: Yet according to *Baldus*, it may by Custom prevail, That
 such a Rector may have the Administration thereof without Confirma-
 tion; and thus we see it commonly practis'd in the Universities of *Italy*,
 and some other Countries. But, I think, in Respect of Ecclesiastical
 Corporations such a Custom is not valid. Confirmation gives the Power
 of Administration; and Acts done by a Person unduly elected are not
 binding and valid in Respect of his Publick Office*. Confirmation is
 always granted by a Superiour, as by Bishops and other Superiours *gra-*
datim †; and by a Chapter during the Vacancy of an Episcopal See:
 ‡ X. 1. 6. 9. Because Confirmation is an Act of Episcopal Jurisdiction, which the
 Chapter exercises during the Vacancy of the See ‡, as being in the Bi-
 shop's Stead. Yea, tho' the Election of any Dignity belongs to the
 Chapter, and the Confirmation belongs to the Bishop; yet the Chapter
 shall both elect and confirm during the Vacancy of the See*: For in
 * Gloss. & Dd. in C. 3. VI. 8. 1. such a Case the Chapter has a Twofold Right. But here 'tis to be
 observ'd, that tho' a Chapter (*sede Vacante*) may confirm the Elections
 of Persons in inferiour Churches, as that of Abbots, and the like; yet
 the Chapter cannot confirm the Election of a Bishop, that is not exempt;
 but the Archbishop ought to confirm it, tho' such Bishop has not yet
 † X. 1. 34. 14. been consecrated †: And according to the Papal-Law an Archbishop
 X. 1. 6. 32. elect is confirm'd by some Primate, Patriarch, and sometimes by the
 64 Dist. 8. Pope himself *: But in Places exempt, by the same Law the Pope ought
 * 100 Dist. 1. X. 1. 6. 9 & 15. always to be apply'd to for Confirmation, or else his Legate in
 such Places where he resides, if the Persons thus exempt are immedi-
 † 63 Dist. 9. ately subject to the Pope †: But 'tis otherwise, if they are only me-
 X. 1. 7. 1. diately subject to him, as Provincials, and the like ‡; who tho' they
 ‡ VI. 1. 6. 36. are exempt, yet they have a general Superiour of their Order, by whom
 they ought to be confirm'd.

* VI. 1.6.47:

† Bald. in
Rub. x 1. 6.
Coll. fin.



Contracts.

* D. 23. 2. I.
Abb. & Fe-
lon, in x. 4. I.

700 S. I.
C. 1. 56
+ Constant.

Spencer 12
11.12.

|| Gen. c. 1. § 1.
v. 22 cap. 30.
v. 18.

* 1 King. cap.
18. v. 25.
† Cic. lib. 2.

Epist.
† *Liuzh. Abr.*
Lit. Eastward

Brook. Tit.
Eod.
* Rebuff is

1. 46. D. 50.
16. 1.
† Delin. t. 1.

† Dd. in L. 1.
D. 23. 1.
‡ Sackard. in
Book 6.

Rib. C. 5.1.
 n. 3.
 || D.23.2. 38.
 D.1.1.

* Richard. ut
sup. n. 10.

† Bart. in L.
4. D. 48. 9.
‡ X. 4. 1. per

tot.
|| X. 4. 31. 1.
* X. 4. 17. 12.

Felin. in
Rub. x. 4. i.
Gloss. in c. i.

*Abb.in Rub,
x. 4. i.

The *Latin Word Sponsalia* is deriv'd from the Verb *Spondeo*, which is to *promise* *: And hence it is, that the Persons betroth'd or affianc'd, and not yet marry'd, are in *Latin* called *Sponsus & Sponsa*, that is to say, the *promis'd Couple*. Therefore I shall here (according to the Lawyer *Modestinus*) define *Espousals* to be a mutual Promise of a future Marriage, righty and duly made between such Persons, as may lawfully make the same †. In which Definition I shall make some particular Remarks. *First*, That this Promise must be mutual. *Secondly*, That it must be made *rightly* and *duly*. And, *Thirdly*, It must be made by them, to whom it is lawful. And, *First*, As this Promise is describ'd to be mutual, 'tis not sufficient for either of the Parties to promise alone singly ‡: And, therefore, (for Example) if the Man says to the Woman, *I promise that I will marry thee*; and the Woman does not promise the like to the Man, this is a Contract that walks upon one Leg; and, consequently, not of any Force in Law ||. And so *vice versa*, if the Woman promises, and not the Man, it shall be deem'd a lame Contract. Nor is the silent Party in this Case presum'd to consent; unless such Consent appears either by Words, or (at least) by sufficient Conjectures *. As when the Father and Mother contracts *Espousals*, or promises Marriage for their Child, the Child's Silence in this Case (if present and hearing the same) shall be taken for a Consent and Approbation thereof †; tho' 'tis otherwise, if any other Person than the Parents takes on him to speak or answer for the Party, in which Case the Parties Silence does not prove any Consent at all, according to *Innocentius*, the Archdeacon, and others. For by the *Canon-Law* Parents may contract *Espousals* for their Children; and such a Contract shall be valid, if they are under Puberty ‡. And in former Ages such was the Authority of Parents, and Obedience of Children (as some will have it) that Parents made Promises of their Children's Marriage, and not the Children themselves ||, who neither would, nor could, without the Parents Consent presume to make any Promise concerning a future Marriage, much less proceed to the actual Celebration of Marriage without the Parents Approbation. But tho' *Espousals* contracted by Parents are now valid by the *Canon-Law*, yet they may not compel their Children on that Account, even by that Law, to contract Matrimony *, nor by the *Civil-Law* is a penal Stipulation forfeited on this Account, because such a Stipulation is conceiv'd and drawn contrary to good Manners: And this is not only true, when the Penalty is inflicted on the Children; but also if it be levy'd and estreated against the Parents: For there ought to be the greatest Liberty imaginable allow'd and given to Children in Respect of Matrimony †; because if such Liberty of contracting Marriage be taken away, 'tis easy to conclude, that nothing but Strife and Discord will ensue thereupon between Husband and Wife; and (perhaps) they will lay mutual Snares for each other's Life ‡; and, therefore, the Law has thought fit to obviate and provide against such dangerous Consequences ||.

Secondly, Whereas this Promise ought to be duly made, we ought to consider that this Word *duly*, in the strict Sense of it, relates only to the Formalities of the Act or Contract *; but, in a more ample Signification, it comprehends whatever is included within the Compass of the Word *rightly*, viz. Whatever respects the Justice and Equity of the Matter †. In this Definition it seems to include both the one and the other, and so this Promise of Marriage must not only be *formal*, but *just* and *right* also ‡. The old *Romans* were so precise in the Observation of this Form, that they did not for a long while admit any other

* D. 23. 2. 2.

† D. 23. 2. 1.

30. Q. 5. 3.

‡ X. 4. 1. 26

& 31. x. 1.

21. 5.

|| Dd. in c.

31. x. 4. 1.

* Abb. in c.

14. x. 4. 2.

† Abb. in c. 5.

x. 2. 23.

‡ X. 4. 16. 2.

x. 4. 1. 29.

|| Alciat. Par.

lib. 1. cap. 2.

* VI. 4. 2. 1.

† X. 4. 1. 14.

‡ X. 4. 1. 17.

|| X. 4. 1. 12.

* Bart. in L.

2. D. 5. 2. &

Reb. in L. 73

D. 50. 16.

† Luc. de

Pen. in L.

10. c. 10. 10.

‡ D. 23. 2. 42.

other way of contracting Espousals, but by *Stipulation* *, viz. By a certain Form of Words consisting of Question and Answer: For Example, the one Party asking, *Wilt thou marry me?* The other answering, *I will* †. But this prescrib'd Form of Words is now not without a just Cause abolish'd, and a Liberty granted to contract Espousals by any Form of Words whatever, or by any other Means; as *Writing, Signs, Tokens, &c.* whereby a mutual Consent may appear: And thus, at present, there is no one Form of betrothing more lawful than another; but 'tis enough, if the Consent of Parties appear by any Form ‡.

* D. 23. 1. 2.

† Richard: in Rub.

‡ D. 23. 1. 4.

Thirdly, By these Words of the Definition, viz. *Between such Persons as may lawfully make the same*, we may infer, That it is not lawful for every Person to contract Espousals, viz. Not for Infants under seven Years of Age *, nor for any Person forbidden to contract Matrimony †, as such are that are of Kin, within the *Levitical* Law Degrees ‡, and such as are already marry'd, with many others hereafter mention'd under the Title of Matrimony. For in contracting Espousals, as well as Matrimony, there is a certain and particular Age necessarily requir'd, which is capable of receiving and understanding Advice: And, therefore, tho' a Person under fourteen Years of Age in a Man, and twelve in a Woman, called the Age of Puberty, may contract Espousals *de futuro* *; yet he cannot contract Matrimony or Espousal *de presenti*. The *Civil-Law* approves the Opinion of those Men who think that Puberty ought to be taken and adjudg'd according to the Number of a Person's Years, and not according to the Strength of his Body: And, therefore, it deems a young Man fit for Marriage at fourteen, and a young Woman at twelve Years of Age compleat; for a Woman arrives at Puberty sooner than a Man by Reason of her natural Heat, and the nutritious Powers of her Body *. But by the *Canon-Law* Puberty is not adjudg'd according to the Number of the Persons Years, but from the Habitude of the Body, and the Faculty of Generation, whether the Term of Puberty decreed by the *Civil-Law* be past or not: For it sometimes happens, that a Person above fourteen Years of Age, has not the Power of getting Children, and sometimes that a Person under this Age has this Power. Hence it was anciently observ'd without any Inconvenience, that the Proof of Puberty was deriv'd and taken from an Inspection of the Body about the *Membra Pudica*: For when those Parts put forth a Down or *Lanugo*, and the Beard grew below, Persons were adjudg'd to arrive at Puberty.

* X. 4. 2. 4.

D. 23. 1. 14.

† D. 23. 1. 16.

‡ 32 H. 8. c.

38.

* C. 5. 5. 2.

* X. 4. 2. 3.

Espousals are divided into Espousals *de futuro*, of that which is to come; and into Espousals *de presenti*, of that which is present (as aforesaid). Espousals *de futuro* are a mutual Promise of Marriage to be had hereafter *: As when a Man says to a Woman, *I will take thee for my Wife*; and she then answers, *I will take thee to be my Husband* †. Espousals *de presenti* are a mutual Promise or Contract of present Marriage ‡: As when the Man says to the Woman, *I take thee to my Wife*; and she answers, *I take thee to my Husband* ||: But some think this Distinction fights with the foregoing Definition of Espousals; because if Espousals are only a Promise of future Marriage, they do not consist with a Contract of present Marriage: And, therefore, the Definition is either insufficient, comprehending only Espousals *de futuro*; or if it be perfect, it destroys this Member of Espousals *de presenti*. Hereunto I answer, 'Tis true that Espousals *de presenti* are improperly called *Espousals*, being in Nature and Substance rather Marriage than Espousals. But this Distinction was not known to the Makers of the *Civil-Law*, but

* Welsemb.in

Tit. 1. D. 23.

† X. 4. 1. 30.

31.

‡ Welsemb.ut

supra.

|| X. 4. 1. 31.

but was the Invention of the *Canonists* about a Thousand Years ago. And yet there is no such great Disagreement between that Definition and this Distinction; but that they may be reconcil'd by a good *Canonist*: For the Word *Marriage* is not always referr'd to the Substance and indissoluble Knot of Matrimony alone, but often signifies the Rites and Ceremonies observ'd at the Celebration of the Marriage *. And if this be true, then it follows, That since a Man may contract present Matrimony, and yet defer the Solemnization thereof till another time, in respect of this future Solemnization; the Contract *de presenti* may justly be defended and verify'd to be a Promise of future Marriage †.

* 30 Q. 5. 8.
Gen. cap. 24.
v. 66.

† Abb. & Dd
in C. 31. x.

4. I.
‡ X. 4. 5.
Hostien ibi.
|| Abb. in c.
5. x. 4. 5.

* X. 4. 5. 5.

† Abb. & Dd.
in C. 22. x. 4. 1.
* Frig. Traët.
de Spons.
† Frig. ut sup.

‡ Abb. & Dd.
in c. 3. x. 4. 3.

† Host. Sum.
x. 4. 5.

‡ Host. Sum.
x. 4. 1.

* X. 4. 3. 2.

† 30 Q. 5. 1.
Gloss. inc. 3.
x. 4. 3.

‡ X. 4. 1. 1.
15 & 31.

|| Masc. de
Prob. Vol. 3.

* C. 5. 1. 3.

Secondly, Some Espousals are *pure* and *simple*, and others are *conditional* ‡. *Pure* and *simple* are they, wherein no Condition is added: As *I will take thee to my Wife*, and *I will take thee to my Husband*, &c. *Conditional* Espousals are they, whereunto some such Quality is annex'd, as thereby the Validity of the Contract is suspended: As *I will marry thee, if my Father consents**, &c. To which Distinction it may be said, That some Espousals are referr'd to a Day: As *I will marry thee before the first Day of May* †. Again, some Espousals are *publick*, and others are *private*, or made in a *Clandestine* manner *. Those I call *publick* that are contracted before sufficient Witnesses †; and those are *Clandestine* and *private*, that are contracted betwixt the Parties without the *Presence of Witnesses* ‡. And, *lastly*, Espousals may be contracted either between them that are *present*, or betwixt *absent* Persons. By *present* I mean, when one of the Parties is personally subject to the others Sense: And by *absent*, when the one Party neither hears, nor sees, nor apprehends the other with any Sense; but are espous'd by the *Intercession* or *Mediation* of a third Person †.

I have said that *Clandestine* Espousals are such as are contracted without the Presence of Witnesses ‡, whereby they may be proved: But this I only understand of Espousals *de futuro*, for Espousals *de presenti* may be stiled *Clandestine* three several Ways. *First*, If they be not contracted in the Presence of Witnesses, but privily, and as it were by stealth *. *Secondly*, If the due and proper Solemnities requisite unto Marriage be not observ'd, but omitted; as heretofore a leading of the Woman into the Church, the Publication of Banns, and the like †. And, *Thirdly*, If they be made contrary to some Statute or Custom, or the Tenor thereof. Hence it is, that if there be a Canon or Statute in some certain Place, commanding, That no one should contract Marriage or Espousals without the Prince's Consent, they will be called *Clandestine* Espousals, if the Prince be not requested thereunto, or if the Persons have not the Prince's Consent.

It may be clearly and well enough inferr'd from the aforesaid Definition of Espousals, That a Contract of Espousals may be prov'd, if any simple Promise of future Marriage has interven'd between a Man and a Woman: As when they mutually say to each other, *I will take thee to be my Wife*, and *I will take thee to be my Husband* ‡: And this is good in Law, according to the Doctors, whether the Words are utter'd or conceiv'd in the present or future Tense ||. And the Testimony of the Man and Woman thus betrothed unto each other shall likewise be good Evidence of such a Contract, if they confess the same, since Espousals are contracted by Consent alone. But yet, for the greater Proof and Solemnity of the Contract, the Parties contracting were wont in the Days of the latter Emperors to give Earnest on both sides *; tho' this Earnest had nothing in common with the Dowry itself, or with the

the Donation *propter Nuptias*. And, according to *Bartolus*, such a Delivery of Earnest in Espousals may be prov'd by the Confession of the Parties, or the Person that receives the same, unless the contrary appears by strong Conjectures. But *Baldus* seems to be of another Opinion, saying, That it ought to be proved either by Witnesses, or else by some publick Instrument, wherein the Notary Publick attests the Payment of such Earnest in the Presence of the Party, or some Notary witnessing the same. And upon the Intervention of Earnest, if the Person that gave the same did dissolve or break off the Contract, he was to lose his Earnest, and if the Person that receiv'd the same did dissolve the Contract, he was not only to lose the Earnest that he had taken, but was likewise oblig'd to restore Twofold, if he was a Person of lawful Condition, but if he was a Minor, then he was bound only to pay back the Earnest given *. But now in this present Age a Ring is usually given by way of Earnest, tho' Espousals are not contracted by the giving of this Ring alone, unless the same be express'd in proper Terms, uttered by the Voice and Tongue of the Parties contracting, or else otherwise signify'd in Writing, that this Ring was given for this End and Purpose, and that the Woman receiv'd the same on the Account of Espousals.

* C. 5. 1. 7.

† Imol. in C. 10. ix. 2. 27. Aretin. Conf. 17.

The Effects of Espousals are various and several, the first and Principal whereof is this, *viz.* That the Parties, which have contracted Espousals, are bound by the *Laws Ecclesiastical* of this Realm to perform their Promise, and to celebrate Matrimony together in pursuance thereof *. But this Conclusion is both extended and restrain'd, as may appear from the following Ampliations and Limitations. The first Ampliation is, that not only they who contract Espousals *de presenti*, but even they who contract Espousals *de futuro*, are bound to the Performance of the same †: And to this the Parties betrothed are oblig'd, tho' the same was made without an Oath ‡. Secondly, Tho' one of the Parties affianced should afterwards contract Espousals with another Person, and confirm the same with an Oath; yet the first Contract shall be perform'd, tho' not sworn to ||. And, Thirdly, Not only they who have contracted Espousals are bound to perform the same, but even they who promise that they will contract Espousals *. Lastly, If the Parties have contracted *de presenti*, and one of the Parties should afterwards marry another Person in the Face of the Church, and consummate the same by carnal Copulation, and Procreation of Children; yet the first Contract is good, and shall prevail against the Marriage †. *Sed Quare.* The Limitations of the foregoing Conclusion are these, *viz.* First, Where the Parties espoused were not of ripe Age at the Time of the Contract made; for, afterwards coming to Years of Consent, they may dissent without Danger ‡. Secondly, When the Espousals are Conditional, and the Condition is not perform'd, the Parties are not bound to intermarry ||; unless the Condition be impossible, dishonest, &c. Thirdly, When either of the Parties thus affianc'd afterwards contracts Matrimony with another Person *; or else contracts Espousals *de futuro* with another, and then has Knowledge of the same Person †; for in both these Cases the former Espousals are dissolv'd by the latter. Finally, When the Espousals are unlawful either by Reason of some Impediment in the Person, as being of Kin within the Degrees prohibited; or thro' want of Consent occasion'd by Fear, Madness, Drunkenness, &c. I say in these and the like Cases Espousals have no Effect ‡.

* Lindw. lib. 3. Tit. 13. cap. 4. v. *Solutarum*.

† X. 4. 2. 7. Abb ibi. x. 4. 1. 7. Dd. ibi. ‡ X. 4. 2. 7.

|| Abb. in c. 22 X. 4. 1.

* D. 30. 1. 49. S.

† X. 4. 1. 31.

‡ X. 4. 2. 7.

|| X. 4. 5. 5.

* X. 4. 1. 22

&c. 31.

† Dd. inc. 50. X. 4. 1.

‡ D. 42. 1. 4 6.

The second Effect is, That Espousals *de futuro* do become Matrimony by carnal Knowledge between the Parties betrothed ||: But then

|| X. 4. 1. 30.

even this Conclusion admits of some Ampliations and Limitations. As, *First*, Tho' one of the Parties betrothed should afterwards marry another Person in the Face of the Church, and should even lye with the said new married Person; yet (notwithstanding this Marriage thus solemnized and consummated) the Party so marrying shall be compell'd to return to his or her aforesaid Spouse formerly known *. *Secondly*, Tho' the Parties betrothed should protest before the Act done, that they did not thereby intend, that the Espousals should become Matrimony; yet this Protestation is defeated by the ensuing Act: For by lying together they are presum'd to have swerved from their dishonest Protestation; and so the former Espousals are now presum'd to be honest Matrimony †. *Thirdly*, Tho' he or she, who contended for a Contract of Matrimony, should after the Deed done confess, That they did not thereby intend to make Matrimony; yet the Presumption of Law is so strong in Favour of Matrimony, that this Confession works nothing against it ‡. *Fourthly*, Tho' the Woman was betrothed against her Will; yet if she suffers herself to be known by him, to whom she was espous'd, she is presum'd to have consented as to her Husband, which makes the Espousals to be Matrimony ||. *Fifthly*, Tho' a Woman be uncertain, as where a Man swears to three Sisters, that he will marry one of them: For by lying with one of them, such Espousals do become Matrimony *. *Sixthly*, Espousals *de futuro* by carnal Copulation become Matrimony, tho' either Party had first contracted Espousals with some other Persons †. And, *lastly*, Tho' the Man does by Violence carry away the Woman, with whom he has contracted Espousals, and has carnal Knowledge of her; yet Espousals hereby become Matrimony, according to *Paul de Castro* ‡. The Limitations of the former Conclusion are, *First*, It appears that the Espousals were dissolv'd either by mutual Consent, or by some other lawful Means, before the Parties lay together: For dissolv'd Espousals never become Matrimony, tho' the Parties afterwards know each other. And 'tis the same Thing, if the Espousals were void from the Beginning by reason of some just Impediment; as Consanguinity or Affinity within the Degrees prohibited, and the like. *Secondly*, Espousals do not become Matrimony, when the Parties lay together before a Contract of Espousals, but not after. *Thirdly*, When the Parties themselves betrothed do not actually know each other, but only endeavour so to do, Espousals *de futuro* are not hereby resolv'd into Matrimony, unless they were Espousals by Interpretation of Law only: As when two Children are contracted by Words of the Present Tense; for these Espousals are transform'd into Matrimony by Endeavours only, after the Parties have attained to lawful Age ||.

By the Ecclesiastical Laws of this Realm, if any Persons having contracted Espousals, and being thereupon conven'd and adjudg'd to celebrate Matrimony in pursuance thereof, shall refuse to undergo the Execution of the Sentence pronounc'd by the Ordinary, he or she so refusing, after lawful Admonition in that Behalf, may for such Disobedience therein be excommunicated *: And if he shall persevere in his Excommunication for forty Days, the Ordinary shall by a *Significavit* under his Seal certify his Contempt into the Court of *Chancery*, and crave the Aid of the Secular Power, as is done in Matters of the like Kind for such Perseverance; for which see Title of *Excommunication* hereafter: Where 'tis said, that a Writ *de Excommunicato capiendo* shall be issued out and directed to the Sheriff for arresting his Body, and detaining the same in Prison without Bail or Mainprize, till he shall humble himself, and obey the Monition of the Ordinary, &c.

* X. 4. 1. 30.
x. 4. 1. 15.

† X. 4. 5. 6.
Abb. & Gloss.
ibi.

‡ Abb. & Dd.
in c. 30. x. 4. 1.

|| X. 1. 4. 7.

* Abb. in c.
10. x. 4. 1.

† Jo. And. in
c. 30. x. 4. 1.

‡ In L. 54.
C. 1. 3.

|| X. 4. 2. 10.

* Lindw. lib.
5. Tit. 17. c.
3. v. Regni
Consuetudini-
nem.



Of Exceptions, and of the Nature and Division of them.

AN *Exception*, in the strict Sense of the Word, is a Bar or Plea, which the Defendant often makes to the Plaintiffs Action, in order to exclude and destroy the Force thereof, by marring the Plaintiffs Intention, and preventing his own Condemnation *. For it sometimes happens, that tho' the Action itself be just and well founded on Law, as consider'd in its own Nature; yet it may be unjust in respect of him against whom it is commenc'd. And hence *Theophilus* defines an Exception to be a kind of Allegation accruing to the Defendant against the Plaintiffs Action; which tho' effectual enough in strictness of Law; yet in Point of Equity it carries much Iniquity with it: But an Exception taken in the general Sense of the Term is nothing else but a necessary Defence †; and he that makes the same does in some Measure sustain the Part of a Plaintiff ‡. And, tho' in Property of Speech, an Exception is only a Bar to the Plaintiffs Action (as aforesaid) yet under this Stile or Title of Exceptions we may also reckon *Replications* ||, which are Exceptions made on the Plaintiffs Part to the Defendants Plea, by Means of which the Plaintiff retorts and as it were casts back the Defendants Exceptions; and thereby maintains and defends his own Action. And thus in the like manner *Duplications* are those Exceptions, which the Defendant makes use of to repel the Plaintiffs *Replication*; and thereby the Defendant justifies his own Exceptions. There are also *Triplications*, which the Plaintiff objects to the Defendants *Duplication*; and *Quadruplications*, which the Defendant propounds to the Plaintiffs *Triplication*. These three last our Common Lawyers call *Rejoinders*, *Sur-Rejoinders*, and *Rebutters*. But good Practice in the *Civil-Law* does not permit us to go beyond a *Replication*.

* D. 44. 1. 2.

† D. 44. 1. 9. & 11.

‡ D. 44. 1. 1.

|| X. 2. 25. 2.

Every Exception is either an Exception of *Fact*, otherwise called an Exception to the Plaintiffs Intention; or an Exception of *Law*. Now the first is that which bars and excludes the Plaintiffs Intention (as we say) *nullo Jure Actoris*, or in *English*, from the Plaintiffs having no Right to the *Action* commenc'd: As when he brings an *Action* for Money, which was never lent or credited, or if lent it has been already paid and satisfied: And an Exception of *Law* is a Bar to the Plaintiffs Right, *viz.* it excludes the *Action* itself: As when the Plaintiff brings his *Action* thro' an Impulse of Fear, or thro' the Subtlety of Fraud and Deceit, in order to obtain the Things promis'd him; for an Exception of *Law* bars such *Action* accruing to him.

Exceptions of *Law* are either *Dilatory* and *Temporal*, or else *Peremptory* and *Perpetual* *: And these last are so called, because they do entirely perempt and destroy the Plaintiffs Suit or *Action*; whereas the former do only for a Time stop the principal Matter in Suit, and the Cognizance thereof: For sometimes the Cognizance of a Cause is delay'd,

* D. 44. 1. 3.

delay'd, because some Objection is made against the Judge or his Jurisdiction * : And such an Exception ought to be propounded in the Beginning and before Contestation of Suit, lest the Defendant by Pleading in Judgment should seemingly consent to the Judge and his Jurisdiction. *Secondly*, The Cognizance of a Cause may be deferred, because some Exceptions may be made to the Persons of the Litigants, or to such as intervene in their Behalf : As that they are not fit and proper Persons to appear and practice in a Court of Law. Or else, *Thirdly*, Because some Objection may be made to the Propriety or the Form of the *Action*, viz. That such a particular *Action* ought to be commenc'd and enter'd ; or that some previous *Action* ought to be enter'd, lest a greater Cause should be injur'd and prejudg'd thereby. And this is the Nature of *Dilatory* Exceptions, viz. That they ought to be propounded before Contestation of Suit, as aforesaid ; since they touch not the Merits of the Cause, but only such Things as are the chief Constituents of Judicature, or a *Judicial* Process : As Persons, Time, Place, and the like. For it would be very Preposterous to propound them after Suit contested ; since a Person, by his Silence herein till then, seems to have renounc'd the Benefit of all these Exceptions. Wherefore, if he will afterwards make use of a *dilatory* Exception, which he has passed by, he must make Oath that such Exception did not come to his Knowledge before, or else he shall not only lose the Benefit and Effect thereof, but his Advocate shall likewise be fin'd and condemn'd in a certain Penalty, if he might have inform'd him better. Therefore, lest *Judicial* Proceedings should be delay'd too long, the stated Time for making these Exceptions ought to be observ'd ; unless (perhaps) some new Matter or Cause should emerge and start up afterwards as a Foundation for such an Exception, and the Defendant then must make Oath *, as aforesaid ; or else prove that he had, before Suit contested, enter'd his Protestation touching the same † : And all this must be done, unless the Proceedings previous or subsequent to Contestation of Suit are null and void. An Exception of the *greater* Excommunication is a *dilatory* Exception, and may be made both before and after Contestation of Suit ‡ ; provided it be not made *Animo Calumniandi* : Wherefore, the *Species* of Excommunication, and the Persons pronouncing it, ought to be set forth in the Pleading by the Party *Excipient* within eight Days ; and the Truth thereof ought to be prov'd. This Exception was introduc'd by the *Canon-Law*, in Hatred and Detestation of an excommunicated Person, in order to repress his Contumacy, and cover him over with Shame, that he might be the more easily induc'd *ad Humanitatis Gratiam*, and be reconcil'd thereunto ; as I shall shew hereafter. But an Exception of Excommunication may be eluded by a Reply after this manner, viz. *Titius* accuses *Martin*. *Martin* excepts against *Titius*, saying, That *Titius* is Excommunicated with the *greater Excommunication*. *Titius* replies against *Martin*, saying, *Thou can'st not except against me, because thou hast participated with me both in Prayer and Conversation*.

Peremptory Exceptions may be propounded at any Time before a definitive Sentence, because they do not concern the constituent Parts of Judicature, but relate only to the Determination of a *Judicial* Process already settled, by putting an end to the Cause itself : But after Sentence *Peremptory* Exceptions cannot be objected without an Appeal from thence. Yet there are some *Peremptory* Exceptions, which being propounded in the Beginning of the Suit, do prevent and hinder an Entrance thereon : And these are term'd Exceptions *Litis finitæ* ;

* Cle. 2. 2.

† Dd. in l. 19. C. 2. 13.

* X. 2. 25. 4.

† X. 2. 25. 4.

‡ X. 2. 25. 12.

finite; of which Kind we reckon an Exception *Rei Judicatae, Jurisjurandi, &c.* for that, besides the principal Matter, they respect the *Instance* also. And the same Thing is allow'd in all such *Peremptory* Exceptions, whereby the Defendant avers the Plaintiff to have no Right of Action accruing to him; as in an Exception of *Payment*, and of *Acceptilation* too*. And this Restriction according to *Bartolus*, is so true, that if these Exceptions are propounded and prov'd *incontinently* after the manner of *dilatory* Exceptions, they rather hinder any further Proceedings in the Cause than refute the Merits thereof. *Peremptory* Exceptions may not only be propounded before Contestation of Suit, if there be a Publick *Constat* of the Truth of them, and the Plaintiffs Calumny does not evidently appear thereby, and by this Means hinder a Contestation of Suit to the great Ease of the Defendant in Court; but the Defendant may also make them after the Plaintiff has founded his Intention, and Witnesses have been produc'd; and such an Exception destroys the Plaintiffs Intention. Every *Peremptory* is stiled an *Incident* Exception, *quasi incidens seu perimens ipsum negotium principale*. But if the Defendant propounds such an Exception after the Plaintiffs Intention founded; and does not on the Assignment of a Term-Probatory *incontinently* prove the same, he shall be condemn'd in Expences, because he is herein presum'd to be guilty of Fraud, Malice and Deceit: And, therefore, shall be compelled to pay the same without expecting a Definitive Sentence. And if he cannot pay these Expences, he shall be *corporally* punished according to the Judge's Discretion; and the like holds true in *dilatory* Exceptions. When a *peremptory* Exception is made before Contestation of Suit, it bars the Plaintiffs Intention only; but when 'tis made afterwards, it bars the *Action* itself: For such an Exception is admitted in a notorious Case, even before Contestation of Suit (as already observ'd) and it has the Effect and Operation then of a *dilatory* Exception†. But *peremptory* Exceptions regularly ought not to be made after Sentence; because then no one can be repelled: Yet some *peremptory* Exceptions may be propounded even after Sentence, tho' pass'd in *Rem Judicatam*; and being thus made and prov'd, do impeach the Execution thereof. As an Exception *Senatus Consulti Macedoniani*, which accrued to Children in the Father's Power, if they borrow'd Money‡: It being introduc'd in favour of them, in Detestation of Usurers. And by a Special Privilege granted to Soldiers, they might propound such an Exception after Sentence||, if thro' Ignorance of Law they had not made it before Sentence. And this Benefit also accrues to Minors under Twenty five Years old, by reason of their tender Age; and likewise to some other Persons.

Dilatory Exception ought to be prov'd before Contestation of Suit*, lest the Defendant by contesting Suit should seem to consent to the Judge, and to approve the Persons that implead him, tho' the *Code* seems to thwart this Opinion, saying, that the Defendant ought to alledge and prove a *dilatory* and *peremptory* Exception at one and the same time Time; and 'tis enough for the Defendant to prove a *dilatory* Exception after the Plaintiff has set forth his Intention; for if he cannot make good his *peremptory*, he may prove his *dilatory* Exception: But *Donellus* thinks this an Error in the Text, and instead of the Word *Dilatoriam* read *Peremptoriam*. But, according to the usual Reading of all our Books, the Law (I think) speaks of such a *dilatory* Exception as rather concerns the Cause itself than the *constituent* Parts of Judicature: For such an Exception may be proved after Contestation of Suit, as the Defendant does not thereby seem to prejudice himself;

self. *Ex. gr.* Suppose a Man sues for a Loan of Ten Pounds, and the Defendant denies to have borrowed any Money of him; adding, by way of *Disjunctive*, *viz.* That if he lent him the Money, he covenanted with him not to sue for the same within five Years. And as this Exception *ex Pacto* concerns the principal Cause, and is of a mix'd Nature; so 'tis enough for the Defendant to prove the same, after the Plaintiff has prov'd his Intention or Asseveration touching the Money lent.

* D. 17. 1. A *Procuratorial* Exception is Twofold, *viz.* *First*, That A. is not a lawful Proctor*: And, *Secondly*, That he cannot be a Proctor†. And if any one has omitted this Exception, he cannot afterwards on better Thoughts resume the same, unless such Exception be of the first Kind of these *Procuratorial* Exceptions, *viz.* *That he is not a lawful Proctor*: And 'tis a known Rule in Law, that all *Procuratorial* Exceptions ought to be made before Contestation of Suit, and not afterwards, as being *dilatory* Exceptions, if a Proctor was then made and constituted. He that objects it as a *Procuratorial* Exception, that 'tis not lawful for the adverse Party to appoint a Proctor, as in *Popular* Actions, and all Criminal Causes; or that such a Person cannot be a Proctor, because he is a Soldier, and the like, ought to prove these his Exceptions, the Proof of some of them consists in Law. See hereafter the Title of *Proctors*.

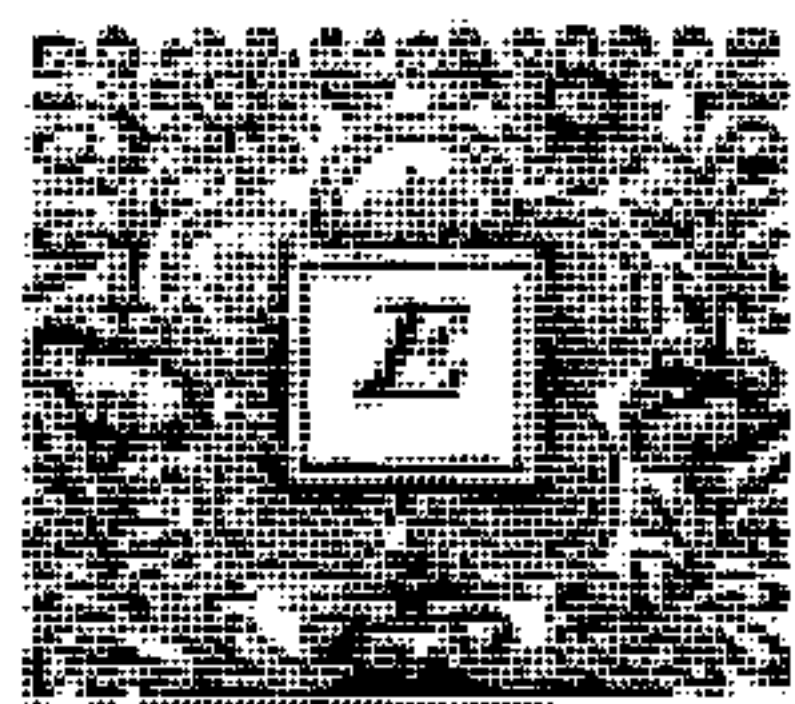
An Exception is also a Defence made against improper Witnesses, by whom the Defendant may be aggriev'd: And such an Exception may be alledg'd on a Threefold Account. *First*, It respects the Witnesses themselves, *viz.* because they are such as ought not to be examin'd in a Criminal Cause; as they are Persons infamous, guilty of Perjury, and the like. We ought, therefore, to know, That when any Exception is insufficient, *viz.* *That they are Persons infamous, guilty of Perjury, &c.* but the Place where, and the Time when such Crime was committed, ought to be specified, and other Circumstances thereof. Some will have it that the Party *Excipient* ought also to prove, that the Witnesses alledg'd to be infamous are held and reputed as such in the common Opinion of all Men. But the more common Opinion in this Case is to the contrary, *viz.* 'Tis enough to prove a Witness infamous on such and such a particular Account, thro' some Crime committed, without saying, *He was and is reputed*, as aforesaid. Yet let Men be careful how they make such Exceptions without Witnesses ready at Hand to prove the same; because by the *Civil-Law*, if they do not prove the Crimes objected, they are liable to an Action of Injury. But a Person *judicially* objecting any Crime against Witnesses, in how general Terms soever it be, is not liable, if he proves the same, whether it be by Action or Exception. But if he does not prove it, he is obnoxious, tho' done by way of Exception, according to the common Sense of the Doctors. Yet by the general Custom of *France*, the Person objecting any Crime by way of *Judicial* Exception against Witnesses is not liable to an Action of Injury, tho' he does not prove the same: But Advocates always protest in their Exceptions against Witnesses, *viz.* They do not make the same *Animo Calumniandi, &c.* The second Head regards the Process of Depositions, *viz.* because the Witnesses themselves are not admitted according to Law: As when they depose without an Oath administered to them; or are examin'd according to Law; or (perhaps) are admitted on a general Inquiry: In which Cases their Depositions gain no Credit, tho' they be repeated. The third Head respects the very Depositions of Witnesses themselves; as being false, various, contrariant,

trariant, single, inconcludent, &c. But more of this under the Title of *Witnesses*.

Every Exception has the Nature and Property of a Defence, as already hinted; and a Defence accrues from the Law of Nature, so it ought not to be deny'd to any one: And, therefore, every Exception, that may be made after Contestation of Suit, may be objected in an Appeal: But a *dilatory* Exception cannot be objected in a Cause of Appeal, because regularly it ought to be propounded before Contestation of Suit, unless it be omitted thro' Ignorance, as before observ'd. Nay, sometimes an Exception has a greater Operation in Law than an Action itself; since we obtain many Things by an Exception which we could not do by commencing an Action as Plaintiff in a Cause. A Judge in not admitting a lawful Exception, seems to aggrieve the Party *Excipient*, tho' he not expressly pronounces thereon; and, therefore, an Appeal lies from hence *: But two contrary Exceptions cannot be al-
 ledg'd; because as one Exception is contrary to the other, the first destroys the last. An Exception may be propounded in such doubtful Terms as do not positively determine any Thing; as by the Word *Credo*, and the like ‡ For Example, *I believe my self not to be oblig'd*.
 A *legal* Exception is said to be such as cannot be eluded by the Help † D. 5. 3. 42.
 and Means of any Replication whatever: And such an Exception D. 16. 3. 13.
 breaks the Force of an Action, if it cannot be repelled by a *legal* Re-
 plication †. But Exceptions which do require a deeper Search and In-
 quiry, are not admitted in summary Causes, tho' they are reserv'd in † Abb.in c. 5.
 principal Causes ||: And an Exception is said to require such Search and X. 1. 9. n. 13.
 Inquiry, when it is involv'd with some Subtlety of Law. An Excep- || D. 10. 4. 3.
 tion is more easily prepar'd and given to any one than an Action; but 13.
 then the Defendant, who in respect of his *exceptive* Matter becomes a
 Plaintiff, must prove the Intention of his Plea; since all Exceptions are
 properly said to consist in Fact, as they all arise from something or other
 done or not done.



Of Excommunication, and of the Division and Effects of it.



EXCOMMUNICATION being an ancient Censure or Punishment made use of in the Church to establish the Discipline thereof; I shall, in order to explain the Force and Authority of it, here consider, *First*, What it is: And, *Secondly*, How it is divided. The Word itself is a generical Term, which signifies an expelling or casting of Persons out of the Communion and Society among Men: And, therefore, there may be as many *Species* of it as there are Kinds of Communion or Society among Men, from whence they are cast out. And as there is one *Species* of Communion with God (as the Church phrases it) and another with Men; so there is one *Species* of Excommunication, which is stiled a *Divine*, and another which is stiled a *Human* Punishment: Again, there is another *Species* of Communion, which

which is entirely among Men ; and this is either *Civil* or *Ecclesiastical*. So that by the *Canon-Law* there is one Kind of Excommunication, which separates us from the Grace and Favour of God ; and another, which separates us from Civil Society ; and a third, which (according to the *Canon-Law*) separates us from God and the Civil Society of Christians. Touching the first, 'tis certain, according to the fifth Synod or general Council in the Church, that every impious and wicked Man is entirely separated from God, till God is pleased to be reconciled to him again by a Pardon of his Sins *. And herein St. *Jerome* in his Book *de Jud.* perfectly agrees ; where, speaking of a wicked Man, he says, *That God has departed from him, in that he has committed Sin.* But a Civil Excommunication is made by Human Authority : And as the former is a Sentence pronounced by God alone ; so this latter is a Sentence pronounc'd by Man, and is either *Civil* or *Ecclesiastical*, properly so called. I shall in this Title treat of that which we stile *Ecclesiastical*.

* 24 Q. 3. 9.

Now such an Excommunication is an Ecclesiastical Censure, whereby a Person baptiz'd is depriv'd of some good Things, which are common to all Christians, *viz.* The Fellowship of the Faithful, the Participation of the Sacraments, and the common Suffrages of the Church. It is called a *Censure* by way of *Genus* ; because every Excommunication is a Censure : And 'tis said, *Whereby a Person baptiz'd is depriv'd of some good Things, which are common to all Christians,* in order to distinguish Excommunication from other Censures. And by the Words *a Person baptiz'd* we likewise point out the Subject thereof ; since a Person not yet baptiz'd is not the Subject of Excommunication, as being no Member of the Church†. And thus Excommunication in the Import of the Word is the same with *Extra-communication*‡ ; because a Man is thereby separated from the Communion of the Faithful, and the Participation of the Sacraments, especially of the *Eucharist*, by an *Antonomasia* called the Communion. Excommunication is also by another Name called an *Anathema*, which properly differs from an Excommunication only in respect of a greater Kind of Solemnity, with which the Bishop usually pronounc'd it, having twelve Priests standing round about with Candles, which they threw on the Ground at the end of the Solemnity and trampled on. The Word *Anathema* is deriv'd from ἀνά and τίθεμι to place ; taking its Similitude from the Ancients, who placed those Things in a manner distinct and separate from others, that were taken from the Enemy in War. Excommunication is likewise stiled *Anathema Maranatha*, importing the greater Excommunication pronounced by a Sentence ; for the Word *Maranatha* signifies *till Christ's coming*. Wherefore, when this *Anathema* is pronounc'd, 'tis the same Thing as to say, *Let him stand excommunicated till our Lord's coming*, or in other Terms, till by Repentance he be converted. Excommunication in *Latin* has several Names : For 'tis stiled *Mors*, sometimes *Medicina*, sometimes *Mucro Episcopalis* ||, *Virga ferrea*, and *Nervus Ecclesiasticæ Disciplinæ*. In the foregoing Definition it is said, *from the Fellowship of the Faithful, &c.* chiefly to denote the Effect of the greater Excommunication, which consists in depriving a Person of such good Things as are common to all Christians, *viz.* The Fellowship of the Faithful, the Participation of the Sacrament, and the Prayers of the Church *. And hence appears the Difference between the greater and lesser Excommunication : For Excommunication is Twofold according to this Distinction.

† 24 Q. 1. 4.

‡ 11 Q. 3. 33.

|| 16 Q. 2. 1.

* 11 Q. 3. 24. Sect. evidenter.

The

The *greater* is that which is called an *Anathema* (as aforesaid) excluding a Man *ab ingressu Ecclesie*, from the Communion of the Faithful, and from the Sacrament of the *Eucharist*; or (as the *Papists* say) from the Sacraments of the Church; because they maintain seven Sacraments. But the *lesser* Excommunication is that which excludes a Man from one of these Things only; and does not bar him the Participation of the Sacraments, nor repel him a *limine Judiciali*, from commencing a Suit; much less from propounding a lawful Exception; nor does it hinder a Man from the Execution of an Office*. For an excommunicated Person can neither be Plaintiff in a Civil, nor an Accuser in a Criminal Cause, tho' he may do all Things that are Matters *Meri facti*, viz. He may buy and sell, hire or let to Hire, and make all other Contracts in his own Name, and even constitute a Proctor *ad Negotia*: But he cannot come into Judgment, unless he be a Defendant; and then he may (notwithstanding his Excommunication) use his lawful Exceptions against the Plaintiff, because a Person has every legal Defence reserv'd to him, tho' he be excommunicated. But if the Defendant shall industriously omit his Exception of Excommunication, which is a *dilatory* Exception, with a Design of wearying out the Plaintiff with Vexation and Expences of Suit, he shall be condemn'd to pay the Plaintiff all his lawful Charges†, though he may object the same in any Part of the Suit: Which is particular in this Exception, since all *dilatory* Exceptions ought regularly to be propounded before Contestation of Suit, as already remembred in the foregoing Title. But if a Man communicates with an excommunicated Person, he cannot object Excommunication to him in Judgment, as likewise there observ'd; because he cannot reprobate and disallow of that which he daily approves of by his Conversation‡. For a Conversation with excommunicated Persons ought to be avoided, if they are excommunicated with the *greater* Excommunication: But 'tis otherwise, if this be with the *lesser* Excommunication; since such Person is not separated from the Communion of Men, but only from the Participation of the Sacraments||. But when a Man is excommunicated even with the *greater* Excommunication, and a Person only knows this *in Foro Conscientie*, as God knows it, then he ought not to avoid him in Publick or Private, since he ought not to betray his Neighbour either by Word or Sign*: For a Man is not properly said to know a Thing, who knows it as God does, according to *Hostiensis*†: But if he knows as a Man, *extra Signum Confessionis*, according to the *Papists*, then in such Cases as the Law allows, he is not forbidden to communicate with such a Person.

* X. 5. 27. 10.

† X. 2. 25. 12.

‡ X. 5. 39. 46.

|| X. 2. 25. 2.

X. 5. 27. 10.

* X. 1. 31. 13.

X. 5. 38. 12.

Señ. fin.

† Inc. 14. x.

5. 39. x. 5.

39. 7.

But tho' an excommunicated Person cannot bring his Action at Law; yet he may appeal from every Grievance inflicted on him before a Sentence; and, consequently, may *a fortiori* appeal from a definitive Sentence‡, if he has any Complaint against the Iniquity of the Judge's Sentence: And he may in Defence of himself *Personally* appear in Judgment; and is not bound to constitute and appoint a Proctor to this end||. But an excommunicated Person shall not be admitted to prosecute his Appeal, unless he does in the first Place pray Absolution from such Excommunication*; yet 'tis otherwise, when a Person appeals from a Sentence of Excommunication, which he alledges to be an unjust Sentence. But when he confesses himself to be bound by such Sentence, he ought not to be admitted to litigate about the Injustice of such Sentence, till he first prays Absolution. An Excommunication pronounc'd after a *Judicial* or *Extra-Judicial* Appeal is null an void *ipso Jure*; and so is every Act done by a Judge after an *Extra-Judicial* Appeal, as already

‡ X. 2. 25. 11.

|| X. 2. 1. 7.

* X. 5. 39. 40.

ready hinted under the Title of *Appeals*. As a Sentence of Interdict is not suspended by an Appeal, after it has been once pronounced in Things Spiritual; so neither is a Sentence of Excommunication suspended by any subsequent Appeal. I call it here a Sentence of Excommunication, because it favours of the Nature of an Interlocutory Sentence or Decree; for an Excommunication properly speaking is no Sentence, because it does not put an end to the Suit.

Tho' an excommunicated Person may be conven'd into a Court of Judicature, and defend himself by Pleading, yet he ought to give in his *Personal Answer* by some other Person, lest he should seem to reap an
 * X. 2. 1. 7. Advantage from his own Malice and Iniquity *: And thus a Debt may
 † X. 5. 39. 31. lawfully be demanded and sued for from all excommunicated Persons †;
 ‡ X. 2. 1. 7. for they may be conven'd and impleaded in Judgment, tho' they ought
 not rightly to answer by themselves ‡. If a Defendant shall by way of
 Exception *Judicially* object Excommunication to the Plaintiff, which
 he does not prove within due Season, the Plaintiff shall be heard and
 admitted to plead his Cause; but if he proves it, the Judge shall ob-
 solve the Plaintiff, if he be excommunicated for a Cause committed to
 his Cognizance: But if it be for any other Cause, and it be not among
 the Cases reserv'd by the *Canon-Law*, he shall remit him to his Ex-
 communicator; and if he will not absolve him, in *Papish* Countries the
 Pope's Delegate may absolve him. And sometimes the Judge ought to
 remit the Excommunication and other Censures, by granting the Person
 excommunicated the Power of impleading his Adversary on the Parties
 giving of Caution, *viz.* When the Excommunication seems to require
 a deeper Examination, and a longer Cognizance than the Matter then
 admits of. An Excommunication may be proved by one Witness, to-
 gether with the Oath of the Party objecting the same ||; tho' *Specu-*
 lator, *Anton. de Butrio* in his Treatise of Witnesses, and *Romanus* in
 his *Singularia* are of a contrary Opinion: But I think *Imola's* to be
 the better Opinion, because the Doctors, that hold the contrary, do
 there speak of a Crime criminally impleaded. And according to *Felinus**,
 'tis the same Thing in proving an Absolution from Excommunication
 by one Witness.
 † 11 Q. 3. 32. The Church, according to the *Canon-Law* †, derives this Censure of
 Excommunication from St. *Paul* the Apostle in his first Epistle to the *Co-*
 rinthians, who deliver'd the incestuous *Corinthian* over to *Satan*: And,
 therefore, the *Canonists* say, that Excommunication is of Apostolical
 Authority; and is a Censure whereby the Souls of such as err in the
 Faith, and lead others into Error, are delivered over unto *Satan* ‡.
 For, according to them, those Persons are given over to *Satan*, who
 are not of the Faithful with the Church: As among the *Jews* such
 as had greatly sinned or offended were cast out of their Synagogues;
 as it is written in St. *John's* Gospel, That it was a Decree among the
Jews, if any one confessed our Lord *Jesus* to be the *Christ*, he should
 be cast out of the Synagogue, which the *Jews* dreaded very much.
 And surely a good Christian ought to stand in Fear of nothing more
 than the Danger of being sequestred from Christ's Body the Church:
 For if he be separated from the Church, he is no longer a Member
 of Christ's Body; and if he be not a Member, he is not refreshed
 and quickned by his Spirit: And the Apostle says ||, *That whosoever*
 ‡ 24 Q. 3. 13. *has not the Spirit of Christ, is none of his*. And hence it is, that we
 define Excommunication to be a separating and casting of any Person
 out of the Communion of the Church *: But then, I think, that Chri-
 stians ought not to be excommunicated for light and trifling Matters,
 but

|| Imol. in c.
38. x. 2. 20.

* Inc. ut sup.

† 11 Q. 3. 32.

‡ 24 Q. 3. 13.

|| Rom. cap.
8. v. 9.

* 11 Q. 3. 33.

but only for great and heinous Sins *. But every wicked and impious Man is separated from God, tho' (perhaps) he be not separated from the Communion of the Church: And in this Sense an *Anathema* has no other Import than that of a Separation from God; so that in the true Signification of the Word, he that is separated from God as an impious Person, is said to be *anathematiz'd* †. This Censure in the early Times of Christianity, when Men were more in Earnest with Religion than at present, was decreed by and with the Consent of the Church in general, upon a full Hearing of the Matter, and only pronounc'd by the Mouth of the Bishop or some one Person there assembled: And tho' according to the Discipline of the Church at the Time when the Council of *Nice* met, Excommunication was supposed to pass by the Bishop only; yet it was still under the Direction of a General or Provincial Synod, and not at the Pleasure of any one single Person. See the fifth Canon of the Council of *Nice*.

And tho' afterwards Bishops, by invading the Rights of the Church, got this Power solely into their own Hands; and exercis'd it on the slightest Acts of Disobedience and Contumacy; yet now by the *Canon-Law* even Abbots and Priors may excommunicate their Monks for Disobedience to their Commands; and if they become incorrigible thereby, they may be expell'd and turn'd out of the Society of the Fryarhood ‡. So that Excommunication is not now restrain'd to the Power of Bishops alone; which was a mighty Step gain'd by the Pope towards exalting his Spiritual Monarchy, if we consider the near Relation and Dependence that Abbots and Priors have on the Holy See: Of which hereafter under the Title of *Monasteries*.

But 'tis a Rule in Law, That before any Person can be involv'd in a Sentence of Excommunication, he ought to receive three Admonitions, as well by the Law of God *, as by the *Canon-Law* †; since 'tis the greatest Punishment that can happen in the Church of God ‡: But then by a Distinction the *Canonists* have evaded both these Laws, saying, That this Law only extends to Archdeacons and their Officials, and other Inferiour Ordinaries in the Church, who are forbidden to pronounce any Sentence of Excommunication, Suspension or interdict against any Person without a Canonical Monition previous thereunto, unless the Excess be manifest and notorious. And so says a Provincial Constitution in *Lindwood* ||. And a Prelate or Ordinary that excommunicates a Man without a competent Admonition, or a manifest and reasonable Cause, shall be suspended for one Month *ab ingressu Ecclesie*; and a Person who falsely complains of an unjust Excommunication, shall be punish'd after the same manner *. A Sentence of Excommunication ought also to be in Writing †; and he that does not cause it to be so made, shall be *ipso facto* suspended *ab ingressu Ecclesie* for a Month; and the Pronouncer thereof shall, moreover, be condemn'd in Expences, and have some other condign Punishment inflicted on him. But when the Judge pronounces a Sentence of Excommunication *in vim Statuti*, a verbal Monition is not necessary; because the Law or Statute is a Monition unto such a Person: Nor is a Sentence in Writing necessary hereunto; for that the Law itself is the Sentence.

There is one Kind of Excommunication, which is stiled an Excommunication of *Law*, and another which is called an Excommunication of *Man*, as I have already related under the Title of *Censures Ecclesiastical* ‡. The first is said to be that which is pronounc'd by the Legislator himself, with an Intent of making some general Law or Statute perpetual; and is *ipso Jure* inflicted on the Transgressors thereof

* 11 Q. 3. 41.

† 24 Q. 3. 9.

‡ X. 1. 33. 10.

* Mat. c. 18.

v. 17.

† X. 5. 39. 45.

& 48.

‡ 24 Q. 3. 17.

|| Lib. 5. Tit.

17. cap. 2.

* X. 5. 39. 48.

† 2 Q. 19. 4.

‡ Pag. 156.

of by way of Punishment without the Ministry or Declaration of Man. But an Excommunication of Man is that which is pronounc'd by some Judge or Superiour that has a Power of doing the same; and is justly, according to the *Canon-Law*, inflicted on contumacious and disobedient Offenders: And by that Law a Person excommunicated may be again

* X. 5. 6. 6. and again excommunicated, if there be an Occasion for so doing *; and the Sentence of Excommunication ought to be publick and manifest, since Persons conversing with a Criminal under such Sentence incur an Excommunication *ipso facto* †. If a Judge be excommunicated, his Deputy or Vicegerent is not hereby excommunicated, unless he participates with him in the same Crimes.

‡ Lib. 5. Tit. 17. Cap. 1.

By a Provincial Constitution in *Lindwood* ‡, all such Persons do incur the Sentence of Excommunication, who injuriously presume to disturb the Peace and Tranquility of our Sovereign Lord the King, and his Realm: The Clergy at the Time when this Constitution was made pretending, That the Cognizance of the King's Peace did belong to the Church, because Acts of Pacification among the King's contentious and disagreeing Subjects did then appertain to them as Pastors of *Christ's* Flock. And they founded their Pretensions on our Saviour's Institution at the Time of his Death, saying ||, *Behold! Peace I leave with you; or rather, I would have Peace preserv'd among you*: And from hence they would infer, That the Preservation of the Peace throughout the whole Kingdom both in Spirituals and Temporals did belong to them. I will make no Remark hereon, since the Reflection is obvious: And I only mention it in this Place by the by, to shew the Sophistry of Men, that were willing to be the Rulers of the People.

|| Job. c. 14. v. 27.

By the Custom of the Realm of *England* excommunicated Persons persevering under a Sentence of Excommunication for forty Days, shall at the Request of *their proper Bishops* be arrested and imprison'd till such Time as they shall humble themselves to God, and yield Obedience to the Church: For the King is not wont to send and issue out his Writ *de Excommunicato capiendo* for the arresting of excommunicated Persons at the Request of Inferiour Prelates, as Archdeacons, and the like. And 'tis said, that if any one be excommunicated by a Person below a Bishop, as by the Dean or Archdeacon, the Bishop ought to invoke the Secular Arm or King's Assistance for such Contempt of this Sentence; since Persons inferiour to Bishops cannot do the same without a Custom: Yet the Bishop ought to execute their Sentences *; and if he shall refuse to

* X. 1. 31. 3.

† X. 5. 38. 17.

do it, the Archbishop may compel him hereunto †. And the usual Writ *de Excommunicato capiendo* ought to be granted, whenever a Bishop, that has Power and Authority to ask the same, does by writing to the King certify such Contempt: For before such a Writ can be granted, the Contumacy and Contempt of the Party made to Holy Church must be signify'd into the Court of *Chancery*, by the Bishop's Letter under his Seal Episcopal. But this Certificate by Letters may be made into *Chancery* by a Bishop even before his Consecration: And the same may also be certified by Letters of the Chancellor or Vicar-General, when the Bishop is beyond the Seas, or out of his Diocefs *in remotis agend*, &c. And tho' the Bishop be in his Diocefs; yet the Certificate of the Vicar-General by his Letters into *Chancery*, reciting, that the Bishop is *in remotis agend*. is sufficient, and shall not be travers'd. And in the Time of the Vacancy of the Bishoprick, the Certificate ought to be made by the Guardian of the Spiritualties. And upon this Writ he shall have an *Alias* and a *Pluries*: And if they are not answer'd, an Attachment against the Sheriff, directed to the Coroner, and return.

returnable into the King's Bench. But if this Certificate be made under the Bishop's private and ordinary Seal, it is not good *. The Reason why an Archdeacon's Certificate is not good, tho' he is an immediate Ordinary (as has been said) is, because the King cannot have Benefit to seize his Temporalties for his Contempt upon a Writ *de Excommunicato deliberando*, since he has not Temporalties as a Bishop has. For if the Person excommunicated has made Satisfaction to the Church for his Contumacy and Contempt, &c. then the Bishop or his Vicar-General, or the Guardian of the Spiritualties (as aforesaid) ought to certify the King in his Court of *Chancery*, That the Party has satisfy'd the Church for the Contempt, &c. And thereupon he shall have granted him such a Writ to the Sheriff to cause the Person imprison'd to be set at Liberty. And if the Sheriff shall not execute this Writ, he shall have an *Alias* and a *Pluries*, and an Attachment against the Sheriff, directed to the Coroner, and returnable, as aforesaid.

But if the Party thus arrested and imprison'd shall offer sufficient Caution or Surety to abide by the Rules and Orders of the Church; and the Ordinary or Judges there do refuse to admit such Caution or Surety, then the Party may have another Writ to the Bishop to admit of his Caution †: Which Writ see in the Register. For where any Person is excommunicated, suspended or interdicted on the Score of any Contumacy committed by him, he ought by the *Canon-Law* before a Relaxation of such Sentence, to give Caution *de parendo Juri* ‡; and if he cannot give any other than *Juratory* Caution, he ought then to take an Oath, that he will obey and submit himself to the Commands of the Church ||. If the Bishop takes Caution of the Party to obey the Orders of the Church, then the Bishop may certify the same into *Chancery*; and thereupon the Party shall have a Writ to the Sheriff to deliver him. But if the Bishop will not send to the Sheriff to deliver him upon giving Caution, then the Person so excommunicated shall have such a Writ out of *Chancery* to deliver him, as we find in the *Natura Brevium* *. And upon this Writ he shall have an *Alias* and a *Pluries* to the Sheriff; and if he does not serve the Writs, he shall have an Attachment against the Sheriff; but he shall not have the same against the Bishop, &c. But if the Bishop certifies by his Letters into the *Chancery* that he has sent to his Official or Archdeacon to absolve the Party excommunicated, then the said Party shall have a Writ to the Sheriff rehearsing those Letters: And yet it seems that the Official or Archdeacon, to whom the Bishop has sent his Letter to absolve the Party, is not bound to certify the Sheriff that he has such Letters; but the Bishop ought to go or send to them to know the Truth thereof; and thereupon to deliver the Party: And the Bishop, or he who excommunicated him, and upon whose Certificate the Party was taken, may command the Sheriff to deliver him, as may be seen from the Writs in the *Register*. For if the Bishop thinks in his Conscience, or be in Doubt whether the Sheriff will deliver him by that Writ, the Bishop may purchase another Writ directed to the Sheriff, reciting the Case †. But if the Sheriff delivers such excommunicated Persons without Order of Law, then on the Bishop's Complaint into *Chancery*, he shall have a new Writ to the new Sheriff (upon a Rehearsal of the Matter) commanding him to arrest and detain such Person in Prison: And also in the same Writ he shall command the Sheriff to cause the old Sheriff to answer the King in his Bench for such Contempt: And if the Sheriff who sets the Party at large be yet Sheriff, then it seems the Writ shall be awarded to the Coroner

* 20 H. 6. 1.

† F. N. B. p.

141.

‡ X. 5 40.23.

|| X. 5.39.40.

* F. N. B.

141. D.

† F. N. B. 64.

to apprehend the Party excommunicated, and to cause the Sheriff to appear, as aforesaid.

* Lib. 5. Tit.
17. cap. 3.

By a Provincial Constitution in *Lindwood* * it is ordain'd, That all excommunicated Persons thus arrested and going out of Prison without the Bishop's Consent, and their making Satisfaction to the Church (as aforesaid) be publickly and solemnly excommunicated by Bell, Book and Candle in all Churches, Markets, Fairs, or other Publick Places, where a multitude of People assemble together, as a Terror to them; or else in such Places where their Ordinaries shall think fit to have it denounc'd. And such Sheriffs and Bailiffs as shall discharge them without making such Satisfaction and Amends to the Church, shall incur an Excommunication on a *Judicial* Process at Law, (for they ought to be cited to shew a reasonable Cause why they ought not to be excommunicated) and if they shall not within the Term prefix'd them appear and alledge the same, nor sufficiently excuse themselves from this Offence, they shall be excommunicated. But (I think) the Edge of this Constitution is blunted by subsequent Laws of the Realm, and (particularly) by the 25th of *H. 8.* For to so high a Pitch of Power were the Clergy advanc'd, when this Constitution was enacted, that they presum'd to admonish the King himself of his Duty herein, if he did not immediately grant or cause the said Writ *de Excommunicato capiendo* to be issued out upon their Certificates; tho' the same be only a Writ of *Grace*, and not of *Right*, according to the *Register*: And upon failure hereof, they instantly subjected all his Majesty's Cities, Castles, Manors, Towns, Boroughs, and Villages, which he had within the Diocess of such Prelate who wrote to the King hereon, to an Ecclesiastical Interdict, till such Writ was granted, and it had its lawful Execution. *Note*, A solemn Excommunication here mentioned, is that which is publickly pronounced by the Priest in his Sacerdotal Habit, viz. His Gown and Surplice (at least) and other Priests standing round him. See *Lindwood's* Gloss †.

† Lib. 5. Tit.
17. cap. 3. v.
Solemniter.

If a Man be sued in the Spiritual Court, or the Bishop cites him *ex Officio*, and excommunicates him, and certifies the same into the Court of *Chancery*; and upon the same a Writ is awarded to the Sheriff to apprehend him: And afterwards the Official by Letters certifies into the *Chancery*, that he has appealed from that Sentence of Excommunication to the Court of *Canterbury*, and the like; then upon such Certificate he shall have a Writ of *Supersedeas* directed to the Sheriff, reciting that he has appeal'd, and commanding the Sheriff not to arrest him, *pending the Business of such Appeal*; or thus, to surcease, *donec de consilio nostro aliud inde duxerimus ordinand'*, or *usq; talem diem*; or thus, if he has arrested him upon that Account, *tunc ipsum a prisona predicta qua, &c. deliberari facias, &c.* And if a Man be excommunicated by the Bishop, and afterwards the Vicar-General certifies the same into *Chancery* (the Bishop being *in remotis*) for which a *Significavit* is granted, and he is taken by it; and then the Person arrested does by his Friends shew in the Court of *Chancery*, that he has appealed to the Court of *Arches*, which he follows with effect: I say, upon this Surmise he shall have a Writ to the Sheriff who has the Party excommunicated in his Custody, commanding him to warn the Bishop or Vicar-General, and him who sued out the Process against the Person excommunicated, to appear at a certain Day in *Chancery*, to shew wherefore the Party should not (*pendente Appellatione*) be deliver'd; and also to cause the Excommunicated Person under safe Custody to come and do as the Court shall consider in in the said Cause ‡.

‡ F. N. B. P.
145.

A Sentence of Excommunication is condemn'd several ways, according to the *Canon-Law*. *First*, When the Person excommunicated adds one Fault to another *. *Secondly*, When he enters and comes into the Church, tho' it be not in the Time of Divine Service †, unless he does this on the Score of hearing a Sermon preach'd, and the like; which when he has done, he ought immediately to withdraw from thence ‡. *Thirdly*, If he stands Abroad at the Church-Doors at the Time of Divine Service for hearing the Celebration thereof, tho' he never enters the Church ||; and if any Clergyman, that celebrates the same within, does not on Knowledge hereof immediately desist from the Ministration hereof, he shall be punish'd *. *Fourthly*, When he thrusts and intrudes himself into the Company of other Men, when 'tis in his Power to avoid the same †. *Fifthly*, When he sleeps and sits secure under such a Sentence whereby 'tis presum'd that this wholesom Medicine has no Operation at all on him. And tho' regularly the Church ought to wait for the Submission of such a Person till the end of the Year ||, according to the *Canon-Law* before the Ordinary can proceed against him as a Person suspected of Heresy for his Continuance in his Obstinacy *: Yet by the Custom of this Realm, in respect of invoking the Secular Arm, a Lapse of forty Days is sufficient, as already observed: Which is a Liberty peculiar to the Church of *England* above all the Realms in *Christendom*.

In a Sentence of Excommunication, Suspension and Interdict, the same Rule is not always to be assign'd: For sometimes a Diversity happens in all these Censures. They are Equivalent in ten Respects, and different in nine. For, *First*, They are Equivalent in respect of the Form to be observ'd in each of them †. *Secondly*, A previous Appeal is a Defence and Protection to the Appellant in each of them, but not a subsequent Appeal ‡. *Thirdly*, Persons that incur either of these Sentences ought not to celebrate Divine Service ||. *Fourthly*, A Monition ought to precede each of them *. *Fifthly*, Persons under either of these Censures ought to take an Oath before they receive Absolution; and an Absolution *ad Cautelam* may be granted in each Case †. *Sixthly*, No Persons during either of these Sentences can be a Witness, an Elector, or Person elected ‡. *Seventhly*, Superiours ought to observe these Sentences ||. *Eighthly*, A Superior ought not to make any Order or Decree about them without first citing the Parties *. *Ninthly*, The Pope's Legatés, who are stiled the peculiar Sons of the *Romish* Church or the Apostolick See, are not bound by either of these Sentences †. And, *Lastly*, These Sentences are all compriz'd under the Appellation of an Ecclesiastical Censure ‡. And they differ in nine Respects. *First*, In Participation; because I may participate with a Person suspended or interdicted, unless Participation be specially forbidden ||; but not with an excommunicated Person *. *Secondly*, Because properly speaking a Man is excommunicated or suspended, but not interdicted. *Thirdly*, Because the Effect of an Excommunication pronounc'd cannot be suspended, but the Effect of the two other Censures may †. *Fourthly*, Because a Relaxation of a general Interdict against Cities, Towns and other Places cannot be made *ad Cautelam*, but an Absolution from an Excommunication or Suspension may ‡. *Fifthly*, Because a Sentence of Excommunication generally pronounc'd binds a Bishop, tho' there be no special mention made of him; but a Sentence of Suspension or Interdict does not ||. *Sixthly*, Because, tho' a Sentence of Excommunication cannot be pronounc'd against a Corporation or Body Politick; yet an Interdict may *. *Seventhly*, Because excommunicated Persons are not admit-

admitted to Penance, unless it be *in articulo mortis*; but 'tis otherwise of Persons suspended or interdicted*. *Eighthly*, On certain Festivals Persons interdicted are admitted into Churches; but Persons excommunicated are not †. And, *Lastly*, Because Excommunication is never pronounced *pro Culpâ alienâ*; tho' an Interdict and Suspension may ‡.

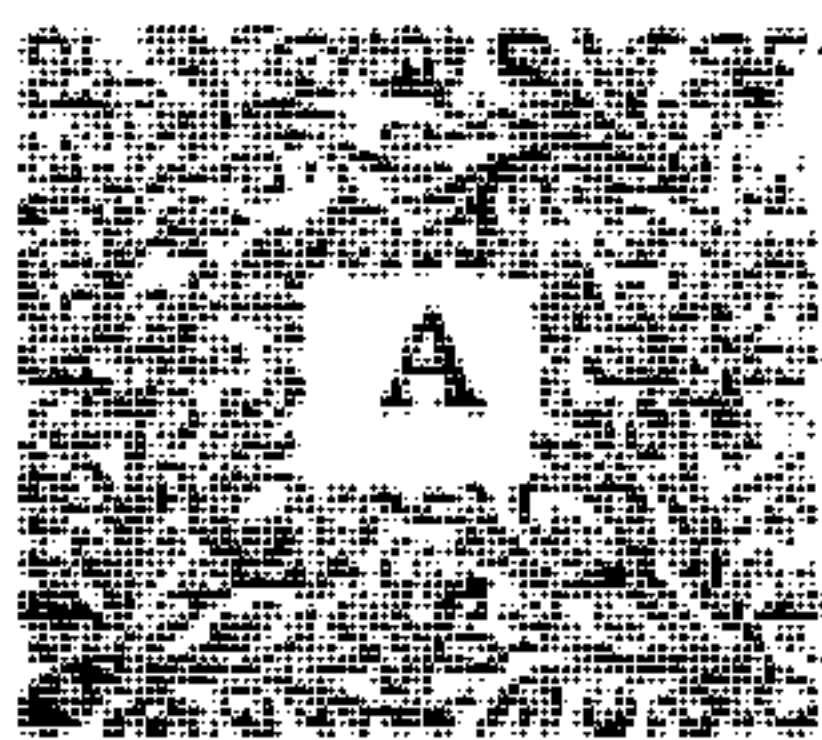
*VI. 5. 11. 24.

† VI. 5. 11.

‡ 24. 3. 1.



Of Executors, their several Kinds, and of their Duty, &c.



AN Executor, so called *ab exequendo*, is he that is appointed by any Man in his last Will and Testament to have the Execution thereof, and to dispose of all his Substance according to the Direction of the said Will; and in the *Civil* and *Canon-Law* he is sometimes called *Hæres Testamentarius*, and often *Hæres* simply. This Executor is either *Particular* or *Universal*: *Particular* when this or that Thing is committed to his Charge; *Universal*, when he has the Care and Disposal of the whole Estate. This Executor had his Beginning in the *Civil-Law* by the *Imperia* Constitutions, which permitted such as thought fit by their last Wills to bestow any Thing upon good and pious Uses, to appoint whom they pleas'd to see the same perform'd; and if they appointed none, then the Law ordain'd, That the Bishop of the Place should have Authority of Course to effect it*. But now an Executor is generally taken to be a Person appointed by the Testator to execute his last Will and Testament, and has a Property and Interest in the Testator's Goods and Chattels, upon Confidence to dispose of them according to the Will as the Law directs.

*C. 1. 3. 28.
1. & 2.

In treating of Executors I shall here, *First*, Consider what Persons the Law forbids to be Executors: For knowing this, it will easily appear, who may be Executors; because *Cognito uno ex contrariis, cognoscuntur & reliqua*. *Secondly*, I shall consider the Power of Executors. And, *Thirdly*, I will endeavour to shew, wherein Executors differ from *Tutors* and *Curators*: And by the way I shall incidently treat of such Points or Matters as relate to the Business of Executors. And here 'tis to be observ'd, That an Executor may be taken in a Threelfold Sense or Manner, *viz.* *First*, In a Sense of the largest Extent. *Secondly*, In what we call a larger Sense. And, *Thirdly*, In a large Sense. In the first Sense every Person is comprehended, that has the Management and Execution of another Man's Affairs, as a Proctor, a *Negotiorum Gestor*, and the like, as the Etymology of the Word *Executor* denotes. *Secondly*, It includes those that execute Sentences and last Wills. And, *Thirdly*, It only takes in Messengers, and such as execute Sentences and other Acts of Judicature*.

*X. 3. 26. 17.

† Specul de
Instrum. c-
dend.

Among these Executors of last Wills and Testaments there are three Sorts of Executors †: Some of which are properly stiled *Testamentary*; others are called *Legal* Executors; and a third Sort are term'd *Dative* Executors. Those are properly *Testamentary* Executors, whom the Testator appoints to this End and Purpose, as we daily see practis'd ‡.

‡X. 3. 26. 17.

Those

Those are stiled *legal* Executors, unto whom either the *Civil* or *Canon-Law* has given the Power of executing the Wills of Persons deceas'd; as Bishops, an *Oeconomus*, and the like ||. And those are term'd *Dative* Executors who are appointed such by the Judge's Decree *, as Administrators with us here in *England*; tho' this among the *Romans* happen'd very seldom. Now having thus explain'd the Nature of Executors, I come in the next Place to consider, what Persons cannot be Executors of last Wills and Testaments, as I before propos'd to do.

|| C. 1. 3. 49
x. 3. 26 17.
† D. 34. 1. 3.
Sect. fin.

Now the Law repels a Pupil, Madman, Lunatick, Ideot, and the like, from this Office of an Executor, because they cannot be Proctors *ad Negotia tractanda*; nor can they be such in *Judicial* Causes thro' a Defect of Understanding: But a Woman, if she be of good Understanding, may be an Executrix †, tho' she cannot be a Proctor *ad Lites*. And by the *Canon-Law* all minor Fryars and Religious Persons confin'd to a Cloyster are prohibited this Office; because the handling and meddling with Money is contrary to the Rule of the *Franciscan* Order; but other Religious *Mendicants* may by the leave of their Superiour (and not otherwise) become Executors: For a Religious confin'd to a Cloyster cannot be an Executor even in a Will made to Pious Uses without the Leave of his Superiour ||, not only because he can neither Will or Nill a Thing, but because he ought to abstain from those Things which may distract and draw his Mind from Things Divine. But notwithstanding this Bishops and other Secular Clerks may be made Executors of last Wills and Testaments: For tho' this Office was heretofore interdicted them *, yet for the good of the Church at this time it seems to be permitted them, as appears not only from daily Practice, but from the Law itself †, and according to the Council of *Trent*. I have just now said, that a Woman may be made an Executrix of a last Will and Testament, because she is not prohibited by the Law; and all Persons whom the Law does not forbid, may become Executors; for as they undertake all other Business, so they may likewise undertake this: Nor is a Woman that is made Executrix by her former Husband, depriv'd of this Office by passing to a second Marriage, since she is not depriv'd of this Office by any Law. But if a Testator that has Brothers and Sisters, shall say, *I leave my Brothers, or my Brethren, my Executors*, I think that under the Name of *Brethren* or *Fratres*, the Males are then only understood; because that Women are not very fit for this Office. But, according to *Molina*, this admits of a Limitation. For if a Testator, that has only one Brother, shall say, *I make my Brethren my Executors*, then under the Word *Brethren* even his Sisters seem to be included; for otherwise the Testator's Disposition is not rightly verify'd.

† D. 34. 1.
15. 1.

‡ Dd. in c. 2.
VI. 3. 11.

|| VI. 3. 11. 2.

* 11 Q. 1. 29.

† D. 5. 3. 50.

By the *Civil* and *Canon-Law* no Heretick can be an Executor ‡, tho' the Party be not condemn'd of Heresy; for if he perseveres in his Heresy, he shall not be admitted, no not in a Military Testament ||, tho' a Soldier has more liberty in making an Executor than another Person. And tho' he that is named Executor, does by Repentance reclaim his Heresy; yet being a Heretick either at the Time of making the Will, or at the Time of the Testator's Death, or at the Time when he undertakes the Executorship, he stands excluded *. For this is a perpetual Rule in Law, that if any Person be incapable either at the Time of the Will made, or at the Testator's Death, or at taking the Executorship on himself, 'tis as if he was always incapable †; but it does not hinder, if he be incapable at other Times ‡. Nor by the

‡ C. 1. 5. 5.

|| C. 1. 5. 22.

* I. 2. 19. 5.

† D. 28. 5.
49. 1.

‡ D. 28. 5. 6. 2.

Canon-Law can an excommunicated Person be admitted as an Executor, as long as he continues under a Sentence of Excommunication; and this is agreeable to the Laws of *England*. But if a Corporation aggregate of many are made Executors, Excommunication cannot be decreed against them; because they are a Body Politick. My Lord *Coke* * seems to intimate, That an Excommunication is a greater Disability to an Executor than an Outlawry: For if a Plaintiff, who is an Executor, be outlaw'd, his Outlawry cannot be pleaded to disable him from proceeding in the Suit, because 'tis in the Right of another; but if he is excommunicated 'tis otherwise, because every Man that converses with such a Person is excommunicated himself. But with my Lord *Coke's* Leave, this is a Mistake; for they are not excommunicated, till he is denounc'd, and they are admonish'd not to converse with him. So likewise where there are three Executors †, and one is excommunicated, and in an Action of Debt brought by them, the Excommunication of one of them is pleaded in *Abatement*, this only *suspends* but does not *abate* the Action, since he may obtain Absolution.

It has been a Question among the Doctors, Whether an Executor may be compelled to undergo this Office? And some of them think that he may; because 'tis the Interest of the Publick that Mens last Wills and Testaments should have a good Effect or Event in Law: Therefore, say they, every Private Man may be compelled to undergo a Publick Office of this Kind *. But, on the contrary, this admits of a good Distinction according to the *Civil-Law* now practis'd. For if it be understood of an Executor in Law, or a legal Executor, he shall be compelled hereunto †: But if it be intended of a *Testamentary* Executor, then he shall not be precisely compelled to execute this Office; but 'tis enough if he be contented to lose the Legacy, or the Residuary Advantage of the Estate left him by the Deceas'd: And the Reason of this is, because no one can charge or burden another *ultra Beneficium* ‡, beyond his own Advantage. But if he has once taken on himself the Administration of the Goods he shall be compell'd to fulfil and go thro' the said Office, even by the Censures of the Church, or else by some other arbitrary Punishment ||. And if one Executor, where several are nam'd, shall delay to administer, the others may in the mean time execute this Office, according to the Doctors *: But if there are several Executors appointed, 'tis necessary that all of them should implead, or be impleaded together, according to *Odofredus*; for, says he, these Executors are like unto Proctors, so that one of them alone cannot execute a Will in Part, unless this be so order'd by the Testator; but every one ought to execute the same *in solidum* †. And *Guido Papa* approves this Opinion, saying ‡, That one Executor cannot bring his Action, nor be impleaded without the other, if any Exception be made hereunto. But *Franciscus*, by assimilating these Executors unto Guardians or *Curators* of Minors, says, That each of them may execute the Will *per se & in solidum*. And this last Kind of Practice is observ'd by the Custom of *England* in our Temporal Courts ||. And this second Opinion seems to be the truer Doctrine in Point of Executors, that take on themselves the Administration of their own accord.

An Executor and Administrator ought to swear that each of them will faithfully perform and do all such Things as are committed to their Administration *, and whenever requir'd render a true Account. And so true is this, that no one shall be admitted to be an Executor to any Testament, till he has given sufficient Caution either by Pledge, Oath,

* 1 Inst. 134.

† 3 Lev. 208.

* D. 50. 4.
18. 15.

† C. 1. 3. 28. 2.

‡ D. 31. 1. 70.
prin.|| Joh. An. in
c. 19. x. 3. 26.
v. Cogi. X. de
reg. jur. 21.
* Guid. in c.
2. VI. 11. 2.
v. nolente.† D. 30. 1. 107
D. 3. 3. 32.
‡ In c. 2. VI.
3. 11.|| D. 14. 1. 1.
29. D. 14. 1. 2.

* C. 6. 42. 32.

Oath, or Surety for the due Execution thereof; and for rendering a faithful Account of the Residue of the Goods, that is to say, of such Things as are not specify'd by the Testator, but pass under a general Clause ^{||}. And if a Religious was made an Executor, his Superior gave ^{|| C. 5. 37. 13. 14. 8. c.} this Caution or Surety for him: For a Religious Person even of an exempt Jurisdiction may not only be called to render an Account of his Administration or Executorship before the Ordinary, but he is even hereunto bound by Law, notwithstanding his Exemption ^{* VI. 3. 5. 1.}. And tho' a Testator should be so weak as to forbid an Executor to render an Account of his Office; yet it shall be at the Discretion of the Judge or Ordinary (notwithstanding such Testator's Order) to compel the same, by considering the Fame and Character of the Testator; and the Quality and Quantity of the Thing in dispute: For the Testator's Intention cannot be presum'd to be such, as that he should insert a Clause in his Will to bar the Power of the Ordinary by destroying the Execution of his own Testament, but rather that he would chuse to rely very much on the Honesty of his Executor, as well as on that of the Ordinary ^{† D. 25. 2. 3. D. 26. 7. 21. & 44. ‡ D. 34. 3. 9.}. For 'tis a Rule in Law, that in every general Remitter, it is never to be understood, that Fraud and Deceit is thereby remitted [†]. Nor is it foreign to our present Purpose to add, that Executors are presum'd to be fraudulent Persons, as we may collect from the Emperor *Justinian* in the *Authenticks*, and *Luca de Penna* in his Commentary on the *Code*.

The Law requires an Executor to make an Inventory of all the Goods and Chattels, before he intermeddles or lets himself into the Possession of them, at least he ought to do this for his own Safety, to the end that he may not be made liable *ultra vires bonorum*, that is to say, beyond the Assets found in such Inventory according to the Form of it. And this is not only enjoin'd both by the *Civil* and *Canon-Law*, but also by an express Constitution in *Lindwood* ^{||}; where 'tis ^{† D. 25. 2. 3. D. 26. 7. 21. & 44. ‡ D. 34. 3. 9.} enacted, That before such Executor shall be vested with the Administration of the Goods of the Deceas'd, he shall exhibit a true and perfect Inventory of all the said Goods taken in the Presence of fit and proper Persons (as Creditors and Legataries are) unto the Ordinary; and if he shall refuse or neglect to do this, he shall be punish'd according to the Discretion of the Ordinary: And, moreover, it is here order'd, That before any Executor be admitted to the Execution of any last Will and Testament, upon his presenting the same to the Ordinary for the Probat thereof, he shall wave and renounce the Privilege of his own Court or Jurisdiction in respect of this Act: For by the *Civil-Law* a Controversy touching an Executorship ought to be determin'd in that Court or Jurisdiction, where the Person who is conven'd has his Dwelling or Habitation; or else where Hereditary Effects are lying and being, if the Defendant can be found there: For the *Civil-Law* deems it contrary to Justice and Equity to call a Man away from his own Court and Dwelling to the Place where the Testator's Estate lies; since Men are not drawn away from their Estates and proper Employments without some great Disadvantage.

It has been said, that a *Testamentary* Executor, who takes on himself the Office of such a Person, ought to perform his Trust, and shall be oblig'd to execute the same with Fidelity, by the Compulsion of a competent Judge [†]. And here it is to be observ'd, that by the *Canon-Law* it does not only belong to the Bishop of the Diocese to take Care and see that the last Wills and Testaments of Persons deceas'd be demanded to Execution [†], but even to the Diocesan whoever he be, that is to say, ^{† X. 3. 26. 19. ‡ X. 3. 26. 17.}

say, to him who has Episcopal Jurisdiction exclusive of the Bishop, tho' he be no Bishop himself. For it often happens, that Abbots, Archdeacons, and others that are not Bishops, have either by Privilege or Prescription an Episcopal Jurisdiction: And these, according to the Gloss, are compriz'd under the Appellation of Diocesans; and have sometimes *Ordinary Jurisdiction* in this Behalf, tho they are not properly Ordinaries. Yea, a College of Canons, vulgarly called a *Chapter*, may in the Vacancy of the Episcopal See compel Executors to execute the last Wills of Testator's deceas'd: And if these Executors are negligent, they may demand the same to Execution, since this Matter belongs to Episcopal Jurisdiction, as aforesaid. The Bishop of the Diocess is the lawful Executor of a Will made *ad pias Causas*, and may compel Executors in Trust to execute the Wills of Persons deceas'd in respect of Legacies given to *Pious Uses* *; tho' the Testator should have interdicted the same by a contrary Order: But notwithstanding this, by the *Civil-Law* the Secular Judge may be apply'd to also in this Case, and has still this Power in Respect of Legacies left to Charitable Uses; this being a Trust of a mix'd Jurisdiction||. And hence all Men are by this Law allow'd to sue, in order to have such Legacies paid and brought to Execution, if they see any Thing attempted contrary to the Testator's Will, either by the Fraud or Sloth of the Heir, Executor, or the Judge himself.

* X. 3. 17. 16.

|| C. 1. 3. 28.

† I. 1. 25. 5. v.

‡ Gloss. in L. 6. I. 1. 26.

|| C. 1. 3. 28. & 49.

By the *Civil-Law* it seems, That the Ordinary may remove and put out an Executor, that is appointed even by the Testator himself, from his Executorship, whereby he shall not have the Administration of the Testator's Goods; especially if this be upon a just Occasion, as because he cannot render an Account of his Administration: And *Justinian* in his Institutions seems to favour this Opinion†. But yet the last Section of this Title in the *Imperial* Institutes is objected hereunto: From whence it appears, that tho' a Man be poor, yet if he faithful and diligent in his Administration, he shall not be remov'd. To which I answer, that when a Presumption of Fraud and Deceit lies against him, because he has formerly in Matters of the like Nature behav'd himself deceitfully, he may be well remov'd and set aside before the Administration is committed to him‡; but not afterwards without just Cause shewn. But an Executor or Administrator may (according to *Bartolus*) be also remov'd from his Office, if he runs away and becomes a Fugitive; provided this be for some Crime or Offence committed: But (I think) *Bartolus* stands single in this Opinion. But if a Person be only poor, and can give Security for his just Administration, he shall not be remov'd from his Office; and herewith agrees the Law of *England*: And tho' he cannot find Security; yet so indulgent is the *Civil-Law*, that if he be otherwise diligent and faithful in his Administration, his Poverty shall be no Objection to him. For 'tis not Poverty that shall render a Man suspected; but only an evil Behaviour, and a strong Inclination to Knavery and Negligence. And 'tis regularly true, according to the *Civil-Law*, that if an Executor be hindred in the Execution of his Office by any Impotence of Law or Fact, whereby he cannot fulfil the last Will and Testament of the Person deceas'd, the Bishop of the Diocess shall have the Power of acting and distributing the Testator's Goods transferr'd and committed to him||: But this is only to be so understood, when one single Person alone is made Executor; the Matter being otherwise, if there be more than one appointed to the Office. For then if one of them shall be deficient in his Administration, the Administration is lodged with the others.

By

By a Provincial Constitution in *Lindwood* *, an Executor is forbidden to apply or appropriate unto himself any of the Goods of the Person deceas'd, whose Will he has the Execution of, either by the way of secret Purchase, or by any other Title whatever, under the Pain of Suspension *ab Ingressu Ecclesie*, unless it be in the following Cases, *viz.* *First*, When the Testator has made him a Grant thereof by way of Donation *inter vivos*. Or, *Secondly*, When he has in his last Will and Testament bequeath'd the same to him by way of Legacy. Or, *Thirdly*, Has order'd, that his Executor shall have so much out of his Personal Estate, according to the Discretion of the Ordinary, by way of Recompence for his Labour and Trouble, when he has no particular Legacy left him: For in such a Case an Executor cannot reward himself *arbitrio proprio*, because he would by this Means be a Judge in his own Cause. Or, *Fourthly*, When the Deceas'd was indebted to him in his Life-time: For an Executor may openly and fairly deduct such a Debt out of the Substance, and pay himself in the first Place upon an equal Right. Or, *Lastly*, On the Score of some moderate Expences he has been at on the Account of his Administration or Funeral. And such Executor shall in no wise obtain an Absolution from such Sentence, till such Time as he shall have made Restitution of what he has unduly appropriated or apply'd unto his own Use, and shall have paid Twofold out of his own Estate for the Goods thus appropriated to himself towards the building and Repairs of the Cathedral Church, unto which the Person deceas'd was a Subject. And this Constitution was to be solemnly publish'd twice every Year in all the Churches within the Province of *Canterbury*: But it is now grown obsolete and entirely out of Use upon a better Foundation of Law.

* Lib. 3. Tit. 13. cap. 5.

Executors according to *Hostiensis*, may not only have an Action against the Heirs, if there be any, in respect of Legacies given to Charitable Uses; but even against all other Persons, if they are not *nude* Executors, to recover Debts, and the like; and in all other such Matters as do relate to the Execution of a last Will and Testament, because they are to receive an Advantage from hence: But if they be *nude* Executors, then no Action accrues to them for a contrary Reason †. And if an Executor *ad pias Causas* shall be negligent herein, then the Diocesan, who is the Executor in Law, shall cause this to be done. A *nude* Executor here mention'd is no more than an Executor in Trust, whom the Testator has made Choice of on the Account of his great Integrity; and as he has not the Right of Administration, and no Interest accrues to him, he is not oblig'd to give Security for his faithful Administration. But an Executor *Testamentary*, and the like, cannot make an Agreement with the Heir, or with the Testator's Debtor, in such a manner as to remit the Debt ‡, any more than a Proctor assign'd *ad agendum* can; unless it be (perchance) with the Consent of the Creditors and Legatees, who have an Interest herein ||; or unless he has a special Order and Mandate from the Testator for this End and Purpose *. But some Persons hold the contrary Opinion, especially if he has made a Distribution of all the Testator's Goods, and the Suit be doubtful for want of good Evidence. Nor can a *Testamentary* or *Legal* Executor of any Person deceas'd commit his Office by way of Delegation unto another Person. Yea, the Testator himself cannot so much as give him a Power of substituting another Person in his Stead, according to *Tiraquellas*, unless it be *ad pias Causas* †.

† Inn & Alb. in c. 19. x. 3. 26.

‡ C. 2. 3. 22.

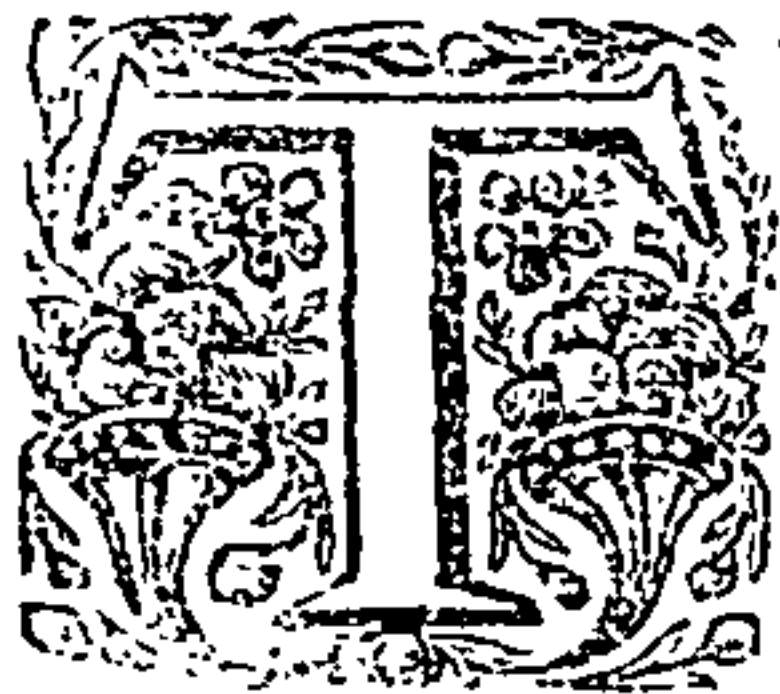
|| X. 1. 36. 3.

* C. 2. 13. 10.

† de Priv. 31. pia Caus.



Of the Execution of a Judicial Sentence.



* X. 2. 27. 15.

† C. 7. 42. C.
1. 19. 5.

THE last principal Act in a *Judicial* Process is the Execution of a Sentence: For 'tis not enough that a Sentence be pronounced, unless it be demanded to Execution*. And that Sentence is said to be committed or demanded to Execution, which is valid according to Law, and not suspended by any Appeal or Petition of Restitution *in integrum*: For if so, the Execution of such a Sentence ought to be deferred and put off till the Business of the Appeal, or the Cause of Restitution shall be decided. But if a Sentence be only suspended by a *Supplication*, such Sentence shall be demanded to Execution, and the *Victor* in the Cause shall find Sureties for the Restitution of that which he has obtained by the Sentence, in case the former Sentence happens to be reversed. A *Supplication* here mention'd is a Remonstrance by way of Petition against a Sentence pronounc'd by some Superiour Judge †, from whom no Appeal lies, to revoke such Sentence upon a Re-hearing of the Cause. Of which hereafter.

‡ X. 2. 27. 15.
C. 7. 53. 2.

|| X. 2. 27. 15.
D. 2. 1. 19.
* D. 4. 4. 40.

† Opin. 400.
N. 3.

‡ C. 7. 53. 1.

Now the demanding of a Sentence to Execution, after it has passed *in Rem Judicatam*, is a Thing so entirely necessary, that as Laws are of no Advantage to any State, which cannot be executed: So a Sentence is vainly pronounc'd, and has no Life and Force without a due Execution thereof‡. Wherefore, I shall here, *First*, examine, what Sentences ought of Right to be demanded to Execution, and likewise by what Judges. *Secondly*, I shall enquire in what Order and Manner this Execution ought to be made. *Thirdly*, I shall consider in what Causes, and against what Persons it may be committed. And, *Fourthly*, For what Reasons it may be stopp'd and delay'd. And, *First*, 'Tis to be observ'd, That every Sentence may be demanded to Execution, as soon as passed *in Rem Judicatam*, *viz.* After the *Fatale* for the Interposition of an Appeal is elaps'd; and it may be committed to Execution by the Judge pronouncing the same ||. For a Sentence is always said to have *Executionem paratam*, or an Execution at Hand*. Yet this Rule in Law, *viz.* That a Sentence ought to be executed by the same Judge that pronounc'd it, or, which is the same Thing, that *Judgment ought to be ended where it began*, does not always obtain: Since the Execution of a Sentence sometimes does of *Common Right*, according to *Vicius* in his first Book of *Common Opinions* †, belong to the Province of another Judge. *Secondly*, This Rule has no Place in Matters *Executive*, when the Process is by way of Execution, and not according to the ordinary manner of Proceeding. For in Matters *Executive*, when the Process is by way of Execution, the Person may vary the *Judicial* Process, and commence a Suit by several *Executive* ways, not only before the same, but even before any other Judge, and in any other Place. But properly speaking, indeed we ought not to begin a Process with Execution, but a Sentence ought to go before, and the Execution thereof ought to follow the same‡. But a Sentence has no need of Execution;

tion, that is invalid *ipso Jure*, as being pronounc'd by one, that has no Right or Power to pronounce the same ||; as by an Executor, Apparitor, &c. || D. 42. 1. 4. 6. whose Office it is effectually to execute the Force of the Judgment, after D. 42. 1. 58. the Matter of the Suit is heard and discuss'd, and a Sentence pronounc'd thereon between the Parties †. For such an Executor cannot by taking † C. 7. 53. 8. Cognizance judge touching the Equity or Validity of the Sentence; and if he should order or act any Thing contrary to such a Sentence, it is of no Moment or Consequence at all. But,

Secondly, A Sentence cannot be executed by the same Person that pronounc'd it, (how great soever he be) unless he has *Ordinary* Jurisdiction; and, consequently, a *mixtum Imperium* incident thereunto: For 'tis a Matter of some Jurisdiction to execute a Sentence *. Wherefore by the *Civil-Law* a Judge, or *Arbiter*, assign'd by the *Prætor* cannot execute his own Sentence, as having no Jurisdiction, but only a Power of examining thereinto; and as soon as he has taken Cognizance of the Matter he is discharg'd from his Office, as having finish'd the same †. Nor can a *delegated* Judge execute a Sentence; but the Execution thereof belongs to the Person that delegates him ‡: And generally speaking the *Ordinary* or President of the Province executes the Sentence of a *delegated* Judge. But the Prince or Pope's Delegate may in his own Person execute his own Sentence, because he is in the Place of an *Ordinary* Judge, and may assign a Judge, and oblige the *Ordinary* Judge to execute a Sentence pronounc'd by him ||. And (I think) the same holds good in any *delegated* Judge whatever, if such a Power be expressly committed to him. For tho' the Power of admitting a Person into Possession of Goods be a Matter of *mixt* Jurisdiction; yet, I suppose, the same may be transferr'd *Mandatâ Jurisdictione*. Wherefore, doubtless, even he to whom a Jurisdiction is delegated has a Power to execute his own Sentence, since this *Mixtum Imperium* passes with a delegated Jurisdiction *. So that what *Accursius* says †, is evidently false, *viz.* That *the Execution of a Sentence cannot be Delegated, as being a Matter of Merum Imperium*. And Sentence cannot, according to the *Civil-Law*, be demanded to Execution immediately on its passing *in Rem Judicatam*; for on the Score of Humanity the *Civil-Law* allows a certain Space of Time both to the Convict, and to Persons confessing, in order to satisfy the Judgment: And by the twelve Tables, according to *Ant. Gellius*, a Month or thirty Days was indulg'd. But afterwards this Term was enlarg'd unto two Months: And at length *Justinian* granted four Months from the Day of Condemnation; or, in case of an Appeal, from the Day of confirming the first Sentence to be computed. But this Time is now variously limited according to the Customs ‡, Statutes and Edicts of every Place. ‡ C. 7. 54. 3. 1. But tho' this Term appointed by the *Civil-Law* had Room in *Personal*, yet in *real* Actions it had not: But even in *real* Actions if the Possessor pleaded, that he was not at present able to restore the Thing in Demand, and desired a Time to be assign'd for the Restitution thereof, he might out of his great Humanity gratify him in this Respect by granting a moderate Term for the Restitution of the Thing demanded of him, within which Term he ought to restore it without Fraud ||. || I. 4. 17. 2. But in *personal* Actions the Term of four Months was granted *ipso Jure* to the Person condemn'd; and at the Expiration of this Term he was bound to pay Interest after the Rate of five *per Cent.* that the Plaintiff (being in some Measure injur'd by this Delay) might be reliev'd in another Respect *. But, according to the Custom of *Holland*, and some trading Countries, neither of these two Rules is now observ'd. * D. 23. 3. 6. D. 12. 2. 30. For

* D. 2. 1. 4.

† D. 42. 1. 5.

& 15.

‡ D. 42. 1. 15.

D. ibi.

C. 3. 1. 13. 3.

X. 2. 2. 4.

|| X. 1. 29.

16. & 28.

* D. 1. 21. 5.

† In L. 15.

D. 42. 1.

For Interest or Usury on a Judgment is not paid at this Day, unless it be deduc'd and allow'd of in the Sentence of Condemnation itself. And because Merchant's Affairs, whereby *Holland* flourishes, seldom admits of Delay, but require great expedition, Sentence is there at this Day immediately demanded to Execution, according to *Merula's* Practice of the *Civil-Law* *.

* Lit. 4. Tit.
93. cap. 7. n.
5.

† D. 42. 1. 6.
3. Dd. ib.

‡ Alex. Conf.
50. Vol. 2.

|| D. 42. 1. 15.

* Bart. in L.
3. D. 26. 10.

† Abb. in c.
15. x. 27. 2.

‡ Bald. in L.
8. C. 7. 62.

|| Bart. in L.
15. D. 42. 1. 2.

* Alex. in L.
15. D. 42. 1. 2.

X. 2. 1. 10.

‡ D. 48. 20. 6.

|| Bald. in L.
5 C. 7. 53.

The second Thing here to be consider'd was, in what Order and Manner this Execution ought to be made. And here 'tis to be observ'd, That it may be made by either of these ways in a Civil Cause, viz. either by an Action on the Case arising from the Sentence †; or else by the Office of the Judge, which last is the way always practis'd in our Ecclesiastical Courts; and in Civil Causes it is much better to proceed this way than by an Action; because a Libel is not then requir'd, nor any Contestation of Suit. But when Execution is made by a Right of Action, it is necessary to form a new Process ‡. In the Execution of a Sentence in Civil Causes the following Order ought to be observ'd, viz. *First*, The Officer ought to attach Moveable Goods, then Immoveables, and after that then the Person's Account-Books; and if these are not sufficient to discharge the Execution, the Person of the Litigant may be arrested ||: For the Person of a Man ought not by the *Civil-Law* to be taken for a Debt, unless his Goods and Estate has been first excus'd *; and if upon such an Excussion there are not Goods found sufficient to satisfy the Judgment, then his Body may be attach'd, and not otherwise †. But (I think) wherever an Execution is made, the Laws and Customs of the Place ought to be observ'd. In the Execution of a Sentence, when a Man deserts his Appeal, a Citation is always necessary; otherwise such Execution is not valid ‡: But when an Execution is made in the same Thing, wherein the Sentence was pronounc'd, it is not necessary to cite the Party ||. But if an Execution be made against the Successor of the Person condemn'd, or by a Judge that succeeds him who pronounc'd the Sentence, a Citation is always requir'd *. An Ecclesiastical Judge in the Execution of his Sentence may proceed either by Suspension, Deposition, Excommunication or Degradation, according to the State and Condition of the Person cast in the Suit: For if he be a Clergyman, the greatest Punishment that can be inflicted on him is Degradation with Excommunication: And if he be a Layman, then Excommunication. But if the Person cast has a Contempt of the Censures of the Church, and will not obey the Sentence pronounc'd against him, then the Ecclesiastical Court may implore the Secular Arm, which is the last Remedy it has †.

As to my third Consideration, an Excommunication may be made against all Persons, and in all Things; unless the same be found prohibited by Law: For 'tis a Rule in Law, that all Things are deem'd to be permitted, unless they are found to be prohibited. *First*, An Execution cannot in Civil Causes proceed to a Man's Bed, Wearing Apparel and other Things of the like Kind, necessary to his daily Use; because these Things do not pass under an Hypotheque, nor are a Man's Wearing Cloaths taken away from him, tho' condemn'd to dye as a Criminal ‡. But when a Debtor has no other Goods to satisfy the Judgment, his Household Goods and Bed are liable to an Execution; and only the Wearing Apparel on his Back shall be left him. Nor is an Execution to proceed or extend to a Scholar's Books, or to a Husbandman's Plow-Team, provided they have other Effects; nor to the Goods of particular Citizens for a Debt of the Corporation ||; nor to the Goods of a Monastery, because an Execution cannot be made thereon for the Debt

of

of a Monk. unless the Monastery acquir'd such Goods by the Means of the Monk: Nor to the Fruits and Profits of a Prebend or Ecclesiastical Benefice, because no Execution lies against them, if the Person has other Goods; but if he has no other Goods, then an Execution will lye against the said Fruits and Profits*. But if any Person has been at any Expence about the Funeral of a Scholar deceas'd, he may retain his Books for the Reimbursement thereof, according to *Fason* †.

* Bart. & Dd. in L. 40. D. 42. 1.
† In L. 26. D. 12. 6. 4.

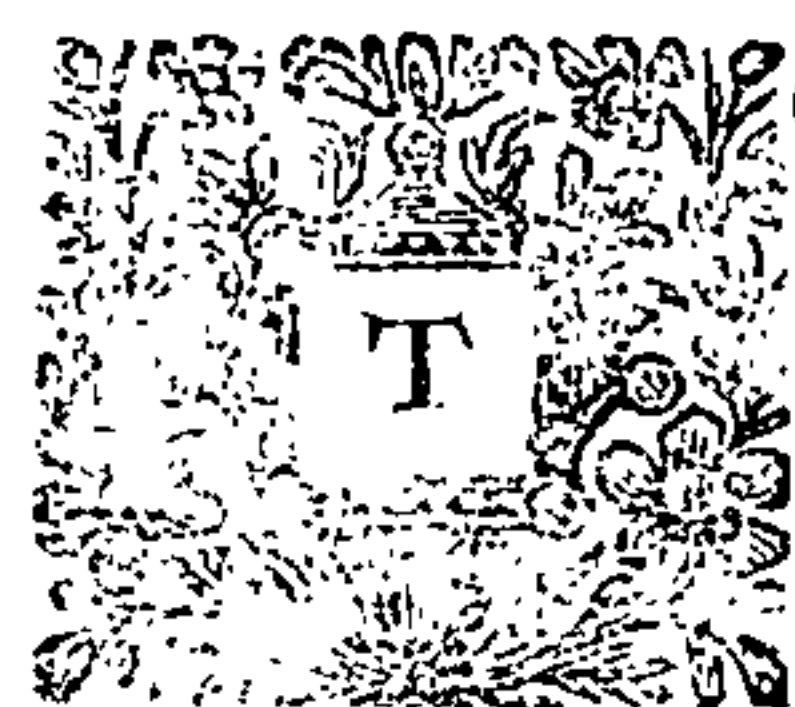
As to my fourth Consideration, *viz.* Upon what Account an Execution may be stopt, it is to be first observ'd, That it may be stay'd upon the Score of a *Nullity* ‡: But when the Exception of *Nullity* is propounded before an inferiour Judge to him that pronounced the Sentence, it never hinders the Execution thereof. *Secondly*, Restitution *in integrum* impeaches the Execution of a Sentence ||, unless it be pray'd Maliciously, and with a Design of protracting the evil Day, or else that it requires a long and tedious Examination of the Matter.

‡ D. 42. 1. 4. 6.

|| C. 2. 4. 32.



Of Expences of Suit, and the Kinds thereof.



TOUCHING Expences of Suit, it is to be observ'd, That these Expences are due on various Accounts, and for several Reasons. For sometimes they are due on the Account of obtaining a Victory in the Cause*, sometimes on the Score of Contumacy †, and sometimes on the Account of some Delay in the Proceedings ‡: And, again, they are sometimes due on Account of a rash and temerarious Citation ||. Some have made this Distinction about suing for Expences, saying*, That such Expences of Suit as are made in Matters Preparatory to the commencing thereof; and in restoring a Defendant that has been in Delay, ought to be sued for by a Right of Action; because they are made before any Contestation of Suit; and, therefore, shall not be recover'd *Officio judicis*: For no Demand or Suit shall be maintain'd for any Expences made before Contestation of Suit, but only for such as were made subsequent thereunto. But this Distinction is at present little regarded by any Court of Judicature, as being too nice and frivolous. And at this Day Expences of Suit may be sued for either by way of Action, or by virtue of the Judge's Office, if the Judge has tax'd the Bill and allow'd the same: And it matters not, whether they are made before or after Contestation of Suit. For since these Expences have their Beginning and Rise from the Suit, they also cease and come to an end with the Suit itself, lest that a Suit should commence and begin from a Suit. Therefore 'tis adviseable in Practice to sue for them by imploring and making Use of the Judge's Office.

* C. 3. 1. 13. 11.
x. 1. 34. 12.
† C. 3. 1. 15.
x. 2. 14. 6.
‡ C. 7. 5. 4.
x. 2. 14. 5.
|| D. 5. 1. 79.
x. 2. 14. 1.
* Gloss. in c. 5. x. 2. 14.

If Expences are due by Reason of any Contumacy, they do impeach and hinder the Prosecution of a Suit, and the contumacious Person shall be set aside from Pleading, till such Time as he shall have paid the Expences of his Contumacy, or (as we say) his Contumacy Fees: But if Expences are due *ratione Victoriæ*, or on any other Account, he shall not be repelled and set aside †. If the Party shall be dismiss'd

† C. 3. 1. 15. Dd. ibi.

and acquitted from any further Attendance on the Court by Reason of a Lapse of *Instance*, Expences may be demanded and sued for after the Lapse of such *Instance*; and the Defendant may desire to be dismiss'd and acquitted from any further Attendance of the Court in that Cause; praying the Plaintiff may condemn'd in Expences *.

* Cyn. in L.
13. C. 3. 1. in
fin.

† Dd. in L. 25.
D. 21. 1. 8.
& in L. 29.
h. 2.

‡ C. 3. 1. 13.
Gloss. & Dd.

|| D. 16. 2. 7. 1

Touching Expences made before Contestation of Suit, the Judge ought not to impart his Office to the Party unless the Party requests him thereunto, since this is a Matter that has no Relation to the Decision of a Cause which happens before Contestation of Suit: But touching those Expences which arise after Contestation of Suit, the Judge may *ex Officio*, and without being requested thereunto, either absolve or condemn the Party in them †: Yet he is not bound so to do, if he has a Mind not to do it. Therefore, both the Plaintiff and Defendant will do well always to pray Expences. If Expences are once mov'd for, and the Judge shall either omit or refuse to absolve or condemn the Party in them, the Party may sue the Judge for a Restitution or Payment of such Expences, he being bound on this Account to make Restitution or Payment thereof to the Party injur'd out of his own Money: Which ought always to be understood, when the Party moves and petitions for Expences ‡. Or else Expences of Suit are sometimes demanded *ex Conventione*, or by the *mercenary* Office of the Judge without a Convention. In the first Case they may be demanded in any *Instance*, if the Judge has not pronounc'd for the same in the first *Instance* ||. And in the second Case they may not be demanded by any Means, unless it be in a Cause of Appeal; because when they are demanded or sued for by *Convention*, that is to say, by convening and commencing a Suit against the Party, they do then accrue by the Act and Provision of Man, which ought to be deny'd to no one. But when they are not demanded by *Convention*, they do then accrue by the Provision of Law; and the Law may take away that Benefit from a Person, which it has once conferr'd on him: Because those Expences which accrue by Virtue of the Judge's Office after Contestation of Suit, do accrue as Accessory to the Principal Cause; and, therefore, *sublato Principali tollitur Accessorum*. But when they are demanded by Right of Action, then they accrue *Principally*; and by this Means the foregoing Rule ceases.

Expences of Suit are only prov'd by the Oath of the Party, by Reason of the Difficulty of proving the same *: But with this Proviso, that the Judge does in the first Place tax and moderate the same according to the Stile and Custom of the Court, before the Party swears touching the Truth thereof †: And herein the Judge ought also to have a great Regard to the Nature and Quality of the Cause itself ‡: And herein it is to be observ'd, That a Taxation of Expences reserv'd unto the Judge himself under his own proper Name may be made by his Successor; that is to say, if the Judge does expressly by Name reserve unto himself the Taxation of Expences; yet the Power of taxing the same does (notwithstanding) descend to his Successors; since this does not concern his Person, but is only a Matter concerning his Dignity and Office alone ||.

† Nov. 32. c. 10
‡ C. 3. 1. 15.

|| Bart. in L.
4. D. 49. 1.

I have already noted, that necessary *Judicial* Expences do consist in a Fourfold Difference: There being some which are *Judicially* made in order to instruct the Process, that is to say, for the Labour and Pains which the Advocate takes in drawing the Libel, and in framing other Writings and Exhibits, which appertain to the Cause itself: And these

these Writings and Exhibits ought to be tax'd according to the Quality of the Persons and the Importance of the Cause : For little or no Regard shall be had to the length of the Exhibits, but to the Learning and Ingenuity of the Advocate drawing the same *, since it ought to be consider'd what he shall write, and not how much, in a profuse Stile, and in the most impertinent manner ; for the Words ought not to be number'd, but Things well consider'd herein. Under this Head we may also reckon such Expences as are given to Proctors for propounding and exhibiting the Pleadings of the Parties as well in Writing as *Viva Voce*. In the *Imperial* Chamber the Proctors have half a Florin tax'd and allow'd them for every *Substantial Recess*, as they call it †: And for *lesser Recesses* the fourth Part of a Florin is due. The *substantial Recesses* are the Introduction of the Cause, the exhibiting of the Libel, an Answer to the Libel, Contestation of Suit, the Oath of Calumny, the Petition, or Motion, for Commissioners to examine Witnesses, the Publication of the Depositions, Accusation of Contumacy, Conclusion of the Cause, and the like, which do appertain to the *Modus Procedendi*, and also to the Merits of the Cause ‡. The *lesser Recesses* are the Recognition of the Seals, the *Petitio Terminum*, Motions for a second and third Term Probatory, or for proroguing the Term-Probatory already assign'd, and likewise such other Motions as are incidently made and propounded in Judgment according to the Practice of Courts ||. Under the Appellation of these *Preparatory Expences* are likewise such as are given to Notaries for drawing Instruments ; and to Messengers and Apparitors for executing *Judicial* Processes and Decrees of Court *. And, lastly, under this first Kind of Expences are compriz'd those which are given in *Chancery* for redeeming of Processes, for Copies of Acts, and other necessary Writings immediately appertaining to the principal Cause.

Secondly, Those *Judicial* Expences are said to be necessary, which are made for the Examination of Witnesses : And under these *Paranormatan* includes the *Eatables* and *Drinkables* of Witnesses ; deducting those Expences of Eating and Drinking, which a Witness would otherwise make at Home †: Provided, he did not live there on some Trade and Employment. But this Deduction is scarce any where observ'd ; especially, in the *Imperial* Chamber, and here in *England*.



Of Fame and Suspicion, whether and what Evidence in Law.



AMONG the various *Species* of Proof, which is nothing else but a Demonstration of some doubtful Matter of Fact made clear and evident to the Court, according to the Rules of Law, we may reckon that of a well-grounded Fame *, assisted by other concurrent Evidence : Which in the same Sense here made use of is defined to be the prevailing Opinion of the Vulgar, arising from Suspicion, or (at least) the greater Part

Part of them consenting and agreeing to some Matter of Fact in the Neighbourhood; and made manifest by the Voice of the People *. Now this Definition or Description has a Relation both to a *good* and an *ill Fame*; and when it respects an *ill Fame*, 'tis taken for *Infamy*; as when we say of any one, that he leads an *infamous* Life by wicked and enormous Practices, or that he has not the Fear of God before his Eyes, or that he keeps a Concubine, and the like. But when 'tis used in a good Sense, as it relates to a Man's Honour and Reputation, it is in *Latin* defined to be *Status illæsa Dignitatis vitæ & moribus comprobatus*, a State of an untainted Honour approv'd by the good Life and Behaviour of any Person: As when 'tis said of any one, That he is an honest and a good Man. And for such Fame a Man ought to labour and take Pains in order to assume the Name of an honest Man, and one of good Report. And thus *Fame* signifies the same as *Report*, which may either be Good or Evil, according to the Object or Subject thereof; and the Honesty of the Persons that do spread the same Abroad. For a good Fame and Reputation does not only depend on the laudable Actions of a Man himself, but on the Lips and Breath of others that publish the same: And, therefore, if they be not Men of Veracity, Knowledge and Integrity, that publish the same *, little Regard will be had to their Reports, whether they carry a good or an evil Sound with them.

In each Way or Manner of expressing ourselves Fame sometimes proceeds from Knowledge, sometimes from Suspicion, sometimes from a certain Thing or Author, and sometimes from an uncertain Author; and, lastly, from the Deposition and Averment of one Witness or Person alone: Yet, properly speaking, Fame, as here describ'd, proceeds from an uncertain Author, and from Suspicion only; and herein it differs from what we call a *manifest* Fame. Indeed, Fame itself is no Proof or Evidence at all in strictness of Law †; nor is Suspicion any Evidence of a Thing done by a particular Person: But if there be a Fame concurrent with the Deposition of one good Witness, it is in many Respects sufficient Evidence, according to the *Civil* and *Canon-Law*. Thus if an Exception of Excommunication be objected to the Plaintiff, it may be prov'd by Fame and one Witness: For this being an *odious* Exception, it ought not to have too great a Scope and Power given it; and, therefore, one Witness ought to concur with the Fame thereof. And the same may be said of a *probable* or *likely* Suspicion, which arises from some strong and previous Conjectures, and from a growing Fame or Report of some Fact; and such a Suspicion or Presumption induces a Canonical Purgation ‡: For it being stiled a *Presumption of the Judge alone*, it admits of Proof to the Contrary ||. Now Suspicion, as deriv'd from the *Latin* Verb *suspicio*, which signifies to look on those Things with some Fear and Caution, touching which we have some Doubt with ourselves, is defin'd to be an Act, whereby we are drawn into some Doubt or Question with ourselves about some certain Matter or other, which we cannot determine without some Fear or Dread of Falshood. And of this there is a Threefold Division, viz. a *rash*, *probable* and *violent* Suspicion. The first deserves no Credit at all; the second creates a Presumption, as aforesaid; and the third induces a Condemnation *. Some Persons make Suspicion and Presumption each of them to import the same Thing †: And others add a fourth Kind of Suspicion or Presumption, which is called a *necessary* Suspicion or Presumption; and is a Presumption of *Law* and by *Law* ‡. And herein it differs from a *violent* Suspicion, because it does not

* Bart. in L.
10. D. 48. 18.
n. 7.

* Bart. ut sup.
n. 15.

† X. 3. 2. 8.

‡ X. 5. 34. 2
& 4.
|| X. 1. 9. 5.

* Bern. in c.
4. x. 5. 34.
† Arch. in c.
9. Q. 6. 1.

‡ X. 4. 5. 6.

not admit of Proof to the contrary : And 'tis, therefore, said to be *of Law* and *by Law*, because it is vehemently presum'd to be thus or not to be thus, and the Law is determin'd on the Score of such a Presumption. But more of this under the Title of *Presumptions* hereafter. A *rash* Suspicion arises from evil Men and from vile Causes : As when they see a Person talking with a Woman, and they immediately from thence suspect an evil Conversation with her, whereas doubtful Matters ought always to be interpreted in the better Part * ; and, therefore, such a Suspicion ought not to move the Mind of the Judge, but he ought to repel the same †.

* X. 5. 41. 4.

† 2 Q. 1. 1.

Fame, when it has a solid Foundation, and is well prov'd, is of greater Validity than the Saying or Deposition of one Witness ‡ : For (says the Law) *where a Man doubts of any Thing, let him enquire of the Neighbourhood*. So that a publick Fame ought to arise from the Voice of just and honest Men living in the Neighbourhood, and not from the vain and malicious Reports of Persons (perhaps) dwelling at a distance, and (probably) unacquainted with the Person defam'd or accus'd ||. But tho' a Fame caused by credible Persons living in the Neighbourhood administers just Cause of Credulity, and in Civil Causes induces a half Proof, yet the most common, publick and divulged Fame never makes a full Proof * : Nor does it always make a half Proof ; for it does not make a half Proof in Criminal Causes : For Fame alone is not sufficient to condemn a Man of a Crime without the Aid and Assistance of one Witness (at least) and some other Adminicular Evidence and Circumstantial Proof ‡. Nay, the Fame of a whole Neighbourhood does not prove Carnal Copulation ; nor has it Power to destroy and take away a lawful Exception : For Fame has no Operation at all, when the Truth of the contrary is prov'd. Nor is Fame of itself sufficient to dissolve a Marriage, unless such a Fame be supported with some concurrent adminicular Proof and circumstantial Evidence, as aforesaid. But tho' Fame alone be not sufficient to condemn a Man in a Crime of Simony, or any other Crime, yet 'tis enough to bring him to his Purgation-Oath ‡.

‡ X. 4. 14. 2.

|| X. 5. 1. 17. ibi. Inn.

* Socin. reg. 144

‡ X. 3. 2. 8.

‡ X. 5. 34. 8. X. 5. 1. 15

When I say, that a well-grounded Fame makes a greater Proof than one Witness, I mean such a Witness as deposes touching what he has heard from others ; as it also does stronger Proof than one Witness deposing without an Oath administered to him. So that if one sworn Witness deposes touching what he has heard from others, and another without an Oath deposes of his own Knowledge, a well-grounded Fame makes a stronger and better Proof than both the other two together. But Fame has less of Proof in it than a Notoriety of Fact : For Fame often deceives us, but a Fact, which is notorious, shews and exhibits itself in such a manner, that it cannot be concealed by any Tergiversation whatsoever. Yet in Matters of Antiquity, and in Matters relating to an occult Obscurity, Fame, together with other adminicular Circumstances, makes full Proof. Thus Fame alone, with other concurring Circumstances, is sufficient to prove a Title for the compleating of a Prescription, and likewise to prove a Man an Usurer, according to some, because Usury is a Matter of an occult Nature. *Sed Quare de hoc*. For it sometimes happens, that Crimes are committed in so secret a manner, that 'tis very difficult, and often impossible to find Witnesses that can depose touching the Truth of such, and sometimes in Crimes that are openly committed ; and, therefore, Judges are wont in these Cases, as soon as they have a legal *Constat* that such a Crime was committed, and cannot find a Witness to depose touching the Truth of

A a a a

such

such a Crime; to interrogate Witnesses on the Fame thereof, in order to know who is defam'd of such a Crime: And whenever a Suspicion arises against one from Informations taken on such an Infamy or evil Report, they proceed farther against him by enquiring into the Crime itself. Let us see; therefore, after what manner such a Fame is prov'd*.

* Jul. Clar.
pract. Crim.
lib. 5. Q. 6.

† Gloss. in 1. 3.
D. 22. 5. 2.

And, *First*, 'tis to be observ'd, That a Fame may be prov'd even by two Witnesses only, according to the Gloss, and the receiv'd Opinion of the Doctors; since in the Mouth of two or three Witnesses every Word shall be establish'd: But then they must depose, that they have heard so from among divers honest and sober Men†. But to the end that a Fame may be join'd with other adminicular Proofs to make full Evidence, it ought to be perfect *in suo esse*; and by such a Fame Matrimony may be prov'd. For 'tis certain, that such Witnesses deposing touching a Fame, ought to render a sufficient Reason of their Knowledge, else they make no Proof of the Matter: For they ought to say, That they have heard it from the greater Part of the Neighbourhood; and 'tis not enough to say, that they have heard it spoken in a Publick Place, but yet by a few.

‡ In 1. 10. D.
48. 18. n. 24.

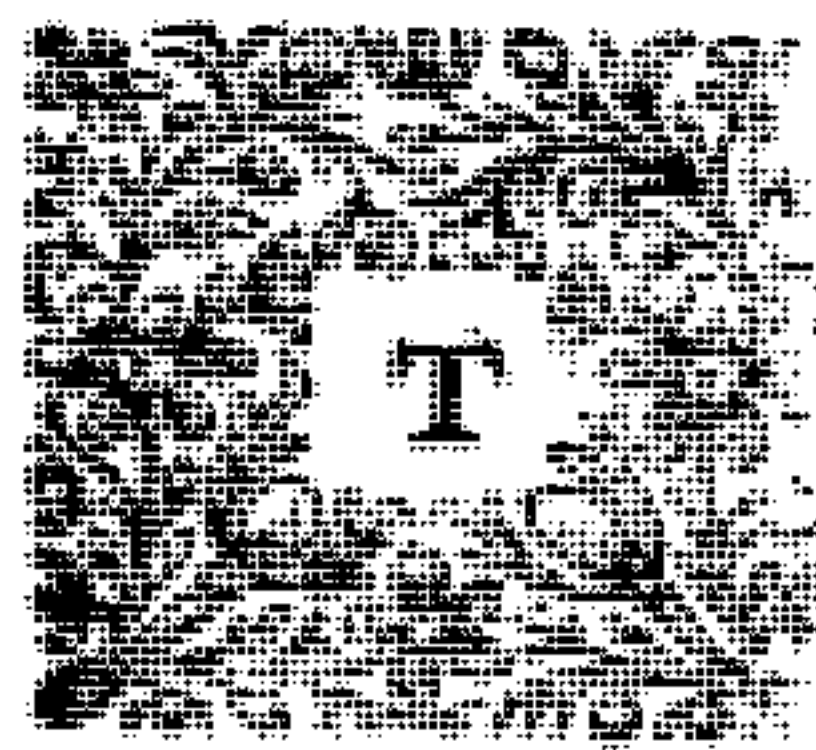
§ Bart. ut sup.
n. 25.

* Bart. ut sup.
n. 26.

But what if the Witnesses should say, that they have known it from different Persons; as when one Witness names some Persons, and another Witness others, or they diversify in their Depositions in Respect of Place; as when one Witness says, he heard it in the Street; and another says, that he heard it in a House, and the like: Shall this vitiate the Proof of Fame? *Bartolus* says, That it shall not‡. Nor shall it, tho' they should diversify in respect of Time; as when one deposes, that he heard it on such a Day; and another deposes, that he heard it on such a Day. Fame may also admit of a negative Proof; as when 'tis affirm'd, that *Titius* did not do so: And *Bartolus* will have this to be an Affirmative, and not a Negative, because publick Voice and Fame says, that *Titius* did not do it§. But if Fame be proved by one side *Affirmatively*, and by the other side *Negatively*, we ought to adhere to the more credible Witnesses; and if the Witnesses shall be of equal Credit, then we ought to abide by that Proof; or that Fame which had its Rise from the most probable Presumptions. But when a contrary Fame is prov'd in respect of different Places, if the Proofs are of equal Credit, a Regard is to be had to neither side, otherwise the Quality and Character of the Witnesses ought to be considered*.



Of Fasting, the several Kinds and Effects thereof.



HO' Fasting, as far as it relates to moral Abstinence, was heretofore well known to the ancient Philosophers by the Light of Nature alone, without any Prescript of Divine or Human Law to direct them therein, and is still practis'd among the more sober and thinking Heathens themselves; it being the Command of right Reason that every one should exercise Temperance not only to keep his Body in good Health, but also to help and illustrate the Faculties of his Mind, that

a Man should not rashly, thro' too much Intemperance of Eating and Drinking, fall into any Distemper of Body or Mind: Yet I cannot learn from any Reading of mine that they ever used this as a Means to draw Money out of the Pockets of silly ignorant Men by way of Dispensations for not keeping the Fast as the *Romish Church* does now in its Communion ||: Which lays so great a Stress upon it, that with St. *Ambrose*, their great Patron, the *Papists* now stile it an *Heavenly Image, the Food of the Mind, the Refreshment of the Soul, the Life of Angels, the Root of Grace, the Foundation of Chastity, the Death of Guilt, &c.* These are the Eulogies and Commendations which that Church gives of Fasting, so strictly enjoined by the *Canon-Law* not so much on a Religious Account, as for sake of Gain to the Priests and the Pope's Treasury. Indeed, that Law has made Fasting and an Abstinence from Meats, to be a Kind of Divine Punishment, whereby Sin is done away, and the Person reconciles himself to God, who was an Enemy to him for his Sin: But, I think, the best Remedy for Sin is a true Repentance and an Abstinence from such Inchantments of Pleasures as may defile the Soul, without which Bodily Fasting is of very little Advantage. For, says the Lord, *Turn to me with Weeping, Fasting and Praying; and rent your Hearts and not your Garments, &c.** I will not deny Fasting to be a Kind of Pennance for Sin; but then 'tis to afflict the Body, and to humble the Soul for a State of Repentance, to make us think of our Sins, and to bewail them before God, that he may in his great Mercy forgive them: For Fasting alone has no Merit in itself without such a Disposition and Humility of Mind.

|| 82 Dist. 5.

* Joel. cap. 2. v. 13.

The *Canonists* divide Fasting into *Profane* and *Sacred* Fasting. The first (they say) is, when a Man fasts upon some other Account than to take Care of his Soul; and thus he is said to fast, who endeavours to expel some Disease by not eating, or who has not an Appetite to eat, and the like: And this Kind of Fasting, according to them, carries no Merit along with it; because it does not appease the Anger of God, nor is it done for the Souls Health. For Eating and Drinking are natural Acts for the Repair of the Body that dyes daily. *Sacred* Fasting they divide into *Spiritual* and *Corporal*†. *Spiritual* Fasting is an Abstinence from Sin, and this is the most excellent way of Fasting, which we ought to observe all the Days of our Life; and to this end all other Fasts ought to tend. *Judas* kept a Bodily Fast, but he did not fast from Sin; and so of others. A *Corporal* or *Bodily* Fast is an Abstinence from all Things eatable, in order to subdue the Flesh. *We fast from Wine and Flesh* (says St. *Cyril*, Bishop of *Jerusalem*) *not that we hate these Things as Abominations, but that we expect a Reward from thence, as despising Sensualities; and that we may hereafter enjoy a Spiritual and Intellectual Table, sowing now in Tears that we may in Time to come reap in Joy.* A *Corporal* Fast, according to the *Canon-Law*, is either *Penitential* or *Ecclesiastical*. The first is that which relates to the humbling of the Mind, or (at least) should do so; and serves to appease God's Anger for Sins committed. Thus the Children of *Israel* being about to fight the *Philistines*, fasted on that Day wherein they were to engage; saying, *We have sinned, O Lord, against thee*‡, &c. And we read, that *David* fasted on the Account of the Sickness of his Child, which he had by the Wife of *Uriah* the *Hittite*; and, laying all Night on the Earth, said unto *Nathan*, *I have sinned against the Lord*||. And such were the *Penitential* Fasts which the *Jews* observed, by confessing their Sins

† Con. 5 Dist. cap. 25.

‡ 1 Sam. cap. 7. v. 6.

|| 2 Sam. c. 12. v. 13. 16.

Sins unto God ; and by turning themselves unto him in weeping and praying ; and not such as are now practis'd in the *Romish* Church, which may be purchas'd and bought off by the Sinner. An *Ecclesiastical* Fast is an Abstinence from eating of Flesh, and other Things forbidden by the *Canon-Law*, to be observ'd on certain stated Days as there pre-
* Con. 5. Dist. 18. scrib'd, with only a moderate Use of other Meats* ; and not to be vio-
† Con. 5. Dist. 17. lated without an absolute Necessity †. Or an *Ecclesiastical* Fast (as others say) is a *voluntary* Abstinence from all manner of Food accord-
‡ Con. 1. Dist. 50. ing to the prescrib'd Order of the Church, or the receiv'd Custom there-
¶ 4 Dist. 6. of in every Country. And hence it follows, that he who dines at Noon ‡, and sups in the Evening, (as the *Papists* do very plentifully upon Fish, and the like) cannot be said to keep the Fast || ; because he does not entirely abstain from Meat or Food according to the prescrib'd Order of the Church : But he that is contented with one Meal only is said to observe the Fast ; because he Voluntarily abstains from Meat, according to the prescrib'd Order of the Church, or the common Usage thereof in his own Country. It is called a *voluntary* Abstinence, to put us in Mind, that the Intention is necessary, in order to satisfy the Precept of Fasting. Wherefore, he that entirely abstains from Meat against his Will, or does not eat as having nothing to eat, is not said to fast. And it is in this Definition said of *Meat* ; because Fasting consists not in every Kind of Abstinence : For Man has a Twofold Appetite, viz. *Hunger* and *Thirst* ; and as the one is satisfy'd with Drink, so the other is principally allay'd by Meat, of what Kind soever, whether it be Bread, Flesh, Fish, Apples, Nuts, Herbs, and the like, which are taken by way of Refection for Dinner or Supper. Therefore, as in the *Romish* Church an *Ecclesiastical* Fast does not consist in abstaining from Drink, so neither does it in ours (I think) consist in a bare re-
 fraining from Flesh, as some Superstitiously imagine.

By the *Canon-Law*, and according to the Doctrine of the *Papists*, every *Christian*, being Twenty one Years of Age compleat, and *Compos Mentis*, is bound to observe the Fasts prescrib'd by the Church, unless he be otherwise dispens'd with, as very frequently he is, if a Man has Money to purchase a Dispensation : For as every *Christian* is a Subject of the Church, he is as a Subject, bound to obey the Laws thereof that command Fasting. I say *Compos Mentis*, because he that wants the use of Reason, is not capable of any Precepts : And I say, *One and Twenty Years of Age compleat*, because tho' *Christians* Naturally speaking are obliged to obey all Laws as soon as they come to the use of their Reason ; yet they are not in this Case immediately bound, on obtaining the use thereof, to observe this Law of Fasting enjoind by the Church ; because when they are in their growing Years they stand more frequently in need of Eating, in order to add to their Growth by a more abundant Heat necessary hereunto ; wherefore that indulgent Church would not impose an Obligation till they are able to perform it. The Days of abstaining from Flesh in the *Romish* Church are *Fridays* and *Saturdays* ; and yet they cannot properly be called a Fast, because they
|| Othob. Tit. 44. may eat twice or more on those Days, provided they forbear Flesh || : But if *Christmas-Day* happens on either of those Days, then the *Papists* have a Dispensation to eat Flesh thereon, unless a Person ab-
* X. 3. 46. 3. stains from thence by Reason of a Vow*. But sometimes Men were not allow'd to fast on the *Sabbath*, with us called *Saturday*, as ap-
 pears from the eighth Epistle of *Ignatius* to the *Philippians*, if those Epistles are genuine : And this is also forbidden in the Sixty fifth Canon of the great *Russian* Apostle. See *Sigismund. Baro's* History of
Muscovy.

Muscovy. Pope *Innocent* the First order'd *Saturday* to be kept as a Day of Fasting, because *Christ's* Disciples fasted and mourn'd on that Day for him, whilst he lay in the Grave (as the *Romanists* pretend) as well as they did on the Day of his Death.

The stated Days and Times appointed for Fasting by the Church*, are the Time of *Lent*†, the four Seasons of the Year‡. called the *Ember-Weeks*, and the *Vigils* of or before some Saints Days, commonly called *Holidays*. By the fourth Distinction of the *Decretum* in the Body of the *Canon-Law* Fasting is ordain'd and decreed in *Lent*. For by this Law the Clergy who are, or should be the Lord's Inheritance in a particular Manner, are enjoin'd to abstain from Flesh, and other Delicacies of Eating for seven Weeks compleat before *Easter*†: Because, as the Lives of Clergymen ought to be distinguish'd from the Lives and Conversation of others on the Account of Holiness; so likewise (says that *Canon*) ought they to distinguish themselves in the Business of Fasting. The time of *Lent*, in *Latin* call'd *Quadragesima* was, indeed, at first only six Weeks; but in Process of Time, Pope *Telesphorus* added a seventh Week thereunto, and called this Time *Quinquagesima*. As to the *Ember-Weeks* we read, that Pope *Calixtus* ordain'd a solemn Fast, to be observ'd three times a Year, on *Saturday* particularly, to pray for a Blessing on the Fruits of the Earth, as Corn, Wine, Oyl, &c. and establish'd these three Seasons in the Fourth, Seventh, and Tenth Month of the Year, beginning the same according to the *Jewish* Custom, or Calender. But afterwards changing his Opinion, he appointed this Fast to be kept at four Seasons of the Year, with a Respect had to those of the *Jews*, mentioned in *Zechariah**, viz. in Spring, Summer, Autumn, and Winter; at which Times, in succeeding Ages, Holy Orders were conferr'd, which before was only wont to be done in the Month of *Decemb.* Tho' some truly attribute this Distinction of the four stated annual Times of Fasting, called *Ember-Weeks*, to Pope *Urban* the First; which, thro' Mens Ignorance, (says *Platina*) were before kept very confusedly. Others will have it, *Calixtus* instituted this solemn Fast, in Imitation of the old *Romans*, who appointed three yearly Solemnities in Honour of their Gods, to bring down a Blessing on the Fruits of the Earth, which Custom the *Romish* Church did observe, 'till it was found more convenient, and for the Honour of the Clergy, to have four solemn Times limited, and set aside for the giving of Holy Orders, which ought not to be conferr'd without Imposition of Hands, and without Prayer and Fasting.

In respect of *Vigils*, they are so called from the *Latin* Word *Vigiliae*, because, according to the *Canon Law*, Men ought not only to Fast thereon, but likewise to watch and pray all Night, immediately before the Festival belonging to such *Vigil*‖. And here we must observe, that the following Feasts, or *Holidays* in the Church, have all of them their proper *Vigils* annex'd to them; some of which are deriv'd from the Common Law of the Church, as that of *Christmas-Day*, the Assumption of the Blessed Virgin, the Feast of the Apostles, St. *Matthew's-Day*, the Feast of *Easter*,† and *Whitsuntide**. And, besides these, the *Romish* Church has appointed the *Vigil* of St. *John* the Baptist, that of St. *Lawrence*, and the Feast of *All-Saints*: Which are rather deriv'd, and establish'd from the common Observance of the Church, than from the Authority of any Canon. As *Friday* was made a Day of Fasting in Memory of our Saviour's Passion, so *Saturday* was order'd to be a Day of Abstinence, or Fasting, in Memory of *Christ's* Burial, says the Canon.‡ The Reason given by the *Papists* for Fasting on a *Wednesday*, is, because the *Jews* on that Day conspir'd to betray *Jesus*, and to put him to Death.

* X. 3. 46. 2.
† 4 Dist. 6.
‡ Con. 1. Dist. 50.

† 4. Dist. 5.

* Ch. 8. v. 19.

‖ 76. dist. c. 9.

† 76. ut. Sup.
* Ibid.

‡ Can. 5. Dist. 13.



Of Fees belonging to Ecclesiastical Courts, &c.



* Can. 185,
186. &c.

FEES, according to the Sense of the Canons of the Church, and as commonly understood with us, are certain rated, and stated Allowances of Money paid to Persons for emergent Services done by them, either in the Business of Law, or otherwise, according to the Nature of the Business it self: And they differ from *Salaries*, because a *Salary*, properly speaking, was anciently a yearly Payment of Money; which was made, and given to any one for appearing, and defending another Persons Cause. And hence it now signifies any yearly Stipend, or Reward, given on the Account of any liberal Art, or Science, as to a Lawyer for his Advice, and to a Physician for his Attendance, and the like, according to the Custom of some Countries. *Vopiscus*, in his Life of *Aurelian*, thinks that it was deriv'd from the *Greek* Word *Ἀλδιον* because they, who receive *Salaries*, *indé se alunt*, do live and maintain themselves from thence. A *Salary*, was a Sum of Money covenanted, and agreed on between the Parties; but *Fees* are Sums of Money allocated by the Law it self, according to a rated Proportion, and Table made of them†. A *Salary* is given *pro Honore*, but a *Fee* is given *pro Labore*. But waving these Distinctions, as now almost antiquated with us, I shall here consider *Fees* as a certain Remuneration for any Business done by a Person, or Payments of Money to be made him for the Expences he has been at therein.

‡ Vide Append.

† Linw. lib. 3.
Tit. 13. cap. 1.

We have several Canons and Constitutions with us, made to restrain the Demand of exorbitant Fees. For we read in *Lindwood*, that *local* Ordinaries heretofore, had rendred themselves very Grievous and Burdensome to Executors, &c. touching the Probats of Wills, and granting Letters of Administration, by frivolous Delays, and idle Cavils about the same, in order to extort Money out of them, with a better Grace: Wherefore, a Provincial Constitution † was made by *Mephram*, Arch-Bishop of *Canturbury*, forbidding any Demand to be made for the Probate of a *Paupers* Will, whose Inventory of Goods did not exceed a Hundred Shillings Sterling. But as the Law does not forbid any Demand to be made for registering and writing the same, and for other Business to be done in relation thereunto, it was easily evaded. And as Registers, and other Persons, were not hereby expressly prohibited the receiving what was offer'd them by way of Gratuity, they had several Artifices to excuse Money out of the Pockets of the Poor. But (I think) in this Case, even what is offer'd them by way of Gratuity, seems to be exacted; since this Constitution was made in Favour of the Poor, and I am confirm'd in this Opinion, both from the Books of the *Civil* || and *Canon*

|| C. 12. 42. 1.
‡ 10. Q. 3. 1.

& 7. in fin.
Arch in c. 9.

vi. 1. 3. v.
exigat.

* Lindw. lib.
3. Tit. 13.

cap. 7.

Law. ‡ The next Provincial Constitution I meet with, is that of Arch-Bishop *Stratford*, * which forbids any thing to be taken by Bishops, or other Ordinaries for the Probate, or pronouncing of their Decree, touching the Validity of any Wills whatsoever, or for publishing, and engrossing the same in their Office, commonly stiled *apud acta Judicis*: And that the Writing Clerks, or Register, should be allow'd no more than six Pence for

for their Labour in engrossing the same, unless the Inventory of the Goods of the Person deceas'd, upon Account was found to exceed the Sum of Thirty Shillings of current Money of *England*, and did not amount to a Hundred Shillings. But, for an Account, and all other Matters touching the same, and for Acquittances and the like, Bishops Ordinaries, and Persons deputed by them, auditing all Accounts, and their Ministers intending the same might in the whole take twelve Pence and no more. But if such Inventory came up to the Sum of a Hundred Shillings, or did exceed the same, and was under Twenty Pounds, then the Persons intending such Accounts, might take for their Labour, and for the *Quietus*, &c. Three Shillings and no more. But if the Inventory came to Twenty Pounds, or upwards, and was under Forty, then they were allowed to receive Five Shillings only. And likewise if such Inventories came to Forty Pounds and upwards, and were under a Hundred, then they were permitted to take Ten Shillings. And if they amounted to One Hundred Pounds, or upwards, and were under One Hundred and Fifty, then their Fees were Twenty Shillings, and with this they were to be contented in respect of the Premises. And for the Increase of every Fifty Pounds beyond this Sum of 150 Pounds, they shall take Ten Shillings, besides the aforesaid Twenty. And the Clerks for writing every *Quietus*, or Acquittance herein, besides, were allow'd to receive Six Pence for their Pains. And if a Bishop by any Cavil whatsoever, did presume to receive more than the Sum before tax'd, either in Tale of Money, or otherwise, he was to restore Twofold of what he had taken beyond such Sum towards the Fabrick of the Cathedral Church of that Diocese within a Months time, under Pain of being suspended, *ab Ingressu Ecclesie*: But Persons inferior to Bishops, were suspended *ab Officio & Beneficio*, till they made full Satisfaction to such Cathedrals as aforesaid.

By another Provincial Constitution in *Lindwood*, * all such Persons, whose Duty it is on the Mandate of the Bishop, Archbishop, or other, to whom it does of Right or Custom belong to grant Institution to Clerks, and to induct such as are admitted to Ecclesiastical Livings thereinto, are to content themselves with moderate Fees for performing their Office, *viz.* If the Arch-Deacon himself shall give Induction, he may receive 3 s. 4 d. But if it be his Official, he then shall demand no more than 2 s. for his own, and the Expences of his Servants, &c. for one natural Days charges, and the Person to be inducted, was to chuse whether he would pay this in Money, or other Necessaries. And if Inductors received more than this on the Score of such Induction, or for a Certificate thereof, they were for their Guilt to incur a Suspension *ab Officio*, and *ab Ingressu Ecclesie*, *ipso facto*, till they should Restore such Sum taken contrary to the said Constitution to such as paid the same, and satisfy the Party for this Offence.

And thus the Business of *Fees* depended generally on the Provincial Constitutions, for the Certainty of them till Queen *Elizabeth's* Accession to the Crown, when some Alteration was made herein by Arch-Bishop *Parker*, according to the change of Times, and then they were better ascertain'd for the Relief of the Subject. But by an Ecclesiastical Constitution made in the Year 1597 under Arch-Bishop *Whitgift*, it was in pursuance of such Alteration, provided that no Bishop, Ordinary, Arch-deacon, or their Ministers, should for the future on any Account take other or greater *Fees*, than such as were usually taken at the said Queen's Accession to the Throne †. And it was hereby order'd, that a Table of all the particular *Fees*, and Sums of Money relating thereunto, should be Publickly fixt up in every Consistory, and the *Exemplar* of such Table being sign'd under the Hand of the Ordinary was to be transmitted

* Lib. 3. Tit. 6. cap. 1.

† Vid. Appendix.

transmitted to the Arch-Bishop within a Time limited. And now, lest it should be doubtful, what certain *Fees* were taken 40 Years ago, for the dispatch of all particular Affairs in each Ecclesiastical respective Court, unless it were declar'd what *Fees* have been usually taken since that time according to Approbation; therefore it was now* decreed, that every Bishop, or Guardian of the Spiritualities (*sede vacante*) do take care to have a Table of *Fees* publickly fixt up in the Consistory, or some other Place where the Court is held, and subscribed under the Hand of the Judge, and Register, or else publickly lodged in the Archives of his Jurisdiction, so that every Person may have Power to inspect the said Table of *Fees*. And this Table ought to contain in it the separate Sums of particular *Fees*, which have been usually taken by the Judge, and all other Officers, and Ministers of the said Court, from the beginning of Queen *Elizabeth's* Reign to the 18th Year thereof†. Moreover, every Bishop, or Guardian of the Spiritualities (*sede vacante*) was to take care that every Judge should deliver a faithful and authentick Copy of the said Table of *Fees*, unto his Bishop, or the Guardian of the Spiritualities, to be kept in the Bishops Archives or Registry, under the Pain of a Suspension from the Execution of his Office, untill he comply'd herewith according to the Mode and Form thereof. And if any Officers or Ministers of the Court took greater *Fees* than were expressed in those respective Tables, he was to undergo six Months Suspension from the Execution of his Office, to be inflicted on him by his Ordinary; and if the Ordinary was Negligent, or omitted to inflict the same, then the Archbishop might inflict it, and substitute another in his Room. See the 18th of King *James's* Canons, *versus finem*, touching any Question that might arise about the Certainty of these *Fees*.

A Judge, Advocate, Proctor, or Notary in a *Judicial* Cause, cannot retain the Process, or Acts of such Cause on the Account of their *Fees*; nor can any retain any Deeds, or Writings deliver'd to them under any Pretence of *Fees*, or Salaries not paid; they having no Right of Retainer herein. But though a Proctor may not thus retain the Acts, or Instruments of Suit *pro mercede sua*; yet he may do it well enough, till such time his Client satisfies him for the Costs and Charges he has been at, and laid out of his own Pocket, tho' he cannot do this for his *Fees* or Salary. If an Advocate, or other Person, that has an Office of Employment, leaves and foregoes the same by his own Fault, before he has compleatly fulfilled such Office, he ought not to have the whole Salary for the Time to come, if the Salary be not to be paid at one Payment only; yet, if a Yearly Payment be made thereof, then he shall have it (at least for the Year which he has begun, if he did not quit the same by his own Fault: And if he dyes, before he has finish'd his Office, the whole of such Salary is due to his Heirs, or Executors, by the *Civil* Law †; and thus a Salary becomes due, and shall be paid to *Regent* Doctors, or Professors, (as we say) *Integraliter* and for the whole Year, tho' they have not read *Integraliter*. But if a Person be elected unto an Office, that requires Labour and Pains, as a Parish-Clerk, and the like, he shall have his Salary, or Wages, only *pro Rata temporis*, that he has serv'd; for the Law makes a Difference between Matter of servile Labour, and Matters of an honourable Employment as that of an Advocate, and a Reading Doctor is ‡ because that, which is given unto a Parish-Clerk, is paid as Wages for Work and Labour done; but that which is paid unto an Advocate, or *Regent* Doctor, is given as a Remuneration for his Learning and Skill in the Law.

Of

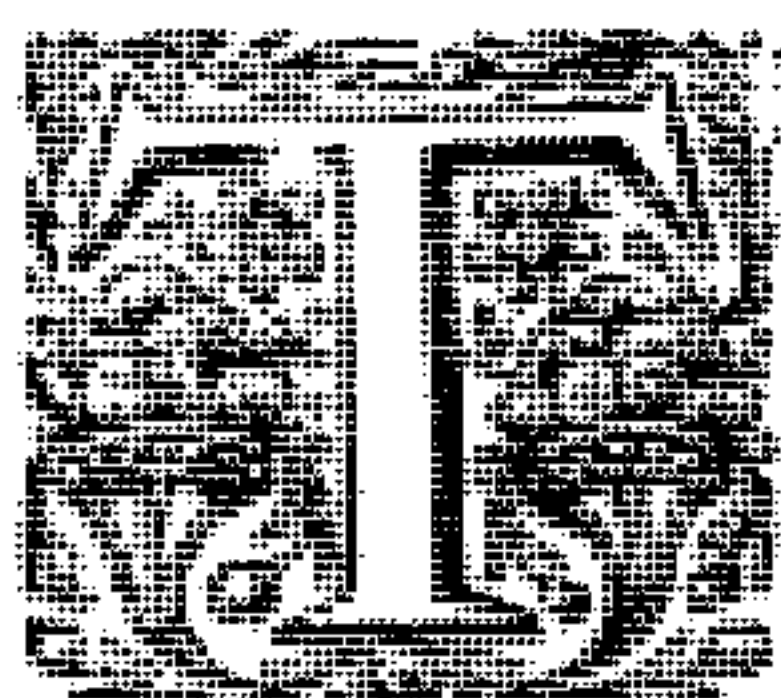
* A. D. 1597.

† Vide Append. postea.

† C. 2. 7. 17

‡ Bart. in l. 1. d. 50. 13. 13. N. 6.

Of the Glebe, and whether Titheable or not.



THE Word *Glebe* in Propriety of Speech, according to *Januensis*, is a hard Turf or Clod of Earth with Grass growing thereon: But in our Law-Books it is used for that Land, wherein the Endowment of the Church consists; and which, according to the Papal-Law, ought to be entirely free and exempt from all Secular Taxes and Payments whatever *, but yet such Glebe ought to pay to the Church. For if there are Lands lying in one Parish which do belong to another Church, and are of the Glebe or Endowment of the other Church, the Person occupying such Lands ought to contribute to the Repairs and Ornaments of that Church, within which Parish such Lands are situated. Nor is the Law in the Margin here quoted † any Objection hereunto, which will have such Lands to be free from Taxes; because this Law has only a Respect to Secular, and not to Ecclesiastical Payments, as it there appears. Therefore in the present Case Persons enjoying Glebe-Land shall be obliged to contribute to a Church-Rate or Tax; and *John de Athon* in his Annotations on the *Legatine* Constitutions ‡ confirms this Opinion. When, I say, that the Glebe shall be free from Secular Taxes, it is only to be understood, that a Parson shall not be charg'd for his *Glebe* to send out either Man or Horse to the *Militia*, and the like; because 'tis a Spiritual Revenue, and held in *Frank-Almogn*.

* X. 3. 39. 1.
X. 3. 30. 2.

† X. 3. 39. 1.

‡ Othob. Tit.
17. v. ad hoc
tenentur.

But as long as the Parson keeps the *Glebe* in his own Hands, he shall pay no Tithes to the Vicar, tho' the Vicaridge be endow'd of all the small Tithes in the Parish: But it has been held, that if he demises the *Glebe* to a Layman, the Tenant must pay the small Tithes to the Vicar, and the great Tithes to the Lessor ||. So likewise where the Vicar leases his *Glebe*, the Tenant must pay the great Tithes to the Rector or Impropiator, and the small Tithes to the Vicar: But this must be understood, where the Land was titheable at the Time of the Endowment. For if it was appropriated to a Priory before the Vicaridge was endow'd, then tho' the Endowment was *de Minutis decimis* of the whole Parish, the Vicar shall not have the Tithes of the *Glebe* there, tho' he had leased the same; because it was not Titheable at the Time of the Endowment. 'Tis true, if Tithes have been once paid out of the *Glebe* demised by a Parson or an Impropiator, it ought to be so as often as 'tis demis'd: But where such Tithes are demanded, if they were never paid, then either of them may prescribe, that he and all his Predecessors have enjoy'd the *Glebe* Lands by themselves, and by their Tenants discharg'd of Tithes to the Vicar *; and such a Suggestion shall be a sufficient Ground for a Prohibition; and the rather, because small Tithes out of *Glebe* Land demis'd by an Impropiator, are not payable of *Common-Right* to the Vicar, because *Ecclesia non solvit Decimas Ecclesie*. But if a Parson, where there is no Vicar, leases his *Glebe*, it is otherwise; especially, if he reserves only a small

§ Owens Rep.
p. 35.

* 2 Lutw.
Rep. 1062.

C c c c

Rent;

Rent: For in such a Case the Lessee shall pay Tithes of the *Glebe* to the Parson himself.

* An. 14. cap.
17.

Before the Statute of *Edward* the Third*, a Vicar had no manner of Freehold in the *Glebe*; and, therefore, he could not have the Writ of *Juris utrum* to recover what had been alienated by his Predecessor, which Writ is given to the Vicar by that Statute. During the Voidance of a Church the Fee-Simple of the *Glebe* is not in the Patron, but in Abeyance, viz. 'tis only in Expectation, and not in any certain Person, according to *Littleton* †; because (says he) it should not be Subject to any Alienation or Discontinuance, which might be made by the Possessor so as to bar the Successor: For since the Parson has the *Cure of Souls*, the Law provides that he should not be destitute of that Maintenance, which arises from the *Glebe* ‡. This the Year-Book is cited to prove; but it was said, that an Estate cannot be for Life, unless there be also a Reversion expectant upon such Estate, which must be in some Body: And *Babington*, then Chief Justice of the *Common-Pleas*, was of an Opinion, That upon a Voidance the Fee-Simple rightfully belongs to the Patron. *Fitzherbert* says, 'tis in the Patron and Ordinary; and long before he wrote, it was held, that they might charge it before the Church was full †.

† Sect. 643.

‡ 1 Inst. 341.
2.

† F. N. B. 49.
b.

‡ 1 Rolls
Abr. 655.

|| Bulstr. Rep.
184.

Can. 87.

Lastly, If a Parson or Vicar sows his *Glebe*, and then demises, and does not lease the Tithes with the Land; or if he sells the Corn, and disposes of the same, and the Vendee cuts it; yet he must pay the Tithes to the Parson ‡, &c. So if the Parson should dye before the Corn is cut, his Executor shall have it; but if another is inducted, the Executor of the deceas'd must pay the Tithes of the *Glebe* to the Parson inducted: But 'tis otherwise if the Corn was cut in the Life-time of the former Incumbent; for in such the Executor pays no Tithes. That there may be a perpetual Memory of this *Glebe*, 'tis requir'd by King *James's* Canons||, that the Bishops procure a *Terrier* to be taken of such Lands by the View of honest Men within every Parish of their respective Dioceses, by the Appointment of the Bishop himself, whereof the Minister to be one; and such *Terrier* shall be laid up in the Bishop's Registry*.



Of the Habit or Apparel of the Clergy.

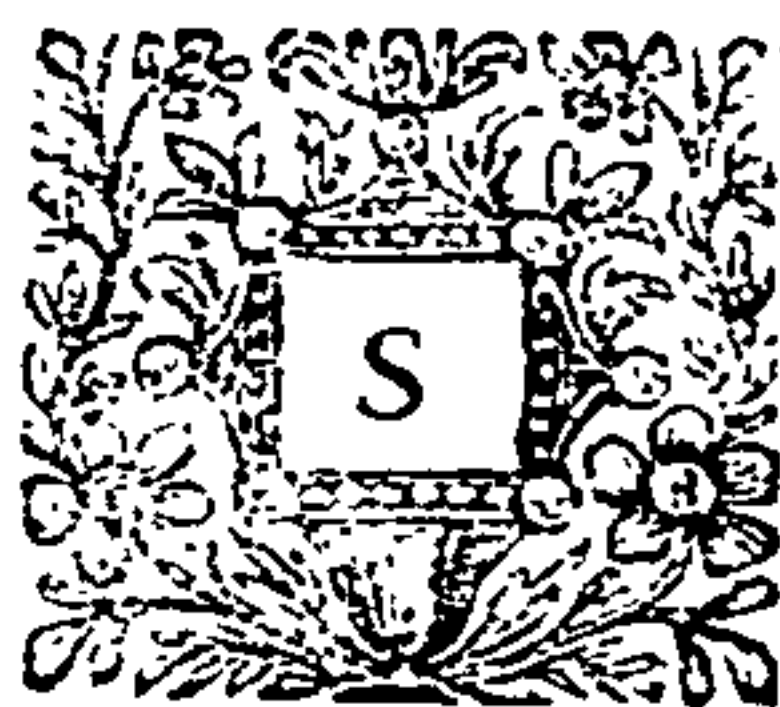
* Can. 74.

† 21 Q. 4. 5.

‡ Dd. in c. 2.

x. 5. 1.

|| 21 Q. 4. 1.
& 5.



SINCE the Church has thought fit by her Canons* to enjoin a Decency of Apparel unto Ministers, that the Prelacy and Clergy may as well in outward Reverence as otherwise for the Worthiness of their Office be regarded and esteem'd by the People†, I shall here say something of Clerical Habits, which ought not to be of a red or green Colour, lest through Ostentation, Pride and Wantonness it should administer Occasion of Scandal unto the People‡. For tho' the Use of Cloaths or Meats is very far from being culpable in itself; yea, they are for the Sustenance of Life||: Yet the Abuse of them to Pride, Luxury and Vanity is highly condemn'd by all Ages and Men whatever; and much more blameable in the Clergy than in other Men, since

since the Clergy ought to be more especially humble, sober, modest, temperate and free from Vanity, that they may give a good Example unto their Flock*. But, notwithstanding what has been said, even Clergymen may use these Garments, if it be the Custom of the Country, and they be not too gawdy and sumptuous†; for gorgeous and sumptuous Apparel (says the Scripture) is for King's Houses‡: And, therefore, unless the Clergy would be thought to be Kings and Princes, they ought not to wear such Apparel. But yet they ought not to dress themselves in too mean a Habit neither, to avoid this Censure of the Law, but to conform themselves to the respective Customs and Fashions of the Country where they dwell, in Point of Apparel, as it best suits with their Degrees and Conditions of Life#. But why the Law should forbid the aforesaid Colours of red and green more than any others, no Reason (I think) can be assign'd; since there are other Colours as indecent for a Clergyman to affect as these. A Clergyman's Habit ought then, according to *Lindwood*, to be of a plain Cloth, and the like, without any Lace, or Gold or Silver Trimmings, not open at Bottom or at Top, under a severe Penalty to be inflicted on the Infringers of the Provincial Constitution*. Which enjoins all Persons having Ecclesiastical Livings within the Province of *Canterbury*, and such especially as are in Holy Orders, to wear such Cloaths as are suitable to their State and Condition of Life†. And if any of the Clergy within the said Province shall publicly within the same appear in any Close-body'd Coat, or wear any other outward Garment than a Gown with long Sleeves, or with excessive and wide Sleeves, or shall go with long Hair and large Beards, or wear any other Rings on their Fingers than such as are suitable to their Dignity; as Bishops, Archbishops, &c. And, being Guilty of any Excess in the Premises, shall not on a Monition stand corrected within six Months from the Time of such Excess committed, and effectually lay aside such irregular Habits, they shall *ipso facto* (on having any Ecclesiastical Livings) incur a Suspension *ab Officio*; and if they persist herein for three Months longer, they shall, after nine Months, without any farther Admonition, be *ipso Jure* suspended from their Benefices. Nor shall they be absolved by their Diocesan, to whom this Power of Absolution is reserv'd from the said Sentences, till they have paid a fifth Part of the Yearly Profits of their Livings to the Poor of the Parish where their Benefices are, to be tax'd by their Diocesans, and to be paid within three Months afterwards. And if they shall during the Time of such Suspensions celebrate Divine Service, or administer in their Benefices as before, they shall from the Time of such Celebration or Administration be *eo ipso* depriv'd thereof by a Declaratory Sentence. And such Clergymen as are not benefic'd, if they shall offend in any of the Premises, shall *eo ipso* be render'd incapable for four Months to obtain any Benefice, unless they shall within six Months after an Admonition stand corrected. By another Provincial Constitution of Archbishop *Peccham*‡ founded on that of Cardinal *Othobon*§, the Pope's Legate here in *England*, the Clergy in Holy Orders were forbid to wear an outward Habit like unto that of Soldiers or Laymen*, under Pain of Suspension *ab Ingressu Ecclesie*. So that it evidently appears both from the *Canon-Law* in general, and from our own Provincial Constitutions in particular, what Care the Church took in former Times to have a Clergy grave and modest in their outward Habits; and it had been well if she had taken the same Care to have reform'd the inward Habits of their Minds, and not suffer'd them to have kept Concubines, and the like. But tho' Clergymen

* 41 Dist. c. 2 & 5.

† 21 Q. 4. 1. || Luk. cap. 7. v. 25.

‡ 21 Q. 4. 2. 41 Dist. 1. Sect. fin.

|| Lindw. lib. 3. Tit. 1. c. 3.

‡ Lindw. ut sup. c. 2. || Tit. 5. * 21 Q. 4. 3

* Lindw. ut
sup. cap. 3. v.
expressatis.

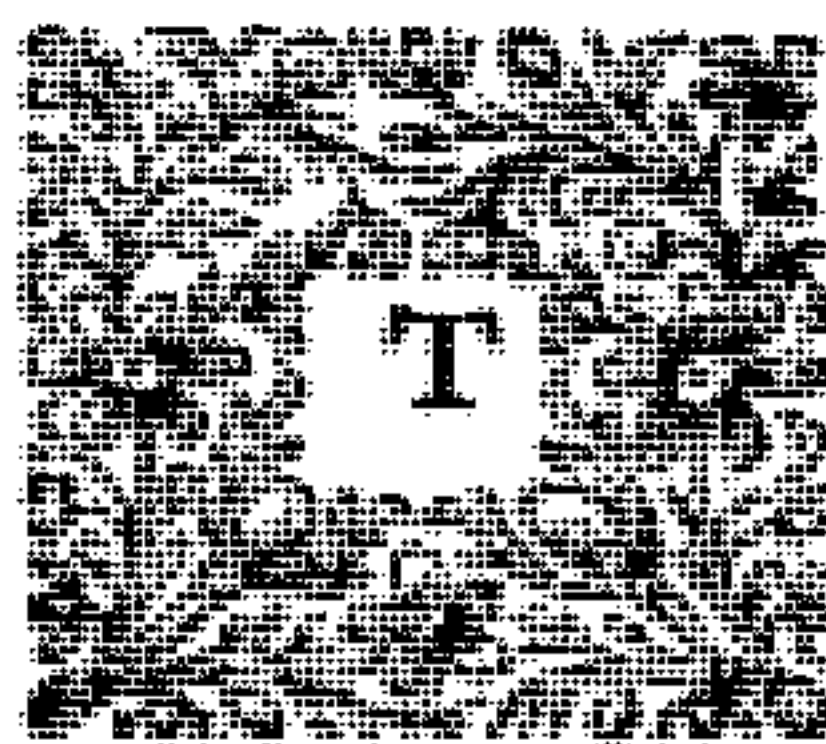
† 21 Q. 4. 4. ment †.

men were forbidden to wear Cloaths of certain Colours and Fashions; yet I do not find, they have any Habit prescrib'd them in Law to wear out of the Church, either in respect of Colour or Fashion: And, therefore, they may use any sort whatsoever suitable to their State, provided it be not expressly forbidden them, as red and green heel'd Shoes, red Stockings, Boots, and the like were *. The Twenty second and Twenty third of the *Laodicean* Canons forbids the Inferiour Clergy to wear the *Orarium*, which was a sort of Scarf, or (as *du Pin* calls it) a *Stola*, which the Bishops and Priests might wear on each Shoulder, but the Deacon could only wear it on the left Shoulder, and the Sub-deacon on neither. The Use the Deacon made of it, besides that of the Distinction of his Order, was to give Notice to the People and Clergy, what they were to do or say by the several Motions that he made with it. And 'tis probable, that the Word is of a *Latin* Original, and deriv'd from the Verb *orare*, to pray; because by this the Deacon gave Signals to the People, when they were to make their Responses, and perform their Parts in the publick Acts of Devotion. The *Greek* derive it from the Verb 'Ogō, to observe. But this is only Conjecture. By the *Canon-Law* Priests are not to appear out of their Houses without their Sacerdotal Habit, lest they should be affronted and suffer Insults, like the Laity: And he that shall be found acting contrary hereunto, shall be Subject to Canonical Punish-



Of Heresy, and the Punishment thereof.

* 24 Q. 3. 27.



† Cap. 6. v.
2 & 3.

‡ 2 Epist. cap.
2. v. 1.

THE *English* Word *Heresy*, in the *Greek* called 'Αἵρεσις, according to St. *Jerome* in one of his Epistles, denotes an *Election*; because an Heretick chuses that Opinion, which he conceives to be best for himself *. For the Word 'αἵρεσις is deriv'd from the *Greek* Verb 'αἵρέω, signifying to *chuse*; and from hence comes 'αἵρεσις, in *Latin* translated *Hæresis*, and in *English* term'd *Heresy*: Which in Propriety of Speech signifies an Election, tho' common Usage has given it another Sense by causing it to be now taken almost ever in *Malam partem*, viz. for an Erroneous Opinion touching some Article of the *Christian* Faith. Among the ancient Philosophers it signify'd the Institutions of some particular *Dogma*, or Opinion, and thus it denoted a Sect or Division of them in Point of Opinion. St. *Paul* in his first Epistle to *Timothy* † calls it 'Επιδιδασκαλία; which, according to the Context, imports a pertinacious Teaching of false Doctrine: So that an Heretick is he that obstinately perseveres in any erroneous Doctrine, which is contrary to the *Christian* Faith; and as such St. *Peter* describes it, saying ‡, *There were false Prophets among the People, even as there shall be false Teachers among you, who shall bring in damnable Heresies, &c.* And, again, an Heretick is stiled a Blasphemer of the Truth, one that brings in damnable Heresies contrary to the Doctrine of the Apostles, erring and leading others into Error; such as has erred and caused Diversity of

of Opinions contrary to the sound Doctrine which he has learn'd: And thus an Heretick is one, that despises all Admonitions; and will not submit himself to sound Doctrines. Some derive *Heresy* from the old *Latin* Verb *Herciscor*, signifying the same as *Divido*: And hence (say they) Heresy is a Division from the Unity of the Faith*: And others will have it, that Heresy is so called from the two *Latin* Words *Hæreo* and *Error*, defining Heresy to be an adhering to some Error in Point of Faith. For the *Canonists* say, that an Error of itself, and in its own Nature, does not make a Man an Heretick; but his adhering thereunto renders him such.

* Azo. in
sum. C. 1. 5.
1. Q. 1. 4.

By the Papal Law a Person may be said to be a Heretick several ways, *viz.* sometimes in respect of Words, and sometimes in respect of Deeds. For he that teaches false Doctrine in respect of the Christian Faith, or thinks otherwise than Mother Church instructs him, is by that Law deem'd an Heretick, whether his Thoughts or Doctrine regard Baptism, the Body of *Christ*, Confession of Sins, Matrimony, or any other of the *Romish* Sacraments or Articles of Faith†. For to so great a Length does the *Romish* Church extend the Notion, that a Man does not only incur the Guilt thereof, by impugning any of the Articles of the Christian Faith; but also if he impugns any of the Determinations of the Church, tho' they do not concern Articles of Faith‡: For he is deem'd a Heretick by the *Canon-Law*, who does not believe as the Church does||, tho' he has often made contrary Determinations touching Matters of Faith. But this Law makes a Distinction (in Point of Name) between such as beget Errors of Doctrine, and such as only follow them: For he is properly an Heretick, who begets Errors, and pertinaciously defends them*; and the other is only called a Follower of Heresy, and is more gently dealt withal than an Arch-Heretick, as the first is often stiled. Again, a Person may be said to be a Heretick, who understands or expounds the Holy Scripture in any other Sense than the Holy Ghost design'd it†. In a large Acceptation of Heresy, every Person may be said to incur the same, who is cut off from the Church by an Excommunication; and so likewise the Papists stile him an Heretick, who denies the Pope's Supremacy, and endeavours to rob the *Romish* Church of its great Privilege of being the Head of all other Churches#. But by the *Civil-Law* only such is deem'd a Heretick, who does not receive and believe the Doctrines which are preach'd and taught by the four Evangelists||; or in other Terms, he who is discover'd to deviate from the Fundamental Doctrines of the Catholick Faith*: And this I apprehend to be Heresy with us here in *England*.

† X. 1. 1. 1.
X. 5. 7. 9.
23 Q. 1.

‡ X. 5. 7. 9.
pr. Cl. 5. 3. 3.
|| 11 Dist.

* 24 Q. 3. 32.

† 24 Q. 3. 27.
37 Dist. 14.

22 Dist. 1.

|| C. 1. 5. 8.

* C. 1. 5. 2.

By the *Canon-Law* a Favourer of Heresy renders himself vehemently suspected of Heresy; and from such Suspicion, according to that Law, an Inquisition may be form'd against him†, and a Purgation enjoyn'd him at the Discretion of the Inquisitors: And if he shall fail in his Purgation, he shall be condemn'd as an Heretick‡; yea, by that Law such Person is liable to an Excommunication *ipso Jure*. And after a Person has been thus excommunicated, he is render'd Infamous and Intestable both *Actively* and *Passively*; and all Acts of Law are entirely interdicted him||. Receivers of Hereticks are such Persons as do willingly receive and entertain Hereticks in their Houses, knowing them to be such Persons; and do conceal them in such a manner as that they may escape the Hands of the Judge; and 'tis enough to render a Man liable to the Penalty of the Provincial Constitution*, if he only receives them knowingly: But if a Man entertains his Kinsman, that

† 13 Q. 3.

‡ X. 5. 7. 13. 3.
X. 2. 23. 14.
X. 5. 34. 10.

|| X. 5. 7. 13. 6.

Lindw. lib.
5. Tit. 5. cap. 1

is an Heretick, he shall be punish'd in a gentler manner. And thus a Person may be said to be a *Defender* of Hereticks two ways. *First*, When he does in a publick Manner defend them, together with their Errors: And such a Person is stiled a *manifest* Heretick *; and sometimes an *Arch-Heretick* †. *Secondly*, He is stiled a Defender of them, who does not defend the Error, but only the Person of the Heretick, lest (perhaps) he should fall into the Judge's Hands: And this a Man may do either by giving him Aid and Assistance, or else by hindring such as are willing to arrest an Heretick, and the like. The first of these, who is stiled a Defender of Heresy, shall be condemn'd as an Heretick ‡: And the second, who is only a Defender of the Person, shall only in some Measure be condemn'd as an Heretick, and a Purgation shall be enjoin'd him as one suspected of Heresy ||. Yet 'tis to be observ'd, That if the Person thus defended shall be of Kin to the Person defending him, he shall be punish'd in a less severe manner*, being only *ex tanto* and not *a toto* Guilty thereof, since several Things are often tolerated in respect of Blood and Kindred, which otherwise would not be suffer'd †.

As the *Species* of Hereticks are various and several, (for the *Canon-Law* reckons up no less than Eighty eight *Species* or different Sorts of Heresy ‡) so likewise the Punishments invented for them are manifold and different, to the end that they may be sufficient to coerce this profligate Sort of Men, born to disturb the Peace of the State and the Tranquility of the Church. Wherefore, the Cognizance of this Crime appertains both to the Civil and Ecclesiastical Judge ||: For tho' Heresy be a Matter to be adjudg'd of by the Church, *viz.* according to the *Canon-Law* and the Sense of the Inquisitors after Heretical Pravity, and to be determin'd, whether such a Doctrine and the Persons embracing the same be Heretical or not; yet, it being the Duty and Office of Secular Magistrates to defend Religion and maintain the Precepts thereof, they may animadvert on, and censure him, whom the Church adjudges to be an Heretick. And hence it is, that the Punishments of this Crime are either *Canonical* or *Civil*. *Canonical*, as when Hereticks in their Life-time are excommunicated and cut off as dead and rotten Members from the Church *; and so likewise are their Favourers and Defenders, as aforesaid. *Secondly*, Their Children are by the *Canon-Law* render'd incapable of Ecclesiastical Benefices, even to the second Generation †. A *third* Ecclesiastical Punishment due to this Crime is Degradation: For when Clergymen will not repent of their wicked Errors, they shall be condemn'd as Hereticks, and their Estates are confiscated ‡; and, hereupon, by the Papal-Law, they are remitted to the Secular Judge, to be punish'd with Death, as Persons (says that Law) worthy thereof. *Lastly*, A *fourth* Kind of Canonical Punishment due to Hereticks persevering in their Heresy, is a Denial of all Christian Burial to them after their Death ||, and even then by that Law they may be excommunicated; tho' by the *Civil-Law* *, Hereticks are bury'd as other Christian Persons are.

The Punishments inflicted on Hereticks, according to the *Civil-Law*, are many. As, *First*, They cannot convene or implead any Person in a Court of Judicature, make Litanies, celebrate Divine Service, or dispense and administer the Sacraments †; much less can they ordain Bishops or other Ecclesiastical Ministers‡. Again, by the *Civil-Law*, notorious Hereticks lost the Freedom of the City of *Rome*, and were render'd infamous Persons: And, therefore, were made wholly incapable of attaining to any Honours in the State, and could not

* X. 5. 40. 26.
† 24 Q. 3. 32.

‡ X. 5. 40. 26.

|| Arch. inc. 2.
vi. 5. 2. v. de-
fensor.

* D. 47. 16. 2.

† D. 26. 10. 9.

‡ 24 Q. 3. 39.

|| X. 1. 6. 30.

* X. 5. 7. 9.

† 24 Q. 3. 9.
& 13.

‡ X. 5. 7. 10.

|| X. 5. 7. 13. 6.

* C. 1. 5. 9.

† C. 1. 5. 3. 1.
L. 5 & 6. h. t.
‡ C. 1. 5. 2.
in prin. L. 14
h. t.

not be admitted to the Sacraments or any Dignities in the Church *; * C. 1. 5. 1 & 7. yea, they were depriv'd of such as they had already obtain'd, and were also strip'd of all other Privileges therein. An Heretical Woman lost her Prerogative and Preheminence of being preferr'd to her Husband's Creditors in respect of her Dowry or Marriage Portion, as otherwise she might be. By the *Civil-Law* Hereticks are also inhibited and restrain'd from buying, renting and possessing any Estate or Goods belonging to the Church †, and even from Trafficking or having any Work-Houses, † C. 1. 5. 10. Shops, Ware-Houses, &c. within Church-Yards, or the Bounds of the Church, to trade in; this being only granted to the Orthodox ‡. Be- ‡ C. 1. 5. 20. sides, that Law denies them the Power of making last Wills and Testaments, the entire Alienation and Administration of their Estates, and likewise the Acquisition of all Inheritances, Executorships and Legacies ||. || C. 1. 5. 4. 18 & 22. Nor is the Evidence and Testimony of a Heretick admitted against an Orthodox Person, tho' he may give Evidence in Favour of him *. * C. 1. 5. 21. Nov. 45. *Lastly*, The *Civil-Law* orders all Hereticks to be banish'd the State, lest other Persons should be infected with their Errors. By a Constitution of *Frederick* the Emperor, they are deem'd infamous and proserib'd Persons on a Suspicion of Heresy alone, unless they purge themselves from such Suspicion. But such as endeavour'd either publicly or privately to draw others into their Heretical Errors by teaching or writing Heretical Books, were punish'd with Death, and their Books order'd to be burnt; and such as kept Books of this Kind were condemn'd to perpetual Deportation or Banishment.

The Christian Church, or (at least) the Polity and Government thereof never pretended to inflict Capital Punishments on the Score of Religion for above a Thousand Years after *Christ*. For *Arius*, *Macedonius*, *Nestorius*, *Eutyches*, *Dioscorus* and other Arch-Hereticks, and their Followers, in the Primitive Days of Christianity were by the Church treated with no other Kind of Punishment than Excommunication, and by exaundering and depriving them of their Degrees therein. For the Power of inflicting Civil Punishments was left to Civil Magistrates and Princes, who were only wont to punish Hereticks with Banishment and Deportation †, or else by and with Pecuniary Mulcts, † C. 1. 5. 6. after the Emperors became Christians, and were, thro' a strange Weakness, prevail'd on by the Clergy to do that for them, which they were then asham'd to do for themselves: And 'tis well known, that the Emperors, as Weak as they were, would never be induc'd to establish any Capital Punishment against Hereticks till *Justinian* the Emperor's Time ‡, ‡ C. 1. 5. 12. which was above Five hundred Years after the first preaching of the Gospel. For the Sixty fifth Law in the *Theodosian Code*, from whence the fifth Law in the *Justinian Code* ||, touching Hereticks, was taken, || C. 1. 5. 5. and which was enacted by the Emperors *Theodosius* and *Valentinian*, has been interpolated and corrupted (as many think) in several Particulars by the Clergy and their *Amanuenses* in succeeding Times; and in the fifth Law of the *Justinian Code* these Words were afterwards added, *viz. Et ultimo supplicio tradendis*, as this is found by collating several ancient Manuscripts of the *Theodosian* and *Justinian Codes*, with the printed Copies thereof; and even by some of the printed Copies themselves, wherein these Words are omitted. But now the Court of *Rome* arrogates a Power to itself of decreeing and inflicting Capital Punishments on Hereticks, and even on Kings themselves. For by the Papal *Canon-Law* the Crime of Heresy is a Matter so merely Ecclesiastical, that the Secular Judge cannot by any means take Cognizance of it; but can only have the naked Execution and Punishment of it com-

committed to him. Indeed the *Arians*, *Donatists*, *Vandals* and others whom the Orthodox Christians in those Ages of the Church would never imitate, held; That Religion ought to be maintain'd and propagated *Vi & Armis*: And for this Reason *Athanasius* and *Hilary* do heavily complain of the Emperor *Constantine*, for that he maintain'd and propagated Religion *Vi & Armis*; that is to say, by coercive Laws in respect of pure Matters of Faith. But 'tis Time for me to consider how our Laws here in *England* have punish'd and dealt with Heresy from Age to Age, which to go thro' them all would take up more of this Work than I have Room for within the Compass of my Design: And, therefore, I shall confine my self to the more modern Laws.

* Lindw. lib.
5. Tit. 5. cap.
2.

By a Provincial Constitution of Archbishop *Arundel**, a Preacher was to utter nothing in his Sermon, and the like, touching the Sacraments, either besides or contrary to the Determination of the Church, nor was he to call any Thing into Question that was or had been defin'd or decreed by the Church, under the Pain of Excommunication *ipso facto*, and was not to be absolv'd till he had abjur'd his Heresy, unless in case of Death: And if he relaps'd thereinto, his Estate and Goods were to be confiscated, and he was to perform a Pennance enjoind him by the Law, according to the Form of this Constitution.

† Lindw. ut
sup. cap. 3.

And by another Constitution of the said Archbishop †, all Persons were forbidden to dispute or call in Question any Thing that was or should be done by General or Provincial Councils, unless it were to come at the true Sense of their Decrees: So that the Clergy had the Laity hereby entirely under their Girdle. And lest Heresy should spring up in our Universities from the curious Search of Persons, that desired the Truth,

‡ Lindw. ut
sup. cap. 4.

another Constitution was made by the same Archbishop ‡, commanding all Heads and Governors of Colleges and Halls in our two Universities, once every Month (at least) to enquire, whether any one had offer'd any Proposition which was contrary to sound Doctrine or the Catholick Faith, of which they themselves were to be Judges; and to proceed against such Persons thereupon in a summary Way. And thus stood the Ecclesiastical Law here in *England*, supported by the *Canon-Law* in general in Respect of Heresy. For before the Statute of *Henry* the Fourth||, a Bishop could not commit any one for Heresy. The Proceedings against him were by the Censures of the Church, according to their Law; and after the Archbishop had convicted him in a Provincial Synod, he was then by the ancient Law to be deliver'd to the Sheriff, who, by Vertue of the King's Writ *de Heretico Comburendo* was to burn him. But it being found Troublesome to summon a Convocation upon this Occasion, that Statute provided, That every Bishop might in his Diocess convict an Heretick; and if this was done in the Sheriffs Presence, (as was usual in those Days) for the Bishop would send for him on Purpose, then, immediately on Conviction, the Heretick was deliver'd to the Sheriff, who burnt him without the aforesaid Writ: But if it happen'd (as it sometimes did) that the Sheriff was not present at the Conviction, or if the Heretick was order'd to be burnt in a County other than where he was convicted, the Sheriff in such Cases could not burn him without the said Writ. I don't find that a Heretick convicted had any other way to save himself from the Fire, but by abjuring his Opinion; and this was only on the first Conviction: For if he relaps'd, and was convicted a second time, then he was surely burnt, for the Clergy in those Days shew'd no Mercy.

|| 2 H. 4. cap.
15.

And

And this was *William Sawtree's* Case, who being condemn'd by Archbishop *Arundel* in a Provincial Council * for a relapsed Heretick, a Writ was directed to the Mayor and Sheriffs of *London* to burn him; and this being by the Advice of the Lords Spiritual and Temporal in Parliament assembled †, the Writ was subscrib'd *per ipsum Regem & Concilium*. And this was the first Person that was burnt in *England* for Heresy, on a Sentence given in a Council, and by Virtue of the aforesaid Writ, which see in *Fitzherbert* ‡. 'Tis called there, indeed, the *usual Punishment*; but this must relate to the Usage beyond Sea; for it was seldom or never used here at the Bishop's Request till now, tho' Burning was the Punishment at the Common Law for this Crime; but the Proceedings against the Offender was in the Temporal Courts, upon Indictments, &c. About the beginning of the Thirteenth Century the *Albigenses* in the South Parts of *France* preaching against the Corruptions of the *Romish* Clergy, were for that Reason reputed Hereticks; and St. *Dominick* coming out of *Spain* to convince them of their Errors, but without any Effect, he therefore perswaded the Magistrates to burn them. But, as yet there being no Law for it, the Fourth *Lateran* Council decreed, That Hereticks should be deliver'd to the Magistrates to be extirpated, which is a very soft Word for Burning; and if they neglected it, they were to be excommunicated. Princes were also depos'd by the Pope, and their Subjects absolv'd from their Allegiance; and this Tyrannous Behaviour of the Clergy towards them was so terrible, that they rather chose to deliver up their Subjects to this Kind of Death, than to be thus plagued with a troublesome Priesthood.

In *Wickliff's* Time a Bill passed the Lords House *, tho' never sent to the *Commons*; That upon a Certificate made by the Bishop to the Court of *Chancery*, of the Names of such of *Wickliff's* Followers as preach'd without Licence, and drew great Assemblies together, the Chancellor might issue out Writs to the Sheriff to seize and imprison them, till they justify'd themselves according to the Laws of the Church. But in the next Parliament †, the Commons by a Bill declar'd, that they never assented to that Act; and, therefore, desired it might be look'd on as void. But when *Richard* the Second was depos'd, then in Gratitude to such of the Clergy as assisted *Henry* the Fourth in coming to the Crown, this King procur'd a Law ‡ to pass both Houses of Parliament; which having the Royal Assent, the Purport of it was, that none should preach without Licence, nor deliver any Doctrines contrary to the Determinations of the Church; and if any Person was suspected of acting contrary hereunto, he was then to be imprison'd by the Ordinary till he was either convicted or abjur'd his Opinion; and if he refus'd or relaps'd after Abjuration, he was then to be deliver'd to the Sheriff to be burnt: But first his Conviction was to be certify'd into *Chancery*; whereupon a Writ was issued out to burn him. But afterwards this Writ *de Heretico comburendo* was taken away by Parliament || as a most inhuman Proceeding; and Heresy made punishable by the King's Ecclesiastical Laws, either by Excommunication, Deprivation, Degradation, or other Church Censures not extending to Death.

In respect of Jurisdiction relating to Heresy, the *Canon-Law* considers three Things in General, *viz.* First, The Thing itself. Secondly, The Person: And, Thirdly, The Action. In respect of the Thing itself, we ought to consider the *Dogma* or Opinion which is asserted and maintain'd by the Heretick; and likewise the Crime itself. In respect of the Person it considers not only the Person of the Criminal, but likewise that of the Judge, *viz.* In relation to the first, whether the Person

that has offended be a Bishop or the like, who ought not to be adjudg'd by an Ordinary Inquisitor, but to be admonish'd by the Pope himself ||, or whether he be any other Person of his Court and Jurisdiction. In respect of the Action, it considers the Nature and Quality of the Assertion, and the manner how such Heresy was publish'd, the Favour shewn to Hereticks, the Defence and Maintenance of such wicked Doctrines, the Preaching thereof, and the like; and, *lastly*, Whether such Hereticks assembled in an arm'd and tumultuous Manner. The first Cognizance of this Crime (says that Law) belongs to the Ecclesiastical Judge, and the last to the Secular Judge, according to the *Canonists*, if we may believe their Interpretation of St. *Matthew* * and St. *John's* † Gospels. For the *Papists* say, That if a Person continues obstinate in his Heresy, or relapses thereinto, after he has abjur'd the same, he ought to be cut off from the Church, and put to Death; according to the Form prescrib'd by God himself (as they expound the Text) saying, *If a Man abide not in me, he is cast forth as a Branch, and is wither'd, and Men gather them into the Fire, and they are burned*‡. For by the Words *cast forth*, they say, he means the Punishment of Excommunication; by the Word *wither'd*, he understands a *Perseverance*; by the Words *Men gather them*, he intends the Secular Judgment that follows a Heretick; and by the Words *they are burned*, they will have him to mean the Punishment of Death. But before they give Sentence, let them find an infallible Judge upon Earth.

The *Papists* err very much in one Extream, thinking, That Hereticks ought to be prosecuted with Fire and Sword, whenever they shall judge Men to fall into Heresy: And they measure Heresy by a Dissent from their own Faith, and not from the Doctrine of the Holy Scriptures. And this their Clergy maintain, that they may stir up and excite Princes by this Means to butcher such as are of the Reform'd Religion. But touching this Matter (I think) we ought not to offend either by a preposterous Severity, or to encourage Men of bad Principles by too much Lenity. For we ought to distinguish well between the Seduc'd and the Seducers, between such as err in light Matters, and such as obstinately offend in Matters of the highest Consequence to Religion. The first ought to be instructed with Gentleness and Lenity, and the latter ought to be punish'd in a sharper manner, as Disturbers of the Publick Peace. We ought to distinguish between such as only impeach one or two Articles, and (perhaps) of Man's Invention too; and such as endeavour to pull down and overturn the very Foundations of the Christian Religion; between such as offend out of meer Ignorance, and keep their Errors privately to themselves, and all such as poison and infect whole Nations with their pernicious Errors, and such as they converse with. For no Man can doubt, but that we may proceed with some Severity, tho' not with Death, against such Arch-Hereticks, Blasphemers, and Disturbers of the Publick Tranquility of the Church and State, by the Means of impious Doctrines obstinately defended, and occasionally scatter'd and divulg'd among the People, in order to stir up Tumults and Seditions in the Commonwealth, under the veiled Pretence of Religion. For, says St. *Paul*, *Hast thou Faith? Have it to thy self before God* *: and trouble not the Church with thy Faith. Let us therefore follow after the Things which make for Peace; and Things wherewith one may edify another. And we shall not then persecute the unhappy Dissenter, because he does not think and believe as we do.

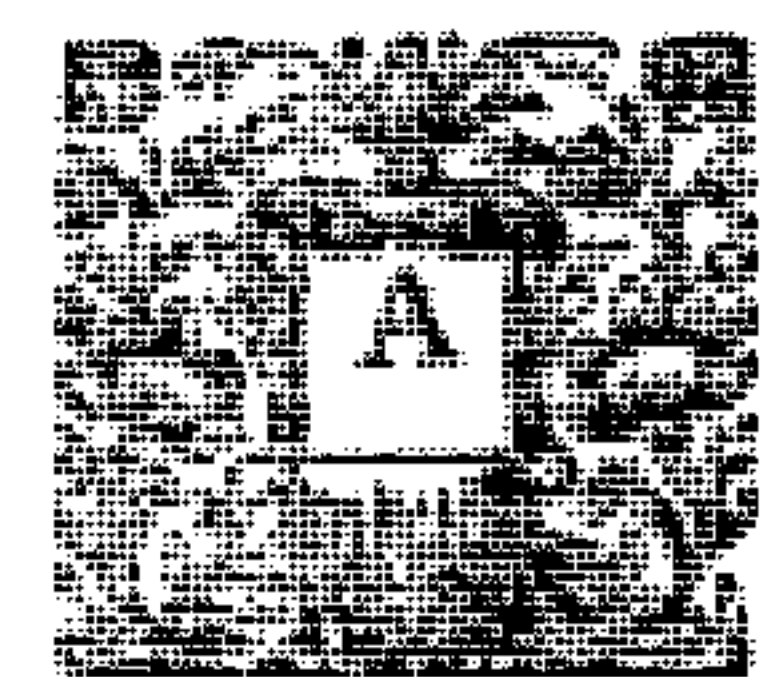
* Cap. 18. v. 15. &c.
† Cap. 15. v. 6.

‡ Joh. cap. 15. v. 6.

* Rom. 14. v. 22.



Of Hospitals, and the Care of them, &c.



ALL Men are descended from one Common Stock, and by Nature of Kin unto each other; so there have been, in all Ages among Heathens as well as Christians themselves, Men of Piety and Compassion towards their own Species, who have built certain Houses for the Maintenance of the poor distressed Part of Mankind, and settled Estates and Revenues thereon for their Relief: And these Houses are with us commonly stiled *Hospitals*, and sometimes *Infirmaries*. The ancient *Romans* had their Hospitals for Orphans and poor fatherless Children; and for Infants expos'd and cast away by their Mothers under seven Years of Age: The first the *Civil-Law* stiles *Orphanotrophium* *, and the Master or Governor of such a House by the Title of *Orphanotrophus*: And the other was called *Brephotrophium* †, as appears in the *Justinian Code*. They had also their Hospitals for Beggars and other indigent Persons, who thro' Age or other Infirmary, could not live by their Labour; and such a House was term'd *Ptochotrophium* ‡, &c. And because the Care of the Poor is the Cause of God, according to the *Old* and *New* || *Testament*, therefore the Clergy in succeeding Ages, under a Pretence of Religion, and being God's Stewards, got the Guardianship of these Pious Foundations into their Clutches*; left Sloth and Irreligion should be cherish'd under a Colour of Charity towards the Poor. And thus in *Popish* Countries they have continued ever since to be under the Bishops Jurisdiction and Protection; and no one can build such Houses of Piety without his License or Authority †, or any Oratory therein for the Publick Celebration of Divine Service. ‡ X. 3. 36. 4. 18 Q. 2. 10. Moreover, sometimes an Hospital is annex'd to a Church, and on the other Hand, a Church is sometimes annex'd to an Hospital; and in this Case, according to *Felinus* ‡, such Hospital enjoys the Privilege of an Ecclesiastical Benefice: But *Joh. de Selva*, in his Treatise of *Benefices*, says||, That before an Hospital be called an Ecclesiastical *Benefice*, tho' it be a Religious House, 'tis necessary it should be spiritualiz'd and col- ‡ In c. 4. x. 2. 26. || Cap. 3. Q. 57. lated to on the Presentation of a Layman.

* C. 1. 3. 32.
C. 1. 2. 19.

† C. 1. 2. 19.

‡ C. 1. 2. 19.

|| Mat. c. 19.

* 5 Q. 5. 2.
Gloss. in c. 1.
v. non possunt.
82 Dist.

† X. 3. 36. 4.
18 Q. 2. 10.

‡ In c. 4. x. 2.
26.

|| Cap. 3. Q.
57.

The Care of Hospitals then, according to *Petrus de Ancharano*, as they are govern'd and visited by Bishops, does of *Common Right* by the *Canon-Law* belong to Episcopal Jurisdiction, and not to the Care of Lay Magistrates: Yet if the Bishops and their Vicars-General shall behave themselves very negligently in the Care of them, it is a receiv'd Doctrine among the *Canonists* themselves, that the Ordinary Magistrates may interpose and take Cognizance thereof. But by a Constitution of *Francis* the First, King of *France*, all Jurisdiction over Hospitals is granted to the King's Ordinary local Judges, or to such as live near unto such Hospitals, to visit the same, and to make Statutes for the Government thereof: And with us here in *England*, all such Hospitals as have been built since the Reformation are Visitable by the King or Lord-Chancellor, if there are no particular Feoffees or Visitors appointed for that end by the Founder him-

himself: For if the Government of an Hospital be not deem'd an Ecclesiastical Benefice, as it often happens not to be, either thro' the Order of the Patron, the Authority of the Civil Magistrate, or from the Law and Nature of the Foundation itself, such Government or Administration is granted without the Bishop's Advice or Consent: But if it be a Benefice with the Right of Patronage, the Bishop gives the Master or Governor thereof Institution on the Patron's Presentation. For there are some Hospitals of a publick, and others of a private Nature. Among the first they reckon such as were granted to the Hospitallers in *Titulum Beneficii*; and in respect of the latter we mean such as are only granted *ratione Administrationis* *. The first becomes an Ecclesiastical Benefice either by the Constitution of its Founder, as for the most Part; or else by having a Church therein with a Belfry and Bells to call People together on the Score of Divine Service†; or if there be any Altar fix'd and consecrated therein‡; and, *lastly*, Whenever any Part of the Revenue is settled on the Master on the Account of reading Divine Service, and doing other Offices therein, and the like. For otherwise, if those Things do not concur, such Hospital may rather be called a Place of Charity than an Ecclesiastical Benefice ||.

* Felin. inc.
4. x. 3. 26.

† Abb. in c.
10. x. 5. 33.
‡ Felin. in c.
4. x. 3. 26.

|| Gloss. in c.
2. C. 2. I. v.
Beneficiis.

It has been said, that by the *Canon-Law* Hospitals erected with a Church, Chapel or Altar therein contain'd, or by and with the Bishop's Authority are said to be Religious Places, and subject to the Bishop's Jurisdiction: And 'tis to be further observ'd, that a Bishop, by deputing a Priest or Chaplain to administer the Sacraments to the Persons therein, may correct and remove him for his Demerits; but yet he ought not to demand or exact any Thing from him *ultra Solitum*. It has been also said, that by this Law no one ought to build an Hospital without the Bishop's Leave or Licence first obtain'd: And, therefore, if a Layman appoints an Heir or an Executor, and charges him in his Will to build an Hospital within a Year after the Testator's Death, under Pain of being *ipso Jure* depriv'd of his Heirship, &c. he shall not by that Law be depriv'd thereof, if he cannot obtain the Bishop's Leave or Licence for so doing; because he ought not to build it without such Leave or Licence had. But yet if the Bishop will not grant his Leave, he ought to build after such a manner as he may, *viz.* as an Oratory, or as a *profane* Hospital. Because if he cannot build it after that manner as the Testator appointed, yet he is bound to execute the Testator's Will after the best manner he may: And such an Hospital built without the Bishop's Leave, and not having the Form of a Church, is deem'd a *profane* Hospital. And by the *Canon-Law* not only the Bishop's Leave and Consent is requir'd, but the Bishop may change the Place wherein it ought to be built, even contrary to the Testator's Will and Intention; and the Heir or Executor is bound to execute the Testator's Will in the Place commuted by the Bishop. Again, tho' an Hospital should be built by a Layman on this Condition, *viz.* That it should not be a Religious Place, or become Subject to the Bishop, as aforesaid; yet it shall be a Religious Place, and be under the Bishop's Care and Jurisdiction, because a Layman cannot do any Thing contrary to the Laws of the Church.

Baldus says, That an Hospital is then said to be a *profane* Thing, when the Bishop does not lay the first Stone; because to the end (says he) that it should be an Ecclesiastical Foundation, it ought to be founded by the Bishop's Authority: And, therefore, such Hospitals which are in the Houses of Laymen, are said to be *profane* and *lay* Foundations.

Of



Of an Inhibition, and the Force thereof.



AN *Inhibition* is the Precept or Mandate of a Superiour Judge issuing out of his Court, and directed to an Inferiour Judge or Court on the Interposition of an Appeal; forbidding such Inferiour Judge to proceed any further in the Suit or Cause formerly depending before him, and now appeal'd to a Superiour Judge, during the Course of such Appeal *.

* VI. 2. 15. 7.

And this Mandate or Precept is usually decreed and granted with some Penalty or Censure of Law annex'd to it. In the *Imperial* Chamber, as well as in other Courts, when it is appeal'd from a *Diffinitive* Sentence, or an *Interlocutory* having the Force of a *Diffinitive* Sentence, this Inhibition is decreed upon the Appellant's Motion, together with a Citation of the Party Appellate †, and an Intimation to the Judge *a Quo*, commanding him to transmit the Process or Acts done in the inferiour Court to the Judge *ad Quem*. And 'tis to be observ'd, That such Intimation may and ought to be issued forth of *Common Right* *, because an Appeal from a *Diffinitive* Sentence, or an *Interlocutory* (as aforesaid) devolves the Cause immediately to the Judge *ad Quem* and reduces it to that State, in which the Principal Cause was after Contestation of Suit †. And tho' there is no need of an Inhibition, when the Judge *a Quo* submits himself to the Appeal; because he has by such Deference to the Appeal abdicated his own Jurisdiction in the Cause: Yet in the *Imperial* Chamber an Inhibition is always granted on a Motion or Petition (as above remember'd): And so it is practis'd here in *England*, because, according to that Maxim in Law, *abundans Cautela non nocet*. Moreover, 'tis to be observ'd, That an Inhibition ought not to be decreed in an *Extra-judicial* Appeal, as it is in a *Judicial* one ‡: Because, an *Extra-judicial* Appeal being only a Provocation to a Cause, it does not suspend what is gone and past, but only submits the Cause *in futurum* to the Protection of the Superiour Judge, and has only a Respect to what shall hereafter happen, lest any one should be unduly molested ||. Nor ought an Inhibition, together with a Citation, to be decreed and granted immediately in an Appeal from an *Interlocutory* Sentence *simply* so called, tho' the same be appealable: Because in Respect of an Inhibition the Judge ought to have a *Constat* of the Grievance, that he may know the Truth thereof; for the Causes of a Grievance ought not only to be express'd in the Instrument of the Appeal, but also the Truth of such Grievance ought to be verifi'd from the Acts of the Inferiour Judge *. And from hence the Judge *ad Quem* ought to consider, whether the Cause be devolv'd or not: For as long as the Cognizance continues before him, whether he ought to receive the Appeal or not, and whether the Cause be devolv'd or no, he ought not to inhibit the Inferiour Judge. Therefore, if the adverse Party makes a Question or Matter of Doubt *in Puncto Competentie*, whether the Judge *ad Quem* has Jurisdiction, the Judge *a Quo* ought not to be inhibited till such Time as this is clear'd and remov'd by the Interpretation or Interlocution

† Alex. Conf. 91. Vol. 2.

* Gail. lib. 1. Obs. 144. n. 1. x. 2. 28. 5. 2 & 3.

† C. 2. 13. 13. Bart. & Bald. ibid.

‡ X. 2. 28. 5.

|| Abb. in c. 13. x. 1. 33. n. 4.

* Gail. ut sup. n. 4.

* X. 2. 28. 5. of the Judge *ad Quem* pronouncing for his Jurisdiction *. And thus there is Difference to be made between a *Diffinitive* and a *simple Interlocutory* Sentence, in respect of decreeing an Inhibition. For in the first Case an Inhibition is indistinctly and immediately granted, whether the Judge *a Quo* be wont to proceed to an Execution or not: But in the other Case it ought not to be granted any otherwise than till after such time as he has taken Cognizance of the Cause of Appeal.

† In c. 13. x. l. 33. It has been a Question among some, whether a Judge of an Appeal can indifferently inhibit the Judge *a Quo* not to proceed, before the Merits of the Appeal have been heard and try'd? But according to *Innocentius* he cannot †. For in the first Place he ought to take Cognizance about the Admission of the Appeal; and if he receives the Appeal as emitted on a probable Account, he may afterwards inhibit the Judge *a Quo* not to proceed; because as a Metropolitan has not Jurisdiction over the Subjects of his Suffragans, unless it be in a Cause of an Appeal, so he ought not to inhibit, because he has not receiv'd the Appeal as emitted *ex Causâ probabili*. And if need be he ought to take Cognizance of the Truth thereof; because he begins the same again. But *Speculator* is of a quite contrary Opinion, saying, That the Jurisdiction of the Judge *a Quo* is not immediately suspended by an Appeal from an *Interlocutory* Sentence even on the very Article on which it was appeal'd, but that the Judge may proceed *ad ulteriora*: And the Validity of the Process depends on a future Event; because if the Appeal shall be pronounc'd to be unlawful, the Process shall be valid.

‡ Gail. lib. 1. Obs. 127. n. 10. If the Judge *ad Quem* receives an Appeal *ex certâ Scientiâ*, he may send an Inhibition without any such Cognizance: But if the Grievance be not expressly mention'd in the Appeal (as aforesaid) he ought in the first Place to take such Cognizance before he decrees and emits such an Inhibition. Therefore, in decreeing an Inhibition with a Citation, the Judge of the Appeal ought to consider with himself, whether the Sentence appeal'd from be a *simple Interlocutory*; which inflicts such a Grievance as cannot be repair'd by an Appeal from a *Diffinitive* Sentence; or whether it be from an *Interlocutory*, that has the Force of a *Diffinitive* Sentence. In the first Case he ought to read over and consider, whether it be rightly appeal'd as *in scriptis*; or whether the Causes of the Grievance be express'd or not on Account of the aforesaid Reasons: For an Inhibition ought not to be otherwise decreed and granted in an Appeal from an *Interlocutory*. But if the *Interlocutory* has the Force of a *Diffinitive* Sentence, then an Inhibition with a Citation may be decreed, if there be no Defect of the Formalities. In a Cause of Appeal, when it is principally appeal'd on the Account of some Nullity, an Inhibition with a Citation ought not to be decreed, because after Sentence has pass'd *in Rem Judicatam*, it establishes and gives a Right between the Parties ‡: And the Process of a Nullity ought not to retard or hinder the Execution of a Sentence. And, moreover, there lies a Presumption in Favour of such a Sentence not only in respect of the Justice of it, but also in regard to the regular Process thereof. And hence there is a *Constat* of a Presumption of Law in Favour of the Judge and his Proceedings, till such time as the Nullity of the Sentence be set forth, and plainly appears: And, therefore, no Regard ought to be had to the naked and simple Narrations of the Supplicant, in respect of decreeing an Inhibition. And this is observ'd as a Rule in the *Imperial* Chamber, *viz.* That an Inhibition ought not to be decreed in Causes of Nullities ||, because a Nullity is not presum'd, unless it be prov'd, nor ought an Inhibition to be decreed, when Causes

|| Myns. cent. 4. Obs. 64.

Causas are null and void ; because a Nullity is not presum'd, unless it be prov'd, as aforesaid.



Of Institution and Induction into Benefices.

BECAUSE *Institution* and *Induction* into Ecclesiastical Benefices have so near a Relation to each other, I shall here place them both under one and the same Title, though treat of them asunder : And first of Institution, because in respect of Order it precedes Induction. Now Institution is nothing else but a transferring or conferring the Right of an Ecclesiastical Benefice, subject to the Right of Patronage, on the Person presented thereunto for Institution ; and it is made by the Ordinary of the Diocese on the Patrons Presentation of a fit Person to be instituted thereunto, if the Ordinary admits him to be qualify'd for the Cure of Souls *. And thus Institution is only a particular way or manner of giving Ecclesiastical Benefices or Prebends not much Distinct from Collation itself : For Bishops having by the *Canon-Law* the Right of disposing of all Ecclesiastical Benefices attended with the Cure of Souls, did reserve the Right of Admission and Institution unto themselves, tho' they granted unto Patrons and Founders of Churches, the Power of recommending a fit Clerk for the Cure thereof : But tho' Bishops have this Right reserv'd to them by the *Canon-Law*, yet it is no more than a Trust vested in them for the Good of the Parishioners to see that the Cure of Souls be well supply'd and provided for. They may not refuse the Person presented to them for Institution upon Caprice or Humour, or thro' Hatred, and the like, if he be duly qualify'd : For tho' (perhaps) at first they only design'd to give the Patron the bare Nomination of a Clerk, in order to encourage the building and endowing of Churches ; well knowing that in after Ages they might, by the Help of this Reservation of Right, secure to themselves the entire Disposol of all Livings, under a Pretence of Disability : Yet our Laws have fenced against this manifest Breach of Trust and Power in the Ordinary, by making him a Disturber if he does not give Institution upon the Fitness of a Person presented to him, or (at least) give Notice to the Patron of the Disability of his Presentee, that he may present another upon his unfitness : And herein Institution differs from Collation ; because the Ordinary is oblig'd to confer the Living on the Person presented, whether he will or not ; provided the Presentee be qualify'd : But in collating to a Benefice, he is not bound to confer it on this or that Person against his Will ; but may give it to whom he pleases, provided he be a Person qualify'd in Law. Institution is by the *Canonists*, in respect of the Ordinary, stiled a *Transferring of Right* ; because the Patron has not *plenum Jus* in the Living, as not having a Spiritual Right therein : And it may be defin'd to be an *involuntary* Transferring ; because the Ordinary must transfer his Right in such Benefice whether he will or not, as aforesaid.

* Abb. in c. 2. x. 3. 8.

The

The Bishop of the Diocess had anciently all the Churches therein vested in him as universal Incumbent thereof; and sent out Curates and Deacons to officiate therein with such Salaries as he pleas'd to allow them out of the Profits that he receiv'd himself, which were then only Offerings of Devotion, as Mr. *Selden* observes in his History of Tithes*: And hence it is, That the Institution of fit Persons to be admitted into vacant Benefices, and the Custody of such Livings do of *Common-Right* belong to the Bishop of the Diocess, where such Livings lye †. But Institutions and the Custody or Guardianship of vacant Churches, which follows the Right of Institution and Collation, may of *Special Right*, viz. by Privilege or Prescription, belong to a Person that is not a Bishop; and such a Person, pending Suit with the Diocesan, shall be defended in the Possession thereof‡. Between the Archbishop of *York* on one side, and the Archdeacon of *Richmond* on the other, the Question was touching the Institution of Clerks to Ecclesiastical Livings, and the Custody of vacant Churches. And this Question devolving to the Pope on the Part of the said Archbishop, it was alledg'd, That as well of *Common-Right* as by General Custom, the Institution of Persons, and the Custody of vacant Benefices in his Diocess did belong to him: But that some of his Predecessors had delegated this Power of Institution and Right of Guardianship *personally* to some of the Archdeacons of *Richmond*. Whereupon the Archbishop's Proctor demanded, That the Archdeacon should quit Claim, and yield up all Right thereunto. 'Twas answer'd on the Archdeacon's side, That the Archbishop did not make a *personal*, but a *real* and *perpetual* Grant, not only of Institutions, but likewise of the Guardianship to vacant Churches, and that this was done by the Chapters Consent; and that the Archdeacon had been in a continu'd Possession of these Rights in the Times of several Archbishops and Archdeacons: And that the Archdeacon had this Right granted him from the Archbishop without any *Salvo Jure* to Institution and Guardianship. But the Archbishop reply'd, That he granted him the Archdeaconry with a *Salvo Jure* to Institution and Guardianship as aforesaid; and, further, that the Archdeacon had abjur'd these Liberties and Dignities. The Pope, upon hearing the Matter, pronounc'd, That the Archdeacon should be confirm'd in the Possession of these Liberties, till the Archbishop prov'd the same to be only a *personal* and not a *real* Grant. See ¶ X. 3. 7. 6. Pope *Gregory's* Decretals ||.

But tho' Institution into Ecclesiastical Benefices does of *Common-Right* particularly belong to the Bishop, to the end that it may be deem'd Canonical*; yet it may belong to any other Ecclesiastical Judge or Prelate, to whom the Admission of such Curates as are charged with the Cure of Souls, does likewise appertain; for Bishop's Officials and Chancellors may by Commission grant this Institution, as is commonly practis'd. And so likewise may a Chapter (*sede vacante*) grant the same: For tho' a Chapter cannot collate unto Ecclesiastical Benefices belonging to the Bishop's Collation, during the Vacancy of a See; yet a Chapter may lawfully admit and institute into Benefices such Persons as are presented by Patrons, if they are fitly qualify'd*; and by this Means a Chapter may try a *Jus-Patronatus*. But tho' it appears by the Laws of the Church, that neither Kings, Princes, nor any Laymen can give Institution to Clergymen in respect of vacant Benefices without the Bishop's Consent; yet with his Consent even Laymen may do it: And thus with us in *England* Lay-Chancellors, Vicar-Generals, and the like, grant Institutions. A Deanery does not strictly come under

* Cap. 6. pt. 3. fol. 80. cap. 9. pt. 2. fol. 253.

† X. 8. 7. 3.

‡ X. 3. 7. 6.

¶ X. 3. 7. 6.

* X. 8. 7. 3.

* VI. 3. 6. 1.

der the Notion of an Ecclesiastical Benefice, as the Deanery of St. Martins le Grand in London, and other Deaneries of Royal Donation, and in the Gift of Lay Patrons *: And, therefore, the Persons that occupy such Deaneries have not Institution from the Bishop, nor Induction from any Spiritual Authority; but all Matters relating thereunto are dispatch'd and expedited by the King himself, and other Lay Patrons, by virtue of their Mandate or Commission. And as such Deans do not receive Canonical Institution from any Bishop, or from any other Ecclesiastical Ordinary Judge; so they are not subject to the Bishop's Power or Visitation. And hence it appears, that Deaneries of this Kind are not Ecclesiastical Benefices; because that, which is properly stiled an Ecclesiastical Benefice, cannot be obtained without Canonical Institution †.

* Lindw. lib. 3. Tit. 2. cap. 1. v. Beneficiati.

† VI. 5. de Reg. Jur. 1.

Institution may be perform'd by the Bishop under the Episcopal or any other Seal besides that of his Office, according to some Mens Opinion; and tho' he be not in his Diocess: For (say they) 'tis the Act of the Bishop, which makes the Institution; and the Instrument under the Seal is only a Testimonial of what has been done by him; to which Instrument some Witnesses should subscribe their Names. *Sed de hoc Quare* hereafter under the Title of *Seals*. If Institution be granted by the Vicar-General, or any other Substitute, their Acts are taken in Law to be the Acts of the Bishop himself, and he must answer for any Irregularities committed by them. But the Canon forbids a Bishop to institute a Clerk, that has been ordain'd by any other Bishop, without shewing his Letters of Orders. By Institution the Clerk has only *Fus ad Rem**, and not *Fus in Re* † (as the Lawyers say): And, therefore, he can do no Act to charge the *Glebe*, tho' confirm'd by the Patron and Ordinary, till he is actually inducted into the Living, since he has not till then a Freehold in the *Glebe*, as I have already related. Nor can he sue or bring any Action for his Tithes, and the like, before Induction, as I shall observe by and by.

‡ Can. 39.

* Plow. Com. p. 528.
† X. 3. 38. 5.

At the *Common Law* an Institution even upon a wrongful Presentation gave the Incumbent such a Right, that if he had been possess'd of the Living for the Space of Six Months, this was such a Plenarty, that he could not be remov'd; because he came in by a Judicial Act of the Bishop, whom the Law entrusts to take Care in this Matter ‡: And since by the Writ of *Quare Impedit* it self it appears, that the Law requires a fit Person to be Incumbent in every Parish, when the Bishop has admitted one to be qualified, that implies him to be a fit Person ||; and then the Law has its final Intention, that is to say, the Church is then sufficiently provided with a Clerk. And it being *plena & consulta*, it puts the rightful Patron out of Possession, tho' not without a Remedy; for he might have a Writ of Right of Advowson, and recover that which he was divested of by this Usurpation. The Books are plain, that upon an Institution the Church is full against a Common Person, and likewise against the King, if he has no Title but what he derives from a Subject; because the Incumbent has then a Freehold, which is begun, tho' not compleated till Induction. And to give an Instance that the Church is full upon an Institution, I will put this Case, *viz.* If the Grantee of the next Avoidance presents his Clerk, who after Admission and Institution dies before Induction, such Grantee shall not present again; for his Grant was satisfy'd by the Institution of his Clerk, which proves that the Church was then full. But a bare Institution without Induction does not make a Plenarty against the King, where he has a Title to present in his own Right*, or by Virtue of his Prerogative: ‡

‡ 2 Inst. 356.

|| Roll. Abr. 549. 294. 312. 1. Roll. Rep. 191. 227. 4. Rep 72.

* 2 Inst. 356. 9 Rep. 132.

And, therefore, if his Presentee should dye before Induction, he may present again, as already hinted; because he had not the full Effect of his Presentation. But tho' it makes no Plenary against the King; yet if a Person thus instituted, tho' not inducted, takes a second Benefice, it shall make the first Void; because by the very Institution he is said to have *accepted* of a second Benefice: And the Words of the * Statute are, *viz. If a Parson having one Benefice with Cure accepts of another, &c.* And if in such Case there should be a Dispensation to hold both the Livings, it will not serve, as coming too late after Institution; because the Church is full by it, and both the Patron and Ordinary having executed their Authority, can never revoke the same: For the Institution is a Matter of Substance, and the Induction which is to follow no more than a Ceremony to give the People Notice of the Incumbent's Possession of the Living. And, *lastly*, Institution is properly cognizable in the Ecclesiastical Court: But if after Induction a Man is sued there, supposing his Institution to be void, that shall be try'd in the *Common Law* Courts; because by the Induction of the Person he had a Freehold in the Benefice, which must be try'd in the Temporal Courts†, I shall, therefore, next treat of *Induction*.

* 21 H. 8. cap.
13.

† 2 Rolls.
Abr. 282 &
294.

‡ X. 1. 23. 7.
& 9.

|| X. 1. 23. 4.
& 7.

* VI. 1. 8. 1.

* Lindw. lib.
3. Tit. 6. cap.
4. v. *Certificatio-
rias Literas.*

† Dyn. de
Reg. Jur. vi.
5. 1. Arch. in
c. 18. vi. 3. 4.
‡ Arch. in c.
5. vi. 1. 6. v.
Confirmetur.

Now *Induction* is nothing else but the admitting or a putting of a Person instituted or collated to a Benefice, into the Possession of such an Ecclesiastical Preferment, whereby he is made compleat Incumbent of the Living; and it is the same in the *Canon-Law* as *Livery* and *Seisin* at the *Common Law*: And tho' of *Common Right* it belongs to the Archdeacon to do this Act of Induction‡, or to give Possession of an Ecclesiastical Benefice; yet he ought not to do it without the Bishop's Mandate directed to him for inducting a Person into the Corporal Possession of such Benefice||. For (says the Law) Induction into the Possession of a Benefice ought not to be perform'd by the Archdeacon or any other Person, unless it be *ad Mandatum Instituentis*: And this Mandate the Archdeacon is bound to obey. And if the Bishop shall be negligent in this Matter concerning Induction, the Archbishop may then upon Complaint command the Archdeacon to induct such a Clerk*, But if the Archbishop should inhibit the Archdeacon to induct a Clerk thus instituted, he may do it notwithstanding such Inhibition, and the Induction shall be good. This Induction is in our Books of the *Canon-Law* frequently in *Latin* stiled *Missio in Possessionem*: And it follows Collation as well as Institution.

Now the Persons, whose Business it is to give Induction, or who undertake for the same, ought by Letters of Certificate to certify to the Bishop or the Ordinary, whether they have really and truly inducted the Person thus instituted or not, according to the Precept or Mandate directed to them*: And these Letters of Certificate are in a vulgar way of Speech often stiled *Letters of Induction* in respect of the Person instituted or collated; because they do by way of a Testimonial give Evidence of the Induction of such Person. And this corporal Induction is said to be *Pars Tituli*, or Part of the Title; because Canonical Institution cannot be compleatly finish'd without it, tho' it be Canonical Institution that gives a Title to the Person Benefic'd to come at Induction†: And a Person occupying an Ecclesiastical Benefice without such a Title, that is to say, without coming to the Possession thereof by the Authority of the Superiour Power, is deem'd an Intruder‡. A Clerk may (according to some Persons) by his own proper Authority, immediately after Confirmation or Institution, obtain the Possession of an Ecclesiastical Benefice, and have the Administration thereof in Temporals and Spirituals:

rituals * : And *Paulus* on the *Clementines* †, is of this Opinion, laying down the Reasons hereof, and quoting several Laws that make for both sides of the Question. And in this Conclusion he there says, That the Law does not of Necessity require Induction, in order to give a Man the aforesaid Possession; especially, where a Right is acquir'd from Institution, and not from the Delivery of Possession ‡: But 'tis otherwise, where Livery of Possession is necessary to transfer or alienate a Property ||.

About this Matter of Induction the Archdeacon further observes *, That where the Pope, or any Archbishop or Bishop confirms or gives Institution *Jure Ordinario*, the Person thus instituted may then have the said Administration without any other Induction; which is a *Salvo* to the Opinion of *Innocentius* †, and his Followers: But 'tis otherwise, when the Ordinary of the Place does not confirm and give Institution to the Clerk, but some other Person does it; for then Induction is necessary, which ought to be perform'd by the Authority of him, who presides over the Cure, and has the Government of such Benefice ‡. In Prebends and the lesser Benefices Induction or Installation, which is the same Thing, is requir'd; unless there be a Custom to the Contrary: For in such a Case we ought to observe and abide by the Custom ||. But in Curacies, as to the Effect of Ministration, or of bringing a Cause into Judgement, Induction is necessary by the *Canon-Law*: For the commencing of Actions and the Right of Administration by that Law does not arise from the Title, but from the Possession of the Thing *. By our *Common-Law* Induction settles and fixes the Freehold in the Incumbent; for as to the Temporalities, the *Glebe-Land*, and the like, the Parson has no Freehold in them till Induction had and obtain'd, according to my Lord *Coke* †. And Induction likewise, according to *Plowden* ‡, makes a Prebendary to have the actual Possession of the Prebend; for before that he has no Freehold either in Deed or in Law. As *Investiture* is, in respect of the greater Benefices in the Church, the same with *Institution*; so is *Installation*, in respect of Ecclesiastical Dignities, equivalent unto *Collation* in respect of simple Benefices.

'Tis provided by a Provincial Constitution in *Lindwood* ||, That when a Prelate does *de Jure proprio* collate to any Church or Prebend, he shall in no wise presume to usurp unto himself the Fruits and Profits of such Church or Prebend not yet collected, under any Pretence of Institution or Induction; or for Letters of Institution; nor extort any Thing on the Score of Collation, Institution or Induction, as formerly practis'd; nor suffer any Demand to be made by his Officers or Archdeacons. And at this Day if the Person that does this be a Bishop, he shall be suspended *ab Ingressu Ecclesie*, till he makes Restitution of his unrighteous Gains: For the Fruits of such Church ought either to be apply'd to the Advantage of the Church, or else reserv'd for the Successor, as now observ'd, unless it be otherwise provided either by Privilege or Custom. But if the Person be inferiour to a Bishop, he shall be suspended *ab Officio & Beneficio* till he shall refund the same. And by another Provincial Constitution *, Persons giving Induction are enjoyn'd to receive only a moderate Fee or Reward for their Trouble and Expence therein, *viz.* the Archdeacon is forbidden to demand more than Three Shillings and Four-Pence, and his Official is not to receive more than two Shillings under Pain of Suspension *ab Officio*.

* Host. & Bern. inc. 15. x. 1. 6. † In c. 2. Cl. 1. 6. v. *pacifice*

‡ VI. de Reg. Jur. 5. 1.

|| C. 2. 3. 20. 1. 2. 1. 40.

* In c. 1. 16. Q. 2.

† In c. 5. Dist. 92.

‡ X. 5. 33. 19. in fin. 16. Q. 5. 1.

|| Pet. de Anch. in c. 4. X. 3. 8.

* X. 3. 38. 19.

† 4 Rep. 79.

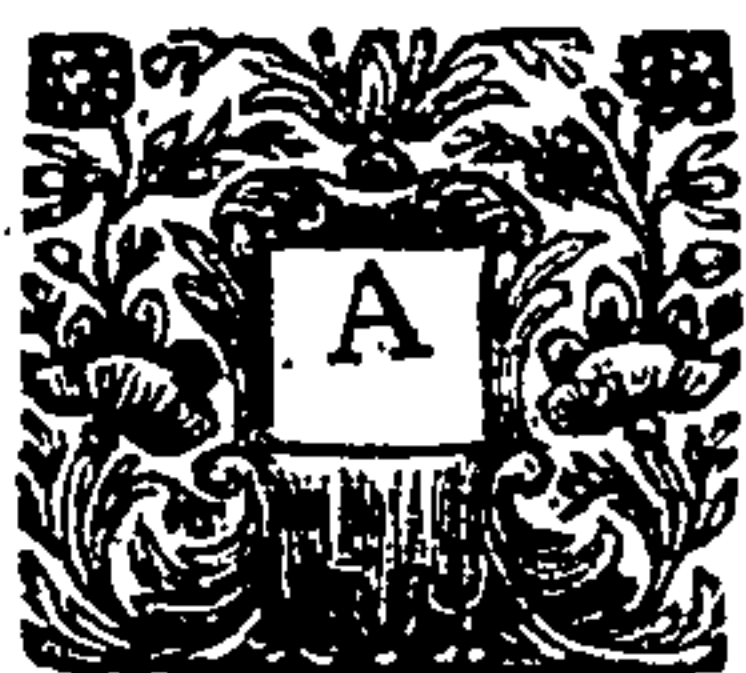
‡ 2 Plow. 529. 530.

|| Lib. 3. Tit. 6. cap. 1.

* Lib. 3. Tit. 6. cap. 4.



Of Instruments and Deeds, and the Validity of them.



AS there is one Kind of Evidence made by Witnesses, so there is another which is made by Deeds and Instruments: And of this I shall here discourse. Now under the Appellation of Instruments some comprehend all such Matters whereby a Cause is prepared and instructed for a Sentence:

But this is an absurd Notion of an Instrument; because then we should have no Occasion for particular Rubricks and Titles in Law to distinguish Proof made by Witnesses from such as is made by Instruments. An Instrument in the general Sense thereof signifies a Household Implement †, or something made use of on an Estate, as the Stock thereof ||; and, moreover, it likewise denotes, whatever a Man makes use of to accomplish his Work and Design: But in the most proper Acceptation of it, as used here, 'tis taken for a Writing, which conduces to the Proof of any Thing in Controversy, in respect of preparing and instructing a Cause for Sentence *. Thus a private Writing, which gives Evidence of a Thing, is called an *Instrument*; because it instructs the Mind of the Judge touching the Merits of a Cause before him. So that under the Name of *Instruments*, we may reckon every Writing that informs the Judge by letting him into the true State and Knowledge of a Cause; as Instruments and other publick and private Writings are often produc'd in Judicature *in vim probationis*. An Instrument is sometimes put for a *Charter*, sometimes for a *Feudal Deed* of Conveyance, and sometimes for a Deed of Caution given.

Among Instruments these are the principal Names, *viz.* an *Original* and *Authentick* Instrument; and that which is called *the Copy* of an Instrument †. An Original is in other Terms stiled the *Protocol* ‡, or *Scriptura Matrix*; and if the *Protocol*, which is the Root and Foundation of the Instrument, does not appear, the Instrument is not valid; because 'tis the *Protocol* which gives Evidence and Testimony to the Truth thereof: And, therefore, if there be no *Protocol*, such Instrument is liable to great Suspicion of Falshood. An Authentick Writing or Instrument is that which has Credit given to it from its own Nature and Authority, and which requires no foreign Aid to support it as valid ||: And to this end the Apposition of an *Authentick* Seal is sufficient, or any other Authentick Method whatever. The Prince cannot by Virtue of his *Ordinary* Power *ex post Facto* give Credit to a Writing which is not *Authentick*, in Prejudice of any Person. An Exemplification of an Instrument, is what our Common Lawyers call an *Inspeximus*, and sometimes a *Vidimus* or *Innotescimus* *. By the *Civil* and *Canon-Law* in Exemplifications of Instruments the Subscription of a Notary, and the like, is not necessary, if such Exemplifications are not made use of for the Proof and Evidence of a Thing: But 'tis otherwise, if they are. Tho' Instruments be an *Inartificial* Kind or *Species* of Proof, yet they do not entirely reject and disallow of all Art, as I shall observe in the sequel of this Title.

Instru-

† D. 33. 7. 12.
15.
|| & 6.

* D. 22. 4. 1.

† D. 22. 4. 2.
‡ Nov. 44.
cap. 2.

|| C. 16. 23. 2.
Dd. ibi. x. 2.
22. 12.

* Cck. 5. Rep.
fol. 52.

Instruments are also divided into *publick* and *private* Writings †. The first is that which is made by a Notary or Publick Person, with proper Solemnities requisite to prove the same ‡, or sign'd with a Publick Seal, according to the *Canon-Law* *. And 'tis to be observ'd, that every Publick Instrument is an Authentick Writing or Instrument, tho' every Authentick Writing is not a Publick Instrument. A Private Writing or Instrument is that which wants the Hand of a Notary Publick, and cannot be stiled an *Authentick* Writing till such time as 'tis acknowledged or sworn to by Witnesses: But afterwards it may be so called. A Writing made by an Officer touching Matters relating to his Office is not a Publick, tho' it be an Authentick Writing; because 'tis not made by a Notary Publick with the proper Solemnities necessary thereunto. And 'tis the same Thing of an Instrument or Writing laid up in a Publick Archive: For tho' the Marks of a Publick Instrument are not to it (as aforesaid) by the Apposition of a Publick Seal, and the like; yet it may be called an Authentick Writing †, tho' not a Publick Instrument, thro' want of a *Notarial* Evidence. Therefore, every Writing which has not Credit of its own Nature, is not a Publick or Authentick Writing, till it receives Credit from some other due and proper Method. And Credit is so long given to an Instrument till the same is disprov'd; which may be done several ways. For legal Proof may be made against the Credit of the Instrument either by Letters, Witnesses or by the Parties Confession: But an Instrument is no Proof against an Instrument, unless such Instrument impugns and becomes contrariant to itself ‡.

† C. 4. 19. 5. & 6.

‡ C. 7. 52. 6. Nov. 73. c. 2. * X. 2. 22. 2. X. 2. 19. 5.

† Auth. ad l. ac.

‡ X. 2. 22. 13.

First, The Credit of a Witness to an Instrument may be lessen'd or destroy'd by an Exception against the Person of the Notary himself, that made it, if his Condition, State, Manners and Credit be unknown to the Party *Excipient*; for an Instrument has its Force and Substance from the Credit of the Notary himself *: Therefore, if these Requisites are wanting, such Instrument is gone and destroy'd; for an Instrument made by a Notary excommunicated is null and void by the *Canon-Law* †. And the same Thing may be said of a suspected Notary, and the like. *Secondly*, An Exception lies against the Tenor of an Instrument by other Proofs and Evidence in Writing: And this Method (among others) is the best way of reprobating an Instrument. For an Instrument is disallow'd of, if any such Thing be prov'd, on the Proof whereof either such Instrument cannot subsist, or (at least) that which is contain'd in such Instrument, cannot subsist. *Thirdly*, An Instrument may be annull'd and destroy'd for want of due Solemnities, *viz.* If the Notary be not requested to make or sign the same ‡; and, according to modern Practice, if there be not an Invocation of the Divine Name, the Year of *Christ's* Birth or Incarnation, according to the Custom of the Place; the *Roman* Indiction, the Day and Month of the Thing done; the Name of the Prince or Emperor †, in whose Dominion the Instrument is made; a Detail of the Matters transacted; and the Names of the Witnesses, &c. *. But these Solemnities, or many of them, depend entirely on the Custom of the Country. But all Publick Instruments (I think) ought to contain the Day, Year and Month of executing the same, and the Names of the Witnesses necessary thereunto, together with that of the Prince, otherwise such Instruments are not valid †. But 'tis not necessary to exhibit a Copy thereof with the Prince's Name, and the Day of the Month when exhibited, lest it should occasion an Opportunity or Means of forging the same. A Notary that makes an Instrument between two *Jews* or more, may invoke the Name of *Christ*, if he pleases *; because

* Gloss. in l. 6. D. 2. 13.

† Abb. inc. 7. x. 3. 49. n. 13.

‡ Paul. de Castr. in l. 2. C. 4. 19. n. 9.

† D. 2. 13. l. 2. * X. 2. 22. 2.

† Nov. 73. c. 7.

* Barr. in l. 6. D. 2. 13. 6. n. 7.

because such Instrument is not made by the Parties, but by the Notary who is a Christian. But tho', according to *Baldus*, an Instrument is not valid without such an Invocation; yet the common Opinion is against him, because this Solemnity is not found among the Substantials of an Instrument; and as this is reputed a light Solemnity, the Omission thereof does not vitiate an Instrument*. But Indiction and the Year of our Lord are Matters of Substance†; because they denote the Time, which ought necessarily to be inserted in every Act: And hence an Instrument may be reprobated as a Matter of Forgery, if it shall be prov'd, that such Instrument was not made, or such Act done at the Time inserted therein. In Publick Instruments likewise some general Place ought to be set down and added, where the Act is done or Contract executed‡; as that it was done at *London*, *Bristol*, or some other Place, which is general: But then the Place named in such Instrument must not be too general and indeterminate; as that it was done in the Diocese of *London* or *Bristol*; for if the Place mention'd be too general and indeterminate, it vitiates the Instrument or Contract. But the special Addition of a Place is not necessary, unless Custom will have such an express Mention to be made thereof for the Validity of an Act. But an Instrument, according to some, is not hereby render'd naught and vicious, but only becomes suspected, if a special and particular Place be not inserted: And 'tis Incumbent on him, who produces such Instrument to declare and prove the particular Place where it was sped and executed, if the same be demanded of him by the adverse Party. And the Reason why an Instrument is not valid without inserting the particular Place's Name where it was made is, because by Circumscription of Time and Place the Matter is render'd more certain and less suspected: For if this was not done, no Ways and Means would appear, whereby we could discover the Falsity, Nullity and Viciousness of such Instrument. And this is true, unless it may by other manifest Proofs appear, where such Instrument was sped or Matter transacted: For then the inserting of the Place is not so much of the Substance of the Deed, but that it may be valid without such a special Addition.

*Menoch.lib.
Q. 99. n. 14.

†Dec. Conf.
36. n. 6.

‡Bald & Dd.
in l. 1. D. 1.
39. n. 10.

|| Bald. in l.
18. D. 1. 5.

As there is a great Presumption in Favour of an Instrument*, so from an Instrument two Presumptions do arise. *First*, That it is a *true* Instrument: And, *Secondly*, That it is a *solemn* Instrument†. In respect of the first 'tis presum'd, that those Things which the Notary has wrote therein, were truly spoken and transacted by the Parties therein nam'd; and that which he wrote therein was the Will and Consent of the Parties express'd, and thus written down: For it would not be a true Instrument if what was wrote therein, did not proceed from the Will and Consent of the Parties. Now these Presumptions have this Effect and Operation in Law, *viz.* That we ought to give due Credit to such Instruments, and abide by them, till the contrary appears and is well prov'd. Yea, a Publick Instrument is so far presum'd to be true, that it contains *Probationem probatam*‡, as the Lawyers call it, which is to say, an approv'd Evidence: And this holds good till something be objected to the Truth and Credit thereof. For tho' the Matter should not then be clear and evident, yet there is still a Presumption extant in Favour of such Instrument, till some Matter contrary thereunto be prov'd: And so far is this extended in Favour of an Instrument, that a Diversity of Time and Place is rather presum'd than that an Instrument should not be true||. But this Presumption, according to some, only proceeds and obtains in respect of the *dispositive* Words of an Instrument, and not in regard of the *enunciative* Terms thereof: As *Titius* the

Son

Son of *Sempronius* : For such *enunciative* Words do not induce a Presumption, that he was the Son of *Sempronius* *. Again, this Presumption does not hold good, when an Instrument is false in any Part thereof; for then 'tis presum'd to be false in the whole. *Thirdly*, This Presumption does not take Place, when any Patent or manifest Flaw appears in the Instrument it self; as the cancelling and erasing of it, and the like; or when any latent Flaw appears in it, and is thus prov'd †. When an Instrument is presum'd to be true, solemn and valid (as aforesaid) I would be understood to mean, that this Conclusion must be proved, *viz.* That if he who wrote such Instrument was a Notary Publick, the same is presum'd to be true and solemn, especially if it be an ancient Instrument.

* Angel. in l.
7. D. 2. 14. 12.

† Menoch. ut
supr. n. 21.

Secondly, An Instrument is presum'd to be true and solemn, when it has all the Solemnities the Law requires it to have, and wants no Judicial Examination to support it; and in this Case likewise such Instrument is said to be *Probatio probata*: For an Instrument is said to be *Probatio probata*, when the adverse Party acquiesces and makes no Objection thereunto; but 'tis otherwise, if an Objection be made to it. But tho' an Instrument in a doubtful Case be said to be true, yet this is not a Presumption of Law and by Law: And, therefore, Proof is admitted against the Truth of such Instrument. If any one should say, That such Instrument is not cancell'd or abolish'd, he is bound to prove it by producing the same: And he that produces an Instrument, and does not prove the Truth thereof, is presum'd to be a *Falsarius*; and may be punish'd as such. A Person producing an Instrument is not only deemed to approve the same, tho' such Instrument produc'd should want the Solemnities which the Law requires‡, but is also presum'd to confess and approve such Things as true, which are contain'd therein ||: And the Production and Approbation of such Instrument as true, shall not only be to the Behoof of the Person present, and against whom it is produc'd, but it shall likewise extend to the Advantage of a third Person absent; and all this holds good as well in respect of a Private Writing as a Publick Instrument. And not only the Person producing such Instrument is presum'd to approve the same, but also the Party that desires to have the same produc'd and exhibited *: But the Production of an Instrument shall be of no Prejudice to the Person producing the same, if the adverse Party impugns the Truth and Solemnity of it. If an Instrument be produc'd with a Protestation in respect of those Parts of it which make in Favour of the *Producent*, and the adverse Party does not contradict the same, it shall be constru'd to the Advantage of the *Producent*; for then such a Production induces an Approbation only in respect of those Things, which are in the *Producent's* Favour*.

‡ Bald. in l. 8.
C. 6. 35.

|| Dd. in c. 6.
X. 2. 25.

* Cravat.
Conf. 275. n.
2. & 3.

* Jaf. in l. 8.
D. 39. 1. 6.
n. 27.

In respect of a Private Writing 'tis to be observ'd, That it is good Evidence against the Writer himself, tho' not in Favour of him, as his Book of Accompts, and the like: But a Publick Instrument is Evidence for each of the Parties therein concern'd; and we must abide by the Credit of such Instrument, till the contrary is prov'd. But tho' entire Credit ought to be given to a Publick Deed or Instrument even after the Death of the Notary that made it, and of the Witnesses that were present at the making and signing it; yet the same cannot be said of a Private Writing, which is no Proof in Law, nor ought any Credit to be given thereunto without an Oath confirming the Truth of it, either before or after the Writer's Death. But this shall be sufficient Evidence, if two or more Witnesses shall on the Production of such

such Private Writing depose touching the *Tenor* and *Contents* thereof, (tho' they have not subscrib'd themselves thereunto) by affirming, That what is therein contain'd was so acted and done in their Sight and Presence, as the Writing it self sets forth and declares; for this is to prove the Thing by Witnesses after the manner of a legal and ordinary Proof: Yet sometimes the Witnesses do not depose touching the *Contents* thereof, but only say, *viz.* That they saw the same written and subscrib'd by the Parties, or by him against whom 'tis produc'd, and this is properly called a *Recognition* of Witnesses, of which hereafter. For 'tis not enough for Witnesses (how legal soever they be) to say, That they certainly know such Writing to be written by the Hand of *Titius*; unless they know it to be such, because they saw *Titius* write it.

All Exemplifications and Things register'd make Proof after the same manner as their Originals, and no farther: And hence 'tis, that whatever Objection lies against the Original, the same may be made to the Matter exemplify'd*. But such an Exemplification of a Record or Matter register'd is of no Credit or Evidence, unless it has been collated and compared with the Original in the Presence of the adverse Party being cited thereunto. An Instrument copy'd or exemplify'd by the Notary without the Judge's Authority is good Proof and Evidence by Consent of Parties, tho' not otherwise. If an Original Instrument be lost, and the *Tenor* of it be prov'd by Witnesses, that on reading over the same do depose touching the *Tenor* thereof, and that it is was *sine vitio*; the Copy of such Instrument may in such a Case be given in Evidence. If an Instrument exhibited be a special Instrument particularly belonging to that Cause which is depending in Judgment, it ought not to be restor'd to the Party demanding the same, because Originals ought to remain with the Judge to prevent fabricating of false Instruments, and the falsifying of true Ones: But if such Instrument be of a general Nature, and not confin'd to any particular Cause depending in Judgment, but extending its Efficacy even to other Causes, then the Original ought to be return'd; and only a Copy thereof to remain with the Judge *apud Acta Curiae*, that the Party may use the same in other Causes: And this Copy ought to be exemplify'd by the Notary or Scribe of Court, *viz.* It ought to be collated with its Original, in order to see that all Things therein contain'd do agree with the Copy, which ought to be given in Evidence. And, moreover, it ought to be subscrib'd and attested by the Notary or Scribe of the Court: And after this is done, such Copy shall be of equal Proof with the Original it self. *Jacob. de Butrio* says, that when the Copy of an Instrument is produc'd, that has no Original Extant, or produc'd without referring to such Original, it administers Cause of Suspicion in respect of such Instrument or Writing, because it does not appear from whence it had its Original.

There are three Things which render a Writing or Instrument suspected, *viz.* *First*, The Person producing the same, as having been accustomed to produce false Instruments or Writings. *Secondly*, The Person that frames or writes it; for that he has been wont to make false Instruments or Writings*. And, *Thirdly*, The interlining and rasing out of Words contain'd in such Instrument †. And, on the other Hand, there are three or four Things which do strengthen and confirm the Credit of the Instrument, *viz.* *First*, The Integrity and good Character of the Person producing it. *Secondly*, The Credit and fair Reputation of the Notary or Person himself, that makes it, who ought to be superiour

* *Mencch. ut sup. n. 18.*

† *Gloss. in l. 1. D. 37. 11.*

superiour to every Exception ; for if the Notary be a Man of ill Fame, and consequently of little Credit, such Instrument shall be looked on as a suspected Instrument or Writing on the sole Diffamation of such Notary. And, *Thirdly*, Such a Writing ought to be clean and free from any Cavil or Vituperation of Rasure. If an Instrument be vitiated, the Notary may make another, which shall not be vitiated, if it be made on the same Fact or Footing, tho' it cants or speaks in another manner : And an Instrument may be drawn, and speak in the *Præterperfect* Tense, tho' the Act or Contract be made or done in the *Present* Tense ; and so likewise it may be drawn either in the first or third Person *. A Publick Instrument has always a Presumption in Favour of it, as I have already remember'd ; and, therefore, Proof is incumbent on him, that alledges any Thing in Deceazance of such Instrument : But an Instrument is not firm and valid, if there be any Disability found in the Witnesses, after the same is sped and executed ; tho' it be not entirely necessary that the Witnesses do subscribe themselves thereunto.

* Bart. in cap. 1. Nov. 47.

If one Man shall produce an Instrument against another, and the other shall snatch it out of his Hands and tear it, he shall abide by the Oath of the *Producent* in respect of the *Tenor* thereof ; and the Person thus rudely treating such Instrument shall be liable to the Ordinary Punishment of Forgery. And this is true, if he shall cancel such Instrument with mature Thought and Deliberation, or any wise damn the same ; provided it be not done out of Passion or wrathful Indignation : But if it shall be done *ex iracundiâ*, he shall then only be liable to the extraordinary Punishment of Forgery, and not to the other. But if I do by my own Act of Anger and Passion throw my own Instrument, which I had against you, into the Fire and burn it, I shall not thereby lose my Debt, for the Law pardons my weak Condition, and admits me to prove the Contents thereof by Witnesses : But yet if I can only prove the *Tenor* thereof by one Witness, I shall not be admitted to the Suppletory Oath through a Defect of Evidence, because I have robbed my self of liquid Proof by my own Act †. Instruments *Judicially* exhibited, are not of the Acts of Courts ; and, therefore, may be re-deliver'd on the Request or Demand of the Person that exhibited them. A Person, that impugns the Credit of an Instrument, loses the Advantage which he might receive from the same ‡ : And, therefore, Advocates ought to be very careful how they impeach the Credit of an Instrument, whether they do it in the whole, or only in some Part ; for an Instrument may be false in some substantial Part thereof, and yet it shall not be presum'd to be false in the whole ; because *Separatorum separati sunt effectus*. Though the visible Flaws and Defects of Instruments do hinder and obstruct the Exemplification of them ; yet the Invisible do not.

† Paul. de Castr. in l. 1. C. 4. 21.

‡ Bart. in l. 3. D. 34. 9. n. 6. & 9.

In the Exemplification of Instruments the Notary or Person that does exemplify the same, ought to put his Seal, or set his Mark thereunto, to attest that he has compar'd the same with the Original || ; and then such Instrument exemplify'd shall be full Proof against the Person that produces it. All Publick Instruments ought to be written *claris & apertis Literis*, in Words at length, and not in Cyphers or Words of Abbreviation : And such Clauses ought to be inserted therein, as are usually put therein, otherwise they are not valid ; and they may be produc'd after Publication of Depositions, even till a Conclusion be had in the Cause *.

|| Bart. in s. 2. Nov. 73. n. 5.

* Bart. in c. 8. Nov. 90. n. 3. & 32.



Of an Inventory, and the Law relating thereunto.

AN Inventory, in the common Acceptation of it, is defin'd to be a Writing, wherein all the Goods and Chattels which are found in a Man's Custody or Possession at the Time of his Death, are written and recorded * ; and it was introduc'd by the *Civil-Law* in the Place of the *Jus Deliberandi* among the old *Romans* : For, says that Law, " If the Heir be in Doubt with himself, whether he shall accept of the Heirship or not, let him not think Deliberation necessary, but let him take the Heirship on himself by making an Inventory.*" And in that Law we meet with various sorts of Inventories, according to the Nature of the Thing describ'd therein, *viz.* *First*, There is an Inventory, which Tutors and Curators are obliged to make of their Pupil's and Minor's Estate†. *Secondly*, There is an Inventory which Bishops and other Prelates are bound to make of the Goods and Estates of their Churches‡. And, *Thirdly*, There is an Inventory, which an Heir, by us stiled an Executor, is obliged to make of the Testator's Goods, if he will be safe in his Administration || : And the Bishop was also heretofore bound to make it as Executor in Law*. And as this last Kind of Inventory is a Matter, that admits of some Nicety according to the Forms of the *Civil-Law* ; so some Persons that have taken much Pains in making it, have often been deceiv'd and mistaken therein : For

* 12 Q. 2. 45.

* C. 6. 30. 22. 2.

† C. 5. 37. 24. 12 Q. 2. 20.

|| C. 6. 30. 22. C. 1. 3. 28. 2

† C. 6. 30. 22. 2 & 3.

† C. 6. 30. 22. 2.

By the *Civil-Law* an Inventory requires several joint and concurring Solemnities to the perfect compleating thereof : But three Things are by that Law principally requir'd herein, *viz.* *First*, that Law considers the Time when such Inventory was begun, and the Month when 'tis ended : For regularly such an Inventory ought to be begun and ended within sixty Days after the Executor has taken the Office of an Executor on himself † ; which is not regarded here in *England*. *Secondly*, The Executor ought to have a Respect to the solemn Form, *viz.* There ought to be the Intervention or Presence of one Notary (at least) in order to reduce it into Writing ; and such Executor ought to subscribe himself thereunto ‡ : But if he cannot write himself, he ought then to make use of a second Notary to this Purpose ; and in *Popish* Countries the Sign of the Cross is made thereon, tho' this Solemnity is not necessary. But none of these Formalities are necessary with us besides subscribing the same. And, 'tis necessary by that Law, that all Creditors and Legataries be by a general Proclamation cited in order to see the same duly made (for a special Citation is not necessary) ; and in the Place of such as are absent three known Witnesses ought to intervene : And likewise such Persons ought to be summon'd hereunto, who do either know of, or else are possess'd of any Part of the Testator's Substance. So that by the *Civil-Law* there ought to be two Witnesses to prove the Inventory, and three Witnesses by their Presence to supply the Absence of Creditors and Legataries : Therefore, according to the Doctrine of that Law, five Witnesses are necessary to an Inventory. But this was only in re-

spect

spect of a *publick* and *solemn* Inventory; which was made in the Presence of the Magistrate, or some Publick Person, as a Notary is: But a *simple* Inventory was not attended with these Solemnities, but might be made by a Private Person, and such an Inventory I am here to treat of.

By a Provincial Constitution in *Lindwood* *; as well as by the *Civil-Law*, the making of an Inventory is requir'd, before an Executor intermeddles or lets himself into the Possession of the Testator's Goods and Chattels; at least he ought to do this for his own Safety; that he be not made liable *ultra vires bonorum*, or Assets, as we stile them†. And this Inventory ought to be made not only of all Corporeal Goods, but even of Incorporeal Rights, if they appear to have been in the Hands of the Person deceas'd at the Time of his Death: For Bonds and other Deeds and Writings ought to be mentioned and inserted therein‡. But 'tis not necessary to insert those Debts which the Deceas'd ow'd unto others in the Inventory, because they cannot be called the Goods and Chattels of the Deceas'd ||, but are deduc'd in the Account, whenever render'd; yet they may be inserted, if it be thought expedient. Moreover, 'tis not necessary to insert in the Inventory such Debts as were owing to the Deceas'd at the Time of his Death, if the Bonds or Specialities are lost and cannot be found, in such a manner as they may be su'd (at least) and recover'd*. But after such Debts are receiv'd, they ought to be added to the Inventory as Things accruing *de novo*.

It has been a Question among some, whether a Testator may in his Will remit the making of an Inventory to his Executor. And it is the receiv'd Opinion of the Doctors, that he cannot *simply* and *absolutely* remit this Duty to his Executor. Yet this Matter ought not to be understood without a Distinction. Wherefore, we ought to consider, That several Effects do arise in Prejudice to Executors from not making an Inventory: And, among these, some relate to the Benefit of the Creditors of the Deceas'd: For if the Executor does not make an Inventory, he is liable to Creditors *ultra vires bonorum*, as aforesaid; and shall by this Means be oblig'd to satisfy all Debts and Legacies out of his own proper Estate. But, I think, that a Testator may remit the making of an Inventory†, if there be no Debts and Legacies to be paid; unless the Judge shall on some reasonable Account think fit to order it otherwise in confirming the Executorship on the Person appointed‡: And even Custom it self in such a Case excuses the Executor herein||. And thus in the like manner may the Ordinary remit the making of an Inventory, when 'tis not convenient to publish the Sum and Extent of the Testator's Estate*. For tho' the Statute† says, That the Executor shall bring in a true and perfect Inventory, and the Executor swears so to do; yet as the Ordinary may dispense with the Time of bringing it in, so he may dispense with the Inventory itself upon good Cause, even in the Sense and Exposition of this Statute by our Common Lawyers. And when a Legacy is given to A. to be paid at three several times of Payment; and the Executor making two Payments takes Releases thereof and offers to pay the third Portion; but the Legatee refusing to accept the third Payment, cites the Executor before the Judge in the Ecclesiastical Court: In such a Case, according to their Exposition of that Statute, the Ordinary may dispense or remit the bringing in of any Inventory at all. For the Intention of the Statute was for the Advantage of Creditors and Legatees; and here the Legacy was tender'd, and no Creditor complains: And, therefore, such Inventory may be remitted‡. *Note*, That an Inventory by the aforesaid Statute is only to consist of Goods, Wares, Merchandizes and Chattels; and not of Things in Action, as by the *Civil-Law* it ought to do.

* Othob. Tit. 14.

† Lind. lib. 3. Tit. 13. cap. 5.

‡ Lindw. ut sup. v. *dictis bonis*.

|| C. 5. 50. 2.

* I. 2. 1. 13.

† Dd. in l. 13. C. 5. 51. 1.

‡ Dd. in l. 7. D. 26. 3.

|| Dd. in l. 32. D. 1. 3.

* D. 38. 1. 2.

†† 21 H. 8. c. 5.

‡ Raym. Rep. p. 470. 471.

In making an Inventory with us the Prefence of the Judge is not necessary ; nor is the Executor obliged to make use of those other Solemnities which the *Civil-Law* did formerly require, because all ours are *simple* Inventories. But 'tis convenient, tho' not necessary, to call one or more of the Creditors or Legatees to the making thereof, if he thinks he shall have any Controversy with them upon a Failure of Assets, after Funeral Expences, and the like, are deducted. Nor have we any prefix'd and limited Time for making an Inventory ascertain'd by our Law. Some will have it, that it ought to be made within four Months : But the Gloss says *, that it ought to be made as soon as possible, according to the Discretion of the Executor, which ought to be govern'd according to Persons, Things and Places.

* In l. 13. C.
5. 37.



Of an Intestate, and the Consequences thereof.

HAVING already treated of *Intestate* Succession under the Title of *Administration*, I shall only here consider who may be properly said to dye Intestate, and what are the Consequences thereof. Now he is said to dye Intestate, who tho' he had the Power of making a Will, yet made none, or (at least) none appears to have been made. *Secondly*, He is also said to dye Intestate, who made a Will, but his Executor refus'd to prove the same, and to take the Executorship on himself. And, *Thirdly*, He dies Intestate, who tho' he has made a Will, yet such Will is irritated and made void *. But he, who cannot make a Will, is not properly said to dye Intestate, because such Person ought rather to be said to dye *Intestable* than *Intestate*: Yet, by common Usage of Speech, even such Persons are reputed to dye Intestate ; and herein we must rather follow the common way of Speech than the Propriety of the Term †. And such Persons are said to be Intestable, as are not yet arriv'd at the Age of Puberty, Madmen, Prodigals, and the like, who have the Administration of their Estates interdicted them by the *Civil-Law*. For tho', says *Bartolus*, a Statute should be made, ordaining, That the Bishop of the Diocess should succeed him who dies Intestate, when the Will is made void after the Testator's Death, or when the Executor nam'd therein refuses the Executorship: Yet herein, according to the proper meaning of the Word *Intestate*, the Bishop shall not succeed ; because at the Testator's Death he was not *Intestate*, but a Person *Testate* ; yet, according to the common Usage of Speech, by which such Persons may improperly be said to be an Intestate, the Bishop shall succeed ‡. Hence it is, that if universal Executors, that are in the Place of an Heir, will not take the Executorship on themselves ; and if each of them refuses it, then the Person so dying shall be accounted a Person Intestate, to the Effect that the Execution of the Will, or the granting of Letters of Administration belongs to the Bishop. Whenever a Statute grants Administration of the Goods of Persons dying Intestate unto the Ordinary, the Ordinary shall under this Word *Intestate* likewise have the Administration of the Goods of Persons dying Intestable ; because the Word *Intestate*, in the Sense of the Law, belongs even to such Persons as are *Intestable* ||.

* D. 38. 16.
1. in prin.

† D. 32. 1.
52. 4.

‡ Bart. in l. 1.
D. 38. 16.

|| l. 3. 1. in
prin.

Of a Judge.



Of a Judge, his Power, Duty, and the like.

A Judge is in *Latin* stiled *Judex*, *quasi Jus dicens populo* ; because 'tis his Duty and Business to pronounce Law to the People : And he is a Person, who, either by his own proper Jurisdiction, or else by a delegated Jurisdiction committed to him, has a Right and Power of taking cognizance in such Causes as are litigated before him in Judgment. And he, that has this Power in virtue of his own proper Jurisdiction, is called an *ordinary* Judge †; and he, that has it by virtue of a delegated Jurisdiction, is term'd a *delegated* Judge, or *Judex extraordinarius* ; tho' the Word *Judex* is sometimes improperly used in the *Digests* *. A Judge is also in *Latin* call'd *Jus animatum*, and in the *Greek* Tongue *μετρετής*, a Mediator of *Justice* ; because he ought to be a Minister and Mediator of Justice between both Parties in a Suit : For a good Judge ought not to do any Thing according to his arbitrary Will and Pleasure, but to pronounce Sentence, and other Matters in Law, according to the Direction of the Laws themselves. Only such Persons can appoint and make a Man a Judge, who have this Power granted them by the Law † ; as the Prince, or other superior and sovereign Magistrates : But in some Matters, according to *Angelus*, we ought to have a regard to Custom, which has a Power of delegating a Judge, as in Cases of Arbitration, and the like. But if a Jurisdiction does not accrue to a Person either by some Act of Law, or by the Prince's Grant, or by some other Means, he has nothing to do to give Judgment ; as the *Hebrews* truly verify'd this against *Moses*, saying, *Who made thee a Judge over us* * ?

† D. 2. 1. 5.

* D. 4. 8. 41.

‡ D. 5. 1. 12.

† Ex. cap. 2. v. 14.

Judges heretofore were not rashly chosen without any regard had to the Merit, Integrity, and Abilities of the Persons elected, as is too frequently practised in these Days. For the first Consideration among the *Romans* was, what Estate the Person to be appointed had : And hence 'tis, that *Cicero*, in an Oration against *Mark Anthony*, says, That in the choice of a Judge, both the Fortune and Dignity of the Person ought to be well consider'd. Yea, *Asconius* informs us, that, according to the *Pompeian* Law, none could be elected Judges, but Persons of the greatest Estates : And hence *Pliny* in his Proem to the 14th Book of his *Natural History*, makes this Complaint, *viz.* " Afterwards, when Princes and States began " to make Conquests, and to grow rich and mighty, Posterity smarted " thereby : For then Men began to chuse a Senator for his Wealth, to " make a Judge for his Riches, and so on." The second Care, was the Age of the Person to be chosen : For a Judge ought at the Time of his Election to be twenty five Years of Age at least ; and, according to *Suetonius*, *Augustus* would have his Judges to be two and thirty Years of age, and under this (I think) none could be chosen. And a third Qualification necessary to a Judge was, and (I hope) still is, a sufficient and thorough knowledge in the Laws, with which he has to do : for an illiterate Judge, to whom a Cause is committed, may, by the *Civil* Law, be repell'd and set aside by a Recusation of him. But of this I shall discourse hereafter.

† X. 1. 36. 10. According to the Institution both of the *Civil* and *Canon* Law †, Judges ought to be so far from encouraging Suits, that they ought to interpose their good Offices and best Endeavours between the Parties *litigant*, in order to bring them to a good Agreement (if possible) *pro bono Pacis* : And if the Parties should be willing to adjust the Matter among themselves without the assistance and mediation of the Judge, they ought not to be hindered ; nor ought Judges to exact or demand any thing from them on this account ; nor even their Ministers and Servants. Every Judge is said to be God's Minister upon Earth, and, therefore, his Judgment is deem'd to proceed *de vultu Dei* : But nothing can proceed from thence but Truth and Justice ; for God says, *I am the Way, the Truth, and the Life* *. And again, 'tis said, *The Ways of the Lord are Mercy and Truth* †, &c. Therefore, whilst a Judge follows *Truth* and *Justice*, he is God's Minister ; but if he commits *Injustice*, he is the Devil's Servant, and not properly a Judge : For he can be no longer called a Judge, according to *Cassiodorus* ‖, than he is deem'd to be a just Judge. *Baldus* says, that a Judge ought to have *Duos Sales* : the one called *the Salt of Knowledge*, and without this, he is *Judex insipiens* ; and the other, *the Salt of Conscience*, and without this, he is *Judex diabolicus*. Yea, a Judge that acts contrary to Justice, is not only said to be no Judge at all, but to be a Madman, and is reckon'd among brute Beasts. For as *Aristotle* observes in his *Politicks*, that as Man under the Use and Enjoyment of the Law is the best of all Animals ; so, being destitute of Law and Justice, he is the worst of all living Creatures.

It has been already hinted, that there are two *Species* or Degrees of Judges, *viz.* an *ordinary* and a *delegated* Judge *. The first is he that has *ordinary* Jurisdiction, and receives his lawful Power and Commission from the Emperor, or some other Sovereign Prince : And the second is he that has a *judicial* Power and Authority of hearing and determining some certain Causes not in his own Right, but in virtue of a Commission granted to him by some other Person. And hereunto we may add a *sub-delegated* Judge, to whom only some part of the mesne Process in a Cause is committed in the second Place by a delegated Judge, as Commissioners to receive and take an Answer, to examine Witnesses and the like : But though a Sub-delegate is sometimes a delegated Judge ; yet being a Person to whom some part of the mesne Process is committed, he cannot, in this respect, be properly call'd a *delegated* Judge, but an *Auditor* or *Commissioner* only. I say an *ordinary Judge*, as when any Person presides and is set over the entire and universal Jurisdiction of any State, Province, or Country, and the like : for he is *eo ipso* deem'd to be created an *ordinary* Judge, in that an universality of Business is committed to him by one, that has the Power of committing, unless it be expressly said in his Commission, That *he makes him only his Delegate, or delegates Causes to him*, and the like. A Judge, who may pronounce a Sentence either as an *ordinary* or as a *delegated* Judge, is, in a doubtful Case, presumed to have pronounced the same in the quality of an *ordinary* Judge. By the *Civil* Law †, an *ordinary* Judge cannot be recused by way of Exception, how suspected soever he be ; yet if he be a suspected Judge, an Assessor or Co-adjutor shall be assign'd him, and this Assessor shall see that all *judicial* Proceedings go fairly on without suspicion : But by the *Canon* Law ‖, even an *ordinary* Judge may be recused ; though a Judge recused even by this last Law, cannot take cognizance of such Recusation ; because an exception of Suspicion affects him much, provokes him to Anger and Resentment, and renders him incapable of Judging ; and, therefore, he shall not have cognizance either of the principal Matter, or of any Incident thereunto belonging,

* Joh. cap.
14. v. 6.
† Psalm. 25.
v. 10.

‖ Lib. 3.
Ep. 18.

* D. 2. 1. 5.
16. & 17.

† D. 3. 1. 16.

‖ X. 2. 2. 4.

longing, lest he should injure the Party recusing him, to whom nothing can happen more grievous than to litigate under a suspected Judge.

No Person ought to be preferr'd and advanc'd to the Dignity of a Judge in his own Country*, unless it be by the express Will and special Appointment of the Prince, lest he should be induced to be partial in his Proceedings either through Hatred or Affection: nor ought a Judge to take cognizance of that Cause, wherein he himself has been an Advocate, lest Pride, or some other evil Passion, should warp and byass his Judgment; but in such a Case, he ought to delegate the Cognizance thereof to some other Person. And as no one ought to be a Judge in his own proper Cause †, so neither ought he to be a Judge in the Cause of his Children, † C. 3. 5. 1. Family, or Consanguinity ||: for natural Reason will not suffer a Father to || D. 2. 1. 10. be a Judge, unless it be in the private Affairs of his Family, wherein the Father may have the Son for a Judge, as the Son may have the Father. But a Judge may proceed and pronounce Sentence among his Consanguinity of the same Degree. But here I speak of an *ordinary* Judge, who cannot give Judgment in the Cause of his own Children, though a *delegated* Judge, in point of Law, is not forbid to be a Judge in the Cause of his Son, nor a Son to be a *delegated* Judge in the Cause of his Father; because a *delegated* Judge may be recused *primo Limine*, at first setting forth in the Cause*: and hence a Litigant may blame himself, if he does * C. 3. 1. 16. not refuse the Father being made Judge in his Son's Cause. And, therefore, the Reason why an *ordinary* Judge is by the *Civil* Law expressly forbidden to be a Judge in the Cause of his Children, is, because by that Law he cannot be recused, how suspected soever he be. But though no one is a fit and proper Judge in his own Cause (as aforesaid) so as to punish an Injury done to himself in his private Capacity, which ought to be redress'd by a superior Judge; yet even among inferior Judges, a Judge may, by his own proper Authority, punish an Injury done to his Jurisdiction, when the same is impeach'd and molested by any one: For regularly 'tis granted to every Judge to defend his own Jurisdiction by a Penal Judgment or Sentence, especially if the Injury be great and notorious †. † D. 2. 3. 1.

Thus also a Bishop cannot take Cognizance in a civil and private Cause of a Bishop, when 'tis peculiar to himself as a Bishop; but Arbitrators or Umpires ought to be chosen for that End and Purpose ||. But if the Cause || 11. Q. 1. 46. or Injury be of such a Nature as concerns the Church committed to such Bishop's Care, he may, according to the *Canon* Law, punish the same by his own proper Authority*; and in this Case, he does not become a Judge * 45 Dist. 11. 23. Q. 4. 30. in his own Cause, but in the Cause of the Church †. And this is true, † Inn. & Host. in c. 9. x. 1. 6. when the Matter in Controversy belongs to the Church, and the adverse Party does not deny the same: For then a Bishop may Excommunicate such a notorious sacrilegious Person ||, without being a Judge in his own || 2. Q. 7. 16. Cause; and the Matter being notorious, he need not take any Cognizance thereof, but is rather an Executor than a Judge*. But if the adverse Party * vi. 5. 2. 18. denies the Matter, touching which the Action is commenced, to be a Matter relating to the Church, by shewing some Cause why this Matter is doubtful; as because the Jurisdiction is disputed, or that a Privilege of Exemption is produced: then (I say) such Person shall not have Cognizance of the Matter, but the Superior shall be the Judge thereof †. Yet † 11. Q. 3. 30. we ought to distinguish in this Case, *viz.* When the Dispute or Action is touching the Affairs of his own Church, as about the Bishop's own proper Table and the like: for if the Dispute relates hereunto, he shall not be a Judge ||; for that it does not seem to be the Cause of the Church, but || 11. Q. 2. the Bishop's own proper Cause †. 2dly, When the Dispute and Action is † C. 3. 5. 1. about some criminal Cause committed by the Bishop himself, and then he

he cannot be a Judge, wherein he is said to have committed a Crime. But if the Crime be committed against him as an Injury done to him, then he may, by his own proper Authority, punish it in his own proper Subjects, and even in extraneous Persons (tho' the same only concerns the Bishop's Person, and not the Church) if the Injury be notorious or otherwise manifest, since such extraneous Persons do offend in his Jurisdiction.

* 11. Q. 2. 2. But if the Injury be occult and private, then he cannot punish it himself*, but ought to prosecute it before his Superior. But tho' he cannot in this

† 23. Q. 4. 27. Case punish such a Person, yet he may imprison him, and reserve the Cognizance of the Cause to his Successor†. But an *ordinary* inferior Judge cannot by any means punish an Injury done to himself, but the superior

|| Arch. in c. Judge is to punish the same ||, because an inferior Prelate may have an easy Access to the Bishop who is near at hand. But 'tis not so in an Injury done to a Bishop or Superior, especially by any one dwelling out of the Diocess, where recourse cannot be had to any of the Diocess in respect of the Offence, unless it be to him. I have publish'd this Paragraph, though it has no relation to *Englishmen*, in order to shew the great Power of the Ecclesiasticks, where the Papal Law governs.

In a doubtful Case, when the Word *Judex* is *simply* pronounced and made use of, it relates to a Secular, and not to an Ecclesiastical Judge: And for this Reason (perhaps) according to the *Canonists*, viz. Because Ecclesiastical Judges are commonly in the Books of the *Canon* Law stiled *Prelatos*, and have their Denomination from the Dignity and Prelacy which they bear in the Church: As Archbishops, Bishops, Abbots, and the like. Yet there is a Text in the Law that makes against this Opini-

* X. 2. 28. 41. on*, where only an Ecclesiastical, and not a Secular Judge is included under the Word *Judex*: For if a Secular Judge was only comprehended, the Word *Laicus* in that Text would be vainly added. But in my Opinion, this ought to be meant and understood according to the subject Matter treated of: For in Depositions touching Ecclesiasticals, Clerks are comprised, unless the subject Matter persuades otherwise; but, in Depositions touching Seculars, only Seculars are included.

A Judge is a Person that presides over Causes, and has the Determination of Law Suits between Litigants by way of a judicial Sentence, and may follow his own Conscience, and Sense of Matters, in the decision of a Cause, if he prejudices no one thereby; especially in a Case where the Law is doubtful, and various Opinions do arise thereupon†: And if, by following one of these several Opinions, he has an eminent Doctor on his side, he shall be excused from the Expences of Suit, and does not make the Suit his own. For he that gives a wrong Judgment by reason of a diversity of Opinions among Lawyers, shall be pardon'd, or (at least) more gently punish'd than a Judge, who errs against a clear and evident

|| Gloss. in 6. Law ||: For no Judge can plead Ignorance of Law as an excuse for a wrong Judgment*. I say, in a variety of Opinions, where the Law is doubtful, and the Judge follows that of an eminent Doctor, he shall be excused from the Expences of Suit, and does not make the Suit his own: For the Judge *ad Quem* in the Appeal, may embrace another of these Opini-

ons; and yet the first Judge shall not be punish'd, since (perhaps) he may have follow'd the more equitable Opinion. But if a Judge maintains one Opinion at one Time, and a contrary Opinion at another Time, without correcting and informing himself upon very substantial Principles, he shall render himself liable to Blame, tho' (peradventure) in no wise obnoxious to Punishment: For no Man is forbidden to change his Advice and Opinion for the better. By the Custom and Usage of modern Times, a Judge does not make the Suit his own, by giving a wrong Judgment, unless

† Anch. Conf. 210.

|| Gloss. in 6.

J. 1. 4. 5.

* J. 4. 5. 5.

unless this be done thro' Fraud and Deceit* ; as by Corruption, and the like. Nor by the Law of *England*, will an Action lie against a Judge for what he does in his judicial Capacity, tho' he should act erroneously ; but if he does any thing Injuriouly or thro' Corruption, he may be complain'd of to the King, in whose Name all Judgments at the Common Law here in *England* are given ; the Judges being delegated by him to do Justice.

* Groenv. de
L.L. abrogat.

A Judge, who takes on himself the Cognizance of a Cause, and acts as a Deputy doing the Office of another Person, cannot in that Cause pronounce two different Sentences : For a delegated Judge may sub-delegate his Power and Office to his Colleague, and thus the Colleague proceeds in his own Name as a Delegate, and his Colleague's, as a Sub-delegate ; and thus he may, by a different Authority, proceed as one and the same Person in the same Cause. And by the same Conscience that he thinks any Thing to be just in his own Name, he ought to conceive the same Thing to be just in his Colleague or Con-delegate's Name. If there be several Judges in the same Cause, all of them have Jurisdiction *in solidum*, tho' they have the Exercise of that Jurisdiction only severally and in part : So that one or either of them may proceed, if the rest of them will not or cannot be present. *Sed de hoc quære.* But if there be more Judges than one assign'd with a Clause of *si non omnes*, &c. one of them may certainly act and proceed without the other † : Tho' 'tis otherwise, if this † X. 1. 29. 21. Clause be not inserted in the Commission ; for then one cannot act on the Death or Absence of his Colleague ||.

|| D. 42. 1.
39. Abb. in
c. 14. X. 1.
29. 5.

Though a Judge ought to be courteous and easy of Access, and may suffer the Litigants to come to his House, yet he ought not go to the House of either of the Litigants for Entertainment and the like, lest it should give Umbrage of his Partiality ; nor ought he to declare to the Parties in private, what Sentence he intends to pronounce ; especially when the Person against whom he gives Judgment is able to raise a Clamour and Difficulty against the same. Nor ought a Judge, in taking cognizance of a Cause, to shew any Anger or Resentment* against such Persons as he conceives to be his Enemies, nor to be prevailed on by the Tears and Prayers of calamitous Persons, nor ought he to affect to be thought Good-natured or Morose, Merciful or Severe, but let him act with Calmness as the Law directs || ; and lastly he ought not to do all that he may do in a Cause without being requested thereunto ; but in all Causes to have a supreme Equity before his Eyes, which must be understood of such Matters as cannot be collected from the Laws themselves. A Judge cannot be said to be without a Jurisdiction, since nothing can be said to be adjudg'd by him, who wants a power of judging and declaring touching Right and Wrong : For if you take away the Foundation of his Power, *viz.* his Jurisdiction, whatever is built on his Judgment must fall to the Ground at once. The Authority of a Judge and a Testator is equal, or (at least) alike* : And, therefore, an Argument from a *judicial* to a *testamentary* Act is valid. A Judge has jurisdiction over a Person that is not truly subject to his Jurisdiction †, in respect of a Crime committed within the same, and may either condemn or acquit him upon hearing of the Evidence : And, in the like manner, he may either punish or acquit a Delinquent that is subject to his Jurisdiction, for an Offence suppos'd or really committed out of his Territory, as well as a Parish-Priest may absolve his Parishioner for an Offence done out of his Parish.

* 11. Q. 3.
67, 68, &c.

|| D. 48. 19.
11.

* C. 5. 52. 2.

† 6. Q. 3. 1.

A Judge, who has the cognizance of the *principal* Cause, may also take cognizance of any Thing *incident* thereunto, tho' the Incident be such, touching which, he cannot otherwise have cognizance *principally* || :

|| Paul. de
Castr. in
1. 3. C. 3. 1.
And N. 1.

And a Cause or Matter is said to be an Incident, when it is not mov'd or commenc'd by way Action, but only by an Exception, Replication, and the like. Thus in a *pecuniary* Cause controverted before an inferior Judge, such Judge may try the State of the incident Matter, though he cannot try the principal Cause. Though a Presumption lies in favour of a Judge, when he proceeds *Judicially*, that his Proceedings are according to Justice ; yet 'tis otherwise, if he shall proceed *extra-judicially* : and a Judge, by proceeding to an extra-judicial Act of Injustice, cannot any more proceed *Judicially* in that Cause, because he has render'd himself suspected therein, by acting as a private Man.

I have said before, that a *Judge ought always to have a supreme Equity before his Eyes* * : But yet he ought not to recede and depart from written Laws on the account of unwritten Equity, unless it be through the Authority of him, to whom this alone belongs, *viz.* in order to limit and restrain a severe written Law. But a Judge may supply those Things in Law, wherein the Advocates of the Parties are greatly deficient in their Informations : As when an Advocate makes Allegations or Quotations of Law, which do not satisfy the Mind of the Judge, and the Judge himself remembers some Law or Statute which rightly determines the Question, he may in such a Case found his Sentence on such a Law or Statute, and not judge herein *secundum allegata & probata* ; and herein he shall not be said to judge rashly and of his own head. For though a Judge is bound to enquire into the Condition of a Cause by *Informations* (as the *Civilians* stile them) and to take the Advice of Advocates thereon ; yet he is not oblig'd to follow the same in such a manner as to give entire Credit to them : And when he has satisfy'd his own Conscience hereby, he may put an end to the Informations and Allegations of Advocates whenever he pleases. A Judge ought to take care and see, that all Solemnities of Law be observ'd † : but by a Consent of Parties, he may hear and determine Causes in a summary way of Proceeding.

Every Judge, in pronouncing Sentence, ought to have a principal Regard to Truth and Equity (as aforesaid) always adhering thereunto, and despising the Quirks and Subtilties of the Law * : For tho' these may sometimes be tolerated in Pleading, yet in pronouncing of a Sentence and Judgment in Law, they ought to be entirely rejected and laid aside. And as a Judge ought to labour and take pains in the search after Truth (as Truth is his chief Concern) so when he has any Case of Difficulty before him, he ought to consult and advise with the superior Judge therein ; and, not through a great Conceit and Opinion of his own Knowledge in the Law, to despise the Advice of Men (perhaps) more learned and skilful therein than himself. In the Decision of Causes, he ought to observe and have a respect to the Statutes of the Place where a Contract is executed, or any other Matter done and transacted. And where there are many and several Judges appointed, they are all understood to pronounce Sentence and give Judgment in a Cause, if they are all present, though one of them should dissent thereunto : for if one of them should swear, that the Matter does not thus appear to him ; yet the others may proceed, and the dissenting Judge shall be included †. A Judge of a foreign Territory or Jurisdiction, cannot regularly execute a Sentence pronounc'd by another Judge, unless it be at the request of that Judge who pronounc'd the same : But this (I think) is limited in a twofold Respect, as I shall remark hereafter. A Judge may, according to the common Opinion of the Doctors, take cognizance, about his own Jurisdiction, as often as the same is disputed by the Parties cited by him ; and examine, whether

* D. 13. 4. 4.

† D. 2. 15. 8.
17.

* Paul. de
Castro in
L. 2. c. 2. 1.
N. 5.

† D. 42. 1.
36. X. 1. 29.
21.

whether he has Jurisdiction or not, that is to say, whether he be a competent Judge or not *: And if, on lawful Cognizance had touching this Matter, he should pronounce himself to be an incompetent Judge, yet he may condemn the Party cast, in Expences of Suit, because he is a competent Judge in respect of this Matter. And, therefore, if the Defendant, in the presence of the Ecclesiastical Judge, does, by way of Exception, aver such a Cause to be of a *feudal* or secular Nature; the Ordinary, or Ecclesiastical Judge may take Cognizance touching the Truth of this Exception, *viz.* Whether the Cause be *Feudal* or Secular, or not; and if he finds it to be such, he ought to pronounce himself to be an incompetent Judge, and to dismiss the Cause with Expences †.

'Tis a Rule in Law, that he, who acts and does a Thing by the Command and Order of the Judge, does not seem to be *in dolo*, or guilty of any Malice, because he ought to yield Obedience to the Judge's Command ||; and such a Necessity tolls a Presumption of Malice and Deceit, and induces a contrary Presumption, *viz.* That no such Malice or Deceit can be presum'd. As for Example; If a Man, that has left a *Depositum* in my Hands, at the Time of his death, leaves four Heirs behind him, and I do, by the Judge's Order, restore this *Depositum* to one of them; I say, in this Case, I shall not be liable to the others by an Action *ex Deposito*, because all Presumption of Fraud and Male-engine ceases through the Authority of the Judge. And the same may be said in respect of Mandataries, Executors and Apparitors, who execute *judicial* Precepts and Sentences legally decreed and pronounced *. But 'tis said by way of Objection hereunto, that he, who does any unlawful Act (tho' by the Judge's Order) is not excused; yea, 'tis imputed to him as a Crime, if he does not resist a Judge commanding an unlawful Thing to be done. As for Instance, If a Judge should order a Man here in *England*, to be put to the Rack, the Officer ought not only to disobey, but even to resist the Judge's Order; and, in such a Case, according to the *Civil* Law, he is punishable for his Non-resistance, if such Order extends to a *Decurio*, who ought not to be put to the Rack. And, therefore, we must distinguish whether the Judge's Precept be evidently contrary to Law, or according to Law; or whether in these two respects, the Matter be doubtful †. In the first Case certainly he ought not to obey; yea, he ought to resist: for a Judge may be resisted by private Men, when he acts contrary to Law. In the second Case, the Officer is punishable for his Disobedience. And in the third Case, he ought to obey the Judge in virtue of the Sentence or Precept of the Court; since in a doubtful Case, there lies a Presumption of Law in favour of such Sentence or Precept: And in this Case, the Person obeying the same, is not presum'd to be guilty of any Malice and the like; but by his Obedience, he is exempt from all suspicion of Male-practice ||.

In Cases not expressly specify'd in Law, a Judge ought always in inflicting Punishments to be inclin'd to the more humane and equitable Part; and sometimes, he may and ought, to detract from the severity of the Law, by receding from the Punishments appointed thereby, if a lawful Cause offers itself; as when there is a multitude of Delinquents in the Case; since a multitude cannot be punish'd without great Scandal: and thus a Punishment inflicted by some Statute or Written-Law, may be moderated by the Judge upon good Cause assign'd. For tho' a Judge may not extend a Punishment beyond the Letter of the Law, yet he may mitigate the same according to the Equity of the Case; and if he cannot warrantably do this, he is to report the same to the Prince for his Mercy.

* D. 5. 1.
2. 6.

† X. 2. 1. 5.

|| vi. de reg.
Jur. 24.

* C. 10. 1.
5. Dd. ibi.

† Dyn. in
l. 13. D. 2. 4.

|| D. 36. 1.
65. 2.

Mercy. But where the Law appoints no Punishment at all, there the Judge may impose the same *ad sui Arbitrium*; because, in Matters not determin'd by Law, recourse is always had to the Will and Discretion of the Judge: and this proceeds not only in inflicting of Punishments, but in all other Matters not determin'd by Law, as here said. In inflicting Punishments; a Judge ought to consider, whether the Law has assign'd several Punishments for one and the same Crime, and then if all those Punishments may concur, he ought to inflict them: But if they cannot all of them have a Concurrence, or if the Law speaks *alternatively*, he ought then to follow the Distinction of the Gloss, *viz.* That they are either impos'd for the same Offence according to the Order and Disposition of the same Law or Statute, and then they may all of them be inflicted, if they may have a Concurrence, otherwise not: For one Law often applies several Punishments in hatred and detestation of the Crime committed*, because single Punishments do not seem sufficient: And sometimes there are various Punishments for the same Crime in divers Laws and Statutes. But more of this in another Place. But whenever a Judge inflicts a Punishment arbitrarily, he ought to have a regard to the Persons, Places, Causes, Times, &c. having an Equity always in view.

A Judge has many Remedies against Disobedient and Contumacious Persons; for he may on the Score of Contumacy, or for any other just Reason, according to the *Civil* Law, order the Doors of such a Person's House to be shut up and seal'd †; and may not only mulct and fine Litigants, but even Advocates, Proctors, and Witnesses themselves, if they do not yield Obedience to his lawful Commands in Matters of Judicature. And on the Account of Contumacy he may deny Audience to the Contumacious Person, though he cannot thereupon condemn him in the whole Cause or Suit, unless it be as before observ'd under the Title of *Contumacy*.

Though a secular Judge may in a Crime merely Ecclesiastical administer the secular Arm at the Request of the Ecclesiastical Judge; yet, according to the *Canonists*, he ought not to intermeddle in the Cognizance of such Crime, but only to execute the Sentence of the Ordinary; for that he is no more (by their Law *) herein, than an Executioner of their Sentences: yet by the *Civil* Law, according to *Bartolus* †, and the received Opinion of all the *Civilians*, 'tis otherwise; and that for these three Reasons, *viz.* First, Because a meer Executor has some kind of Cognizance in criminal Causes of a spiritual Nature, lest he should (according to *Felinus*, the *Abbot* and others †) execute the unjust Sentence of a Superior, and hereby render himself guilty of an irreparable Mischief to some Person or other. 2dly, Because Clergymen are on the score of Heresy even subject to the Jurisdiction of a Secular Judge*. And, 3dly, Because when Hereticks are deliver'd over to be punish'd by the Secular Judge for a Relapse into Heresy, they are to be left entirely to him without any further Audience from the Ecclesiastical Judge †. Nay, so far does the *Canon* Law carry this Matter of spiritual Jurisdiction, that an Ecclesiastical Judge may compel a Secular Judge to surcease and desist from such Things as are in contempt and despite of the Ecclesiastical Jurisdiction †, and oblige him to observe the Canons of the Church in respect of Ecclesiastical Causes, under the Pain of an Ecclesiastical Censure for his Disobedience*. And, moreover, he may, by that Law, inhibit a Secular Judge from proceeding in a Cause even between Laymen, when the Matter is before-hand depending in the Ecclesiastical Court. And a Secular Judge is bound to release a Clerk or Religious Person (for there

|| Abb. in
c. 4. X. 1.
29. N. 1.

* X. 5. 20.
7. vi. 5. 9.
5. 16. Q. 1.
55.

† D. 28. 7. 2.

* vi. 5. 2. 18.
† In c. 1. 12.
D. 2. 1.

|| In c. 8.
X. 1. 29.

* 23. Q. 5.
1.

† X. 5. 2. 4.

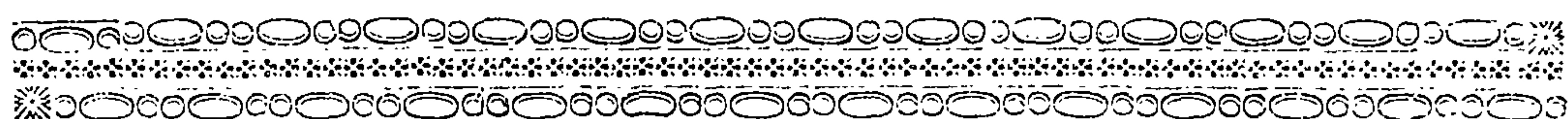
|| vi. 2. 12. 2.

* vi. 2. 2. 2.

there is in the *Romish* Church, a distinction between these Persons) without the Precept of the Ecclesiastical Judge, or any Letters of Request from him, tho' such Person was condemn'd by the Secular Judge, before he became a Clerk or a Religious; because the Execution of the Sentence in such a Case belongs to the Ecclesiastical Judge†, and the Knowledge of the Ecclesiastical Judge has the Force of Letters of Request. But yet if the Sentence has pass'd *in Rem Judicatam*, recourse cannot be had to the Ecclesiastical Judge to stay Execution; unless it appears from the Party that such Sentence is unjust, or the Injustice thereof is notoriously evident by other Means ||. An Ecclesiastical Judge, is made a Judge in respect of Laymen (says the *Canon Law*) whenever Laymen have a Cause in common with the Clergy: And no doubt in such a Case, the Ecclesiastical Judge will do the Layman Justice. The *Canonists* have another Fetch to get Causes before the Ecclesiastical Judge, which otherwise do not belong to his Cognizance, *viz.* by the Exposition of an Oath. But of this hereafter.

† Fed. de Sen. Conf. 300.

|| Alex. Conf. 149. N. 6.



Of Jurisdiction, and the several Kinds thereof.

Jurisdiction, is a judicial Power and Authority given to a Person by the Publick for the sake of administering Justice by the Hearing and Examination of a *judicial* Cause, by pronouncing Sentence thereon, and by a decreeing of an Execution thereof†: or a Power and Authority introduced by publick Right for the Benefit of the Commonwealth, with a Necessity of pronouncing Sentence according to Law, and of making Decrees according to Equity. Now this Power and Authority was first introduced by the Publick, on common Consent, for the good of the whole Community in general, and for the Advantage of every individual Member therein contain'd in particular: And if it be an *ordinary* Jurisdiction, it requires a Territory or Precinct; but if it be a *delegated* Jurisdiction, then the Power is radicated and grounded on the Commission of the Person only, that delegates the same*. I shall here, *first*, treat of the several *species* of Jurisdiction in general. *2dly*, I shall consider its various Effects. And, *lastly*, I shall make some necessary Observations thereon.

† Bart. in L. 1. D. 2. 1. N. 3.

* X. 5. 7. 9.

Now, according to the *Civil Law*, there are three *Species* of Jurisdiction. The first is in *Latin* called *Imperium merum*†; the second is stiled *Imperium mixtum*; and the third is term'd *simple* Jurisdiction ‡. The first is the Power of the Sword, and the Authority of executing publick Punishments; and, according to *Bartolus*, may be defin'd to be that Jurisdiction, which is discharg'd by the *noble Office* of the Judge, or by way of Accusation; and is ever exercised for the publick Wealth. And in this Sense thereof, we may also reckon the Business of making Laws to be a matter *meri Imperii*. Therefore, this first *Species* of Jurisdiction is absolutely plac'd in the Prince or Sovereign Magistrate, whether he be a Temporal or Spiritual Magistrate: And from hence is derived the Power of Legitimation, Restitution *in integrum* on mere *Grace*, the Power of taking away another's Right by way of Forfeiture, or for some very reasonable Cause, the Power of restoring a Man to his

† D. 2. 1. 3.

Credit and Reputation again after he has been pronounc'd *Infamous*; and many other things of the like Nature, which we here in *England* stile the Prince's Prerogative. For by the *Civil* Law, the Prince or Supreme Magistrate may proceed in Judgment without observing any Form or Order of Law; his Presence alone supplying all Defects and Forms of Law, and the like. These Matters are said to be Matters *summi meri Imperii*, of the highest Jurisdiction; because this *merum Imperium* has several degrees of Power vested in it. And as Jurisdiction comprehends Matters both of an arduous and light Importance, as may appear from the degrees of Punishments inflicted thereby; so, according to this *Thesis*, it is either granted *fully* and *absolutely*, or else by way of *Limitation* and *Restriction*. A full and absolute Jurisdiction, is that which is either from itself, or else from the Grant and Favour of the Prince, or some other Sovereign Power, extended to a full and entire Cognizance of any Cause whatever: And this kind of Jurisdiction, in its own nature, chiefly belongs to Kings, Princes, and some Dukes having no immediate Superior. A restrain'd and limited Jurisdiction, is that which is not full and absolute, but of a mix'd and limited nature: And this kind of Jurisdiction, is that Power which is deriv'd from the Prince's Authority, without having the Cognizance of all Causes committed to it; but has that Power and Authority, which the Sovereign Prince alone, or some other Superior Magistrate has (by way of Delegation) conferr'd on any one either *plenarily* or with some Limitation and Restriction. So that as Judges are distinguish'd in a twofold manner, *viz.* into *ordinary* and *delegated* Judges, so likewise is Jurisdiction divided in the same manner.

Secondly, I call that by the Name of *mixtum Imperium*, which, tho' exercised by the *noble Office* of the Judge also, yet it only respects the Advantage of private and particular Men*. And hereunto we may refer those Matters which are of a *voluntary* Jurisdiction, as the Probat of Wills, granting of Administrations, Visitations, Institutions, and such like Matters as are dispatch'd *sub quâdam officii Excellentia*, but yet without any Action or *judicial* Process annex'd to them. As for Example, the admitting of a Person to an Ecclesiastical Living upon an extra-judicial Examination of him, and sometimes without any such Examination; Restitution in *integrum*, on an extra-judicial hearing of a Cause; the granting of Sequestrations unto vacant Benefices: which are all Matters of *voluntary* Jurisdiction, and require no *judicial* Cognizance of the Cause. This kind of Jurisdiction is in *Latin* stiled *mixtum Imperium*, in respect of the *noble Office* of the Judge; and in some measure differs from the former, and is join'd with the ensuing *Species* of Jurisdiction in respect of some Cognizance had in the Cause, and in regard of the private Advantage of some particular Men. And therefore truly, to this kind of Jurisdiction, by the *Civil* Law, there belongs the Assignment of Guardians to Pupils, the inflicting of all such grievous Punishments as are not Capital: For Mutilations, Relegations, and the like severe Corrections do hereunto belong; and these things Judges may dispatch in virtue of their *noble Office*.

Thirdly, *Simple* Jurisdiction is that which only respects civil Matters, and is a Power introduced by publick Authority, with a Necessity of judging and determining Law-Suits according to a Sentence of Law in Affairs of a private nature†: As it accrues to all inferior Judges, it ought to be exercis'd (as the *Civilians* say) *officio Judicis Mercenario*. For inferior Judges have only the Cognizances of light and trivial Offences, (by our common Lawyers) called *Trespases*, and not of such Crimes as Kings and Princes sit in Judgment on: And such Things as are the Object

† Bart. in
1. 3. D. 2. 1.

ject of *simple* Jurisdiction, the Judge may dispatch by his *mercenary* Office, because they only tend to the Good of the Community in a private manner. So that under this *Species* of Jurisdiction consist all civil or pecuniary Causes commenc'd in secular Courts of Judicature by the means of Actions at Law*, and Spiritual Causes of a private Nature, begun in Ecclesiastical Courts. Sometimes this kind of Jurisdiction is of a larger extent in point of Territory; extending itself to the whole Body of the State; and sometimes 'tis limited to a certain Province or Place thereof, and after a certain manner; as it happens by Custom and Prescription in Towns and Villages †, &c.

* Barr. & Bald. in l. 3. D. 2. 1.

† Nov. 15. cap. 1.

The *Imperium merum* (according to *Bartolus*) has six degrees. The first, which is stiled *Imperium Maximum*, being that which is employ'd in the general making of Laws for the whole Community; and this Power belongs to the Prince or Legislative Authority alone. In *Rome* it formerly belong'd to the Senate, and even to the *Prætorian* Prefect: But by the *Lex Regia*, it was transferr'd on the Emperors. The modern Doctors say, that it belongs to this first degree of Power to create Notaries, to confiscate Delinquents Goods and Estates, and to convene General Councils: but, according to the Canonists, the Emperor cannot do this last Act; they ascribing the sole Power hereof to the Pope and his Cardinals. But some will have it, that all these Things are reserv'd to the Prince alone by way of Prerogative: But I cannot agree with them; because heretofore, general Laws were made by such as had not the Power of the Sword; as by the *Roman* People, when a Law was promulgated at the Interrogation of the Consul. Thus the Prætors, Ediles and Senators might make general Laws, tho' the Senate had not the Power of Judging. 'Tis now well known that the People make Statutes, tho' they have not the Cognizance of those Statutes in a *judicial* manner, but the Cognizance thereof is lodged with the Judges elected, as it is here in *England*. I shall here forbear to discourse of the other five degrees of *mere* Jurisdiction, as they are distinguish'd into *Majus*, *Magnum*, *Minimum*, *Minus* and *Parvum*: being of little Importance to the Matter in hand, and very tedious to the Reader. Wherefore, I shall in the next Place proceed to speak of Jurisdiction as before divided into *ordinary* and *delegated* Jurisdiction in a more particular manner.

Now *ordinary* Jurisdiction, is that which arises to any one, either by the means of some Written-Law, or Hereditary-Right, or else by the way of Custom or Privilege; or, *thirdly*, is that which is conferr'd on any one by the Grace and Favour of the Prince or State whereunto he belongs ||: For I have already observ'd, that *ordinary* Jurisdiction accrues to a Person three several ways, *viz.* By Law, Custom and Royal Donation. A Bishop's Vicar-General, or Principal Official or Chancellor here in *England*, has *ordinary* Jurisdiction; and, holding the same Consistory with the Bishop himself, it cannot be appealed from the Chancellor or Vicar-General to the Bishop: For a Jurisdiction may be in a Person without the Exercise thereof, as it is here in the Bishop. In a Cause of Heresy, the Bishop of the Diocess has *ordinary* Jurisdiction over the Persons of such as are in an exempt or peculiar Jurisdiction; because the Cognizance of Heresy, and the Punishment thereof, belongs to the Bishop alone. But the Text in *Linwood** seems to impugn this Opinion of the Doctors, saying, That a Bishop has only a Jurisdiction *delegated* to him by Law, and not an *ordinary* Jurisdiction in a Cause of Heresy against Persons exempt †: which leads me, *secondly*, to speak of a *delegated* Jurisdiction.

|| Barr. in L. 5. D. 2. 7. N. 9.

* Lib. 5. Tit. 5. cap. 2. v. *ordinarii*.

† Host. in C. 9. X. 5. 7. v. *Delegatis*.

Now

Now a *delegated* Jurisdiction, is that which a Man has not in his own proper Right, but only in the Right of another superior to him, *viz.* such a Jurisdiction as the Prince or Sovereign Power gives him for a Time only ; sometimes with a full, and sometimes with a limited Commission ; And it expires usually on the Death of the Person, that delegates him †. But the Jurisdiction of a *delegated* Judge, before whom Issue has been join'd, does not expire by the Death of him who granted such Commission or Delegation to him : yet if the Judge, who delegates another, dies before Issue join'd, the Person delegated ought not to proceed in virtue of such Delegation or Commission, according to the Doctrine of the *Civil* Law ; but (I think) this to be no good Opinion by the *Canon* Law. For if a *delegated* Judge has cited a Person to appear in his Court before the Death of the Person that delegated him, such a Citation perpetuates the Jurisdiction ||. A certain Cause was committed to a delegated Judge, who thereupon immediately cited the Parties to appear, but Suit was not contested till after the Death of the Person that delegated him : And the Question was, Whether the delegated Judge might afterwards proceed in the Cause ? And hereunto it was answer'd, That a Citation being serv'd and executed, the Cause or Business was in some measure begun, and therefore he might lawfully proceed in the Cause ; especially, if the *delegated* Judge was not certain of the Death of the Person that delegated him : For to perpetuate a Jurisdiction, 'tis not entirely necessary that Contestation of Suit should be made before the Death of the Person that delegates another ; nor is it necessary to perpetuate a Jurisdiction (I think) that a Citation should be serv'd on the Party to be cited ; but 'tis enough if it be decreed and emitted by the Judge. And the Jurisdiction of a *delegated* Judge, also expires immediately after a definitive Sentence is demanded to Execution, if such Delegation or Commission be only special to that particular Cause : but 'tis otherwise, if it has a general Respect to all Causes and Persons within his Territory ; as in the Case of a Bishop's Chancellor, or an Archdeacon's Official.

A *Delegation* is a Committing of one or more Causes to be *judicially* heard and determin'd by him or them to whom such Commission of Delegation is granted, either by the Prince, or some *ordinary* Judge * : And as the efficient Cause thereof is the Will and Consent of the Prince, or such *ordinary* Judge added to the Consent of him unto whom such a Delegation is made † ; so the Person delegating, and the Person delegated, are the Subject of such a Delegation. In respect of the Person delegated, 'tis necessary that he should be a Freedman of good Wit and Judgment, skilful in the Law, and of a legal Age : and in Ecclesiastical Causes, according to the Papal Law, he ought to be an Ecclesiastical Person, subject to the Jurisdiction of the Person delegating ; because he that is not of such Jurisdiction, cannot be assign'd a *Delegate* against his Will. In respect of an Ecclesiastical Person, the *Canon* Law distinguishes : For it says, That a Delegation is made either by the Pope himself, or else by his Legate, or lastly, by some Bishop. If it be made by a Bishop, then a *simple* Clerk is enough, provided he be well vers'd and skill'd in the Laws, and qualify'd (as aforesaid) in respect of Age : and in this last Case, according to the Papal Law, twenty Years of age is deem'd sufficient *, tho' King *James's* Canons || require the Person to be twenty six Years of age at least. But if the Parties consent to a Person of eighteen Years of age, or if the Prince shall assign such a Delegate, the Delegation is valid * : but if he be delegated by the Pope or his Legate, then 'tis necessary for him to be a Person vested with some Dignity, or

(at

† D. 2. 1. 6.

|| X. 1. 29. 20.

* X. 1. 29. 3.

† X. 1. 29. 7.
& 9.* X. 1. 29. 41.
|| Can. 127.* X. 1. 29.
41.

(at least) be a Canon of some Cathedral Church. There are some Persons, to whom the Law forbids a Delegation to be made, either in respect of Nature, or else in respect of Manners. In respect of Nature, a Man that is Deaf, Dumb, perpetually Mad, and a Person under the Age of Puberty ; because he wants a good Judgment and Understanding *. In respect of Manners, Women and Bondmen cannot be Delegates ; not that they want Judgment, but because it is a receiv'd Rule in Law, that they ought not to be admitted into Civil Offices and Employments †. And the Law likewise forbids Infamous Persons to be Judges or Delegates, and (among the *Romans*) such as were expell'd the Senate.

* X. 1. 29.
41. 11. Q. 1.
4. 32. Q. 7.
26.
† X. 2. 27.
24. 33. Q. 5.
3.

By the *Civil* Law, an *ordinary* Judge cannot delegate those Things which are matters of *mere* or *mix'd* Jurisdiction || ; but 'tis otherwise by the *Canon* Law ; because, as this last is practis'd in *Popish* Countries, a Bishop has a temporal Jurisdiction, and the Power *meri* & *mixti Imperii*, as 'tis said the Bishop of *Durham* had antiently here in *England*. But even in *Popish* Countries, a Bishop cannot exercise these Matters in his own proper Person * ; and, therefore, he is obliged to delegate the Exercise of this Jurisdiction to another †. The Form of the Delegation is the Tenor of the Commission itself ; which is diversify'd according to the Condition and Quality of the Causes, Clauses, and Persons therein concern'd. For either the whole Business itself is delegated, or else only some Part of the Cause in controversy, as the beginning, middle, or end thereof is committed to one or several Judges with this additional Clause, *viz.* *Quod si non omnes* ; or else unto two only, with a Clause of *Quod si ambo*, &c. or with a Clause of *Appellatione remotâ*, &c. or else it is delegated only for a certain Time, or in a certain Place, and the like. But if no certain Form has been prescrib'd, or no certain Clause added in the Letters Commissionall, then the common Form of Law is to be observ'd ||. A Jurisdiction founded upon former Letters Commissionall expires, and is gone, *ipso facto*, by a second Commission granted : And if a Jurisdiction be given to a Judge or other Person in respect of Quality, such Jurisdiction vanishes and disappears *pro tunc*, if such a Quality be deny'd in the Judge. But whenever the Cause or Quality is deny'd, the Judge, to found his Jurisdiction, may take Cognizance of such Cause or Quality, in order to see whether he has Jurisdiction or not : But the sole Negation of a Cause or Quality, which gives Jurisdiction, does not entirely exclude the Jurisdiction, but only hinders and impeaches the Process on the Principal Matter in such a manner, as that the Defendant is not bound to give an Answer to the Plaintiff's Libel, unless a summary Cognizance be first had touching the *incident* Matter, *viz.* touching the Cause or Quality, which gives a Jurisdiction, in order to see whether the Matter be of a Civil or Ecclesiastical Nature, and the like. So that if a Person of a foreign Jurisdiction, shall on a Citation appear and alledge, That he has made no Contract, or committed any Crime within the Territory where he is cited, it ought in the first Place to be discuss'd in a summary way, and seen whether he has made such Contract, or committed any Crime therein, without any Prejudice to the *principal* Matter in Suit : And if it appears, that he has contracted or offended there, it may be afterwards proceeded in the *principal* Cause. *Note*, Particular Jurisdictions are not to be supported by Implications and Intendments of Law, but ought to be expressly founded : And, in proving a Jurisdiction, single Witnesses are sufficient to establish the same by their Evidence. A Jurisdiction is either *simply* committed against some Persons, and such is a *delegated* Jurisdiction ; or else 'tis ordain'd in respect of some Place or Territory, and then 'tis call'd an *ordinary* Jurisdiction.

|| D. 1. 21. 2.
2 & 3.

* X. 3. 50.
per tot.
† X. 5. 17. 3.

|| X. 1. 29.
13 & 27.

By a *simple* Commission or Delegation of a Cause, a *delegated* Judge may decree Monitions and Citations, and punish the Party cited for his Contumacy, if he does not appear according to the Citation, tho' the Letters Commissionall do not expressly give him that Power, and the

* X. 1. 29. 5.

† X. 1. 29. 39.

Cause be only *simply* delegated to him *: For, the Cause being committed to him, he has a plenary Power thereby of doing all things which are known to belong to the Cognizance of that Cause †. If a Cause be only *simply* delegated to two or more Persons, each of them may make a Sub-delegate, that is to say, he may commit his Power to

‡ X. 1. 29. 6.

his fellow Judge, or to another Person ‡, if he pleases, tho' this be not inserted in the Commission, *viz.* That *one of them may proceed therein without the other*, as I have already remembred. And if a Cause be committed to three Delegates or more, with a Clause (in the Commission)

* X. 1. 29. 21.

of *quod si non omnes, &c.* that is to say, *if all of them cannot be present; yet let two of them execute the Commission notwithstanding* *: I say in this Case, if the Defendant has been only cited by two of them,

† X. 1. 29. 22.

he is not of necessity bound to appear, because all three of them ought to be mention'd in the Citation, tho' they were not all present at the decreeing thereof †. But if a Cause be *simply* delegated to two Persons, the Sentence of one of them is not valid without the express Concurrence of the other ‡.

‡ X. 1. 29. 23.

* Paul de Castr. in l. 74. D. 5. 1.

A delegated Jurisdiction may be prorogued by tacit Consent of Parties *de Re ad Rem* *, and from Time to Time; but for a *local* Prorogation thereof, the express Consent of Parties is required: for a Person delegated to take Cognizance of Causes in one Diocess, cannot take Cognizance thereof out of such Diocess without the express Consent of Parties. If a Cause be delegated or committed to be decided within a certain Day prefix'd; such Commission or Delegation ceases and expires by a Lapse of the Day prefix'd, unless the same be prorogued by the common Consent of all Parties therein concern'd. For a *delegated* Jurisdiction is not extended beyond what is contain'd in the Commission of the Person delegating the same: And, therefore, if the Judge proceeds on other Matters, he may be contradicted and appeal'd from; but if there be no Appeal, the Judgment or Sentence which is founded on a foreign Plea is valid. Tho' no one ought regularly to be judged out of his own proper Jurisdiction †; yet if a Person commits a Crime out of his own proper Jurisdiction, he shall be punish'd where he commits the Crime ‡: for a Crime committed out of a Man's own Jurisdiction, induces a Jurisdiction over an extraneous Person; for the Cause shall be there heard and try'd, where the Crime was committed *.

‡ 3. Q. 6. 12, 13, 14, & 15.

‡ 3. Q. 6. 18.

* 6. Q. 3. 4, & 5.

A Jurisdiction has a twofold Object, *viz.* the *Agent* and the *Patient*. In respect of the *Agent*, the Jurisdiction is placed in the Judge, who acts and administers Justice; as a Kingdom is placed in a King, who governs the same: But in respect of the *Patient*, it resides in the Persons, against or in favour of whom the Law is given. In the *Roman* Church, Abbots are forbidden to usurp that Jurisdiction which belongs to *simple* Clerks and Bishops, and which concerns the Cure of Souls †: Nor can Women, according to the *Civil* or *Canon* Law, have the exercise of Jurisdiction, unless it be in respect of some Dignity which they have; because they cannot, thro' their great Modesty and the Imbecillity of their Nature, discharge the Office of a Man ‡: Yet if a Dignity, with a Jurisdiction annex'd to it, devolves to a Woman by Law, she may exercise the same; and discharge the Office of a Man. As for Instance, in a Woman to whom a Kingdom devolves for want of Male Heirs thereunto: But the *Salick* Law, as receiv'd in *France*, forbids this there. By

‡ 16. Q. 1. 10.

‡ X. 2. 27. 24.

the

the *Canon* Law (I grant) an Abbess may have Episcopal Jurisdiction * : * X. 1. 33. 12. And tho' she cannot of her self excommunicate, yet she may implore the Office of the superior Judge, that he would excommunicate such Persons as shew Disobedience to her †. For an Inferior having Jurisdiction, in important Cases, may have Recourse to the *local* Superior or Ordinary, and implore him to demand his Sentence to Execution, by compelling such as are Subject to such inferior Judge to obey him : And in this Matter, a Bishop is oblig'd to assist a Lady Abbess ||.

† Dd. in c. 12. X. 1. 33.

|| Dd. ut sup.

According to *Baldus*, all Power and Jurisdiction is derived from the Prince or Emperor ; and as it descends from him to his inferior Magistrates, so it returns to him again : Wherefore, a Person inferior to a Sovereign Prince, is not presum'd in Monarchies to have any Jurisdiction or Command over others ; because all Jurisdiction is lodged with the Sovereign Power ; and if the Office of a Judge be a publick and not a private Office, then no one inferior to the sovereign Power can assume the Rights of Magistracy and Jurisdiction to himself, but ought to be made a Magistrate and a Judge by the Prince himself. Therefore, he that avouches a Jurisdiction to be given to him, ought to prove the same ; because Jurisdiction is a matter of Fact, and Facts themselves are not presum'd, but ought to be prov'd. And hence 'tis, that Jurisdiction is a certain Quality, which is not a Man's by Nature, but so arising to one as it does not accrue to another ; and for this Reason likewise it ought to be prov'd. Therefore, whoever avers himself to have a Jurisdiction, whether it be an *ordinary* or a *delegated* Jurisdiction, ought to prove it. Now this is prov'd *first* by *Investiture* ; whereby the Person shows, that he has a Mannor or Lordship granted him with *Jurisdictional* Authority : *2dly*, 'Tis prov'd from the Letters or Instrument of his Commission, which Commission Letters such Magistrate ought to present and exhibit upon his immediate entrance into any Town, City, Province and the like, where he has Jurisdiction ; commanding the same to be publish'd in the usual Places for so doing, according to the Advice of *Bartolus* *, *Speculator* †, and others. But this is otherwise, if the *ordinary* Jurisdiction of such Magistrate has been already made publick either by Investitures or open Commissions : For then this Jurisdiction is, for the future, presumed ; and, it being once manifestly known to the Province, &c. 'tis not necessary to prove the same again. And in this Sense we ought to understand *Baldus* ||, saying, that a Person is presum'd to have *ordinary* Jurisdiction, when he has been already possess'd of the Administration thereof in a publick manner. For when a Judge has been once admitted as such, he is presum'd to be such as long as the Time of his Office lasts. And if such Judge shall happen to be in a Place or Province wherein his Jurisdiction is not notorious in this manner, and a Party shall upon a *Non-constat* deny the same, he may (according to *Vantius* *) prove it by common Fame and Opinion. *2dly*, This is otherwise when a Sentence has been pronounced by such a Judge against a Person present, and not in Terms opposing the same. For in such a Case a Jurisdiction is presum'd ; and therefore, the *onus probandi* is incumbent on him (according to *Bartolus* ||, *Innocent*, and others) that avers the contrary : Because the Person, against whom the Sentence is pronounced, has brought this Mischief on himself by his own Consent and Silence, and a Presumption likewise lies for the Matter itself adjudged. *3dly*, 'Tis otherwise, when the Suit has been contested by the Parties themselves : For, according to *Innocentius* *, no Credit is given to a Person asserting *ex-Post-facto*, That such a one is no competent Judge,

* In l. 3. C. 10. 1. † Tit. delegat. c. superest. vers. Et pro hoc sedis.

|| In l. 22. C. 1. 3.

* De null. Pr. Tit. Quib. mod. Sent. Null. rep. N. 95.

† In l. 2. D. 4. 5. N. 7. || In c. 44. X. 1. 6. in 31. X. 1. 29. in c. 3. X. 5.

* In c. 3. X. 5. 31.

but

but he must prove the same, since a Man cannot reprobate and disallow of what he has once approv'd.

There is one kind of Jurisdiction in Temporals and Spirituals, which is stiled *voluntary*, as I have before hinted; and another, which is term'd *contentious* Jurisdiction. *Voluntary* Jurisdiction, is that which does in a great measure depend on the meer Will and Pleasure of the Superior; and, therefore, 'tis not necessary, that it should be executed with a solemnity of Judicature*, the Judge sitting on the Bench, &c. so that those things are said to be matters of *voluntary* Jurisdiction, which the Parties do of their own Will and Choice, without any Necessity and Dispute at Law. But those Things are said to be the Object of *contentious* Jurisdiction, which are transacted in Courts of Judicature, and which are rendred valid by Compulsion.

There is also another Division of Jurisdiction, *viz.* into *Civil* and *Ecclesiastical*: the last of which was originally in the whole Church, till in after Ages, Bishops got the upper hand of the People, and placed them in the Seat of Power by the Grant of Christian Emperors. For tho' the chief Business of Bishops is to instruct their Flock in the Word of God, and to give a good example of Life; yet since all Men will not be obedient to the Word, nor brought by the Persuasion thereof to good Nurture, nor kept in Order; and, the Eminence of the Degree wherein Bishops are placed, being not sufficient to keep the People in Obedience without some Power and Jurisdiction: Therefore such of the *Roman* Emperors as profess'd Christianity, assign'd† certain peculiar Jurisdictions Ecclesiastical unto Bishops over Persons and Causes Ecclesiastical, such as concern'd the Soul of Man, or appertain'd to any charitable Use; and over the Laity, as far as the Laity themselves have been content to submit themselves to their Government, *viz.* as far as it concerns the Health of their Souls, or the outward Government of the Church in Things decent or comely, or it concerns poor and miserable Persons: And in all these Things a Bishop was antiently to perform double Faith and Sanctity; *first*, that of an uncorrupt Judge; and, *secondly*, that of a holy Bishop. And as a Bishop or Metropolitan, was not to intermeddle with the Jurisdiction of another Bishop without his Knowledge and Consent*: So a Patriarch or Primate, according to the *Canon* Law†, has not immediate Jurisdiction over Bishops, but only over Archbishops, as will be remembred under the Title of *Patriarchs*, &c. The Church has Jurisdiction in divers Crimes, as Sacrilege, Usury, Perjury, Incest, Adultery, Fornication, Heresy, Schism, Simony, Drunkenness, Blasphemy, &c. as I have and shall shew under their respective Heads. But if the Ecclesiastical Court exceeds its Jurisdiction by proceeding in Matters not within its reach, the Proceedings are null and void: for if a Court has not Jurisdiction of the Cause, all is void; but other Faults only render the Proceedings voidable: yet if the Jurisdiction of a Court be once admitted by the Defendant's Pleading, as surely it is||; it is then too late to object against the same, and to pray a Prohibition; for Ecclesiastical Courts here in *England* are to be kept within the Limits of their own Jurisdiction by Prohibitions from the King's Temporal Courts. If a Judge has not Jurisdiction *primâ facie*, 'tis necessary in the first place (unless it be in some certain Cases) for the Person commencing the Suit before such a Judge, to set forth and prove that the Cause begun before him, is of such a Nature of which he has Jurisdiction. For in such Matters as give Jurisdiction to a Judge, the Proof of such Jurisdiction is of necessity required *in principio Judicii*, otherwise the Process is null and void. Though

† C. 1. 4.
per tot.

* 9. Q. 3. 7.

† 9. Q. 3. 8.

|| 9 H. 7. 12.

Though an Ecclesiastical Jurisdiction cannot be demis'd or let to Farm under a certain yearly Rent; yet if a Person having such Jurisdiction should allot a certain Sum of Money to another Person for his Salary, in such a manner as that his Deputy or Official should become accountable to him for the whole Profits of the Jurisdiction, such an Allocation is lawful*, because he does not hereby demise and let the same unto Farm: But if a Person having Jurisdiction shall delegate the same unto another in such a manner as that (the Person delegated paying him a certain Rent or Portion of Money out of the same) he may retain the residue of the Profits to himself *pro labore suo*; this (I say) is not lawful for him to do (tho' too frequently practis'd) because it is a plain letting to Farm, and the Person receiving the Rent or Money in such a manner, shall, by the *Canon Law*, be depriv'd of his Office, and for ever be remov'd from being a Clerk†; that is to say, he shall suffer Deposition, since spiritual Offices by that Law, ought not be purchased or sold for a yearly Rent, it being a kind of Simony. And the Person likewise who commits or delegates an Ecclesiastical Jurisdiction in such an odious manner, shall lose his Office during Life.

* 12. Q. 2.
45. & 66.
Bern. in c. 1.
X. 5. 4.

† Host. in
c. 1. X. 5. 4.



Of Kindred; and the several Divisions, Degrees, and Distinctions thereof, &c.

SINCE no Student in the Law ought to be ignorant of so useful a Part of Knowledge as that of *Kindred*, and of the several Degrees and Distinctions thereof*; and this upon many Accounts, as it concerns Matrimony, Guardianship, Succession unto Intestates Estates, and the like: I shall, therefore, under this Title treat of *Kindred* according to its several Degrees, Branches and Distinctions. Now those Persons are in *Latin* usually stiled *Cognati*, or *Kindred in English*, that are by Birth descended from one and the same common Stock; that is to say (according to *Modestinus*) *communiter nati*†, or (as *Ulpian* has it) *quasi ex uno nati*; and having, as it were, but one common Beginning. And tho' the Law of the twelve Tables stiles them *Agnati*, yet, by the *Roman Law*, there is this difference between the *Agnati* and *Cognati*: the first being such as are of kin by the Father's side, and descended from the same Family; whereas the latter, which by that Law are never called *Agnati*, are such as are ally'd to each other by the Mother's side. But waving this Distinction, as it is now taken away by the modern Law||, as well in respect of Guardianship, as in point of Succession to Intestates Estates, I shall here discourse of Kindred as it is a Proximity of Blood, which renders several Marriages, that are otherwise in their Nature lawful, both impious and disallowable between certain Persons; both the Law as well as Nature itself abhorring such Conjunctions.

* D. 38. 10.
10.

† D. 38. 10.
4. 1.

|| Nov. 118.
cap. 4.

But though, according to the proper Sense of the Word *Kindred*, it only denotes and includes such Persons as are descended from the same common Stock*; yet by Marriage we have divided Kindred into what we call *Consanguinity* and *Affinity*; and make Kindred to signify a certain Body of Persons, that are ally'd unto each other either by Blood or by Marriage. The first we stile in *Latin* *Consanguinei*, as being of the same Blood; and the latter we term *Affines*. So that as *Consanguinity* is the

* D. ut supr.

joining together of several Persons by Blood ; so *Affinity* is a Civil Bond of Persons, that are ally'd unto each by Marriage or Espousals, according to the *Canon Law*. That which I here call a *civil Bond*, *Azo* and *Clavifius* do both of them term *Proximity*. I call it a *civil Bond*, because lawful Marriage cannot be contracted between Persons forbidden by the Law to marry each other ; and I call it a *Bond*, because Persons are join'd together in one Body by Affinity. And lastly, I have added the Word *Espousals* ; because, by the *Civil* and *Canon Law*, there is and may be a good Affinity between Persons betrothed only. Now all the Kindred of the Husband and Wife (in respect of Marriage) being thus join'd together, they are in *Latin* stiled *Affines*, because these two Relations, which are distinct in regard of each other, are by Marriage united together, and approach each other *ad finem cognationis*, on the Verge of Kindred. And though it is often said, that there is no room for Affinity without a Marriage-Contract, yet both *Accursius* and *Panormitan* on the *Civil* and *Canon Law*, do each of them hold, that Affinity may be contracted in Bar to Matrimony without such a Contract, tho' not in respect of other matters.

In propriety of Speech, only Brothers and Sisters are said to be of the Consanguinity, when they are descended from the same Father ; and further, those of the Consanguinity are not reckon'd, according to *Alexander* † : But, according to *Baldus* ‖, *Barbatia* *, and the rest of the Doctors, the Consanguinity, in strictness of Speech, not only extends itself to Brothers and Sisters, but to all in the collateral Line. And *Alexander* himself confesses ; that the Word *Consanguineus*, in the common usage of Speech, is stretch'd to every one ally'd by Blood even beyond the second Degree †, as the *Canonists* say ; that is, beyond Brothers and Sisters. But (I think) that Persons of kin by Blood on the Mother's side, as well as those on the Father's, may very well be call'd *Consanguinei*, and the Law sufficiently justifies the same ‖, as well as the common way of Speech, which ought always to be regarded *. Consanguinity has many Privileges and Operations in Law, which are too numerous to be here specify'd ; as a Kinsman, by Blood, may converse with an excommunicated Person of the same Relation without incurring Excommunication, which no other Person but such a Kinsman can do † : And by the *Civil Law*, such a Kinsman may be an Advocate for his Kindred by Blood, even against the State, which no other Person can, according to *Speculator*, touching Advocates ‖ ; and such a Person receiving his banish'd Kindred is punish'd in a more gentle manner, than if he had entertain'd a banish'd Stranger †, &c. The Proof of Consanguinity, as it arises from the Procreation or Propagation of Mankind, which we in other Terms call *Filiation*, is a matter of equal Difficulty with *Filiation* itself, because this is an Act of Secrecy, and does not (as the Doctors observe *) fall under our corporeal Senses : And, therefore, it may be prov'd by Fame, Conjectures, and Presumptions † ; especially, if such Consanguinity be antient and immemorial. According to *Alexander*, the Term of fifty six Years may in this respect be said to be *Tempus antiquum* ‖ ; because, thro' the shortness of human Life, an Act done before such a number of Years, cannot easily be prov'd by Men surviving such a term of Years, which in some Countries seldom happens. But if Consanguinity or Affinity, which admits of the same Proof with the former, has been so lately contracted, as that it does not exceed the Memory of Man, then publick Voice and Fame is not sufficient to prove the same, but some Overt-act ought to be prov'd together with such Fame ; as the calling a Man by the Name of *Father*, *Son*, *Brother*, *Cousin*, and the like.

† Conf. 228.
‖ In c. 1. vi.
3. 11.
* In l. 30.
C. 6. 42.

† Conf. 82.
lib. 1. N. 1.

‖ D. 29. 2.
30. 3.
* D. 33. 10.
7.

† 11. Q. 3.
103. X. 5.
39. 31.

‖ §. 1. vers.
fed nun-
quid.
† D. 47. 16. 2.

* In l. 83.
D. 35. 1.
Dec. Conf.
195. Anch.
Conf. 52.
† Socin.
Conf. 89.
vol. 1. Jaf.
Conf. 114.
v. 1.
‖ Alex. Conf.
90. vol. 6.
Jaf. ut sup.

like*. And Instruments and Deeds are also a concurrent Evidence, together with a publick Fame, to prove Consanguinity or Affinity, tho' such Consanguinity or Affinity be only mention'd therein by way of Enunciation. * Bart. in L. 9. D. 1. 6. Bald. in L. 9. C. 9. 1.

The Kindred is distinguish'd by Lines or Limits, *viz.* either by the *Right Line* or the *Collateral* †. The *Right Line* is of Parents and their Children, computing by Ascendants and Descendants. The *Collateral* Line is between Brothers and Sisters, and the rest of the Kindred among themselves. For when the Question is ask'd, How such Persons are of kin? you must ascend to the Stock from whence both Parties sprang, and descend *Collaterally* and *Obliquely*, to find out the Degrees. Now a *Line* is nothing else but a Collection of Persons descending from the same Stock, containing the Degrees, and distinguishing the several Relations of Kindred. And as Degrees are distinguish'd by Lines in order to number the same, so are Lines distinguish'd by Degrees. Therefore I shall in the next Place consider, after what manner the Degrees of Kindred ought to be reckon'd. And to do this, we must first observe, that there is one kind of Kindred reckon'd upwards, and another reckon'd downwards in the *Right Line*; and a third kind, which is reckon'd *Collaterally*, or (as we say) *ex Transverso*. The superior Kindred in the *Right Line*, is that of Parents, and this is reckon'd upwards: And the inferior Kindred in the same Line is that of Children, which is always reckon'd downwards. And that which is reckon'd *Collaterally* or *Transversely*, is that of Brothers and Sisters, as aforesaid, and of such as are born from them; and likewise Uncles and Aunts by the Father's side, and the same by the Mother's. Both the upper and lower Kindred begins from the first Degree; but that which is reckon'd *ex Transverso*, or the *Collateral* Kindred, begins from the second Degree. In the first Degree upwards we may reckon the Father and Mother, and downwards the Son and Daughter ||. In the second Degree upwards are the Grand father and Grandmother, and downwards the Grandson and Grandaughter: But in the *Collateral* Line, are the Brother and Sister †. In the third Degree upwards are the Great Grandfather and Great Grandmother, and downwards is the Great Grandson and Great Grandaughter: And in the *Collateral* Line, the Brother and Sisters Children; and likewise the Uncle and Aunt both by the Father and Mother's side*. The Uncle by the Father's side, is the Father's Brother, and is in *Greek* stiled *Πατρός*; and the Uncle by the Mother, is the Mother's Brother, and in the same Language is properly term'd *Μητρός*; and each of these is, in that Tongue, promiscuously call'd *Θείος*, but in the *Latin*, *Patruus* and *Avunculus*. The *Amita*, is the Aunt by the Father's side, or the Father's Sister; and the *Matertera* is the Aunt by the Mother's side, or the Mother's Sister. The first Degree only contains four Persons, *viz.* the Father, Mother, Son and Daughter. But the second Degree comprehends Twelve; the third Degree Thirty two; the fourth Degree includes Eighty Persons; the fifth Degree takes in one Hundred and eighty four; the sixth Degree four Hundred and forty eight; and the seventh Degree contains one Thousand and twenty four Persons †. It is not to be expected, that I should here give the Reader a *Nomenclature*, or the distinct Names of these Relations within the compass of my present Design: But 'tis enough for me to refer him to the Text in the Law, and to his own Consideration. By the *Civil Law* there are no Degrees in respect of *Affinity* ||: But by the *Canon Law*, they are computed after the same manner as the Degrees of *Consanguinity* are*. Touching the way and manner of computing these, see before the Title of *Degrees* in this Work †. But I must

* Bart. in L. 9. D. 1. 6. Bald. in L. 9. C. 9. 1.

† D. 38. 10.

|| D. 38. 10. 1. 12.

† Sect. 13. d. 1.

* Sect. 14. d. 1.

† D. 38. 10. 10. 9. 12. 13, 14, 15, 16, 17 & 18.

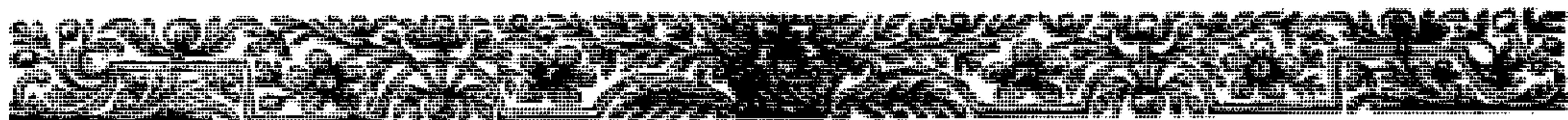
|| D. 38. 10. 4. 5.

* X. 4. 14. 8 & 9.

† Pag. 209.

* 35. Q. 5. 2. must (notwithstanding) here take notice, that the *Canon* Law * agrees with the *Civil* Law, in reckoning Degrees in Respect of the *Right* Line, tho' there is a Disagreement between these two Laws in respect of the *Collateral* Lines, in that the *Canon* Law stops in its Computation at the common Stock: for which see *Page* 209, and the *Title* above quoted. The Common Law of *England* computes the Degrees of Kindred according to the *Canon* Law †.

† Cok. 1.
Inst. 24. a.



Of the Knights Templars, Hospitallers, &c.

THERE were heretofore several Persons, who, according to the Farce of those Times, were stiled *sacred* Knights; and, these assembling themselves together into divers Bodies, upon a pretended account of Religion, were incorporated for this End, tho' they never design'd the Means to come at it. Some of which Corporations or Colleges are now taken away, and others of them are still extant and subsisting. And tho' the Institution and Foundation of these Knights was at first from very small Beginnings, yet it afterwards, in process of time, arrived to great Wealth and Riches in the World. For about the Year of our Lord 1099, when the Christians re-possess'd themselves of *Jerusalem*, there were then at *Jerusalem* several Christians called the *Latins*, who obtain'd a Grant from the *Saracens*, having the Government thereof, that they might have Houses near our Lord's Sepulcher: and, in pursuance of this Grant, they built a Religious House in Honour of the Virgin *Mary*, call'd the *Latin* Abbey. And the Duty and Office of the Abbot, was to receive and entertain all such Strangers as came thither on the Score of Religion; provided, they were of the *Latin* Church: A noble Stratagem of the Bishop of *Rome*, to get Footing in the *Eastern* Countries! Hereunto there was afterwards added the Abbey of *St. Mary Magdalene*, being also another Religious House, which was for the Reception of Women, that Christians might come together there and propagate their *Species*. But the Number of Pilgrims increas'd so fast hereupon, that these Religious Houses were not sufficient for their Reception, and, therefore, they built another Hospital or House of Entertainment, which they dedicated to God by the Name and Title of *St. John the Baptist's* Hospital: And over this House they set one Prefect or Governor for the Rule thereof, according to *Polyd. Virgil, de rerum Inventoribus* ||. And out of these several Houses, have since proceeded divers Families or Orders of Knighthood bearing the Cross: For from their Example, several other superstitious Persons have mark'd themselves with the Cross, in order to perform the same Military Service in the Cause of Religion.

|| Lib. 7. c. 5.

Guil. Tyrius in the second Book of his History of the Holy War (as it is called) writes; That the Christians also built a Temple at *Jerusalem* on the Permission of the *Arabians*, after the Ruin of the Temple by *Cosdroas* King of *Persia*, which (he says) was extant even in his Time: For this *Cosdroas*, about the Year 610, in the Time of the Emperor *Heraclius*, took *Jerusalem* and a great Part of *Asia*, and laid the same waste to the ground. After this the *Arabian* Power display'd itself apace
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and got ground in the East, under the Command of *Homar* the Son of *Chorab*, and the Author of the *Mahometan* Religion; who, having again depopulated all *Palestine*, *Syria*, and *Damascus*, now left *Jerusalem* in its Ruins to be govern'd by his own Laws, and tributary to him; giving the Christians a Power to rebuild their Temple in the Place where it stood, when it was destroy'd by *Titus Vespasian*, and to enjoy their own Religion. To this Temple, Revenues were assign'd; and such Knights as came thither as Pilgrims to visit the Holy Sepulcher, were to have the Government and Conservation thereof, according to *Paul Æmilius*, in the fifth Book of his History. But the Order of the Knights *Templars* was not then founded, (as some will have it) but by *Baldwin* the fourth King of *Jerusalem*, about the Beginning of the twelfth Century*; and were appointed for the Defence of that City, ^{*A. D. 1118.} and the safe Convoy of all such as went thither. At which Time several Persons of Quality, and of the Order of Knighthood, devoting themselves to the Service of the Church, and to live after the manner of Canons Regular, in Chastity and Obedience towards their Superior, and without any such Thing as Property, profess'd themselves of a Religious Order. And whereas they had no Habitation, *Baldwin* granted them that part of his Palace, which was near the aforesaid Temple, and likewise Provision and temporal Estates in perpetuity to live on. The *Templar* Canons also granted them a certain Piece of Ground near the Temple and Palace to build on. Afterwards by the Pious Bounty of Princes, as Piety went in those Days, they were dispers'd into all Parts of *Christendom*, and richly endow'd with large Possessions, which made them degenerate very much from their first Institution, and become execrably vicious: For which reason all Christian Princes did combine together to seize and apprehend them, and to turn them out of their Order and Estates, the *French* King being the foremost in this Design, because (as is pretended) he had Thoughts of making one of his Sons King of *Jerusalem*, and getting their Revenues for him. Their Accusation was brought to the Council at *Vienna*, and they were condemn'd to be rooted out and abolish'd, as is evident from the condemnatory Sentence against them in the Bull of Pope *Clement* the Vth. wherein we meet with these Words, *viz. Quauquam de Jure possumus, tamen ad Plenitudinem potestatis dictum ordinem reprobamus*†. And then their ^{†A. D. 1312.} Estates were given to the *Hospitallers*; of which by and by. King *Richard* II. soon after his Coronation, did at once Arrest all the Knights *Templars* throughout *England*, committing them to Prison, according to the Example given him by the *French* King. For the first nine Years after their Institution they were modest and humble, wearing a Secular Habit, and cloathed in a Charity Dress. But, in the ninth Year, at the Council of *Cressy* in *France*, they had a Rule and a white Garment or Robes assign'd them; and by the Order of Pope *Honorius*, and *Stephen* Patriarch of *Jerusalem*, their number was greatly increas'd. And in the Papacy of *Eugene*, not only the Knights, but also the inferior Friars, which were called their Servants or Esquires, began to wear Crosses of red Cloth on their white Mantles or Gowns. See *Tyrius* his History of the Holy War||, which was written under *Baldwin* the Vth. about the Year 1180. || Lib. 12. Pope *Alexander* the Third, in a *Decretal* of his, styles these *Templars* by ^{cap. 7.} the Name of Religious and Hospitaller Friars, saying, they had some Churches subject to them *pleno Jure*, and others for Institution wherein to they were to pray the Bishop's Authority*. This Order of *Templars* ^{* X. 5. 33.} was approv'd of in *Italy* by Pope *Innocent* † III. who was elected to ^{3. 3.} the Papacy *Anno Dom.* 1198. *Platina* in the Life of Pope *Clement* V. ^{† X. 2. 1. 16.} says,

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¶ Lib. 7. de
vit. Philip.

says, That the Order of these fighting Friars was demolish'd on the account of conspiring and joining with the *Saracens* against Christianity: And the Abbot of *Urspergh* will have it, that their Destruction was owing to their Treachery in betraying the Emperor *Frederick* the Second; tho' *Gaguinus* affirms||, That it was for betraying *Lewis* King of *France*, being ill-affected to the *French* Nation. But whatever the Occasion was, *Albericus de Rosate* says, That *Pope Clement* was resolv'd to extirpate the Race of them; and, therefore, though he could not destroy the Order *viâ Justitiæ*; yet he wou'd do it *viâ Expedientiæ*, lest his dear Son the *French* King should be offended. Yet *Hermannus* will have it, that they were fallly accus'd of Heresy by the said Pope, in order to oblige the *French* King*.

* Herman.
Chron.

But the Number of Pilgrims to the Holy Sepulcher increasing so fast in those Times of Darknes, a Hospital was built near the Temple of *Jerusalem* (as I have already observ'd) stiled by the Name and Title of *St. John's* Hospital, which was for the Reception of all such Pilgrims the Abbeyes could not contain. Wherefore for the Ministry of this House, divers Noblemen on a suppos'd Principle of Piety devoted themselves hereunto; and were as a Guard to the Pilgrims, to defend them from the Incursions of the *Saracens* and other Robbers. These Knights or Champions for the Church, renouncing and laying aside all manner of Property, as the *Templars* did in the Beginning, professed a solemn Vow of Poverty, Chastity and Obedience. Therefore, on the score of their first Vow, they could have no such Thing as Property, but were to receive a certain Maintenance during Life from the Revenues of the Hospital, whereunto they did belong. On the Account of their Vow of Chastity, they were nearly related to Ecclesiasticks; and, therefore, they could not take a Wife, according to the Statutes of the said Hospital: And *Pope Alexander III.* when he did forbid them Marriage, stiled them by the Title of the Friars of *St. John of Jerusalem*; and their Head he term'd a *Prior* †. And *Pope Innocent III.* gave them the same Style or Title||. But yet they were not Ecclesiastical Persons, since they might freely, and by Profession, bear Arms in defence of the Christian Faith against the *Saracens*, after the Example of the *Maccabees*; which Clergymen are not allow'd by the *Canon* Law to do. And tho' these *Hospitaller* Knights ought not to become Priests according to their Order; yet we find in a Letter wrote to them by *Pope Honorius* the Third, That he says he had heard their *Prior* ought to be a Presbyter. *Pope Alexander*, in a Constitution made by him during his Papacy, stiles the *Templars* by the Name of *Hospitaller* Friars (as aforesaid) but surely these were two distinct Orders. The chief Reason why I have here troubled the Reader with an account of these Religious Knights, is, because we have frequent mention made of them in our Books of the *Common* as well as the *Canon* Law; and that both the Knights *Templars* and *Hospitalers* were discharged from the Payment of Tithes in respect of their Estates which they held in their own Hands: which they could not have been, if they had not been deem'd Ecclesiastical Persons. The Corporation and Order of *Hospitalers* here in *England* was dissolved by a special Act made in the thirty second of *Henry VIII.* Chap. 24. by which their Possessions were given to the King, with all the Privileges and Immunities thereunto belonging. And thus I have done with them, till I come to discourse of Tithes hereafter, under the Title of Tithes.

† X. 3. 32. 8.
|| X. 5. 33.
11. Gloss.
ibi. X. 3. 30.
31.

Of a Lapse or Devolution, and how it accrues.

A *Lapse*, by the *Canon* Law stiled a *Devolution*, is a transferring (by Forfeiture) of that Right and Power, which a Person has to present or collate to a vacant Benefice, from one Person to another, by Reason of some Act or Negligence in the Person that is vested with such Right and Power *: for if the Person, to whom such Right of Presentation or Collation belongs, does not present or collate thereunto within the Space of half a Year, the Power of presenting or collating thereunto devolves to the next immediate Superior by way of Lapse or Forfeiture, and shall not return to the inferior Person again for that Turn; because the Nature of a Lapse or Devolution, is, that an Ecclesiastical Benefice being thus devolv'd by the Neglect or Omission of the Patron to present to a Church within six Months after Voidance, it shall not revert again to him for that Turn †. By the *Canon* Law, a Lapse or Devolution may happen two several ways, and on a twofold Account. As *first*, when the Person that is thus depriv'd of his Right of electing, presenting, or collating to a Benefice, has elected, presented, or collated some very unfit and disqualify'd Person ‖. And *secondly*, When he has not discharged the Duty of his Trust within a certain time prescrib'd by the Law for that end and purpose*: for, he that abuses the Trust and Power granted him, ought to lose the same †. A Lapse happens not only by the Patron's being privy unto such Voidance, but also by his Ignorance thereof; except only where such Voidance is made by Resignation or Deprivation of the former Incumbent: In which two Cases the Bishop ought to give Notice or Intimation thereof to the Patron, that he may present another Clerk, before such Lapse or Devolution can happen. And thus a Lapse is also an Act and Office of Trust repos'd by Law in the Ordinary, Metropolitan, and (with us here in *England*) in the last Place reserv'd unto the King; and the Title by a Lapse is rather an Act of Administration than of Interest: But the Patron's Title continues against the Ordinary, and even against the King himself, till the Lapse is executed by Plenarty. If the Ordinary dies after a Lapse happens, his Executor shall not have it; but the King shall present in virtue of his Prerogative, though it has been a Question among some, whether the King or Metropolitan shall have it. But if the Patron presents, and his Clerk be instituted, and remains without Induction for eighteen Months, the King shall not present upon him by virtue of a Lapse, as he may do upon a direct Patronage accruing to him, by having the Guardianship of the Temporalities, or by the Ward of his Tenants Heirs after Institution, and before Induction. For the King cannot have a Lapse, but where the Ordinary might have had it before him.

Now, according to *Hobart*, the Ordinary, or he that is to bestow the Benefice by way of Lapse, is as it were a *Negotiorum Gestor*, or a kind of an Attorney made so by the Law to do that for the Patron, which he would himself (perhaps) have done, as suppos'd, if there had not been some Lett or Impediment that prevented him: And a Collation thus, is in Right of the Patron and for his Turn‖. In *Albany*, and the Bishop

* X. 1. 6. 7.

4.

† vi. 3. 2. 5.
C. 6. 7. 2.

‖ X. 1. 6. 7.

4.

* X. 1. 6. 41.

† C. 19. 11.
D. 3. 5. 38.
74. Dist. 7.

‖ Hob. Rep.
of p. 154.

† vi. 3. 19.
1. 2.

|| Gloss in
c. 14. vi. 1.
3. & in c. 17.
vi. 1. 6.

* X. 3. 8. 2.

† X. 3. 38. 27.

|| X. 3. 8. 6.

* vi. 3. 19.
c. un.

† X. 3. 8. 12.

|| X. 1. 6. 41.
50. Dist. 11.
vi. 1. 6. 6.
Dd. ibi.

* X. 3. 39.
21. X. 5. 7.
13.

† X. 3. 4. 11.

of St. *Asaph's* Case, it was resolv'd and agreed unto by the whole Court; That, in the Computation of the six Months, in respect of a Lapse on notice given, the Reckoning ought not to be according to the Calendar, as *January, February*, and so on; but according to the Number of particular Days, by allowing twenty eight Days to every Month: which I take to be a wrong Judgment, because the Law says *tempus semestre* †. But in *Catesbie's* Case, the Time of Lapse was adjudg'd according to the Computation of Calendar Months, and not according to the Computation of twenty eight Days to the Month. And it was adjudg'd in the Case of *Molineux*, that if the Patron presents, and the Ordinary refuses, he ought to give notice to the Person of the Patron thereof, if he be resident within the County; and if not, then at the Church itself, which is become void: for sufficient notice ought to be given after such a Refusal, and not as in the Case of the said *Albany*, when the Church became void the 14th of *March*. and *Albany* presented the 13th of *August*, and the 29th of *August* the six Months expir'd: yet the Bishop did not give Notice to the Patron till the 4th of *September* of his Refusal, and the 14th of *September* he collated. And it was adjudg'd not to be Notice, by reason of the great Delay of twenty two Days between the time of the Presentation tendred, and Notice given. All the Doctors do agree, that a Lapse or Devolution was introduced as a Punishment for Negligence ||, as a Judge may be depriv'd of his Office for Negligence, and another substituted.

By a Canon of the fourth Council of *Lateran*, it was decreed, That Ecclesiastical Prebends, and all other Offices in any Church, should not continue long vacant, but the same should be filled up within six Months, and conferr'd on such Persons as are fitly qualify'd for the Administration thereof*. But yet this Council decreed nothing in derogation of any shorter term of Time, in respect of filling up such Ecclesiastical Livings as were to be dispos'd of, and filled by some special Law within a lesser Time; but leaves them to remain in their antient State. And by this Council, a Layman was to make his Presentation to a vacant Church within four Months †, and a Clerk that had the Right of Patronage or Election, was to do the same within six Months ||, otherwise the Right of collating thereunto did devolve to the Bishop, or the next immediate Superior*. But in respect of the greater Benefices and Dignities in the Church, as Bishopricks, Archbishopricks, and the like †, they ought to be full of a Pastor within three Months after every Vacancy, under pain of a Devolution ||, as aforesaid: And thus, upon the Lapse of every three or six Months, according to the Nature of the Benefice, a Devolution was made from one Superior to another till the Church was full, and the Right of Devolution commenc'd immediately from the Lapse of such Term. But tho' no other Reason can be given why this Council limited the term of six Months unto ordinary Collators, than that it so pleas'd the Law-makers; yet some will have it, that it was founded upon a Law in Pope *Gregory's* Decretals, whereby Archbishops and Bishops are bound to visit their Provinces and Diocesses, (at least) once a Year *: And, therefore, as they may in their semestral Visitations inform themselves touching such Churches as are become void, this Council thought this a sufficient time to convict any Person of Negligence in point of presenting to Livings, especially since a Benefice becomes void by six Months Non-Residence thereon †. And this term of six Months, and every other given to elect, present or collate to a Benefice, shall begin to be reckon'd from the Time of a true Presumption of such Vacancy, and shall have its proper Effect, if no legal Impediment happens to hinder the Person from dis-

discharging the Duty of his Trust ||: For as negligent Persons have no Relief in Law, so it is fit that Persons who are hindred by a Necessity of their Affairs should have aid in such a Case *. But (I think) this Distinction of four and six Months, in respect of Lay and Ecclesiastical Patrons, was never receiv'd in *England* †.

I have before observ'd, that, according to *Bernard de Compostella* and others ||, when a Patron presents a very unfit and unworthy Person for Institution to a Living, a Devolution is thereby made to the Bishop: But the *Canonists* say, That this has a respect only to Ecclesiastical Patrons, and does not happen when a Lay Patron presents such an unfit Person, though he should do it knowingly. And herein *Hostiensis* * seems *primâ facie* to agree with *Compostella*, saying, that when the first Person presented is unworthy, a Lay Patron presenting such a Clerk, may (perhaps) repent thereof †; yet he afterwards appears to contradict himself by adding, that the Diocesan in admitting of a second Presentation is said to gratify the Patron, because he may repel the second Presentee, since the Patron has presented a Clerk that is *minus idoneus*. But *Joh. Andreas* || says, that if a Lay Patron presents an unfit Person, he has till the end of four Months to present a fit one; and thus he may vary his Presentation: But *Hen. de Bowick* * will have it, that a Lay Patron cannot, even within four Months vary his Presentation, unless the Bishop admits of such Variation. And thus the Doctors are divided in their Opinions about this Matter. But (I think) that, even in the Sense of the *Canon* Law, a Lay Patron may vary his Presentation within four Months, even without the Bishop's Consent; and whether he presents an unfit Person knowing or ignorantly, such a Presentation shall not hinder a second to be made, especially before such a Presentation is tendred to the Bishop. With us here in *England*, no Devolution happens on the Account of the unfitness of the Presentee, but the Bishop ought to give notice to the Patron of the unfitness of his Clerk; and then if the Patron shall not present another within the six Months, a Lapse ensues thereupon. If the first Person presented to the Bishop by a Lay Patron be a Person well qualify'd in every respect, he ought not to set him aside, but to give Institution with all convenient speed, not only under a Canonical Punishment which the Bishop incurs by any unnecessary delay †, but also in *pœnam animæ*, according to *Hostiensis* || and others.

Every Lapse or Devolution ought to be made *gradatim*, and not *per saltum*; as from the Patron to the Bishop, from the Bishop to the Archbishop, and from the Archbishop to the King; but, by the *Canon* Law, to the Pope finally, as every Devolution is from Patrons having Churches exempt from Episcopal Jurisdiction *. But in *regular* Churches, that are exempt from Episcopal Jurisdiction, the Bishop of the Diocese, where such Benefice lies, collates thereunto by the Pope's Authority †. During the Vacancy of the Bishop's See, the Chapter may collate unto such Benefices as are lapsed unto the Bishop by way of Devolution, thro' the Neglect or Fault of an inferior Person ||: But if Prebends become void *sede vacante*, the Chapter shall not collate thereunto by way of Devolution *, because a Collation unto Benefices is *in Fructu Episcopi*; and, therefore, they shall be reserv'd to his future Successor to dispose thereof †.

A Bishop may collate by Lapse, where two Patrons pretend a Right of Presentation, and one sues the other without naming the Bishop, and recovers, and the six Months pass, pending the Action: For in such a Case the Bishop was in no Fault ||: And 'tis the same Thing, if after a Recovery the Defendant brings a Writ of Error upon the Judgment, and

^H X. 3. 8. 2 &
^{5.} X. 1. 11. 3.
* D. 4. 6. 16.
† Dr. and
Stud. 116. b.

|| In c. 4.
X. 1. 31.

* In c. 24.
X. 3. 38.

† D. 37. 6. 8.

|| In c. 4.
X. 1. 31.

* In c. 5.
X. 3. 38.

† X. 3. 38.
29. in fin.
|| In c. 24.
X. 3. 38.

* X. 1. 10.
2 & 3.

† vi. 3. 4. 32.
Cl. 1. 5. 1.

|| X. 1. 33.
14. Joh.
Andr. in
c. 17. vi. 1. 6.
* X. 3. 9. 2.

† vi. 1. 6. 40.

|| Rolls Abr.
pt. 2d. 265.

the six Months expire before the Errors are determin'd. So likewise if a *Quare Impedit* be brought against the Bishop and Patron, who never presented any Clerk to him, if the six Months expire, the Bishop may collate, tho' his Title accru'd to him by Lapse pending the Writ : For he was no Disturber ; and 'tis unreasonable he should lose his Title by any fraudulent Action brought against him *. So if the Bishop collates, and before his Clerk is inducted, the Patron presents, the Bishop may in this Case refuse him †. If the Bishop's Title should accrue by Lapse in the Archbishop's Visitation, and whilst the Ordinary is under an Inhibition, whereby all Acts of Jurisdiction are for a while suspended, tho' he cannot institute a Clerk himself; yet he may present him to the Archbishop, who is bound to do it. In the 18th of *Eliz.* it became a Question, that if the King's Presentee upon a Lapse should die after Institution, and before Induction, whether he should present again or not? And it was adjudg'd he should, because he had not the Effect of his first Presentation *: For the Incumbent dying, before Induction, that was a Revocation of his Presentation in Law.

There are several Matters which according to the Common Law of *England*, do prevent a Lapse ; as when the Bishop delays the Examination of a Clerk presented to him for a Living till the six Months are expired, for the Bishop shall not receive an Advantage from his own Negligence || : nor shall the Bishop collate by Lapse, where a *Quare Incumbavit* is brought against him * ; but touching this, some have made a Query. Nor does a Lapse incur, when the Bishop refuses to award a *Fus-Patronatus* to try the Right of Presentation to a Benefice ; because this would be to deprive the Patron of his just Right by a denial of Justice in the Bishop, which ought not to be suffer'd : But a Lapse may happen (pending a *Fus-Patronatus*) if it be not through the Bishop's default, that such *Fus-Patronatus* remains undetermin'd. And so likewise it shall, if the Patron's Clerk for whom it is certify'd, does not make a new Request to the Ordinary to be admitted †, which may be done upon the first Presentation, without any new Request of the Patron's. Nor, lastly, shall any Lapse incur, where the Right of Presentation is in the King ; because the Words of the Statute of *Westminster* 2. are not particular enough : For though that Statute ordains, That Plenarty by six Months shall bar the Party that has a Right, yet it shall not bar the King, because he is not expressly named in the Statute, and the King's Prerogative *Quod nullum tempus occurrit Regi*, says *Jones*, shall not be taken away by a general Statute ||. And in Case the King does not present, all that the Ordinary can do, is to sequester the Profits of the Church, and appoint a Clerk to serve the Cure*. The King is Patron *Paramount* of all the Benefices within the Realm † ; that is to say, That the King, in right of his Crown, is to see that all Places be duly supply'd with Persons fit for them : And if all others entrusted by Law neglect their Duties, then by the natural order and course of Government, it falls to the supreme Power, which is to supply the Defects, and reform Abuses; and thus the King comes to his Right after the Metropolitan's neglect.. This last resort for filling up of vacant Benefices by the Papal Law is vested in the Pope by virtue of his Supremacy : But as his Supremacy herein was never acknowledg'd by our Kings of *England*, it remain'd upon the Reformation of Religion with us, where it was before, *viz.* in the King. But where the King has a Title by Lapse, and does not present, but the Patron presents, and after the Church becomes void by Death, the King shall not present as it has been adjudg'd : But *Quare*, Whether this will make a diversity when it becomes by Deprivation? I think not, for the Reason already given ||.

Of

* Rolls. ut
sup. 266.
Hob. Rep.
270.
† Dyer. Rep.
p. 277.

* Rolls. ut
sup. p. 353.
9. Rep. 132.

|| 2. Rolls.
Ab. 366.
* 17 E. 3.
75.

† 34 H. 6. 12.

|| Jon. Rep.
21.

* 18 E. 3.
21. 14 H. 7.
21.

† Plowd. C.
12. 498. b.

|| Pag. 331.



Of Legacies, and the several Distinctions thereof, &c.

THE *Latin* Word *Legatum*, which we in *English* call a *Legacy*, is a generical Term, which from one particular Signification has a Relation to several Things: For the Word *Legare* in the Books of the *Civil* Law, seems to import the same as *Eligere*, *Mandare*, *Decernere*, and the like*. And hence by a Law of the twelve Tables, a Legacy was said to be *voluntatis Electio*, of what Kind or Nature soever it was, whether it were of a general or particular Institution and Appointment: For under the Name of a *Legacy*, the *Romans* included a *Fidei-commissum*, and a Donation *mortis causâ*; tho' the Word for the most part now, has only a respect to particular Legacies left by a last Will and Testament; for such as succeed to the whole Estate or Inheritance are not now called *Legataries* or *Fidei-Commissarii*, but only such as succeed to the particular parts of an Estate or Inheritance. And a *Fidei-Commissum* is a Legacy in Trust, committed to the Honesty of the Heir or Executor to be restor'd to another Person; as in this manner, *viz. I desire he would give*; or, *I believe he will give such a Thing to such a Person*: Whereas Legacies are made by direct and *imperative* Terms.

* Alciat. in
L. 120. D. 50.
16. N. 1.

Now a Legacy is a certain kind of Gift or Donation which a Person deceas'd has left by his last Will and Testament to be perform'd and made good by his Heir, or (as we call him in *England*) by his Executor, out of the Estate which belongs to him as Heir or Executor†. Whence we may infer, that a *Legacy* and an *Inheritance* (as the *Civilians* stile it) are not the same Thing, nor is a *Legatary* and an *Executor* the self-same Person: And, consequently, the imposition or granting of a Legacy, is not the making and constituting of an Executor, tho' the Verb *Lego* or (in *English*) *I bequeath*, be sometimes added and used to signify any or every last Will and Testament. Yea, if this Word *Lego* be added to an universality of Goods without expressly naming an Executor, (for so I shall call an *Heir* in this Title) it denotes an Institution or an Appointment of an Executor (at least) by the presumptive Will of the Testator||: as if the Testator should say, *Lego omnia Bona mea Petro*, or, *I bequeath* all my Goods unto *Peter*, it is the self-same Thing as if he had appointed him his Heir or Executor to all his Estate*. So that, according to this, a Legacy is twofold, *viz. Universal* and *Particular*.

† D. 31. 2.
36. D. 30. 1.
116.

|| Bart. &
Dd. in l. 15.
D. 28. 6.

* Mant. lib.
4. De conj.
ult. vol.

An *universal* Legacy happens, when the Testator operates his Executor by obliging him to restore all his Goods and Estate unto such a Person, as to *Peter* or *John*, &c. and this is the same as an universal *Fidei-Commissum*, or Legacy in Trust. A particular Legacy happens, when the Executor is charged with an Incumbrance of paying something certain, out of the Testator's Estate, to a third Person, which does not amount to the whole of his Substance. Now a Legacy is given several Ways; First, *Purely* and *Simply*, that is to say, without any condition or determination of a Day certain; and such a Legacy is immediately due to the Legatary after the Testator's Death. Secondly, A Legacy is limited

limited under a Condition, as when the Testator says, *I leave to Titius one Hundred Pounds, if he has a Son born within such a time* : In which Case the Legacy is not due or payable, unless the Condition happens and comes to pass. Moreover, a Condition is either express'd, it being made in express Terms ; or else it is tacit, it being such either by a Disposition of Law, or else from the Will and Intention of the Testator. As when 'tis said, *I leave to Titius one Hundred Pounds per annum*. For this Condition is thereby understood, *viz.* If *Titius* lives : For if *Titius* dies before the Testator, the Legacy does not descend to his Heirs or Executors*. Again, the Condition is either touching something past, present or to come hereafter. And, lastly, a Condition is either Necessary or Contingent, Possible or Impossible, Honest or Dishonest, &c. It has been a Question, whether a Legacy of Dowry be a *pure* Legacy, being left in these Words, *viz.* *I bequeath unto Sempronia a Thousand Pounds if she marries* ; or whether it be only a *conditional* or *modal* Legacy ? And herein the Doctors disagree in their Opinions. Some will have it to be a *pure* Legacy (at least) when 'tis not left by an extraneous Person, but by her Parents : and, consequently, a Sister, to whom the Father leaves a *Paragium* or Dowry (for *Paragium* is a Woman's Dowry or Marriage Portion) may compel the Brother to pay the same even before she be of Age fit for Marriage †. *2dly*, Some think it to be a *modal* Legacy ; especially, if it be made and left to enable her to marry : and, consequently, a Legacy of this Kind ought to be paid before the *Mode* is fulfilled, as other Legacies left *sub modo* are paid †. But this second Opinion does not differ from the first. The third Opinion is, that a Legacy of this nature is a *conditional* Legacy ; and, therefore, cannot be demanded before the Woman is marriageable* : yet the Brother, whom the Father has enjoin'd to pay this Legacy or Dowry to his Daughter, is in the mean while bound to maintain his Sister, as he succeeds in his Father's Place, and is in Possession of the paternal Estate †. From this third Opinion it follows, according to several of the Doctors, that a Legacy of Dowry left in the aforesaid manner, does not pass to the Executors of such a Person dying a Maiden, or before the Celebration of Matrimony ; because the Condition, under which the Legacy was to be paid, was not then fulfill'd ; unless (perchance) the Girl becoming marriageable, should then have demanded the Payment of such Legacy from the Executor, and the Executor delay'd the same, or was in default of paying thereof. But others think, that this *Paragium* or Legacy descends to her Executors like other Legacies bequeath'd *purely* and *sub modo*. But I am of an Opinion, that a Legacy of this kind is a *conditional* Legacy, when 'tis said, *I bequeath to Berta one Hundred Pounds, if she marries* : And, consequently, such Legacy is not due to *Berta* before her Marriage ; and, therefore, the Legacy does not descend to her Executors, since a *conditional* Legacy is not acquired before the Event of the Condition*. But if it be said, that *I bequeath to Berta one Hundred Pounds that she may marry*, or the like, it seems to me very probable, that such a kind of Legacy is a *modal* Legacy, and is due before the event of the Condition ; and, consequently, passes to her Executors, unless the Testator's Mind appears to be otherwise, or may be thus inferr'd : for the Nature of a *modal* Disposition, whereby a Legacy is given to any one with a Charge or *Onus* of performing something, seems thus to require it. And 'tis the same Thing, if a Legacy be left to *Berta*, that she may marry *Titius* : But *Titius* dying before Marriage, she intends to marry another Man, and wants the *Paragium* or Dowry to that end : For it was not her Fault, she did not marry *Titius* ; and, therefore, the Legacy

* D. 33. 1. 4.

† Bald. in
l. 27. C. 6.
23. N. 1.‡ Tusch.
Concl. 102.
v. Legatum.* Bart. in
l. 71. D. 35.
1. 3. N. 7.† D. 34. 1.
10. 2.

* J. 2. 20. 31.

gacy shall descend to her Executors. And, by a Parity of Reason, the *Canonists* think that a Legacy left to a Church under a Condition of being bury'd therein is valid, and due to such Church, tho' such Burial should not ensue thro' some Impediment of the Testator himself, as because he was excommunicated, burnt for a Heretick or became a Suicide: And the Reason is, because the Condition is rendred impossible thro' the Testator's own Act, and 'tis not through the Means of the Church that he was not bury'd therein*.

* Vasquez.
de Testam.
c. 8. Dub. 6.

All Things may be bequeath'd and left as Legacies, to which the Testator has any just Right and Title of disposing; for as he may sell or anywise alienate the same, so he may also leave them as Legacies: But 'tis otherwise of such Things as he has no right to dispose of, because no one can transfer more Right to another, than he has in himself†. And thus if a Testator should bequeath a Thing, which belongs to another Person, the Legacy is void, even though it should be given to Pious Uses. But if he bequeaths a Thing which is in common to him with another, the Legacy is valid as to that part which belongs to himself, because the Testator might bequeath his own Right therein||. By the *Feudal* Law, a Legacy is not valid, whereby the Testator bequeaths a *Feudal* Estate without a lawful Faculty obtain'd from the Lord: And so likewise it is of all publick Things bequeath'd; because the Alienation of all such Things is prohibited, these Things being not in *nostro commercio*. And the Doctors doubt, whether a Testator can leave a Legacy to be paid out of the Profits of a *Feudal* Estate? For if a *Fief* be antient, and not Hereditary, a Legacy of this kind cannot be bequeath'd; because no Charge or Incumbrance can be laid on such a *Fief*: But if the *Fief* be Hereditary, then, according to the receiv'd Opinion of the Doctors, a Legacy may be charg'd thereon; because though a *Real* or *Hypothecarius* Action does not lie against a *Feudal* Estate, yet a *Personal* Action lies to compel the Heir to satisfy and discharge all such Incumbrances as the Testator shall lay on such Hereditary *Fief*. But, *thirdly*, A Legacy is valid, where the Testator bequeaths unto another his Estate, or any Part of his Goods, which are mortgaged or pawn'd unto a Creditor; because the Testator had still some Right therein, which he might transfer to another*. Yea, if the Testator knew the Thing to be mortgaged or pawn'd, the Executor ought to redeem it, and deliver it to the Legatary†, unless the Testator has declar'd his Intention to be, That the Legatee shall redeem it himself, and not the Executor. *Fourthly*, A Legacy is valid, whereby the Testator has bequeath'd to another a Thing belonging to his Executor||; because as the Testator might impose other Obligations on his Executor, so may he likewise add this *Onus* to the Executorship; and the Executor by taking the Executorship on himself, seems to accept of all Incumbrances left on him, and is bound to ratify the Act of the Person deceas'd. But there is this Difference between a Legacy of the Testator's own proper Goods, and a Legacy of the Goods belonging to the Executor, *viz.* That the Dominion and Property of the Testator's own proper Goods bequeath'd, passes to the Legatary after the Testator's Death (as we say) *rectâ viâ*, that is to say, without Delivery*; but the Property of a Thing, bequeath'd by the Testator, and belonging to his Executor, does not pass to the Legatary without the Executor himself delivers the same to the Legatee after the Testator's Death, since the Testator was not Lord and Proprietor of the Thing belonging to his Executor: And, therefore, he could not transfer the Dominion and Property thereof to the Legatee (as we say) *rectâ viâ*, according to the vulgar Rule, *nemo plus Juris, &c.*†. For as to the Thing

† D. 50. 17.
54.

|| D. 30. 1. 5.
2. D. 30. 1.
24. 2.

* D. 30. 1.
57.

† L. 57. ut
supr.

|| D. 31. 2.
67. 8.

* D. 47. 2.
64. in fin.

† D. 50. 17.
54.

* D. 41. 1.
14. in fin.

† C. 6. 37.
13.

¶ J. 2. 20.
10.

† J. 2. 20. 6.

bequeath'd, the Legatee is in the Place of the Executor *; and as the de-
ceas'd had no Property in his Executor's Estate, so consequently the Le-
gatee can have none without a wilful delivery from the Executor himself.
But a Legacy is not valid, whereby the Testator bequeaths any Thing
proper to the Legatee himself †; for a Testator cannot bequeath that to
another, to which he has no Right himself (as aforesaid): And because
that which is already of a Man's own Property, cannot be made more so
by any additional Right whatever ‖. But if, at the Time of the Legacy
given, the Thing bequeath'd did belong to another, and afterwards in
the Testator's Life the Thing bequeath'd came to the Legatee, the Exe-
cutor in such a Case is bound, according to the common Opinion of the
Doctors, to pay to the Legatee the value of that Thing, if the Thing came
to the Legatee by an *Onerous* Contract, as on the account of Dowry,
Purchase, Permutation or other Contract of the like nature. But 'tis
otherwise, if it came to him by virtue of a *Lucrative* Title: For two
Lucrative Titles, generally speaking, cannot concur to the same Thing,
and happen to the same Persons †; nor by the Civil Law, regularly speak-
ing, is that a valid Legacy, whereby a Man bequeaths a Dower to his
Wife, because a Dower by that Law, is not a Matter of the Husband's
Property; but it belongs to the Wife; and (as before hinted) no one can
bequeath a Thing which is the Property of the Legatary. Yet a Legacy
of this kind is valid as to the Anticipation of Payment; because a Lega-
cy ought to be paid immediately; but a Dower or Dowry may be restor'd
even after a Year from the Husband's Death, and the Heir or Executor is
not bound to pay or restore it sooner, unless it be thus bequeath'd.

If a Person bequeaths unto another the Bed, the Ornaments belonging
to such Bed are likewise deem'd to be given with it; because *Legato*
Principali censentur etiam Legata Accessoria illius: For that properly
speaking, the Principal trails the Accessory along with it. Thus if I be-
queath my Vestments or wearing Apparel, the Gold and Silver Orna-
ments thereunto belonging do go with the Legacy. And, again, if I be-
queath all my Estate or Goods, all Rights and Actions are thereby under-
stood to be given by Will; because these Things come under the Name
of *Goods* or *Chattels*. By a Legacy of *Alimony* we understand Meat,
Drink, and all such Things as appertain to a Man's Habitation, and like-
wise Medicine, Physick, and other Things of this kind: For these Things
are not only Accidents to Alimony; but are all comprehended under
the same *. By a Legacy of Householdgoods or Furniture, all moveable
Goods are understood to be given, which belong to frequent and daily
Use: Gold, Silver, and living Creatures excepted. And, by a Legacy
of *Viſtuals* under the *Latin* Word *Penus*, we reckon such Things to be
bequeath'd, which relate to Meat and Drink, as Corn, Oil, Wine,
Cheese, Honey, and the like: For the Word *Penus* includes both Eatables
and Drinkables, in *Latin* called *Esculenta* & *Poculenta* †. And 'tis the
same Thing, if any one shall bequeath a Legacy by the *Latin* Word
Viſtus unto *Titius*; for he shall be deem'd to have bequeath'd him all
Things, that are necessary to him for Life: And, therefore, Bed and
Board, as well as Cloaths and the like are due to him. But if a Legacy
be left to any one by the Words *Diaria* or *Cibaria*, 'tis otherwise ‖; For
by the Word *Diarium*, we only mean one Day's Meat or Provision,
which the *Greeks* cali $\Delta\iota\alpha\tau\eta\mu$. But Alimony and Education may be be-
queath'd to a Person by the Words *Alimenta* and *Educatio*; because
these are synonymous Terms, and Words of equal Signification.

But what if a Thing be left as a Legacy with its Accessories and Or-
naments, which has no Accessories and Ornaments? *Ex. gra.* If a Horse
be

* D. 34. 1.

† D. 33. 9.

‖ D. 34. 1.
21.

be left as a Legacy with its Furniture, which in Truth has no Furniture, in this Case a Legacy of the Horse is due, because the Furniture (as we say) is not put *Taxatively* and by way of Limitation, but *Augmentatively* and by way of Accessory. But if these Ornaments or Furniture had been put *Taxatively* and by way of Limitation, such a Thing bequeath'd as a Legacy shall not be paid, if it wants Ornaments or Furniture: as when 'tis said, *I leave you the Horses having such a Mark, or such kind of Furniture, &c.* Hence we see what ought to be done, when a Testator leaves a Legacy to be paid to a Person with a pointing out of such a Place, called a *local* Demonstration: As when a Man leaves ten Bushels of Wheat as a Legacy to a Church to be paid out of such a Field of Corn, according to Designation and Appointment, or out of the Rent or Pension of such a House, and by some subsequent Loss or Damage there should not be so much Wheat gathered, or such a Rent or Pension recover'd, as may equal the Pension express'd in the Legacy: for if such a Demonstration be put *Taxatively* and by way of Limitation, a greater Pension ought not to be paid than what is receiv'd *ex re designata*: But 'tis otherwise, if it put *Demonstratively*, viz. with an Intent only of pointing out the Field or House. Now to know whether this Demonstration be put *Taxatively* or *Demonstratively*, this Rule is assign'd, viz. That Demonstration is often adjudg'd to be put *Demonstratively* only, when the Legacy is given *duplici oratione*: as when it is said, *I bequeath ten Pounds to Titius, which I would have paid out of the Rents of such a Farm or Estate.* In which Case, ten Pounds ought to be paid when the Farm or Estate is put *Demonstratively*, tho' so much should not be recover'd or receiv'd from thence *. But if the Legacy be conceiv'd and express'd in one Sentence, the Demonstration then seems to be put *Taxatively*: as thus. *My Will is, that Sempronius should have ten Pounds given him out of the Profits of such a Farm or Estate.* And in this Case if ten Pounds be not receiv'd from the Profits of that Farm or Estate, the Executor shall not be oblig'd to compensate and make it good by any other means †.

* D. 30. 1.
96. in prin.

† D. 32. 1.
34. 2.

The Profits of any thing bequeath'd are due from the Time of the Testator's Death to the Legatary, if the Legacy consists in a particular Thing, tho' the Executor should delay to take on himself the Executorship; because the undertaking of the Executorship has a Retrospect as to this Effect, and respects the Obligation incumbent on the Executor at the Time of the Testator's Death ‖. Yea, if the Testator has bequeath'd a Thing, *together with its Profits and Emoluments*, not only the Profits and Emoluments, which have been growing and receiv'd since the Testator's Death, are due to the Legatary, but even those likewise, which became due in the Testator's Life-time, and have been receiv'd since his Death *. I have said, *If a Legacy consists in a particular Thing*: because if it has its Existence in, and consists of a generical Thing, the Profits are not due, unless it be from the Time of the Delay †; for then *res Domino fructificat*, that is to say, the Profits of the Thing do accrue to the Owner and Proprietor thereof: But the Legatary is not the Owner and Proprietor of the Thing bequeath'd in general; and, therefore, he shall not have the Profits thereof.

‖ D. 30. 1.
86. 2.

* D. 31. 2. 22.

† C. 6. 47. 6.

A Legacy may be left and given to all Persons, that are capable of receiving Goods and Estates; provided they be not Persons altogether Uncertain: Because the Validity of the Legacy depends on the Will of the Person disposing thereof, and on the Capacity of the Person accepting of it: As in a Donation, which is like unto a Legacy, a Legacy being a *Species* or kind of Donation ‖, to be perform'd by the Executor, according to the

‖ J. 2. 20. 1.
Testa-

Testator's Order after his Death. Hence it follows, *First*, That according to the *Civil* Law, a Legacy may be left to a Minor, Madman, Prodigal, &c. and (according to the *Canon* Law) to a Person professing Religious Orders, if he be *Capax Bonorum*: For all such Persons are capable of taking Goods and Estates, tho' they cannot make a Last Will and Testament, as I shall hereafter observe under that Title. *Secondly*, A Legacy may be left and given to a spurious Issue (at least) in respect of Alimony or Maintenance, and a suitable Dowry may be bequeath'd to a *spurious* Daughter in respect of Marriage, and such Dowry shall supply the Place of *Alimony*. For tho' by the *Civil* Law a Father cannot appoint an illegitimate Child to be his Heir; yet he is bound by the Law of Nature to allow him Maintenance or Alimony. *Thirdly*, A Legacy may (according to the *Canon* Law) be left to a Pilgrim, going to *Rome*, or visiting the Shrines of *Popish* Saints; for as a Pilgrim may be appointed and made an Heir, so he may also be a Legatary: 'Tis otherwise by that Law in respect of such as deny the Pope's Supremacy, and apostatize from the Faith. *Fourthly*, A Legacy may be left to a Wife, that shall marry within the Year of mourning, as being *Capax Bonorum*: For though a Legacy cannot otherwise be given to her; yet this must be understood to be by the *Civil* Law. For the *Canon* Law in favour of Matrimony, has taken away all Penalties on such as marry *infra annum Luctus*, except that Penalty which respects the Children had by a former Husband or Marriage*. *Fifthly*, A Debtor may leave a Legacy to his Creditor: But the difficulty in this Case, is, whether a Legacy left by a Debtor to his Creditor may not in a doubtful Case be deem'd to be left him *animo compensandi*, with an intent of Compensation? To which I answer *Negatively*, unless he be Debtor by a disposition and appointment of Law; or unless it may be otherwise infer'd from the Mind of such Debtor, that he did it with a design of quitting Scores with his Creditor; a Legacy being nothing else but a kind of Donation, (as just now remembred.) But that which is left by way of Compensation is not a Gift or Donation. And therefore, it cannot be a Legacy, but must be the Restitution of a Debt. I have said, *unless he be a Debtor by Disposition of Law*: For then a Legacy seems to be a Compensation for a legal Debt, since 'tis to be presum'd, that the Law wou'd not inflict a greater Grievance on the Testator, and yet be willing that the Testator should satisfy the Law in this Point. For when a Father bequeaths a Legacy, or gives any thing to a Son or Daughter, which does not come up to a legal and suitable Portion or Dowry, such Legacy is in Compensation of such Portion or Dowry †. For this is a legal and necessary Debt, according to the *Civil* Law: And, in matters of necessity and compulsion, no one can be said to be liberal, nor is he presum'd prodigally to throw away his Estate: And, consequently, 'tis presum'd to be a Legacy *animo compensandi* ||. And I have also said, unless it may otherwise be infer'd from the Will of the Debtor: For if it does appear from Circumstances, that the Testator bequeath'd such Legacy by way of Compensation or quitting of Scores; as when he says, I leave 100*l.* to *Caius* for all that I owe him: I say in such a case Compensation ought to be made; for the Disposition is confirm'd from the Testator's Intention, according to *Menoch. Lib. 4. Presumpt. 109*. A Legacy may be left to a Bishop, or the Canon of a Cathedral Church; as being capable of receiving a Legacy: And if it becomes a Question, whether such Legacy be given in respect of the Person, or in respect of the Dignity, or in regard to *pious Uses*; and, consequently, whether it shall go to the Bishop's Person or Dignity? I answer, that it is deem'd to be given in respect of his Person, if it appears that

* X. 4. 21. 5.

† C. 3. 28.
26. 1.|| Dd. in L.
22. D. 24. 3.* Mant. de
conject. ult.
vol. lib. 10.
tit. 2.

that the Testator was his Friend or Kinsman *. Again, a Legacy may be left to a banish'd Person: for as a Person that suffers *Relegation* or Banishment does not precisely lose his Goods and Estate †, so neither does he lose his Capacity of taking by Legacy, &c. But some of the *Civilians* are of another Opinion; because Persons condemn'd to the Gallies are incapable of inheriting a Legacy or a *Fidei-Commissum*: for a Condemnation to the Gallies succeeded in the Place of a Condemnation to dig in the Mines; and a Person condemn'd to dig in the Mines cou'd neither be a Legatary, nor an Executor in Trust ‥.

* Bart. in
l. 2. D. 34. 5.
N. 2.
† D. 48. 22.
7.

¶ D. 34. 8. 3.

I have before observ'd, that the Person to whom a Legacy is given ought not to be an uncertain Person: for a Legacy cannot be left to Persons altogether uncertain; but the same becomes *Legatum inutile*, if the Legatee be unknown *. But 'tis otherwise, if the Persons are not altogether uncertain, but may be known and ascertain'd by some Means or other; for then the Legacy ought to be paid †. Wherefore a Legacy is valid, if it be said, *I bequeath a Hundred Pounds to him, who shall marry my Daughter*: For the Person of the Legatee becomes known by a Celebration of Marriage. And 'tis the same Thing, if the Name of the Legatary has not been express'd, and 'tis doubtful whom the Testator meant, there being several Persons of the same Name: For tho' the Legacy is valid, yet it becomes *inutile* on the Account of the uncertainty of the Person, unless the Legatary proves, that the Testator design'd to give the Legacy to him ‥.

* J. 2. 20. 25.

† J. 2. 20. 25.

¶ D. 31. 1. 8.

A Legacy may be left to a College or Corporation that is well establish'd in Law †; but it cannot, by the *Civil* Law, be left to an unlawful College or Corporation, since such is no otherwise than a Conventicle *: yet, by the *Canon* Law, it may be well enough bequeath'd to the particular Members of such College or Corporation, if the same be not reprobated and disallow'd of on the account of some Sect or Heresy therein, but only not approv'd in Law †. For if it be reprobated on the score of any Sect or Heresy therein, as being a College of Hereticks, a Legacy then to the particular Members thereof shall not be valid according to the *Canonists* *. And in the same manner, if a Legacy be left to a College of *Jews*, it is not valid by that Law: But yet because it is not reprobated on the account of any Heresy, it is good to the particular Members of it †. If a Legacy be left to the Citizens of such a Place, as *London*, and the like, it is the same as if it were left to the City itself, when nothing results from such a Legacy that is contrary to Law. If a Legacy be left unto God, it is deem'd to be left unto the Church (say the *Novels* ‥) which ought to take Care of the Poor *: And if the Testator has not mention'd the Place of his Abode in his Will, so that it may be known to what Parish he did belong, it shall be adjudg'd to be given to that Cathedral Church, in which Place the Testator liv'd at the Time of his Death, unless it may be known, where he dwelt at the Time of making his Will †. And in the *Romish* Church, 'tis the same Thing if a Legacy be left to some Saint, or House dedicated to a Saint: And if there be several Houses dedicated to the Name of that Saint, and the Testator has not express'd to which of those Houses he has given it, it shall be intended to be left to the Church of that City, in which the Testator had his Dwelling, and to the poorest of those Churches too. At this Day, by an Edict of the Emperor *Charles* the Vth, and by the Custom of *France*, Churches and other Religious Houses cannot acquire *real* Estates by way of Legacy, or come into Possession of them without the Prince's Placart or Licence first

† D. 34. 5.

* C. 6. 24. 8.

† Mant. de
conject. ul-
tim. vol. lib.
8. Tit. 6.

N. 23.
* Abb. in
c. 5. X. 5. 7.
N. 1 & 2.

† Abb. in
c. 5. X. 5.
6. & Gloss
ib.

¶ Nov. 151.
* Cap. 9.

† Tutch.
Conc. 40.
v. *Legatum*.

had and obtain'd, which we in *England* stile a Charter of *Mortmain* of which hereafter under the Title of *Mortmain*.

By the *Civil* Law, a Testator cannot enjoin his Heir or Executor to pay Interest for the Non-Payment of a Legacy: And though Interest or Usury be only forbidden by the *Civil* Law beyond such a Sum, yet it being entirely prohibited by the *Canon* Law, it follows *a fortiori*, that he cannot do it by that Law. A Legacy given to a Person condemn'd to die, or to perpetual Imprisonment, is no Legacy at all, unless it be left for Alimony*. A Legacy left in this manner, *viz.* *If Titius shall please to pay the same*, is a conditional Legacy in respect of the Payment thereof; but in respect of *Titius's* Will and Pleasure herein, it is deem'd a pure and *absolute* Legacy†: And such a Condition as is above mention'd in the Beginning of this Title is said to be a *Potestative* Condition in respect of a third Person, but a *Casual* Condition in regard to the Person, to whom such Legacy is given; and whenever Words infer a Condition, a Judge ought not to depart from them in giving Sentence for a Legacy. A Legatary in Alternatives has his Choice and Election from the Law it self.

But though a Variation be permitted and allow'd of in some particular Cases, as in Contracts, and likewise judicial Proceedings before Contestation of Suit; yet after a Legatary has once made his Choice of a Legacy, wherein he has his Election, a Variation is prohibited to him, provided such Election be rightly made‖: Nor does it much import, whether such Election does accrue to the Legatary by a Disposition of Man, or a Disposition of the Law. For in last Wills, wherein Property has no such thing as Pendency, the Property of the Legacy does immediately pass unto the Legatary, as soon as he has made his Election*. And 'tis a general Rule in Law, that whenever any Election carries its own Execution along with it, a Variation is never legally admitted: But 'tis otherwise, if such Election does not carry its Execution with it. Heretofore, if the Legatary did not make his Election in alternative Legacies in his own Life-time, such Legacy did not descend to his Executors†: but now this Law is alter'd in favour of Last Wills‖, and the Legatee's Executor may have his Option: But if a Testator gives a Legacy by way of Option, either under an express Condition, or by assigning a Day that carries some uncertain future Event with it, such Legacy is extinct, and shall not pass to the Executors of the Legatee, if he did not in his Life-time make his Choice and Election.

A Legatary is, in some measure, said to be the Heir of the Thing bequeath'd to him†: And 'tis an Observation in Law, that the first Legatary nam'd in a last Will, is more belov'd by the Testator than his Substitute. If a Legatary be made an Executor in a Last Will and Testament, he may receive or retain the Thing bequeath'd to himself: But a Legatary possessing himself of a Legacy bequeath'd to him, if he does it *cum vitio*, shall lose his Legacy: and so he shall, if he possesses himself of the Testator's Will with a malicious and fraudulent Intention, or endeavours to conceal and hide the same. If a Legatary does by his own Money, or otherwise, redeem a Legacy bequeath'd to him from the Hands of a Creditor, or the Power of an Enemy, the Executor is bound to pay him the Price of such Redemption; for the Executor must otherwise have done it*: But if a Legacy be made of a Debt, it is sufficient for the Heir or Executor to assign over the Action itself to the Legatary†. And as an Executor may be damnify'd by the Act of the Legatary, the Legatary may therefore be compell'd to give Caution or Security to indemn-

* D. 34. 1.
11.

† Dd. in l. 1.
C. 6. 51. 7.

‖ D. 33. 5.
20.

* D. 33. 5.
19.

† D. 35. 1.
99.
‖ C. 6. 51.
1. 7.

† Paul. de
Castr. in l.
14. D. 41.
1. N. 2.

* J. 2. 20. 5.

† J. 2. 20. 21.

diminify the Executor : For a Legatee shall be oblig'd to refund against Creditors (if there be not Assets) and likewise against Legatees, if there be not Substance enough to discharge all the Legacies †; for all the Legatees are to have their Proportions, where the Assets fall short : But an Executor himself, if he assents to such Legacy without taking Caution, shall never bring back the Legacy again after such Assent given. But if an Executor has been sued, and paid the Legacy by a Decree of the Court of *Chancery*, the Legatee must refund in proportion, if the Assets fall short of the Legacies bequeath'd. And, according to *Ventris* *, if they give Sentence in the Ecclesiastical Court for the Payment of a Legacy, a Prohibition will lie, unless they take Security to refund in case of Insufficiency of Goods, to discharge Debrs, &c. For a Diminution of Legacies is made *pro Ratâ*, even by our Law, as well as by that of the *Romans* ||, if the Testator's Estate will not extend to pay them all.

† Paul. de
Castr. ut
infr.

* Rep. pt. 2.
p. 358.

But no Action lies at the Common Law to recover a Legacy not paid or satisfy'd, a Legacy being a Testamentary Thing : And as the Spiritual Court has the Jurisdiction of the original Cause thereof, the Temporal Court ought not to extend its Reach or Arm hereunto, but keep itself within its own Bounds. It has been urged, indeed, that the Non-payment of a Legacy is a breach of Trust in the Executor; and therefore an Action on the Case lies for the Recovery of it : But this was urg'd without any Effect, because the Executor for a breach of Trust herein, is subject to the Ecclesiastical Court; for *Principale sequitur Accessorium*; and as a Testament is of their Cognizance, so likewise is a Legacy and the Non-Payment thereof: But Legacies out of Lands are properly suable in *Chancery*. And the Reason why Actions at Law for Legacies were countenanced in the Times of the late Civil Wars, was, because there were no Bishops in Fact, tho' there were in Law; and, therefore, a want of Justice happen'd †.

|| Paul. de
Castr. in
l. 79. D. 30.
1. N. 2.

Only such Persons are capable of receiving Legacies, to whom it was permitted to make a Last Will and Testament ||; and this Capacity is required to be in a *pure* Legacy at the time of the Testator's Death: For if the Legatary be at this Time incapable, he shall be barr'd and excluded from the Legacy thus left him by the *Lex Catoniana*, though he afterwards becomes capable of receiving the same; since in conditional Matters we ought to regard the Time when the Condition is to be fulfill'd, if there be a Capacity in Hand. And herein a Legatary or a particular *Fidei-Commissarius* differs from an extraneous Heir according to the *Civil* Law: For to capacitate such a Person, 'tis necessary that he should be capable at three several Times or Seasons, *viz.* at the Time of making the Will, at the Time of the Testator's Death, and at the Time of taking the Executorship on himself.

† Kebl. Rep.
vol. 1. p. 116.

|| J. 2. 20.
24.

A Legatary is properly said to be him whose principal Interest it is that Legacies should be paid and fulfill'd, tho' the Words of the Legacy be not directed to him: For Legacies are said to be those Gifts which are made by *dispositive* Words *, and are commonly (indeed) directed to the Person thus honour'd, that is to say, to the Legatary. Nor is it of any Import, by what Words Legacies are given, whether by Words introduced by Law or by Custom, provided they are such as do substantiate a Gift: But Legacies left by Words *diffamatory* of the Legatary are not valid, since Legacies are generally left on the account of the Man's Merits †. 'Tis true there were heretofore, among the *Romans*, four several ways of bequeathing Legacies in Form ||. For sometimes the Testator said, *Do you claim unto yourself after my Death this Thing, which I have bequeath'd to you*; and this was stiled a Legacy

* D. 31. 2.
88. in prin.
& Bart. ibi.

† D. 30. 1.
54. in prin.
|| J. 2. 20. 2.

per

* C. 6. 37.
21.

per vendicationem. 2dly, He sometimes said, *Let my Heir suffer Titius to have this Thing or Estate*, and this was term'd a Legacy *Si nendi modo*. 3dly, The Testator said, *Heres, damnas esto*; which is as much as to say *Damnatus esto*; and this way of bequeathing was called *per Damnationem*. And the fourth way of bequeathing was by common Words as now in Use; the other three ways being now abolish'd*. Legataries may convene all the Heirs or Executors on the account of the Hereditary Portion; or that Executor only, which is made such *in Solidum*: And by the *Civil Law*, a Legatary, to whom one Moiety of the Testator's Estate is bequeath'd, is bound to discharge Debts and Legacies according to his Part of the Inheritance.

† Abb. in
c. 6. X. 2.
20.
‖ D. 31. 2.
34. 3.

Legacies left in a Will, cannot subsist without the Will, because if the Will be annull'd, all Things fall to the ground with the Will it self: And, therefore, Legataries regularly speaking, cannot be Witnesses to support a Will in favour of themselves; and consequently, if they will be Witnesses, they must renounce their Legacies, otherwise they are not what the Lawyers call *Testes integri*. But tho' a Legatary cannot be a Witness *principally* in a Testamentary Cause, yet he may be so *incidentally*: For Legataries may be Witnesses in a Will, when the Cause does not principally relate to themselves, or when the Will may be otherwise proved by a sufficient number of Witnesses†. He that avers a Legacy to be left him, ought to shew from the Will, that the Testator so intended it‖. When a Legacy is made of Wine or any thing else in general, the Heir or Executor is well discharg'd *prestando minimum*; yet this is no Discharge or Release from the Payment of a Legacy, if he delivers that which is corrupt, putrid, and the like.

* In L. 4. D.
33. 1.
† D. 36. 2.
20. D. 33.
1. 5.

If Alimony or Maintenance be bequeath'd unto any one by way of Legacy during Life, the Gloss* holds, that such a Legacy is a *pure* and *absolute* Legacy for the first Year, but 'tis only a Conditional Legacy for all the Years ensuing†: And upon a Conditional Legacy, or a Legacy *in diem*, Witnesses may be admitted, examin'd, and publish'd *ad perpetuam rei memoriam*. If a Legacy of Alimony be bequeath'd to any one to be had *in Domo*, the Legatary may demand and sue for the same *extra Dommum*; because, in a doubtful Case, where such a Legacy is given and bequeath'd *in Domo*, it is always presum'd to be so left in favour of the Legatary‖; and since it is put in favour of him, surely he shall not be obliged to the strict observation of such a Clause in the Legacy*. But 'tis said on the other hand, that this Addition of (*in his House*) is put in favour of the Executor, who can maintain the Legatary with less Charge and Inconvenience in his House than out of it, as daily Experience and Evidence of Fact plainly shews: And, therefore, by way of Conclusion, I say, That such a Legatary cannot sue for Alimony out of the House, if he may with any Convenience or Safety live with the Executor in the House; but 'tis otherwise, if he be hindred by any Act of Cruelty, and the like from the Executor to live with him†.

‖ C. 6. 37. 1.
Dyn. de reg.
jur. c. impr.
* D. 35. 1.
71. in prin.

† D. 32. 1.
29. D. 33. 1.
13. in prin.

‖ D. 36. 2.
26.

When a Testator bequeaths a certain Quantity of Corn to be yearly paid to a Legatary, the said Corn is not immediately due; but it ought to be paid at the Time, when such Corn is reap'd and gather'd into the Barn‖: And 'tis the same thing in respect of other Matters of the like nature. If a Testator should bequeath a Way or Road unto *Titius* through his Land or Ground, and the Executor is charg'd with such Legacies, that he is willing to have the Benefit of the *Falcidian Law*, the Legatary shall yield up a fourth Part of such Way for so much Money paid him upon a Valuation or Appraisement thereof; because a Road or Way is an individual Thing. If a Debt be bequeath'd to a

Debtor

Debtor under a Condition, the Executor (pending such Condition) may, notwithstanding such Legacy, demand and sue for the same, and shall not be set aside by an exception of *Deceit*; because such a Condition may become defective: yet such Demand or Suit ought to be made with this *Proviso*, that the Executor do give security to the Debtor himself, by a *Legatary* Stipulation, That if the Condition exists, he will restore so much to him as he himself has demanded, sued for, and recover'd. If a Legacy left to Pious Uses cannot be fulfill'd and perform'd as it is bequeath'd, it ought to be apply'd to some other Use, and not be converted to the Executor's Advantage*: For whenever a Legacy cannot be fulfill'd after the manner the Testator order'd it, it ought, according to *Ancharanus* †, to be converted to some other pious Use and Purpose. If a Man leaves a Legacy, or *Fidei-Commissum*, to Persons by the Name of his *Descendants*, all his Descendants are included, how far soever distant they are in Degree from the common Stock, and of what Sex soever they be, either Male or Female ||: And 'tis the same thing if a Man bequeaths a Legacy to Persons by the Name of his *Children*, his Grandchildren, and Great Grandchildren are therein comprehended.

* D. 33. 2. 16.

† Conf. 197. in fin.

|| D. 50. 16. 56. C. 6. 55. 12.

I shall here in the last Place say something of the Revocation of a Legacy, in the Books of the *Civil* Law, called *Ademptio Legati*: And this may be made either by contrary Words, as when a Person bequeaths any thing in this manner, *viz. I give, bequeath, &c.* and then says, *I do not give, bequeath,* and the like. Or else by Words not contrary to the former, but by any Words whatever*: As when the Testator says, *I do revoke or repent of that which I have bequeath'd,* and the like. Yea, Legacies may be taken away, even by a naked presumptive Will of the Testator: As when the Legatee afterwards becomes the Testator's Enemy by any signal or capital Act of Hatred. And a Revocation of Legacies is firm and valid *ipso Jure*, whether such Legacies be revoked by the same Will or by Codicils annex'd thereunto. *Accursius* indeed dissents hereunto in respect of Codicils; and will not have Legacies to be revoked *ipso Jure* by Codicils, and that they are only revoked by the aid of an Exception: But *Bartolus* refutes this Doctrine, and plainly shews that such a Revocation is valid, whether the Codicils are confirm'd by the Will or not, unless they are made by a Person Intestate. And in a Will, it matters not whether the Words do precede the Legacy, or are subsequent thereunto; for the Will of the Person desirous to revoke the same, *facit utramq; paginam*: so that it is sufficient, if his Will does appear by the Evidence of two good Witnesses, if it be declared by naked Words without any Writing at all.

* J. 2. 21. in prin.



Of Libels, and the Doctrine thereof.

THE Word (*Libel*) bears several Senses in our Law-Books. For, *First*, 'Tis said to be a private Writing made use of to the Defamation of any one †. *2dly*, 'Tis said to be that Writing, which the Inferior Judge gives to the Party *Appellant*; and this is called a *Dimissory* Libel*, or *Letters Dimissory*; and, in other Terms, by the Name of *Apostles*. *3dly*, 'Tis sometimes taken for the Commission or Delegation

† 5 Q. 1. 1 & 2.

* D. 49. 6. 1.

* D. 1. 16.
9. 1.

† X. 2. 3.
1 & 2.
|| 3 Q. 3.
4. 3.

* Cyn. in
cap. 3. Nov.
53. & in
l. 1. C. 3. 9.
† C. 7. 62.
39. 1.

|| C. 6. 26. 8.

* Bart. in
l. 58. D. 42.
1.
† D. 28. 5.
51.

|| X. 2. 3. 3.

* X. 2. 3. 2.

† X. 2. 3. 1.

|| Vide Pag.
24.

of a Judge ; and sometimes for the Delegation of a Cause *. *4thly*, 'Tis often used to denote a supplicatory Address or Petition, and in this Sense 'tis term'd a *supplicatory* Libel. *5thly*, 'Tis taken for the Plaintiff's Petition or Allegation made and exhibited in a *Judicial* Process with some Solemnity of Law † ; and, in this Acceptation, 'tis called a *Conventional* Libel ||. A little Book is also in *Latin* stiled *Libellus*, to distinguish it from a greater Volume. And, according to this Sense of the Word, a Libel here to be treated of is a short and well-order'd Writing, setting forth in a clear manner, as well to the Judge as the Defendant, the Plaintiff or Accuser's Intention in Judgment *: so that a Libel ought to be first short, and not verbose ; because the Law abhors a Prolixity of Words †. *2dly*, It ought to be clear, and such as the Defendant may well deliberate on, and from thence certainly know, whether it be most adviseable for him to submit or contend with the Plaintiff in the Suit. And, lastly, I call it in this Definition a *well order'd* Writing ; because the Order of the Petition ought not to be inverted ; as when a Person desires Execution before Sentence pronounced in the Cause : nor ought the Conclusion of the Libel to go before the Narration of the Fact ||. But if any one should *formally* say thus in his Libel, *viz. Peto talem condemnari, &c.* Yet such an Inversion of Order would not vitiate the Libel, because such a Sentence may, by Interpretation, be reduced to a proper Order and Method of Words * ; the Mind of the Person thus expressing himself being more to be regarded than the Form of Words in Writing †.

In respect of Libels they are all form'd from Actions : And as Positions and Articles are form'd from Libels, so are Exceptions form'd from Positions and Articles. Moreover, 'tis to be noted in respect of Libels, that every solemn Libel ought to contain five Things. *First*, The Name of the Plaintiff, who makes a demand by bringing his Action. *2dly*, The Thing itself which is in Demand or Controversy ||. *3dly*, The Name of the Defendant, from whom the Demand is made. *4thly*, The Action, whereby the Demand is made, and the Defendant sued. And, *5thly*, It ought to mention the Judge or Person, by whom Judgment is given, with a Description of his Power and Commission. All which Things are thus summ'd up in *Latin, viz. Quis, Quid, à Quo, Qualiter, & coram quo petatur.* And again, touching this matter of Libels, 'tis to be observ'd, that a Libel ought not only to contain the five foregoing Things, but it ought to be free from the five following Things, *viz. Generality* *, *Obscurity*, *Duplicity*, *Conditionality*, and *Disunity*. For great Care ought to be taken, that a Libel be not too general and obscure, and that there be no Word of a double signification inserted therein, nor a conditional Term, nor any disjunctive Clause : of all which hereafter.

Tho' Writing be regularly of the Substance of a Libel † ; yet 'tis otherwise in several Cases, as Custom, and the Stile of Court prevails over a written Law in point of Practice : and then a Libel may be made in the Vulgar Tongue, and without Writing. In Criminal Cases, both by the ancient and modern *Civil* Law, a Libel or Articles ought to be preferr'd in Writing with an Inscription and Subscription of Retaliation (as already remembred ||) whether the Crime be of a publick or private Nature : But as every Rule has its Exception, this Rule of the *Civil* Law is otherwise in the following Cases, *viz. First*, In a notorious Crime. *2dly*, In a Crime of *Bawdry*, in *Latin* called *Lenocinium*. *3dly*, In a Crime of *Falshood* or *Forgery*. *4thly*, In a Case wherein a Feme-covert is admitted to an Accusation. *5thly*, In a Crime of a suspected Tutor, &c.

for

for in these Cases, a Libel need not be made in Writing with an Inscription and Subscription of Retaliation. As to the Clauses of Libels I must observe, that there are four necessary Clauses which are usually placed at the end of the Libel, and sometimes at the beginning, *viz.* The first is, that it ought to be said, *super quibus omnibus & singulis peto mihi jus & justitiam ministrari, &c.* The second is, *omni meliori viâ, modo & Juris formâ, &c.* The third is, *non restringens se, &c.* And the fourth is, *Protestans se de expensis.* The first Clause saves a Libel from all Ineptitude. The Operation of the second is, that in a doubtful Case, a Libel ought to be interpreted in such a manner as is most favourable to the Plaintiff *Libellant*: The Effect of the third Clause is, that the Plaintiff is not oblig'd to the Quantity and Quality deduced in the Libel. And the fourth Clause is there put, because the Judge is deem'd to be requested to condemn the Person cast in the Suit in the Expences thereof to the Victor *.

* Gail. lib.
1. obs. 61.

As every thing contain'd in a Libel ought to be express'd in the briefest manner, so it ought (notwithstanding) to be very clear; because Clearness is as great a Friend to the Law, as Obscurity is an Enemy thereunto †. Now a Libel is said to be obscure, *first*, in respect of Equivocation, *viz.* when the same Word or Sentence may be understood several Ways, and in different Senses. *2dly*, In respect of its Generality; as when one Person brings an Action of Slander against another, and does not in his Libel express any particular Injury done him. *3dly*, In respect of Alternation; as when the Name of an Injury is thus describ'd, *viz. Illud vel Illud*: the Injury not being specially deduced and set forth. *4thly*, A Libel may be obscure in point of Diction or Locution, not sufficiently coarcted and restrain'd. And *5thly*, in respect of the Indefiniteness thereof. The Uncertainty of a Libel appears several ways. *First*, If it be an *Alternative*, because Alternation produces Obscurity ‖, as aforesaid. But here I must observe, that there are sometimes several Alternatives in an Obligation, Disposition of Law, or a Covenant of the Parties, &c. And then either both the Parts remain true; in which Case, an *alternative* Libel is admitted; yea, it ought of Necessity to be deduced *alternatively*. Or else only one of the Alternatives remains good: And then only that Alternative is sued and pray'd in that Libel; and an *alternative* Libel is not admitted. Sometimes there is one Alternative in an Obligation, or in a Petition, *viz.* either by Authority of Law, or by the Agreement of the Parties: and then either the Plaintiff is certain of his Right, in which Case only that Right is demanded and sued for; for if it be otherwise sued for under an Alternative, the Libel is vitiated. But if the Plaintiff be uncertain of his Right, then an uncertain Libel is admitted touching his Right, if such uncertainty happens thro' the Act and Fault of the Defendant convened *: but if it be occasion'd thro' the Plaintiff's Act, 'tis otherwise.

† D. 49. 14.
40.

‖ D. 45. 1.
15. 4 & 8.

* D. 43. 5.
1. 4. Bart.
ib. N. 1.

Again, the Reader ought to know, that Generality also produces Obscurity: and when the Defendant moves to have a general and obscure Libel explain'd, a Sentence cannot be pronounced thereon, without such an Explanation or Declaration first had and obtain'd. But this Generality and Obscurity the Plaintiff may explain and declare at any Time whatever, whether call'd upon to do it or not. But a Libel that is general and obscure, is valid, if it be not oppos'd and objected to by the Defendant †, tho' 'tis not otherwise good ‖. Tho' general Words in a Libel may be interpreted by the Plaintiff to his own Advantage *, or where clear and specifick Proof follows, it ought to be adapted to the Libel for the Plaintiff's Benefit: yet where a Libel is general, and hinders

† Glots. in c.
25. X. 5. 40.
‖ C. 7. 40. 3.
* Socin. Reg.
237.

the

the Defendant from any certain determination and deliberation thereon; the Defendant is not so much as oblig'd to deliberate or understand the Libel to the Plaintiff's Behoof; yea, he may cause the Plaintiff to be compell'd to declare the Meaning thereof. For the Defendant is not bound to divine the Plaintiff's Meaning; nor ought the Plaintiff to ramble and wander in his Libel to another's Disadvantage. But if the Plaintiff's Intention be ambiguous, and the Defendant's Answer be likewise so; tho' the Plaintiff may explain his own Intention to his own Advantage, yet his Intention is not understood to be confess'd according to his own Interpretation; but, according to the Sense and Understanding which the Defendant has of his Libel. And tho' the Plaintiff be allow'd *judicially* to explain his obscure and ambiguous Libel, yet his Executor may not do the same, as not knowing the Plaintiff's Meaning. And lastly, 'Tis to be remark'd, that when a Libel is general and obscure, the Defendant is not oblig'd to answer thereunto, as I have already observ'd under the Title of *Personal* Answers.

A Libel is, in *Latin*, said to be *Ineptus*, when we cannot from thence infer, that the Plaintiff has any Right of Action; and if the Ineptitude therein contain'd be notorious, the Judge may, on a Motion made, cancel and rear the same †; but he ought not to cancel, reject, or tear it (*ex officio*) without some Motion made: But a Libel, whose Ineptitude consists in something, that is intrinsecal, ought not to be cancell'd and rejected by the Judge. In such a Libel the Judge may (*ex officio*) rectify the Flaws and Faults therein contain'd, and supply any Thing relating to the Conclusion of the Libel, as it belongs to his Office to put an end to Law-Suits; and herein he is not said to proceed *de Facto*, but *de Jure*. But tho' the Judge may *ex officio* (as aforesaid) supply a Libel, which is *Ineptus*; yet he ought not to admit a Libel, wherein the Cause of Action is not express'd: But a Libel is valid, when the Intention of the Libellant is apt and congruous, though the Action it self be *inept*. When 'tis evident, that a Libel contains some notorious piece of Injustice, such Libel may, on mature Deliberation and Information had touching the Nature and Matter thereof, be rejected as *inept*; tho' the same does not appear from the *Series* and Frame thereof, but the same is extrinsecal to the Libel itself: And the Plaintiff is not only barr'd from bringing his Action again, when the Libel does from the Frame and Scope of it contain an Ineptitude; but even when it is notorious, that the Petition thereof is unjust. A Sentence pronounced *super inepto Libello*, is null and void *ipso Jure* ‖, tho' the Party should not oppose the same, because a Sentence ought to be conformable to the Libel*: Therefore if the Libel be *inept*, the Sentence pronounc'd thereon will likewise be of no Moment at all. And this is so far true, that the judge of an Appeal cannot reform such a Sentence pronounc'd *super Libello inepto*, but ought of Necessity to pronounce touching the Nullity thereof, by condemning the Plaintiff in Expences. But though a Sentence founded on such Libel be null and void, where a Libel is required; yet 'tis otherwise, where a Libel is not necessary, as we see hereafter under the Title of *Sentences*. What I have already related ought to be understood of an *apparent* Ineptitude in a Libel, and not of such an Ineptitude as is only tacitly inferr'd and apprehended by Implications and Subtleties of Law †: for a Sentence is valid, if the Libel be only *tacitly*, and not *expressly* inept. If a Libel be inept, the Defendant ought to say, *I will not answer thereunto, for that the Cause of Suit or Action is not therein express'd* ‖: and accordingly, the Judge ought to pronounce thereon. For in a *personal* Action, the Libel ought to

† Abb. in.
c. 3. X. 2. 3.
N. 10.

‖ X. 3. 17. 3.
Dd. ibi.
* Glos. in
c. 31. X. 5.
3. v. For-
m. 172.

† Vant de
null. sent.
tit. Quis
pos. dic.
N. 22.
‖ X. 2. 3. 3.
Abb. ibi.
N.

to contain the Cause of Action, otherwise the Defendant is not bound to answer thereunto: But if the Defendant makes no exception thereunto, the *judicial* Process goes on. A Cause which ought to be express'd in a Libel, ought to be such as induces a just Suit or Demand in Law: As when a Creditor being Plaintiff, does by way of Allegation say, *I demand of thee one Thousand Marks, &c.* But 'tis not necessary to say, *that* the Defendant converted the said Sum to his own Use, because the Law presumes it. If a Libel contains an *inept* Cause, it cannot be declar'd and explain'd after Contestation of Suit: But 'tis otherwise, if it contains a Cause that is null.

A Libel ought not so much to be consider'd in *modo narrandi*, as in respect of the Substance and Effect of it; as in respect of its Generality in the way of concluding*: for things superfluous, or narrated in too general a manner, ought not to alter the Conclusion of a Libel, and the Nature thereof; since 'tis well enough, if the Libel be clear in respect of the manner and mode of narrating the Fact, but it ought to be very proper in its way of concluding; for Things superfluously declared and set forth therein, are not the proper Objects of Proof. A Libel ought to be judg'd of by its Conclusion, and not by its Narration, nor from its *medium* of concluding only: for the Judge ought, from its Conclusion, to collect and infer what kind of Action it is, that is commenc'd and entered against the Defendant. But the Conclusion of a Libel does not interpret and restrain the same: And 'tis enough, if a Libel has but a *presumptive* Conclusion, or concludes *presumptively*†. But in criminal Matters, a Narration of the Fact alone, without any Conclusion or Petition, is allow'd as sufficient‖; because in such Causes as these, the Law concludes, and nothing is pray'd to be given or done for the Party himself: for either the Punishment is corporal, and then 'tis apply'd to the Body; or else 'tis pecuniary, and then 'tis due to the Exchequer. And hence 'tis, that a legal Punishment succeeds according to the Narration of the Fact, without any Conclusion or Petition at all: And if no Law or Statute prescribes a Punishment, 'tis then left to the Discretion of the Judge, and becomes Arbitrary. Thus in criminal Cases the Law concludes the Judge, and not the Accuser. And, therefore, 'tis not the Judge's Business or Duty herein to consider the Mode and Method, wherein a Libel is conceiv'd and drawn in point of its Conclusion; but he ought to consider, how the Law concludes according to the Nature and Quality of the Offence.

* Gail. l. 1. Obs. 61. N. 15. Abb. in c. 3. X. 2. S. N. 2.

† Felin. in c. 3. X. 2. 3.

‖ Barr. in l. 3. D. 48. 2. N. 19.

But as no one can except against, or reject a Libel, which has not been *judicially* exhibited, I will first say something touching the exhibiting of a Libel, before I proceed to speak of the Exceptions, which may be made thereunto. Now a Libel, or (which is the same Thing) the Plaintiff's Petition, is wont to be offer'd in Judgment on three Accounts*. *First*, For the Plaintiff's sake, who exhibits it to this End, *viz.* That he may thereby declare and demand his Right in Form. *2dly*, 'Tis exhibited on the Defendant's Account; That he may, on Sight and good Advice thereof, by due Deliberation debate with himself what Answer he ought to make thereunto; or, whether it be adviseable for him to submit to the Plaintiff's Demand, or to oppose the same†. And, *3dly*, 'Tis exhibited on the score of the Judge, that he may, from the Form and Quality thereof, the better know, how he ought to form his Sentence, and pronounce it with Justice; which ought always to be given according to the Form of the Plaintiff's Libel, or Petition in such Libel. By the *Canon* Law, the Rector of a Parish, in bringing an Action for the Right of the Church,

* Abb. Tom. S. cap. 36. N. 4.

† Barr. in l. 17. D. 48. 5. 2. N. 1.

ought to form his Libel in the Name of the Church; because such Rector has not a *direct* or *profitable* Action in his own Name.

I come next to consider after what manner an Exception may be made against the Plaintiff's Libel, and how such Libel may be rejected on the Defendant's Motion. Now *first*, the Defendant may impugn such Libel by way of Exception, if the Petition or Demand therein be insufficiently set forth and declared, *viz.* When he says by way of Objection to the Plaintiff, That the Libel exhibited by him is fram'd *indeterminately*: For a Libel is not valid, if the Demand or Petition therein contain'd be deduced and set forth *indeterminately*. And a Libel is first said to be so drawn, when such Libel or Petition does not expressly mention the Plaintiff's Name, Addition, and Place of Abode; which ought of necessity to be therein contain'd, that there may be a full *Constat* of the Plaintiff's Person. *2dly*, When the Defendant's Name, Addition, and Place of Abode are not therein specify'd; and this for the like Reason. *3dly*, When the Judge's Name and Authority are not therein described. *4thly*, When the Name of the Action is not therein set forth. But this last is only an Exception, according to some of the Doctors, it not being now every where in Practice. But though it be not necessary (especially by the *Canon Law*) to express the Name of the Action in the Libel by a conceiv'd Form of Words; yet the Cause of Suit*, or Mode of Concluding, ought to be express'd. *5thly*, When the Libel does not declare and set forth the Matters in Controversy in *Latin* call'd *Res petitas*: for these Things, doubtless, ought to be express'd in a Libel†. *6thly*, When it does not name where the Thing was done or transacted; tho' this is not much in use at this day. *7thly*, When it does not mention the Day on which the Libel or Petition was exhibited; for if a certain Day be not express'd, we cannot know whether twenty Days (more or less) have pass'd since that Time, as the Law requires. *8thly*, When it does not contain the Day, Year, and Name of the Prince, to whom that Province or Diocese is subject, when and where the Suit is commenc'd. In all these Cases, according to the *Civil Law*, a Libel is deduced *indeterminately*; and as such, may be objected to. But all these Things are not strictly pursued and observed with us here in *England*: for we do not observe the last; nor have we any regard to the twenty Days, &c. When a criminal Process is made *per viam querelæ*, which is wont to be described according to common Practice, the Place where, and the Time when a Crime is committed, ought of necessity to be inserted in the Libel or Articles in a solemn Form or Manner, unless the Denunciation be made touching a Crime committed against the divine Majesty, as Blasphemy, and the like; because such Solemnities as these are not then required. But in a Complaint of Injury, the Time and Place, when and where such Injury was done, ought to be solemnly inserted in the Libel, tho' 'tis otherwise when the Injury appears by the Parties own Confession.

In respect of the Amendment and Alteration of a Libel, it is not allow'd of more than once in the Course and Pleadings of a Cause; but if the Libel shall in any part of the Proceedings appear to have an Inepititude therein contain'd, the Defendant shall be dismiss'd from the *Instance* of the Suit. In singular or particular Action, a Libel may be amended in four Cases by adding thereunto. For, *first*, it may be thus amended in the Matter of the Petition, *viz.* in respect of the Thing demanded or sued for, as when less is demanded than is due: And in such a Case, an Amendment is allow'd both after and before Contestation of Suit, even to the Time of a Sentence pronounced||. *2dly*, An Amend-

ment

|| Bart. in
l. 3. C. 2. f.
N. 6.

ment may be made to a Libel in respect of the Substantials thereof. 3^{dly}, A Libel is frequently amended in regard to the principal Qualities of such Libel*. And, 4^{thly}, It may be amended in respect of its adventitious Qualities. According to *Bartolus*, and the rest of the Doctors, when any Libel is amended before Contestation of Suit, the Plaintiff may then amend the same by adding a greater Sum without a new Process on the score of the former Libel amended; but, after Contestation of Suit, the Plaintiff may not do this: But this Opinion (I think) is not true, since a greater Sum may be demanded even after Contestation of Suit without a new Process or Citation. For an Error in a Libel may be corrected after Contestation of Suit on due Proof made to the Judge of such Error: and this also holds good in Law, tho' there be a Term assign'd *ad deliberandum*; because any one may err in Deliberation itself. And, therefore, in respect of an Error, any one may amend his Libel, even after Contestation of Suit, if he proves his Error. But before Contestation of Suit, an Error may be corrected in a Libel without setting forth and proving the same; because a Person may then revoke his own Libel at pleasure. But this Conclusion impugns the receiv'd Opinion of the Doctors, saying, That every one is so bound by a Contestation of Suit to that *Instance*, as that he cannot again recede from it: Because Contestation of Suit cannot include and comprehend such Things as are afterwards deduced and brought into Judgment: and so far the Opinion of the Doctors, that a Libel cannot be corrected on the Score of any just Error; but there ought to be a new Libel, and a fresh Instance. 'Tis to be noted, that in a Case wherein Amendment or Change of the Libel is suffer'd, a Person thus amending his Libel, or changing the Nature of his Action, is oblig'd to a Refusion of such Expences as the Defendant has been at thro' the Plaintiff's temerity in his former Proceeding, for that he did not in the Beginning sufficiently consider the Matter with himself, nor weigh the Action as he ought to have done: For he ought to have come prepared and well instructed to act. But this refusion of Expences ought to be taxed by the Judge.

* Bart. ut
Supr. N. 7.

Judicial Pleadings are either made *viva voce*, or else in Writing; and such on the Plaintiff's Side as are made *viva voce*, are properly stiled Petitions *grosso modo*; but such as are exhibited in Writing, are usually term'd *Libels*: And such a Writing may contain several distinct Petitions against the self-same Person being the Defendant. A Libel is not requir'd, where the Process is *sine figurâ Judicii*†: But then some Petition or other *Qualis Qualis* ought of natural Right to be exhibited, and in no wise omitted. For tho' the Solemnity of a Libel be taken away, yet there is required *talis qualis Petitio* in the way of a simple Petition, containing only a clear Narration of the Fact without any Conclusion, whereby the Defendant may deliberate whether he will submit or contend in Law: And afterwards the Notary or Register ought to reduce the same into Writing or the Acts of Court; for such a Petition may be made *ore tenus*.

† Abb. in
c. 2. Clem.
5. 11. N. 6.

A Citation ought to be previous to a Libel, though in some Places 'tis otherwise: And, therefore, the *judicial* Process begins from the Citation||, and not from the Libel. But some will have it to be the best Practice for a Judge to see the Libel, before he decrees a Citation; because if the Libel contains any Thing which is unjust, he ought not to decree a Citation. But a Libel may be given to a Person that has not been cited, if he be found in the Consistory, or in open Court, on the Account of any other Cause*. A Libel has not the Force of a Demand or Interpellation†; and, therefore, such Demand ought to be made before the Libel be ex-

|| Bart. in
l. 1. C. 2. 1.
N. 1.

* Paul. de
Castr. in
l. 21. D. 28.
1. N. 19.
† Alciat. in
l. 22. D. 12.
1. N. 51.

hibited.

hibited. But suppose that more is demanded in the Libel than is due ; as for Instance, I owe you ten, and you demand twenty Pounds ; or I owe you part of a Thing, and you demand the whole thereof: *Quære*, Whether I may, in this Case, *simply* deny the whole Demand ? And it seems, that I may : for if the Position of a Libel be false in any Part thereof, I may in my Answer deny the whole Position, in regard to that Part which is false *. But the Party *Libellant* seems to confess whatever is contain'd within the Compass and Words of his Libel †, according to a Maxim in Law, *viz. Qui ponit, fatetur*. Wherefore, if the *Libellant* propounds any Thing in his Libel which makes against himself, he must abide by it, tho' to his own prejudice *. A Libel is justify'd by the Acts of Court ; and 'tis sufficient, that the Quality for which the Action is given be found in those Acts, tho' not found in the Libel itself. Where a Power is given to a Person in respect of some certain Quality, the Party *Libellant*, in the first place, ought to verify and make good that Quality : For a Libel founded on a certain Quality, falls to the ground, if that Quality be not prov'd.

In a doubtful Case, a Libel ought to be so interpreted, that it may suit and agree with the Person of the Judge, and the Right of the Plaintiff; and the Thing itself, in Demand, may have some validity ||: for the Words of a Libel ought not only to be understood in favour of the *Libellant*, but ought even to be so expounded, as to support and include his Intention, as much as possible. For, says the *Abbot*, the Words of a Libel ought to be taken in a large and wide Signification, that they may include the Plaintiff's Intention. But this Rule, which says, That the Interpretation of a Libel ought to be made in the favour of the *Libellant* only, proceeds and takes place when the Ambiguity thereof consists in some Points of Law alone ; and not in a Matter of Fact. But in a criminal Cause, according to *Socinus*, a Libel or Articles ought to be expounded in favour of the Defendant. By the *Canon* Law, the Plaintiff ought to deliver unto the Defendant a Copy of the Libel at his own Expence, and hereunto he may be compell'd : But by Practice in our Courts, the Defendant takes out this Copy at his own Charge, if he will have it. And, by the Common Law of *England*, when a Man cannot procure the Copy of a Libel at the hand of an Ecclesiastical Court, there lies a Writ *Copia Libelli deliberandi* *: And by a Statute of the Second of *H. 5.* Cap. 3. If the Judge of the Spiritual Court denies the Copy of a Libel to any Person impleaded there, and demanding the same, a Prohibition shall be awarded *Quousq;* And 'tis the same Thing, if the Copy of a Presentment be refused or denied him : For reading of a Presentment to the Party is not sufficient, since a Copy ought to be deliver'd as well on the Articles of a Presentment as on other Libels ; to the end, that on a Surmise or Suggestion, it may appear whether a Writ of Prohibition ought to be awarded thereupon to the Spiritual Court †.

A discreet Judge and Advocate ought, in the first place, principally to consider the Form of the Libel, and the Quality of the Action propounded, because a Judge ought to form his Sentence according to the Manner and Petition of the Libel as aforesaid ; for if he shall pronounce Sentence in any other manner, *viz.* either contrary to, or besides the Form of the Libel, he shall be censured as a weak and ignorant Person, and his Sentence may be appealed from. I have already hinted, that 'tis enough for the Plaintiff to propound the Fact without expressing the Name of the Action in his Libel : But then he ought to do it in so clear a manner, that the Right of bringing his Action may be inferr'd from thence. A recusatory Libel or Allegation ought to be offer'd before the Judge recus'd ||, if

* Abb. in
c. 1. X. 2.
11. N. 15.
† Abb. in
c. 15. X. 2.
1. N. 4.
* Paul. de
Castr. in
l. 2. C. 6. 25.
N. 4.

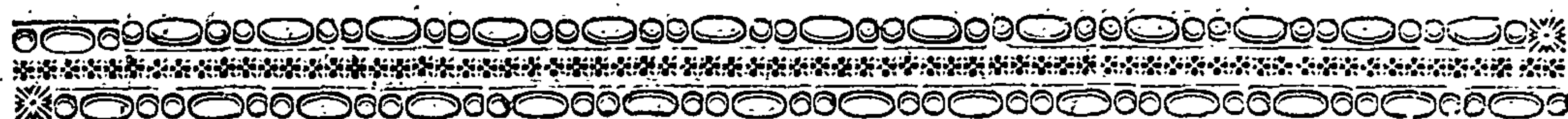
|| Abb. in
c. 5. X. 2.
2. N. 10.

* Reg. Orig.
F. N. B. 51.

† Kebl. Rep.
vol. 3. p. 597.

|| Paul. de
Castr. in
l. 18. C. 3.
1. N. 1.

if he be present in Court ; else it ought to be exhibited before the Judge of that Place where the Party dwells, and this Judge ought to compel the Parties to chuse Arbitrators, as I shall hereafter observe under the Title of *Recusation*.



Of a Licence, and the Power thereof.

A Licence, in *Latin* called *Licentia*, is derived from the Verb *Liceo*, *Lices*, *Licui* ; and is a Power by Grace and Favour granted unto a Person for the doing some Thing, which it was not lawful for him to do before such Grant made *. It is sometimes in our Books term'd a *Grace*, and sometimes a *Faculty* ; and is equivalent unto a Dispensation in many Respects : But strictly speaking, a Dispensation has only Place in case of Necessity ; but a Licence obtains without any Cause of Necessity whatsoever. If a Licence be a *Grace*, it has a perpetual Duration and Continuance after it is once granted †, unless such Grant be limited to a certain Time or Use || : And, moreover, it follows from hence, that a Licence ought to be construed and taken in an extended Sense, because it is a Matter of Grace and Favour *. Upon which account *Innocentius* observes, that if a Licence or Faculty be granted to any one, of going to the Schools, or for any other Reasons whatsoever, such Licence does not expire on the Death of the Person that granted it †, tho' the Gloss on the Law, quoted in the Margin, intimates the contrary. But I make no doubt, but that a Successor may always, upon a good Account, and for just Reasons, revoke a Licence granted by his Predecessor ||. *Croke* in his Reports affirms, That a Licence of its own Nature cannot be without Writing * : And I think, his Opinion, generally speaking, is well warranted from the Books of the *Canon* Law, especially where a Licence is granted *ex provisione Hominis*, and not *ex institutione Legis*.

* Lindw. in c. 2. lib. 1. Tit. 9. v. *Licentia*.

† vi. 1. 14. 6. vi. 3. 4. 36. || X. 3. 15. c. unic. * X. 5. 41. 2.

† X. 3. 4. 16.

|| X. 1. 6. 20. * Crok. 2. Rep. p. 103.

† In c. 24. vi. 1. 6.

|| vi. 3. 11. 2.

* J. 1. 21. 2.

† D. 26. 7. 47. vi. 2. 8. c. un. || Bald. conf. 288. N. 6. v. *Authentica*. lib. 3.

A Licence which is extorted or obtain'd by undue Means, is not properly called a Licence, according to the Archdeacon † : And as a Mandate or Commission is of necessity previous unto the receiving of any Office or Trust ; so likewise in all Cases where a Licence is granted, which is but another kind of Commission, it ought to be previous unto the Act itself || ; as in the Case of a Curate, Schoolmaster, and the like. But where an Authority is required, the same ought to be apply'd in the Act itself incontinently, either before or after it *. But when a Man's Consent is only required, then it is well enough if it be either previous or subsequent unto such Act : But if a Man's Advice or Counsel be necessary, then it ought to be previous to the Act †. We read of several kinds of Licences in our Law-Books ||, as a Licence to preach, a Licence to marry without publishing the Banns of Matrimony, a Licence to purchase in Mortmain, a Licence of Appropriation, a Licence to teach School, and the like ; some of which are founded upon Dispensation, others upon Permission, a third sort upon Approbation, a fourth sort are only Occasional, and a fifth sort are entirely founded upon an Abuse of Power, as being rather design'd to get Money from the Person, than to do any Service to Religion, or Good to the State. No one can grant a Licence unto himself, or for his own Advantage, because such a Licence has

* Bald. ut
Supr. N. 5.
fraterea.

ap. alleg.
N. 3.

Lindw. lib.
Tit. 15.
p. 2.

Cl. 5. 7. 1.

† Stat. 1.
Mar. cap. 3.
14. Car. 2.
cap. 4.
15 Eliz.
cap. 12.
|| 1. Kebl.
Rep. 503.

* X. 5. 5. 1.
2. 3. & 4.

et terminos habiles* ; for the Person that grants a Thing, and the Person that receives it, must be different Persons, since no one can give to himself. In Things prohibited, and which cannot be done without a Licence obtain'd, the tacit Consent of the Person who should grant it is not sufficient †, because in all such Cases, an express Consent is required : And the Person who affirms himself to have a Licence for the doing of a Thing, ought to prove the same by exhibiting the Licence. A Clerk in Orders, cannot administer the Sacrament of the Eucharist unto the Parishioner of another Church, without a Licence obtain'd from the Bishop of the Diocese, or the Parson of the Parish ||, where he administers the same : nor shall any Credit be given to a Person that affirms himself to have such a Licence, nor to the Parishioner averring the Truth thereof; but he ought to shew his Licence in Writing, or prove from the Parson of such Parish that he had Leave so to do. And a Curate, who is not Parson of such Parish, may grant such a Licence, though he be not in Priests Orders. Nay, so severe is the Canon Law in this respect of the Sacraments, that it will not suffer a Parishioner to receive the Sacraments of the Church from another Parish-Priest, or any Clergyman whatsoever, without the special Leave of his own Parson; and if he shall act contrary hereunto, he shall be excommunicated *ipso facto** : And hence it is, that no one ought to solemnize Matrimony without the particular Licence or Leave of the Parish-Priest first had and obtain'd thereupon, because Matrimony is a Sacrament in the *Romish* Church.

Though a Priest by his Ordination receives Authority to preach the Word of God, and to administer the Holy Sacraments in the Congregation, where he shall be lawfully appointed thereunto; yet, notwithstanding this, he may not preach without the Licence either of the King, or his respective Archbishop, Bishop, or other lawful Ordinary, or of one of the Universities of *Oxford* or *Cambridge* †. But a Licence by the Bishop of any Diocese is sufficient, though it be only to preach within his Diocese, the Statute not requiring any Licence by the Bishop of the Diocese where the Church is||. Heretofore, the Necessity of Baptism to newborn Infants was so rigorously taught, that for this Reason, they allow'd Lay People, and even Women to baptize a declining Child, where a Priest could not be immediately found: And this Office of baptizing in such Cases of Necessity was commonly perform'd by Midwives, which very probably first introduced the Licensing of Midwives by the Bishop; because they were first to be examin'd by him or some deputed Officer, whether they could repeat the Form of Baptism, which they were in haste to administer on such extraordinary Occasions.

In antient Times, the Cathedral Church, according to the Council of *Lateran*, was to provide a Master, and to maintain one out of the Estate of the said Church, who was to instruct the Clergy belonging to the said Church, and other poor Scholars *gratis*; (for he was not to demand any Money and the like, under any pretended Custom whatever) and hence it came to pass, that the Bishop had the Licensing of such Master, as being provided by the Church, who was to have no Fee upon such Account, under pain of Deprivation. Nor could a Bishop interdict or restrain any Person that was fitly qualify'd to teach School, from such Employment, on suing out a Licence. In the *Decretals**, we read of several Laws touching this Matter, after the Church set up for the Care and Inspection of Learning, which weaken'd the Power of the Laity very much; and I am inclin'd to think, that this Licensing of Schools by the Clergy, has done no great Service to Religion itself, however it was at first intended.



Of Liturgies, otherwise called Common Forms of Prayer.

THE Word *Liturgy*, in the general Acceptation of it, signifies the performing of some publick Office or Work; being deriv'd from the *Greek Verb* λειτουργεῖν, which is to perform some Service for the Publick: And from hence, according to the Use of the Church, this common Term is by a Metaphor apply'd to Things of a divine Nature; and, having oftentimes a larger Signification, it denotes every Office of Piety whatsoever, as in *St. Paul's Epistle to the Romans* *, where 'tis said, *Their Duty is to minister to them in carnal Things*, that is to say, to administer Supplies to the Poor. And in his second Epistle to the *Corinthians* †, 'tis likewise said, "The Ministration of this Service, not only supplieth the want of the *Saints*," &c. But in a more confin'd Sense of the Word, 'tis generally taken to denote some Office or Function in the Church, as in his Epistle to the *Hebrews* ||. "Every Priest standeth daily ministring and offering sometimes the same Sacrifices, which can never take away Sin:" speaking thereof the Priests of the *Old Testament*, who are said λειτουργοί. And thus Christ is said to be λειτουργός τῶν ἀρίων, the Minister of the Sanctuary *: And in this Sense, *St. Paul* likewise stiles the Preaching of the Gospel by the Word λειτουργία †. And thus the Word *Liturgy*, in the antient Church, signify'd all Holy Offices perform'd by Bishops, Priests, and Deacons; and (perhaps) it denoted the Books themselves, containing such Offices, and the Forms of publick Administrations, as now with us: For by a Liturgy of Prayers, we can understand nothing else but the publick Forms then in common Use.

* Cap. 15.
v. 27.

† Cap. 9.
v. 12.

|| Cap. 10.
v. 11.

* Heb. c. 8.
v. 2.

† Rom. cap.
15. v. 16.

We have very early Proofs of some common Forms of Prayer, which were generally used in Christian Churches, and were the Foundation of those antient Liturgies, which were, by degrees, much enlarged, as I shall observe by and by. And the Interpretations of latter Times, do no more overthrow the antient Ground-work, than the large Additions to a Building, do prove there was no House before. But though it should be said, that such Liturgies were, or could not be the Liturgies of *St. James* or *St. Mark*, because of such Errors, Mistakes, and Interpretations of Things, and from the Phrases of later Times; yet this is not an Argument against the ancient Use of Liturgies in the Churches of *Jerusalem* and *Alexandria*, since we find, even in *Origen's* Time, an entire Collect produced by him out of the *Alexandrian Liturgy* ||. And the like may be shewn as to other Churches, which, by degrees, came to have their Liturgies, or set Forms of Prayers, for general Use among them, which were sometimes stiled the *publick Offices* of the Church. In the old *Saxon Canons*, the Presbyters are required to use and read these publick Offices constantly at Prayers in their Churches *: And so it was decreed in the Council of *Cloveshoe*, and by the Canons of *Egbert* †, and King *Edgar* ||. Indeed, some Persons have since thought it unlawful to pray to God in set Forms of Words; but those that are of this Opinion, do not pretend to any Inspiration, but only to some inward Help from a fran-

|| Biblioth.
Patr.

* Conc.
Angl. vol. 1.
247.

† Can. 2.
|| Can. 45.

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tick Devotion of Mind in their present and sudden Conceptions of Prayer, whereby they are more earnestly excited to implore the divine Blessings, and the Forgiveness of their Sins. I will not here enter into any Dispute with them concerning this Matter, having never yet met with any solid or convincing Argument to determine, why the Holy Spirit should be less assisting to us when we pray for a Thing in a set Form of Words, than when we pray for it in a loose and rambling Manner, according to our own Fancies and Emotions. In the *Roman* Church there were always Forms of Prayer, as may be seen in their *Missals, Breviaries, Rituals, Pontificals, Manuals, Rosaries, &c.* For tho' that Communion has deviated much from the Purity of the antient Church of Christ; yet, in respect of publick Liturgies and common Forms of Prayer, it has follow'd the Primitive way of divine Worship in every Thing, but in Idolatry and Superstition, which have been since introduced for the Grandeur of the *Romish* Clergy. But those Offices beforemention'd, and which were used in the *Romish* Church, being so many; and every Religious Order having likewise some peculiar Rites and Services adapted to themselves, and to be perform'd on the Saint's Day which belonged to their respective Orders, it was formerly a very difficult thing to understand in what manner to officiate. In the *South* Part of *England*, the Offices were generally received after the Use of *Sarum*; and in the *North* after the Use of *York*; in *South Wales*, after the Use of *Hereford*; and in *North Wales*, after the Use of *Bangor*; and in *Lincoln*, and other Places, there were proper Offices to be used: And when any Prelate was made a Saint, there were Collects and particular Forms used in honour of him in his Diocess. And thus stood the publick Forms of Prayer till *Edward* the VIth's Time here in *England*.

* 2 E. 6.
cap. 1.

For upon the Reformation of Religion, or soon after*, these Forms being found full of Superstition and Idolatry, the Protector, and the rest of that King's Council, thought it expedient to have one uniform Order of publick Worship throughout the Kingdom, and [to prepare and compose such a Form, a Committee of particular Divines was appointed, *viz.* the two Archbishops, sixteen other Provincial Bishops, and six Doctors of Divinity, to examine and reform all the old Offices of the Church. And upon the Examination thereof they found them so Superstitious, that they rather resembled the Rites of Heathens than Christians: and, therefore, they rejected every thing which was not warranted by Scripture; and reduced other Matters to their Primitive Purity. In the compiling this Book, the Reformers began with the Morning and Evening Prayers, which they put almost in the same Form we now have them, only the general Confession of Sins, and Absolution to Penitents were omitted. The Communion Service was likewise the same as it is now, only the Ten Commandments were not read in that Service. And because Religion was clouded and encumbered with many Ceremonies, they therefore rejected all such as had been abused by Superstition, retaining such as were decent, and which tended to move our Affections by some apt and good Significations; and they prefix'd a *Preface* concerning such Ceremonies, which is the same as now printed before the Book. But these Alterations in the publick Offices of Worship, occasion'd great Heats among the People, which were excited chiefly from the Pulpit, the Clergy being very unwilling to part with those Methods whereby they govern'd the Laity: And, therefore, Preaching was prohibited for a Time to any Person not licensed by the King or his Council, or by Archbishop *Cranmer*. Afterwards the major part of the Committee framed a Bill which they brought into the House of Peers on the ninth Day of

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December *, and which lay before them for a long while ; for eight of the sixteen Bishops, who were of the Committee, and three Temporal Lords, protested against it ; whereby they shew'd their unwillingness to make any Alterations, tho' they were resolv'd to obey when it was enacted into a Law ; which see at large with the Preamble thereunto. But because some things were contain'd in that Liturgy, which shew'd a Compliance to the Superstition of those Times, and some Exceptions taken to it by some Men at Home, and by *Calvin* abroad, therefore it was review'd two Years afterwards, in which *Martin Bucer* was consulted, and some Alterations were made in it, which consisted in adding some Things, and leaving out others. The Additions were, *viz.* a general Confession of Sins, a general Absolution to the Penitent, and the Communion to begin with Reading the Ten Commandments, and a Rubrick concerning the Posture of Kneeling, which was afterwards order'd to be left out, but is now again explain'd, as it was in K. *Edward's* Time. The use of Oil in Confirmation, and Extreme Unction, were left out, and so were Prayers for Souls departed, and what tended to a Belief of the *real* Presence of Christ in the *Eucharist*. Afterwards a Bill was brought into the House of Peers † to enjoin a Conformity to this Book, with those Additions and Alterations ; which Bill then past into a Law. But on the King's Death, which happen'd soon after, this Liturgy was laid aside ; and some of those Divines, who had been the chief Promoters of it, fled beyond Sea, where at *Frankfort* there happen'd a Contention amongst them : for some thought they ought to accommodate the Worship of God in conformity to the usage of the People there, and nearer to the *Geneva* Form, that all might be united in one way of Worship. But on Queen *Mary's* Death it was again appointed † to be used by every Minister, tho' not as before ; for upon a Review of several Divines, some Additions were made to it, *viz.* There were added certain Lessons for every *Sunday* in the Year, two Sentences added on the delivery of the *Eucharist*, intimating to the Communicants, that Christ's Body is not present in the Elements, &c. The Form of making Bishops, Priests, and Deacons, was likewise added. There were some Alterations made in the Reign of King *James I.* but those were in the Rubrick only. As for the Additions of Thanksgivings at the end of the Litany, and the Prayer for the King and Royal Family, which were not in the last Book, they were added by the Authority of the King's Commission ; and are still in force by virtue of his Proclamation ; and so are the Prayers for the Inauguration of our Kings and Queens, &c.

* Burn. Hist. of the Ref. vol. 2. p. 93.

† 5 & 6. E. 6. cap. 1.

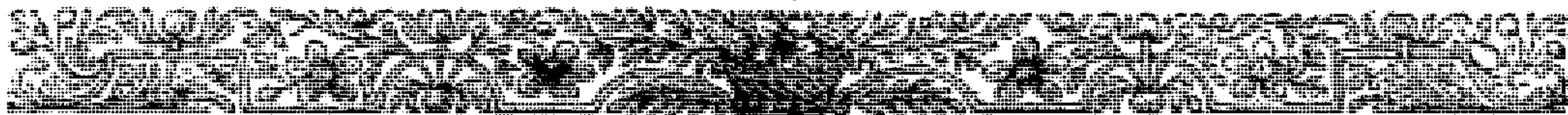
‡ 1 Eliz. c. 2.

Anthems were anciently added to the Liturgy by Pope *Damasus*, who order'd them to be sung in Churches : about ten Years after the first Council of *Nice*, *Marcus*, Bishop of *Rome*, appointed the *Nicene* Creed to be sung after the reading of the Gospel : And Pope *Anastasius* decreed, that Men should hear the Gospel read in a standing Posture. Pope *Sabinus* the First introduced the Distinction of Canonical Hours for Prayers : And Pope *Zepherinus* order'd, that the Wine in the *Eucharist* should be consecrated either in Cups of Gold, Silver, or Pewter, and not in wooden Cups or Glass, as had been done before ; and that all Christians above fourteen Years of Age should receive the Communion upon Easter-day. The *Sanctus* or Hymn beginning, *Holy, Holy, Holy, Lord God, &c.* was instituted by Pope *Sixtus* to be sung at the Celebration of the *Eucharist* ; whereas, before this Pope's Time, the Communion was perform'd without the mixture of any human Institution whatever. As it was a receiv'd Custom in the *Hebrew* or *Jewish* Synagogue to read some Portion of Scripture out of the Law of *Moses* on every Sabbath-day

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throughout the whole Year, and some other Portion of Scripture out of the Prophets; so 'tis particularly enjoin'd by the Holy Liturgy in the Christian Church to read some Lessons out of the *Old* and *New* Testament every Day, so that the whole may be read thorough in the Year; and likewise decreed, that the *Doxology* or *Gloria Patri*, &c. should be repeated at the end of every Psalm, and gave Authority to *Jerom's* Translation of the Bible, according to *Platina*.



Of a Mandatory Writ, in Latin stiled a Mandamus.

SINCE a Writ of *Mandamus* is frequently directed to the Ecclesiastical Courts of this Realm, I shall here mention some Cases wherein such Writ has been awarded. Now a *Mandamus* lies to the Ecclesiastical Court to swear Church-wardens elected by the Parishioners, upon a surmise that the Custom of the Parish has been such, that the Inhabitants thereof shall chuse their Church-wardens *exclusively* of the Parson or Minister thereof; who ought, by the Canon, to chuse upon any Dispute arising about such Election, one of the said Church-wardens: for if the Custom has been such, the Bishops Officers ought not to refuse to admit and swear such Church-wardens thus elected by the Parishioners, under any Pretext of the Canon ||; but shall be obliged to admit and swear the Church-wardens chosen by the Parish: and hereupon several *Mandatory* Writs have been granted, as we may see in the Books of the Common Law*. The Parish of *Ethelburga* in *London*, alledg'd a Custom, that the greater Party of the Parishioners were wont to chuse their own Church-wardens; and they chuse two, and the Parson a third. The Bishop's Official gave Oath to one of them chosen by the Parish, but refused to swear the other, and would have sworn the Party chosen by the Parson, in opposition to the Choice of the Parishioners; whereupon the Parson libelled in the Ecclesiastical Court: And a *Mandamus* was hereupon pray'd and granted, that the Official might swear the other who was chosen by the Parish; And a Prohibition was likewise moved for to stay the Suit in the Ecclesiastical Court. Touching the *Mandamus* the Judges doubted, and desired Precedents and Records might be searched: But at length Precedents and Records being shewn, a *Mandamus* was granted after several Motions. But there being a Suit in the Ecclesiastical Court by the other whom the Parson chose, a Prohibition was granted without any Difficulty: But at first, the Counsel pray'd a Prohibition for not swearing the other, which the Court refused to grant, because there was no Proceeding in the Ecclesiastical Court; and a Prohibition cannot be granted where there is no Proceeding by way of Suit †.

Secondly, A *Mandamus* lies to the Ecclesiastical Court touching the Probate of a Will under Seal, if the Ordinary shall refuse to admit the Executor thereunto. The Case was this: An Executor named in a Will had taken the usual Oath, and then refused the Executorship. But (after a *Caveat* entred, and another had endeavour'd to obtain Letters of Administration) the Executor came, and desired a Probate of the Will under Seal,

|| Car. 89.

* Crok. 3.
Rep. 551,
585. Rolls.
106, 107.
Vent. Rep.
pt. 1. p. 115.

† March.
Rep. p. 22.
9. 50.

Seal, and contested the granting of Letters of Administration: which was adjudg'd against him, as supposing him to be bound by his refusal. And after an Appeal to the Court of Delegates, a *Mandamus* was pray'd and granted by the Temporal Court: For having taken the Oath, he could not be admitted to refuse, the Ecclesiastical Court having no further Authority herein; and the *Caveat* did not alter the Case. Note, the Oath was taken before a Surrogate, but that was all one. In the like manner, a *Mandamus* was pray'd and granted to compel the Judge of the Prerogative Court to grant the Probate of the Will of one *Dunkin*; who, being made an Executor in Trust with some others by one *Brown*, died; and Administration, with *Brown's* Will annexed, was granted to one *Munn*. See the Case at large in *Raymond's Reports* *.

|| Ventr.
Rep. pt. 1.
p. 535.

* P. 236.
237.

A *Mandamus* was also pray'd and directed to the Church-wardens of the Parish of *Kingsmore* in *Hampton*, to restore *John Iles* to the Place of Sexton there, who had been deprived, and it was granted. And the Court said, that it had been granted for restoring a Parish-Clerk, as well as Church-wardens †. In this Case of a Sexton, it was at first doubted, whether the Court should grant it or not, he being rather a Servant than an Officer to the Parish, or one that had a Freehold in his Place. But from a Certificate shewn from the Minister and divers Parishioners, that *the Custom was there to chuse a Sexton, and he held it for Life, and that he had two Pence a Year of every House in the Parish*, the Court granted a *Mandamus* directed to the Church-wardens. I mention this Case, because a Sexton and a Parish-Clerk, are Persons in the Service of the Church, and, consequently, subject to the Ecclesiastical Laws.

† Ventr. ut
sup. p. 143.

|| Ventr. ut
sup. p. 153.

A Person, being chosen Clerk of a Parish-Church, was put in and continu'd Clerk three or four Years, but was never sworn; and now a new Parson put him out, and swore another in his Place: Whereupon a Writ of Restitution was pray'd, and this was compar'd to the Case of a Disfranchisement, where Restitution lies. But two of the Judges (the other being absent) would not grant it *: And the Chief Justice said, that the Parson had not Power to oust him, because it is a temporal Office, with which the Parson has nothing to do. And, further, they conceiv'd, that the Clerk had a Remedy at Law; wherefore they would not award a Writ of Restitution, but said that if the Clerk was never sworn, they wou'd award a *Mandamus* to swear him, to which the Counsel assented †.

* Trin. 17.
Car. B. R.

† March.
Rep. p. 101.



Of Marriage or Matrimony, otherwise called Wedlock.

Marriage is a lawful coupling and joining together of Man and Woman in one individual State or Society of Life, during the Lifetime of one of the Parties *; and this Society of Life is contracted by the Consent and mutual Good-will of the Parties towards each other. It was first instituted by God himself in Paradise between *Adam* and *Eve*, that Man might not be alone, but that he might have a Help-Mate to assist him in the Comforts, as well as in the Necessities of human Life: And as it was ordain'd before Sin came into the World for the Propagation

* D. 23. 2. 1.

tion of Mankind ; so it is now likewise made use of as a Remedy for Man's Weakness and Infirmary, after Sin entred among us, in order to restrain a vagous Concupiscence. And surely since it was first introduced by the Divine Will and Command, it must be a good Thing, and may be practis'd without Sin ; however the Passions of Men may have abused this Holy State. Among the *Papists* there is a threefold matrimonial Good, *viz.* what they in *Latin* call *Fides*, *Proles* and *Sacramentum* : And this threefold Good, they say, was in *Christ's* Parents. There was a *Fides*, because there was no Adultery. *Christ* himself was the *Proles* or Offspring. And there was a Sacrament, in their Notion of it, because there was no Divorce. And as the first Cause and Reason of Matrimony ought to be the Design of having an Offspring ; so the second ought to be the avoiding Fornication : And, therefore, in the Beginning of the World, the Precept of the Law of Nature, or rather right Reason itself oblig'd every one to a Contract of Matrimony for the Necessity of human Propagation ; for if ever there was a Necessity of propagating an Offspring, it was surely in the early Ages of Mankind, when the Race of Men was thin, and the Earth was unpeopled. And in respect of the second Reason, certainly the *Romish* Church does very ill in forbidding Marriage to the Clergy, since so few of its Clergy avoid Fornication and Adultery, which that Church thinks a far less Sin in a Priest than Matrimony it self ; as *Closter*, and others heretofore maintain'd, tho' they are somewhat ashamed to own this Doctrine at present. *Sylvius Aeneas*, *Panormitan*, and other Writers of the *Romish* Church, were all against the Marriage of Bishops and Priests : But *Cassandra*, who was a better Christian, affirms, That that Law which enjoins a single Life unto Bishops and Priests, ought to be abolish'd, though it were an Apostolical Canon. So that this Prohibition of Marriage to the Clergy is condemn'd by one of their own Communion. For to forbear Marriage is not a necessary Means to preserve Chastity, as we may learn from the lewd and scandalous Practices of the *Romish* Clergy, who commit such frequent Acts of Whoredom and Adultery ; and justify the same too, from their Books of the *Canon* Law, *viz.* *Si non castè, tamen cautè*, and the like. Therefore, this Prohibition does no good, nor does it tend to Gods Service (as they vainly boast) since Virginity is not in Scripture deem'd more holy than a chaste Marriage. But the true Reason why the *Papists* will have the Clergy always to abstain from the use of Wedlock, is not so much on a Religious as a Political Account, as thinking not only to recommend themselves to the Laity by a greater shew of Sanctity, that they may procure a larger Authority to themselves thereby, but likewise to put themselves under a greater Subjection to the Pope, and the better to establish the Hierarchy of the Church.

By the Papal *Canon* Law, Matrimony is twofold, *viz.* *Spiritual* and *Carnal*. Spiritual Matrimony is that, which is contracted between a Prelate elected and the Church, unto which he is chosen by means of the Persons electing : And it may be divided into three Parts. The first consists in the Consent of the Persons electing, and the Person elected ; and this is called the *Beginning* of spiritual Matrimony. The second Part consists in Confirmation, whereby this Kind of Matrimony is ratify'd and confirm'd. And the third Part consists in Consecration, whereby the same is consummated, as carnal Matrimony is by Copulation. Note, That spiritual Matrimony is only said to be contracted between a Bishop and his Church, and not between an inferior Prelate and his Church. But here I shall only treat of *Carnal* Matrimony, as it is a Conjunction of Man and Woman in an individual State and Conversation of Life : And herein we ought to consider several Things. For,

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First, We ought to consider the Parties themselves that are thus join'd together. *Secondly*, At what Age of the Parties this Conjunction may be made. And, *Thirdly*, By what, and whose Consent it is to be made. And *First*, in respect of the Woman which marries according to Law, it is said that she ought to be a chaste Virgin, and a Person betroth'd in her Virginitie. *Secondly*, She ought to be legally endow'd, and given by her Parents in Wedlock. And, *Thirdly*, She ought to be such a Person as is acceptable to the Bridegroom. I say, she ought to be endow'd, because Matrimony ought not to be without a Dowry, if it may be had: yet if such Marriage be contracted, it is not therefore void; because, though a Dowry be an Expedient, yet it is not an essential Part of Matrimony. The Dowry, according to *Bartolus* †; is that Estate which is given by the Woman, or else in her Name, to the Husband, in order to support the Charges of a marry'd Life; and it had its rise from the Law of Nations, as well as from the Consent of the Giver: And, according to the *Civil* Law, a rescinding of Wedlock, either by Divorce or by the Death of one of the marry'd Couple, induces a Restitution or Loss of Dower, if such Divorce be grounded on any Fault of the Person divorced.

† In Rub.
D. 24. 3.

As to the Age of the Persons contracting Espousals *de presenti*, commonly called Marriage, it ought to be fourteen in the Man, and twelve Years of Age in the Woman ||: yet a Marriage Contract before such Time is not void, but only voidable, if it be not ratify'd by the Consent of the Parties in Wedlock, when they come to these respective Ages. This is the Age of Persons, which the Law has deem'd capable of Advice and Understanding, which ought to be principally regarded in the Business of Matrimony, because so many Inconveniences may flow from an indiscreet Marriage: And, therefore, though a Person under Puberty may contract Espousals *de futuro*; yet he cannot contract Matrimony or Espousals *de presenti*. But if this shall happen, the Person under the Age of Puberty ought, as soon as he or she shall arrive at such Age, to appear before the Bishop, his Official, or any other competent Judge, if he desires to have such Marriage declared null and void *ab initio*, and pray an Absolution thereof for want of a proper Consent *; otherwise the Marriage shall remain firm and valid; especially, if Carnal Copulation has ensu'd thereupon.

|| Nov. 100.
cap. 2.

* Hostiens.
in c. 1. X. 4.
15.

Thirdly, Matrimony ought to be contracted with the utmost Freedom and Liberty of Consent imaginable, without fear of any Person whatsoever †: For Matrimony contracted through any Menace or Impression of Fear, is null and void *ipso Jure*; so that it is not necessary to rescind the same by an Action, in the Civil and Canon Law called, *Quod metûs causâ*, because all Marriages ought to be free. For Marriages contracted against the Will of either of the Parties are usually attended with very bad and dismal Consequences ||: And, therefore, all Statutes and Decrees made against this Liberty of the Parties are null and void in their own Nature. But tho' Matrimony contracted thro' such a Fear as may happen to a Man of Courage, Constancy, and Resolution, be null and void *ipso Jure*; yet this Fear may be purged and done away by a spontaneous Cohabitation for so long a Time, as that the Cause of such Fear may be presum'd to cease and be destroy'd thereby; and a spontaneous Consent added in its room *. For, according to *Oldradus*, Cohabitation banishes and casts out Fear, whenever such Cohabitation happens, and especially after the Removal of such Cause of Fear: For Fear only remains during the Time, that the Cause of such Fear continues. Thus a Wife is presum'd to have contracted Wedlock thro' Fear, if the Husband beats her, because she would

† C. 5. 4. 12.

|| D. 23. 2.
22.

* X. 4. 7. 2.

not give her Consent to such a Contract. But 'tis otherwise, if the Man has beat the Woman on another Account. Now from this freedom of Consent, which is so necessary in Matrimony, it is inferr'd, that if a Judge has a Jealousy, or any well-grounded Suspicion, that this Liberty of Consent will be hindred by some Fear or Force induced on a Woman, he ought to see that such Woman be kept in some safe and proper Place, where she may express her Consent, and be without Restraint. By Fear, here we ought to understand such a Fear as may happen to a Man or Woman of good Courage and Resolution, and such as either includes some danger of Death, or else some bodily Torment and Distress: otherwise it can have no Operation in Law to rescind a matrimonial Contract.

In respect to the Consent of Parents; 'tis said in our Canons, that Children may not marry without their Consent†: for *Isaac* did not marry without his Father's leave, tho' God himself design'd and appointed the Marriage. And Marriages, that are made contrary to the Consent of Parents, are pronounced to be invalid both by the *Canon*|| and *Civil* Law; and the Church did sometimes Anathematize such as marry'd without the Consent of Parents. But yet when Sons and Daughters arrive at a competent Age, and are endued with the use of strong Reason, they may of themselves contract Marriage without this Consent: for 'tis reasonable, that Children should be left at liberty in nothing more than in Marriage; because their future Happiness in this Life depends hereon. By the *Civil* Law, indeed, an emancipated Son might have contracted Marriage without his Father's Consent*: But a Son under the Power of the Father, could not do it without his Approbation. And thus it appears, that this Consent (according to the *Civil* Law) did not depend on that particular Power which the Father was vested with, and which was peculiar to the *Roman* Citizens†. But as Children owe a reverential Obedience to their Parents, Sons at this day under Twenty-five Years of Age, and Daughters under Twenty, are, in *Holland*||, and other Countries, govern'd by the *Civil* Law, forbidden to marry without their Parents Consent: But if they exceed the said respective Ages, the Dissent of Parents, which is only naked and *simple*, without a sufficient Cause, is not a legal Impediment to hinder them from contracting Marriage. But Marriages contracted in any other manner, are there look'd upon to be as null and void *ipso Jure*; insomuch, as that they can not be confirm'd even by a subsequent carnal Copulation. The Law only makes such Marriages as are contracted without Consent of Parents *civilly* null and void, and not *naturally* so: But a Father cannot force his Children to marry whom and when he pleases.

I have just now observ'd, that the principal Thing required to a legal Marriage, is the Consent of the Parties contracting; which is sufficient alone to establish such a Marriage†: And, tho' there is nothing more contrary to Consent than Error; yet every Error does not exclude Consent. Wherefore, I shall here consider what kind of Error it is, according to the *Canon* Law, that hinders or impeaches a matrimonial Consent; and renders it null and void *ab initio*. Now there are four *Species* of Error, which are hereunto referr'd. The first is stiled *Error Personæ*: as when I have Thoughts of marrying *Ursula*; yet by my Mistake of the Person I have marry'd *Isabella*. For an Error of this kind, is not only an Impediment to a Marriage Contract, but it even dissolves the Contract it self, through a defect of Consent in the Person contracting||. For Deceit is oftentimes wont to intervene in this Case; which ought not to be of any Advantage to the Person deceiving another*. A second

Species

† Can. 100.

|| 27 Q. 2. 2.

* D. 23. 2. 25.

† J. 1. 9. 2.

|| Orden. van Polit. bin- nen Holl. Art. 3 & 13.

† D. 50. 17. 30.

|| X. 4. 1. 25.

* D. 24. 4. 1.

Species is stiled an Error of Condition; as when I think to marry a Free-Woman, and through a Mistake I have contracted Wedlock with a Bond-Woman, and so *vice versâ*: for by the *Canon* Law, such an Error is an Impediment to a matrimonial Contract†. But as there is now no † X. 4. 9. 2. such Thing among Christians as Persons that are truly Bondmen or Bondwomen, (this kind of Bondage or Servitude being now abolish'd among us by the Advantage of the Christian Religion) I shall not long insist on this Head. But if a Freedman marry'd a Bondwoman, knowing her to be such, the Church did not dissolve such a Marriage. And thus we read, that the Marriage between *Abraham* and *Agar* the Hand-maid, was a true and valid Marriage. The third *Species* is what we call *Error Fortunæ*; and is, when I think to marry a rich Wife, and in truth, have contracted Matrimony with a poor one. But this Error does not, even by the *Canon* Law, dissolve a Marriage-Contract made *Simply*, and without any Condition subsisting||: But 'tis otherwise by that Law, if I have contract- || X. 4. 1. 26. ed with a Person to marry her upon Condition that she is worth so many thousands Pounds, and the Condition is not made good. The last *Species* is stiled an Error of *Quality*, viz. when a Person is mistaken in respect of the other's Quality, with whom he or she contracts: As when a Man marries *Berta*, believing her to be a chaste Virgin, or of a noble Family and the like, and afterwards finds her to be a Person deflower'd, or of a mean Parentage*. But according to the common Opinion of the Doctors, * 39.Q. 1. 1. this does not render the Marriage invalid; because Matrimony celebrated under such kind of Error, in point of Consent, is deem'd to be *simply* voluntary as to the Nature and Substance of it, though in respect of the Accidents 'tis not voluntary. Nay, the *Canonists* are so far from rescinding a Marriage contracted with a Strumpet, that their Law makes it a matter of Merit for a Man to take an Harlot out of the Stews and marry her; because it is not the least Act of Charity (says the *Canon* Law) to recall a Person going astray from the Error of her ways: But the true Reason is, because that Law allows of publick Stews.

Among unlawful Marriages, there are some which are stiled *incestuous* Marriages, from the *Latin* Word *Cæstus*, as not being initiated *justâ venere*: For *Venus's* Girdle, or *Cæstus*, as made use of at all honest and decent Nuptials, was by the ancient *Civil* Law in *Latin*, stiled *Legitimorum amorum initium*, as *Politian* observes in his Miscellanies; that is to say, the Initiation of a lawful Marriage; for all such Marriages as are *incestuous* are unlawful, though all unlawful Marriages are not *incestuous*. Now *Incest* is from hence said to be a Carnal Copulation had between two Persons of Consanguinity or Affinity unto each other; and who, by a Prohibition of Law, cannot contract Matrimony: For that Marriages, contracted by such Persons within a certain Degree of Kindred, are condemn'd as *incestuous* Marriages both by the *Civil* and *Canon* Law. The *Persian* Magi were indeed begotten of the Mother and the Son; but the Marriage of Parents with their Children is not only forbidden by the *Jewish* and *Roman* Law, but even by the Gospel Dispensation. And so are all Marriages prohibited to Persons any wise ally'd to each in any Degree of the ascending or descending right Line, by reason of such Kindred or Consanguinity: as between Father and Daughter, Mother and Son, Grandfather and Granddaughter; Grandson and Grandmother; and so on *in infinitum*†. But God has not entirely forbid- † D. 23. 2. den us to marry our Kindred, but only the nearest of our Flesh, *Propin-* 53 & 58. *quos non Cognatos*, says the Law: for as to such as are ally'd to us in a C. 5. 2. 17. collateral Manner, this Prohibition only extends to some certain limited Degrees. Such Marriages as are contracted and enter'd into between
Ascendants

|| Lev. cap.
18. v. 29.

* Pag. 907.

† 33 Eliz.

|| Cap. 6.

* Tit. de
ingen. Hom.

|| 30 Q. 2.
5. 1. 2 & 3.

* X. 2. 9. 4.
in fin.

Ascendants and *Descendants*, are, by the *Civil* Law, stiled by the Title of Nefarious as well as *Incestuous*, to shew the Abhorrence that Law has of such kind of Marriages: Nay, the Laws of God do forbid us not only carnal Knowledge of a Mother, but even of a Step-mother also. Incest committed between *Ascendants* and *Descendants*, was, by the *Jewish* Law, punish'd with Death ||; it being a more heinous Crime with them than Adultery itself. The Interdicts of Marriage and carnal Copulation in the *Levitical* Law, were directed to the Men, and not to the Women, who are only interdicted by a Consequence and Implication of Law: for the Woman being interdicted to the Man, the Man must be also interdicted to the Woman; since a Man cannot marry a Woman, and she not marry him. But for a Man to marry his Wife's Sister, tho' she be not in the right Line ascending or descending, is a Marriage expressly forbidden by the *Levitical* Law. A Man marry'd his Grandfather's Brother's Wife by the Mother's side, and it was held here in *England* not to be an unlawful Marriage. A Man married his first Wife's Sister's Daughter, and it was held to be an unlawful Marriage; and after a Prohibition was pray'd, a Consultation was granted. See *Man's Case* in *More's** and *Croke's* † Reports. By the *Civil* Law, Matrimony is not prohibited with a Sister's Son or Daughter, in *English* commonly called a *Cousin German*, and in *Latin* stiled *Consobrinus*, and *Consobrina*: But 'tis otherwise by the *Canon* Law, in respect of Intermarriages between Cousin Germans, for the sake of Gain to the Church, by a Papal Dispensation. It was a Law among the *Jews* or *Hebrews*, that Freedmen should not marry their Handmaids; nor should any Persons be hereunto compell'd by Love, as we may read in the fourth Book of *Josephus's Jewish Antiquities* ||: But these were only unlawful, and not incestuous Marriages. And this too was an ancient *Salick* Law among the *Franks*. See the Book of the *Salick* Law *: *Qui ingenuas mulieres rapiunt*.

Pope *Evaristus* writing to the *African* Bishops, says, That Marriages ought not to be contracted in a clandestine manner; for Marriage (says he) is no otherwise Lawful, but when the Wife is demanded of such Persons as seem to have the Government and Dominion over the Woman's Person, and who have the Care and Guardianship of her: And unless she be espoused by the Consent of her Parents and nearest Relations, and be endow'd according to Law, and likewise at the time of her Nuptials, receives the Sacerdotal Benediction according to Custom, by the means of Prayer and Oblations, and be also given in Marriage by her *Paranymphe* (as usual) such Marriage is deem'd unlawful by the *Canon* Law. And this was the ancient way of celebrating legal Marriages in the Church: For otherwise they were only stiled *Conjugia presumpta*, and not lawful Marriages; and by that Law are rather term'd *Adulteria*, *Stupra* and *Contubernia*, than lawful Marriages ||. "Let no Believer or Christian of what Condition soever he be, presume to celebrate Wedlock in private, but let him publicly marry in the Lord, receiving the Benediction of the Priest," says the Text of that Law. The Council of *Trent* declares all clandestine Marriages to be null and void: But this is not Law in *England*; our Law only punishing such Marriages with the Censure of the Church.

The solemn and usual Times of solemnizing Marriage, according to the *Canon* Law, cease at certain Seasons of the Year, viz. from the first Sunday of our Lord's *Advent*, to the *Octave* of *Epiphany*, *inclusively*; and from the Beginning of *Lent*, to the *Octave* of *Easter*, *inclusively*; and from the first Day of *Rogation* Week, till seven Days after *Pentecost*; and hence Marriage may be lawfully celebrated on *Trinity* Sunday*.

But

But these Seasons are only appointed by the Papal *Canon* Law, for the sake of purchasing Dispensations: for tho' the Banns of Matrimony are seldom or never publish'd in *Lent*, &c. according to that Law; yet People may marry at that Time with Licences. But as for the Time of *Advent*, which was never observ'd in our Church as a Fast, there is no Foundation for such a Prohibition with us: And though on solemn Fasting Days our Ancestors thought fit to restrain the Common Liberties of Marriage during that Time, because the Mirth and Rejoycings which usually accompany Marriages, are not suitable to the Humiliation and Sorrow which we ought to show at such times for our Sins; yet *Easter* and *Whitsun* Weeks are usually Times of Mirth and Jollity; and therefore, Marriages at those Times ought not to be forbidden, as they are not with us.

A matrimonial Cause is in the *Canon* Law deem'd a Cause of an arduous and important Nature*, *Abb. post Ant. de Butrio*†: And hence it is, that in a matrimonial Cause, an Oath is not given in supply of Proof, according to the common receiv'd Doctrine of all the Doctors and the Gloss on the *Canon* Law||. And in matrimonial Causes, the Process ought to be in a summary manner, *viz. Simpliciter & de plano, & sine Strepitu & Figurâ judicii*†: insomuch that a definitive Sentence is usually pronounced in these Causes on bare Cognizance only had thereof, even without exhibiting any Libel at all, nor any Exceptions of *Stipulation* or *Guaranty* admitted herein by the *Civil* Law. Moreover, 'tis to be observ'd, That by that Law marry'd Women and Virgins may, in such Causes, appear in Judgment without a *Curator* or Guardian, and may be Advocates in their own proper Suits. Matrimonial Causes do also include Causes of Divorce, since the Dispute in this as well as in the Case of affirming a Marriage is *de Fœdere Matrimoniali**: And so likewise do all Causes incident and accessory unto Marriage come under the Stile of matrimonial Causes. But some have doubted whether Expences of Suit made in a Cause of Matrimony or Divorce, may be reckon'd under this Head. And *first*, It seems, that Expences made in a matrimonial Cause, or Cause of Divorce against the Party cast therein, ought not to be included, because all Marriages ought to be free, and so, consequently, (say some) ought the Prosecution thereof to be so too†. But, on the contrary, I think, that the Person cast, ought to be condemn'd in Expences to the Person that obtains in the Cause, since the Law does hereby repress Calumny and malicious Prosecutions. And this is ever true, when there is a Divorce or Separation of Matrimony pray'd at the Instance of either of the Parties: But 'tis otherwise, if the Marriage be affirm'd; for then a demand of Expences (peradventure) ceases, because the Estate and Goods of the marry'd Couple are as it were in Common||, or (at least) the Husband, as long as the Marriage subsists, is made Lord and Proprietor of the Woman's Estate*, in such a manner that she can make no demand on him in this Behalf during the Continuance of Matrimony†.

I have before observ'd, that Marriage was by the *Canon* Law interdicted to the Clergy rather to support the Papal Power against the State, than that it was unlawful in itself; well knowing that they would have less regard for the State, when they gave no lawful Pledges to support it. But tho' there were several Canons made against the Marriage of Priests; yet they were never receiv'd here, but only in *France* and *Italy*: For the *British* Clergy had their Wives, when the *Saxons* ruled here, tho' King *Edgar* at *Dunstan's* Request, to favour the Monks, pressed the marry'd Clergy to leave their Wives; which they refusing to do, were depriv'd, and the Monks put into their Benefices. But 'tis certain, that

* X. 4. 14.
8. Gloss. in
c. 34. X. 2.
24. v. *absolute*.
† In c. 3.
X. 1. 29.
|| In c. 34.
X. 2. 24.
† Cl. 2. 1. 2.

* X. 4. 14. 1.

† X. 4. 1. 14.

|| X. 1. 41. 8.

* C. 3. 32. 9.

† C. 5. 20. 2.

the Priests here kept their Wives long after the Conquest: For, at a Synod held at *Westminster* about the third Year of *Henry* the first's Reign, a Canon was made prohibiting all Priests to marry. And *Henry*, Archdeacon of *Huntington*, observes on that Canon, *viz.* That it seem'd very pure to some, but as dangerous to others; for such Priests as were not able to contain, would by this means fall into horrible uncleanness, to the great Disgrace of the Christian Religion. Cardinal *Crema*, who was sent hither by Pope *Honorius*, afterwards held a Synod at *London*, wherein he made very invective Speeches against the marry'd Clergy, telling them, that it was a horrid Sin for a Priest to rise from a Woman, and immediately to make the Body of Christ: But the next day after he made this Speech, he said Mass himself, and at Night was taken in Bed with a Whore. This Story is deliver'd to us by the Writers of that Age, and we have no Reason to doubt the Truth of it, since *Henry* of *Huntington* who liv'd at that Time, and was a Priest himself, and the Son of a Priest, gives us a large Account of this matter; and concludes, that it was too notorious to be deny'd.

Two Years afterwards another Synod was called at *London*, where some Canons were made to enforce those touching the Celibacy of the Clergy: And two Years after that, another was held at *Westminster*, where it was decreed, that Priests should leave their Wives before the next St. *Andrew's* Day, under Pain of Deprivation. But the Clergy being unwilling to submit to this Decree, the Execution thereof was left to the King*, who took Money of several Priests by way of Commutation, and so permitted them to live with their Wives; and by this means that Constitution was in a manner set aside. By these Canons, the Regulars were under a stricter Obligation than the Secular Clergy, as having made a Vow of Chastity: And, therefore, if a Deacon or Secular Priest had taken a Wife, the Marriage was not void, but voidable; but if a Monk or Nun marry'd, it was void; because they had vow'd Chastity. But the Incontinency of the Priests was so notorious, that about Forty-six Years after the last Canon was made concerning the Celibacy of the Clergy†, Men in Orders were, by a Synod held at *Westminster*, prohibited not only from Marrying, but from keeping Concubines: And the like was done by *Hubert* Archbishop of *Canterbury* in a Synod held at *York*‡, wherein he presided for that Purpose. Afterwards *Stephen Langton* revived those Decrees, and added a Punishment to be inflicted on the Concubines of benefic'd Priests and Men in Orders, not when they were living, but after their death, *viz.* That they should not have Church-Burial, unless they repented; and that the Priests should not be admitted to the Sacraments whilst they kept such Women. But notwithstanding these Constitutions, several of the marry'd Clergy kept their Benefices till Cardinal *Otho* made a *Legatine* Constitution*, whereby such Priests were *ipso Jure* depriv'd of their Ecclesiastical Benefices, as did either privately or openly contract Matrimony, or did in a clandestine manner retain their Wives with their Churches, or did acquire such Benefices *de novo* after Marriage, or were promoted to holy Orders, as being contrary to the Canons of the Church†. And so severe was this *Legatine* Constitution against the Marriage of Priests, that the Estates, which they gain'd by the Church after such Marriages, were to be restor'd and given back to the Church, and their Children were not to be admitted to the Priesthood, though they should have the Pope's Dispensation. And thus this matter continued for almost three Hundred Years, *viz.* till *Henry* the VIIIth's Reign, during all which Time such scandalous Crimes were committed by the Clergy, that Dispensations to keep Concubines were

very

* Hen. 1.

† Anno. 25
H. 2.

‡ Anno. 7
R. 1.

* Tit. 14.

† 28 Dist.
1. 2 & 5.

very common in those Days, if the Priests had Money enough to purchase them. And to such an open Defiance of all Shame were they grown, that the Bishop of *Winchester* (as we read) for the Time being, had a Grant from the Pope to license Stews and Brothel Houses in his Diocess, as was done here in *Southwark*; and hence came the saying of the *Winchester* Goose, for the foul Disease among the Clergy. For lest they should give a bad Example to the Laity, they kept these Concubines not in their Houses, but were privately maintain'd in the Stews; for there was a Constitution made against such as *publicly* kept Concubines in their Houses, and did not remove them within a Month, &c. *: And this made them take Lodgings for them, which occasion'd the making another Provincial Canon, *viz.* That they should not have *publick* access to them *cum scandalo* †. And Sir *Simon Degg* observes, that it was wisely done by the *French* and *German* Laity to solicit the Council of *Trent*, that Priests might be suffer'd to marry, as being unwilling to trust their Wives and Daughters at Confession with Men who might have Concubines tho' no Wives: And Pope *Pius II.* affirm'd, That tho' there were several good Reasons against the Marriage of Priests, yet none which could stand in competition with those Reasons which were for it.

* Othon
Tit. 15.

† Lindw.
Lib. 3. Tit. 2.
cap. 1.

But I don't find, that the Clergy were in those Days reform'd by all those Canons: and therefore it was thought necessary to add a Temporal Law || to those Canons, in order to punish their Incontinency; and it was, *That the Ordinary might commit such Priests to Prison during Pleasure*; and this Law is still in force. Afterwards an Act was made to declare it *Felony* for a Priest to marry; or if marry'd, carnally to know his Wife, or so much as publickly to converse with her; or for any Person to preach or affirm the Lawfulness of a Priest's Marriage *. But the punishment of Death being thought too severe, this Act was repeal'd the very next Year: And then it was enacted †, That if a Priest was guilty of *Incontinency*, he should forfeit all his Goods, &c. and all his Spiritual Preferments except one; and upon a Conviction of the second Offence, he was to forfeit all his Goods, and the Profits of his Lands, Benefices, and Promotions; and for the third Offence, besides the aforesaid Forfeitures, he was to be imprison'd during Life. But these Severities were not effectual enough to prevent this Vice: And, therefore, in the same Year, another Act was made, by which all Marriages were declared to be lawful which were not prohibited by God's Law ||. And this was a general Law, in which the Clergy as well as the Laity were comprehended: But the Statute, which more nearly concerns them, was that of *Edward* the VIth *: the Preamble setting forth, That though it would be better for Priests to live chaste and separate from Womens Company, that they might with more Fervency attend the Ministry of the Gospel; and that it was to be hoped, they would of themselves vow perpetual Chastity, but that when it was enforced by severe Laws, such Inconveniencies follow'd as were not fit to be mention'd: And, therefore, it was enacted, *That all Laws, Canons and Constitutions, prohibiting the Clergy to marry (who by the Laws of God might marry) and all Pains and Forfeitures therein contain'd, should be void.* And by another Act made *Anno 5 & 6 Edw. VI.* it was declared, That the Marriage of Priests should be held Lawful, and their Children be Legitimate and Inheritable, &c. For the former was only taken to be an Act of Toleration for Priests to marry, to prevent greater Inconveniencies; and that notwithstanding that Act, it was still unlawful for the Clergy to marry, and the Issue of such Marriages were accounted Bastards: Wherefore another Act was made, declaring the Marriage of Priests lawful, and their Children legitimate †.

|| 1 H. 7. c. 4.

* 31 H. 8.
c. 14.

† 32 H. 8.
cap. 10.

|| 32 H. 8.
cap. 38.

* 1 & 3 E. 6.
cap. 21.

† 5 & 6 E. 6.
Of cap. 12.



Of Monks, Monasteries, and the like.

HAVING already in the Beginning of this Work said something of Abbots, Priors, &c. I shall here discourse of Monks, Monasteries, and the like, tho' we have nothing to do with these Pretenders to Religion among us; and (I hope in God) never shall again: But as they are the Ground-work, and best Support of the Papal Power, and make a considerable Figure in the *Canon Law*, I could not pass them over in silence without a Chasm in the Undertaking itself, and the Title will serve to explain several other Parts of that Law.

Now a Monk is a Regular, who lives in a Monastery or Religious House, under the Pretence of giving himself up entirely to the Service of God, and the Good of the Church, by quitting the Cares of this World: And Persons become Monks three several ways. *First*, By paternal Devotion; *Secondly*, By proper Profession*; and, *Thirdly*, By the Emission of a Vow. A Person becomes a Monk by paternal Devotion, when a Father delivers up his Child to some Religious House before his Age of Puberty†: in which Case, the Child being under Puberty, and undergoing the sacred Tonsure, or putting on the Habit of his Order, ought, upon a Summons at Fifteen, to be ask'd ||, Whether he will continue in that Habit or not? and if he shall by his continuance in such Habit ratify his Profession formerly made, he shall not afterwards quit the same*. But if he will return to a Secular Habit or State of Life, he shall have Liberty so to do†; because (says that Law) it would be for the Disadvantage of Religion, to have the Services thereof perform'd by Compulsion. And, therefore, 'tis decreed, that no one shall be forced into Holy Orders, nor be compell'd to enter into any Religious Order, either by his Father, or any others whatsoever. But 'tis Lawful to induce a Person hereunto by sweet and gentle Means, tho' not by Violence, Simony, and the like. Before the Age of Puberty, viz. Fourteen in the Male||, and Twelve in the Female* Issue, Children thus devoted by their Parents cannot quit this Religious Bondage without the Parent's Consent†; which they might otherwise do, if an Offering of this kind had not intervened. But if a Child under the Age of Puberty has taken on himself the Monachal or Monkish Tonsure without his Parents Consent, they may irritate and annul this Act: yet if they will not reclaim him within a Year, by applying to some competent Judge, they shall not be able to do it afterwards. A Guardian or Tutor may, according to *Felinus*, reclaim his Ward or Pupil from a Monastery, though he cannot make a Tender or Oblation of him: But *Innocent* is of another Opinion, in respect of this part of the Law, according to this Maxim, viz. *Contrariorum eadem est ratio*. Note, therefore, that a Child under the Age of Puberty ought not to go into a Monastery contrary to Consent of Parents; and if he should thus list himself before such Age, or be devoted by his Parents, he does not thereby cease to be in his Parents power: But 'tis otherwise, if he does it after such an Age||. And if Parents will offer up a Child before such Age, contrary to such Child's Inclination, the Act is invalid, according to *Innocentius*; for the Child may leave the Monastery at his pleasure.

* 20 Q. 1. 3.

† 20 Q. 1. 3.

|| X. 3. 31. 8.

* X. 3. 31. 22.

† X. 3. 31. 14. X. 3. 31. 11.

|| X. 3. 31. 8.

* 3. 31. 12.

† X. 3. 31. 12.

|| 20 Q. 2. 1.

sure. But if such Monastery into which the Child has thus entred himself without or contrary to his Parents Consent, be at such a distance, that it cannot be known within a Year's time, then a larger space of Time shall be allow'd*. But if Persons of an *adult* Age shall devote themselves to a Religious Order, the Parents cannot prohibit the same; for by entering into such Order, the Father's Power is dissolv'd and at an end †; such Persons by a Fiction of Law being dead as to this World. And it would be the same Thing, if the Father himself should go into a Monastery; for his Power would then be at end: because when a Father comes under the Abbot's Power as subject to him, he cannot have another in his Power. An *adult* Age is above the Age of Puberty, and under that of twenty five Years ‖.

Secondly, A Person becomes a Monk by his own proper Profession, and this either *expressly* or *tacitly*. Expressly, when any one after the Year of his Probation, takes the *Monkish* Habit on himself, and professes himself willing to obey the Rules of the Monastery †. Certain Scholars entred themselves of the *Franciscan* Order, but in making their Profession did not all of them observe the same Method. For one of them made a Profession *à principio*, another within the Year, and a third after the Year ended: whereupon it became a Question, *Quid Juris?* And, *First*, it was well enough to observe the Will of the Person (without any Distinction) entering himself, since Profession simply makes a Monk. But hereunto 'tis objected, That 'tis sometimes necessary to make a Tryal of himself; and this Trial shall be according to the Quality of a common Case. *Secondly*, The several Orders of Religious differ from each other in respect of the Time of Probation, and the Laws concerning this Time are various and arbitrary. Some allow only one Year, some two ‖, and others three Years for this End and Purpose: But regularly speaking, the space of a Year is observ'd. It has been a Query, Whether a Person may be said to have compleated his Year, who, after six Months continuance in a Monastery, quits the same, and then after some interval of Time returns again, and abides therein for six other Months, so that such Person may be admitted to his Profession? And it seems it may, tho' the Doctors differ in Opinion. By what Words this Profession may be made, and what Things are essential hereunto, I shall not consider, referring myself to the Doctors on the marginal Law*: But, according to them, an express Profession only requires five Things. *First*, That the Person professing in a Male be fourteen Years of Age †, and in a Female twelve ‖, according to the ancient Canons: But the Council of *Trent* requires eighteen Years of Age in both*. *Secondly*, That this Profession be by a Person that has the Power of incorporating himself in some Religious Order. *Thirdly*, That this Profession be made to some Order approv'd by Law †. *Fourthly*, That the Prelate of the Order do require the Advice of his Chapter touching the same. And, *Fifthly*, That this Profession be made with a regard to the three Vows of Religion ‖. But if the Person desirous of Conversion receives the Habit, and professes before the regular Time prefix'd for such Profession, the Party professing is bound to a regular Observance, and shall be truly deem'd a Monk. But though an Abbot is bound to consult and ask the Advice of his Chapter touching the Admission of a Monk (as aforesaid) in order to render such Admission valid; yet he is not bound to follow the same, but may alone, without the Chapter, admit him*. Though a Person in a Monastery of *Mendicants*, making Profession *ante annum probationis*, be not in special obliged to observe the Rules of their Order; yet he is bound in general to pursue the Religious Order which he has chosen. And this is particular

* Arg. 17 Q.

2. 3.

† Gloss. in c. 1. 20 Q. 1.

‖ D. 34. 3.

20. D. 32. 1.

59.

† X. 3. 31. 16.

‖ 19 Q. 3. 5.

* X. 3. 31.

13.

† vi. 3. 14. 1.

‖ 20 Q. 1. 8.

* Sess. 25.

c. 15 & 16.

† vi. 3. 15. 1.

‖ Sess. ut

sup.

* X. 3. 31.

16.

particular in the *Mendicant* Order. But as a discreet Abbot may on a just and reasonable Account allow of Profession before the Time of Probation, so he may for the like Reason defer the same. Hence 'tis, that if an unknown Person desires Admittance into a Monastery, he shall not be receiv'd till he has wore the Monks Habit for three Years, lest he should become a Servant immediately after his Year of Probation, or be otherwise found unfit for a Monastery. For there are several Things that render a Person incapable of becoming a Monk or a Religious. As first, want of due Age*. *Secondly*, Bondage or Servitude; tho' this of a Monk is the greatest in the World, if they liv'd according to their Rules, being the most abject Slaves upon Earth to the Power of the Pope, and the Superstition of their respective Orders. *Thirdly*, If he be liable or obnoxious to Debts. *Fourthly*, If he be made a Bishop without the Pope's leave. *Fifthly*, If he has consummated Matrimony, or has had carnal Knowledge of a Woman after Espousals. And *lastly*, If he comes into the Monastery by Compulsion contrary to his own Inclination†. But if a Bondman or Servant shall continue in the Monastery, and be afterwards made free for his good Services, he shall by this means, for the future, become a Freedman: which Artifice of the Churchmen increas'd the number of Monks very much.

* X. 3. 31. 8.

† X. 3. 31. 1.

A Person is said to make a *tacit* Profession, when it appears by proper Conjectures, that he is for ever willing to lead the Life of a Monk, and to serve God by some Religious Vow, and retains the Habit of a Monk after the Year of Probation, when this Habit is common and indistinctly given to Novices and Persons profess'd; or takes on himself the Habit of Persons profess'd, when this Habit is distinct. Whence the Council of *Toledo* ordains, That Clerks, who pretend to be Monks in Name and Habit, and are not so indeed, shall be punish'd, and made true Monks. Therefore the Person who will not be thus bound, ought, within the Year, to lay aside the Habit. I now speak of a Person under the Age of Puberty, and of him, who has voluntarily submitted himself, and receiv'd such Habit, or worn the same (at least). But if the Person bearing the same, protests, that he does not thereby intend himself a Monk, 'tis otherwise. The Difference between the Habits of Persons profess'd and Novices, is, that the Habit of the first is blessed by the Priest, and the other is not; the Habit of Persons profess'd is given before the Altar, and that of Novices is not, but in any other Place; the Habit of the first is given by the Abbot, but of the latter by other Persons.

There was sometimes a wide difference made, whether a Person did *expressly* or *tacitly* profess a Religious Order: For the first does absolutely and necessarily, without any Distinction, oblige the Person to that Order he has profess'd, without changing his secular Habit||: For the Habit does not make a Man a Monk, but the Profession of such a Rule or Order of Life*. But if this Profession be *tacitly* made within the Year of Probation by any one's taking on himself the Habit, which is given to such as profess a Religious Order, he is not particularly bound to that Order, the Habit of which he takes on himself. But yet the Person receiving the Habit, is in general obliged to some Order or other; provided he be of lawful Age, and knowingly and advisedly continues to wear the Habit for three Days: But 'tis otherwise if he labours under any Fit of Madness or Indisposition of Mind. A Canon of the Church of *Milan* becoming a *Capuchin*, and having a Prebend, it was a Question, whether his Benefice became void thereby, Regulars being incapable of such secular Benefices? and it was held in the Negative; because he might leave the Order, and lead a Clerical Life. But if he had been a Regular profess'd,

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it had been otherwise, for a bare entring into a Religious Order, does not vacate a Benefice without the Person's Consent, who thus becomes Religious: For Benefices do not become void by reason of Espousals contracted, but only on the score of Marriage itself; since Espousals may be easily dissolv'd again. Therefore, a Person entring into a Religious Order, may retain his Benefice during the Probation-Year, and during that Time it shall not be conferr'd on another*; but in the *Interim* it shall be serv'd by another, allowing him a convenient Portion out of the Profits thereof†: But if the Person becoming Religious shall either *tacitly* or *expressly* profess such an Order, or consent thereunto, such Benefice shall then be given to another. A certain Person vow'd to enter into the *Jesuits* Order, and then repenting thereof, desired to be promoted to a secular Dignity in the Church; and if he did not obtain that, he resolv'd to enter into some other Order: Whereupon a Question in Law arising, it seem'd at first, that he ought to have full Liberty herein; because Services which are by Compulsion, are not acceptable to God. But it was answer'd, that because he made a Vow in the Beginning, which is a Matter of Will and Choice, he ought to observe it now as a Matter of Necessity: which brings me to speak of the third way of becoming a Monk, *viz.* by the Emission of a Vow.

* Gloss. in c. 4. vi. 3. 14.
† Gloss. ut sup.

For if a Person being *compos Mentis* ||, tho' he labours under some bodily Infirmary, has made a Vow to enter into a Religious Order, he is thereby bound to become a Monk; for such Vow made, according to the *Papists*, so far binds a Man unto God's Service, that he shall be compell'd to perform such Promise, tho' he should, after such Vow made, obtain a Prelacy: But tho' he ought to quit the Prelacy, and go into a Monastery*; yet he may afterwards accept of a Bishoprick, if canonically elected thereunto†. Now a Vow, according to *Aquinas*, is a spontaneous and deliberate Promise made to God touching Things relating to him: and it is twofold. A *simple* Vow is that which is not strengthen'd by any Profession: But a *solemn* Vow, is what is confirm'd either by an *express* or *tacit* Profession. He, who puts on the Monkish Habit of his own Will, and being of due Age, ought not to quit the same; but shall be constrain'd to live in his proper Monastery obedient to his Abbot: But if hereunto compell'd, 'tis otherwise, provided the Compulsion be such as may happen to a Man of Courage and Resolution. A Monk can have no such Thing as Property in any Estate or Goods of Fortune*; for if he has, he ought immediately to quit and surrender the same: For the Abdication hereof is so far annex'd to the Rule of a Monk, that the Pope himself cannot dispense with it; but before a Person becomes a Monk, he may dispose of his Estate by his last Will and Testament. And if any Monk, at the Time of his Death, shall be found to have any Thing as Property, he shall be deprived of Christian Burial†: Nay, so severe is the Law in this respect, that if such Person has been bury'd, it enjoins the Corpse to be dug and taken up again, if it may be done without Scandal or Offence; as *Gregory the Great* says he did it ||.

|| X. 3. 31. 15.

* X. 3. 34. 10.

† X. 2. 14. 7.

* X. 3. 35. 6.

† X. 3. 35. 42.

|| X. 3. 35. 4.

'Tis deliver'd as the common Maxim of the *Canonists*, That tho' a Monk be made a Bishop, yet he is not thereby releas'd from wearing his Religious Habit of a Monk, nor from the three substantial Vows of his Order: For if such Monk shall thereupon lay aside his Religious Habit, and assume the exterior *Tunick* of a Bishop, he shall incur (according to some Persons) the Pain of Excommunication*. *Sed quære*, since no Canon inflicts this Punishment on a Monk, that assumes the white Garment in virtue of his Episcopal Dignity, this being worn by Bishops on their outward Garment: Yet if a Monk wears the Episcopal Habit on his being

* X. 3. 35. 6.

being made a Bishop, he acts an ill Part according to the *Canon Law*. For a Monk is not, by the Episcopal Habit, exempt from the substantial Vows of his Order, tho' he be free from the Prohibition of eating Flesh, and from the Jurisdiction of his Abbot; and likewise from all other Rules and Statutes of the Religious Order itself. But when I say, that a Monk is exempt from the Jurisdiction of his Abbot on his being made a Bishop, I do not mean that he is exempt from the Vow of his Obedience, for he still remains subject to that Vow: But I would be understood to mean, that he is free from the Jurisdiction of a regular Prelate, because he has no Abbot to yield Obedience to. But according to *Aquinas*, a Monk made a Bishop is (notwithstanding) subject to all the Rules and Statutes of his Religious Profession or Order; provided, they do in no wise hinder him in the Exercise of his Episcopal Office. And hence *Cajetan* observes, that a Monk becoming a Bishop is not entirely exempt from Fasting, and the Prohibition of eating Flesh, inferring, that such Monk commits a mortal Sin by eating Flesh on a *Friday*, on which day Christ suffer'd in the Flesh.

Abbots ought to be very diligent in searching after and reclaiming their fugitive Monks by excommunicating them, if they do not return to their Monastery upon a Summons, and lead better Lives for the future*: and such are said to be Fugitives, as stay out of the Monastery, and conceal themselves from their Abbot†; for Monks ought not to ramble up and down the Towns and Villages where they dwell, after lewd Women and other Diversions of the Flesh, as is too frequently practis'd among them: nor ought they rashly and giddily to pass from one Monastery to another, unless the Monastery unto which a Monk desires to be translated, be of a stricter Order; in which Case, the Prelate ought, without any Difficulty, to assist in such a Translation, lest he should be said (as the Papal Law phrases it) to hinder a Purpose divinely inspired. And if it be a probable Doubt, which is the stricter Order, the Matter shall be determin'd by some other Abbot; for the immediate superior Abbot to the Monks ought not to be a Judge, as being, as it were, in his own proper Cause. And that a Monastick Discipline may be well observ'd, the Abbot ought to be chosen out of the Assembly of Monks, and to be a Person of eminent Merit for Discretion, and in Humility in the Government of the House, that the Monks may pay Devotion and Obedience to him with all readiness. A Person, therefore, that has not been a Monk profess'd, cannot be chosen an Abbot according to the *Canon Law*||; for he that has not taken on himself the Form of a Disciple, ought not to assume the Office of a Master; nor ought that Man to be set over others, who never knew what it was to be a Subject himself*. By that Law an Abbot has great Authority over his Monks, insomuch that he can absolve them from all Sins and Censures, unless this Power be specially reserv'd to another. Though a Monk or Abbot may be conven'd before a local Ordinary; yet Religious Places, and the Persons of Religious Men, are not subject to him in the like manner as other secular Places and Persons are†: for a Monk ought rather to obey his Abbot than the Bishop of the Place. And an Abbot may in like manner acquire any Possession by the means of his Monk or Monks, as a Lord and Master may by his Bondmen or Vassals; the Life of a Monk being a *Species* of Vassalage.

Having thus far treated of the State and Law relating to Monks, and as they come within the compass of the Complaints which *St. Jerome*, and other Fathers, have made against Ecclesiasticks; I will close this Title with the Rise and Progress of them, and shew how they came to have a Share in the Revenues and Affairs of the Church. Now their Beginning

* X. 3. 31.
24.

† Abb. in
c. 24. X. 3.
31.

|| X. 1. 6. 49.

* X. 1. 14. 3.

† X. 3. 36. 5.

is commonly attributed to *Paul* the Hermit and *St. Anthony*, as some stile him; in imitation of whom, *Egypt* was entirely fill'd with this kind of Locust: Some of which liv'd a solitary Life, and others liv'd in Community. That kind of Life afterwards got footing in *Syria*, *Pontus*, and the *Lesser Asia*: And those of *Egypt* have still retain'd the Name of their Founder *St. Anthony*; whereas those of *Pontus* and the *Lesser Asia*, took the Name of *Basil*, who brought from *Egypt* into those Parts, the Rule and Institution of *St. Anthony*. So that *St. Basil*, and *St. Anthony*, have stock'd the *Levant* with this sort of Cattle, which at present infest the World, and bear their Names. *Athanasius* coming to *Rome*, and having there publish'd the Life of *St. Anthony*, several Persons in *Italy* also embrac'd that kind of Life, which from thence was propagated into the other Provinces.

We must nevertheless take care not to confound the Clerks, who lived in Community under the Direction of their Bishops, with this kind of Herd. *Eusebius*, Bishop of *Virceil*, was the first in the *West*, who (according to the Testimony of *St. Ambrose*) join'd together two Things, which seem'd most contrary to each other, viz. the Monastick Rule and Clerks living in Community: for 'tis not to be imagin'd, that these Clerks were true Monks, any more than that they embrac'd the same kind of Life under *St. Martin*, and *St. Austin*. They borrow'd only from the Monks their way of living in common, being for that no less serviceable to the Church: Whereas in the Beginning, Monks liv'd out of Towns; and, being for the most part Laicks, were so far from performing any publick Ministry in the Church, that their Profession wholly debarr'd them from it; nor ought they by the *Canon Law*, even at this time, to be preferr'd to the Rectories of Parochial Churches. All their Employment consisted in Prayer, and labouring with their own Hands; and reading the Holy Scriptures*. 'Tis true, Bishops sometimes drew Monks out of their Monasteries, and associated them to their Clergy, to maintain an idle Priesthood; but then they were no longer Monks, being reckon'd in the number of Clerks. *St. Jerome* alwas distinguishes this kind of Life; and, speaking of himself as a Monk, says †, *Clerks are Shepherds, for my part I am one of the Sheep*: And he ever builds on this Principle, viz. *That 'tis one Thing to be a Monk, and another Thing to be a Clerk*. He nevertheless acknowledges, that Monks by their Profession were not excluded from Ecclesiastical Employments: But on the contrary, that Monachism ought to serve them as a State of Probation thereunto, when Bishops shall judge them worthy. *Live* (says he in his Letter to *Rusticus*) *in such a manner, as you may deserve to be a Clerk, and if the People or your Bishop fix their Eyes upon you for that end, do that which is incumbent on a Clerk*.

* *Con. 5.*
Dist. c. 33.

† *Hieron.*
Epist. ad
Heliod.

The Monks were then subject to Bishops and ordinary Pastors, having not so much as distinct Places in the Church from the rest of the People, because they were of the number of Laicks. But when several Heresies happen'd in the Eastern Church, which were to be oppos'd by Men of Learning, it was thought convenient to draw them from their Solitudes, and to settle the most learned of them in the Suburbs of Cities, that they might be useful to the People. But *St. Chrysostom* thinking fit to call them even into Cities, they thereupon most of them apply'd themselves to Study, and by their aspiring Thoughts, with great Precipitation, got into Orders; whereof Pope *Zozimus* complains in one of his Epistles. But as they were useful to Bishops not only in spiritual but even in temporal Affairs, they acquired great Reputation for a Time; and such Bishops as rejoiced to have a numerous Clergy, and fit Persons about them to

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carry on their wicked Designs against the State, gave them considerable Offices, wherein they behav'd themselves well enough for a Season, as appear'd in the Affair of *Nestorius*. But having abus'd the Authority put into their Hands, and growing insupportable to all People, even to the Bishops themselves, by their Vanity, and meddling in all kinds of Business, without the Permission of their Ordinaries, the Council of *Chalcedon* thought fit to make Canons against Monks, for putting a stop to the Disorders they occasion'd in the Church. Wherefore that Council decreed, That for the future, Monks should be wholly under the Jurisdiction of Bishops, without whose Leave they should no more meddle in any Affairs either Civil or Ecclesiastical; That they should not leave their Monasteries, by rambling up and down, and frequenting Towns; That they should not build any Chapel or Monastery without the Diocesan's Consent; and that they should be secluded from all Church Employments, unless called thereunto by their Bishops on necessary Occasions *.

* Can. 4.

And thus was the *Canon* Law re-establish'd in respect of Monks, who continu'd not long without shaking it off; and they were put into an absolute dependance on Bishops, who had the Inspection as well of the temporal as spiritual Concerns of the Monastery. As the Monks, at that Time, were but part of the People, so they had no other temporal Revenue but what they gain'd by their own Labour, and a share in the Alms which the Bishops caus'd to be given them, if they were in want, in the same manner as to the other Poor. Besides that, the People gave them private Alms, that they might pray to God for them. Some of them, nevertheless, kept somewhat of their own Patrimony; but *Ferome* blames them as false Monks, who follow'd not the Rules of Evangelical Poverty. As to Spirituals, they came to the Parish-Church with the rest of the People, and were sometimes allow'd to send for a Priest to administer the Sacrament to them. But at length they were suffer'd to have a Priest of their own number; provided, he continu'd a Monk, and only officiated in the Monastery. This gave them an opportunity of having Churches apart, and making a kind of separate Body, by Incroachments on the secular Clergy. After this, 'twas impossible for Bishops to hinder them from performing all Ecclesiastical Functions in their Monasteries; and since that time, there has always been Disputes betwixt the Bishops and the Monks, because the Monks on many Occasions refus'd to submit to the Orders of the Bishops, which they pretended to be contrary to the Discipline of their Monasteries.

Though at that Time, most part of the Monks were in the *East*; yet for all that, there were a great many in the *West*, before St. *Bennet* planted a particular Order there. St. *Ferome*, *Ambrose*, and *Gregory*, mention Monks in *Italy* amongst the *Gauls*, and in several other parts of *Europe*. Besides, such as have written of the Beginning of Christianity in several Countries, speak of Monks that were there. But there was this Difference betwixt the first Monks that were in *Europe* before St. *Bennet*, and those that succeeded him, that they were barely Monks, without being addicted to any particular Order. To be a Monk, was sufficient to make them receiv'd as such in all Monasteries wherever they travelled. There was no Talk then of particular Rules and Institutions, but every Monk labour'd to improve himself by the Example of others; and to embrace what he thought most perfect in the Monastick Life. So that it may be said, that the Monks both of the *East* and *West* were all of one Order, having at that Time no mark of Distinction amongst them. The ancient Rules, written by the primitive Monks, ought

ought rather to be look'd on as different Commentaries on a Monastick Life : For the Design of such as embraced a Monkish Life, was not to distinguish themselves by particular Rules from the manner of other Mens living, but to submit themselves, by a more special Resignation, to the Gospel-Maxims, and to find out all possible ways how they might live up to the Counsels of our Saviour, who will have us to wean our Hearts entirely from the World, that we may follow him alone who is above it.

I shall not here speak of St. *Bennet's* Institution, which is in every one's knowledge, but shall only observe by the bye, that his Intention was not to make any Innovations in the Monastick Life, but to collect what he found most perfect in the Rules and Institutions of others. But Matters are much alter'd since, the several Orders of Monks now-a-days making so many petty different Republicks in the Church ; and are all as so many little States, having all their several Interests. How great a Nuisance and Burden this Set of Men are at present to the World, I shall not here enquire, having increas'd their Houses to a very considerable Number ; inasmuch that *Trithemius* tells us, there were more than 15000 Monasteries of the *Benedictine* or St. *Bennet's* Order, in less than 1000 Years after its first Institution ; and *Volateran* accounted in his Time, 24 Popes of this Order, 200 Cardinals, 1600 Archbishops, 4000 Bishops, 15700 famous Abbots, and 156000 canoniz'd Saints. With us here in *England*, the most remarkable Monastery was that of *Bangor*, of which *Pelagius* was Abbot, wherein (we read) there were above 2000 Monks, and that when any of them in this, or other Religious Houses, were found capable of Orders by their Superiors, they were then ordain'd, not by the Abbot, but by the Bishop. In the City of *Canterbury* there was an antient Church dedicated to St. *Martin*, which was first built by the *Romans*, and afterwards rebuilt by *Austin* of that See, and by him dedicated to *Christ*, which is the Cathedral at this time. He likewise built a Monastery there, which is now a Church, and call'd by his Name : And he being of the *Benedictine* Order, was the first who brought those Monks thither, and placed them in his own Foundations*. Among the *English Saxons*, there were only two Orders of Monks, of which one follow'd the Rites of the *Egyptian* Monks ; and the other were *Benedictines* who came hither with *Austin*. A Law was enacted in *Germany*, after the Conquest thereof by the *French* King *Clodoveus*, and afterwards confirm'd by *Martel*, *Pepin* and *Charlemagne* ; forbidding all Freedmen from entring into a Monastery without the Prince's Leave for so doing. For before this Law, several Persons were found to have acted this Part not on the score of Piety, but to avoid the danger of being Soldiers, and to exempt themselves from the Trouble of Civil Offices and Employments : And another Reason assign'd for this Law, is, that very rich Men were often circumvented by the crafty Wiles of the Monks ; and, like Fishes, drawn into their Nets, to the manifest Impoverishing of the State. From the Time of King *Edgar*, to the Reign of *Henry VIII.* Monachism had been growing here in *England*, and it was settled in some of the great Cathedrals : But the Ignorance and Vices of these Men was so exorbitant, that that wise Prince, who was a great encourager of Learning, perswaded Cardinal *Woolsey* to build two Colleges for the Increase of learned Men. And that these Colleges might be endow'd, it was, even in that Age, thought very justifiable to suppress some Monasteries, and to annex their Revenues to those new-built Foundations : And this was the Beginning of the Suppression of some Monasteries, and the total Dissolution of them follow'd in that Reign. 'Tis certain the Monks had the greatest

* A. D. 1615.

greatest Revenue of the Church in their power, which made them idle and lascivious, sensual and illiterate. And they disparaged all manner of Learning, as the Foundation of Heresies and other Mischiefs, which render'd it contemptible to all good Men : But as we are deliver'd from them, I will leave their Actions to be enquired into by such as are pester'd with them.



Of Mortmain, the Rise and Consequences thereof, &c.

* X. 3. 13. 5. **E**STATES, or Things temporal, which are immoveable and given to the Church for the Celebration of Divine * Worship by the *Canon* Law, ought not regularly to be sold or alienated, neither by Prelates presiding over Churches, nor by the Pope himself † : Yea, if such Persons shall sell or alienate these Estates, they may be reclaim'd and revok'd again by the Church ‡. And, therefore, we say, that when an Estate is thus given to the Church, it is given *in mortuam manum*, or, as we call it, in *Mortmain*; because, according to *Pol. Virgil*, in the 17th Book of his *English History*, such Estates as do accrue to the Church, are unalienable: See the Life of King *Edward*. And such an Estate returns to the Church, even without the Church's making any Restitution of the Price paid for it *. It is called *Mortmain*, says my Lord *Coke*, *quia Possessio eorum est immortalis*: For the *Latin Word Manus* here, imports the same as Possession; and the Word *mortua* does, by the Figure *Antiphrasis*, signify *immortal*, because Bodies politick and corporate never die. Others say, that 'tis called *Mortmain* in resemblance to the holding of a Man's Hand that is ready to die; because what he then holds, he does not let go till he be dead. But these and others are fram'd out of Man's Wit and Invention; but the Cause of the Name, and the Meaning thereof, was taken from the Effects, as 'tis express'd in the Statute itself †, *viz. Whereby the Services that are due from such Fees, and which, at the Beginning, were provided for the Defence of the Realm, are wrongfully withdrawn, and the chief Lords lose their Escheats of the same*: So that in respect of the Lords, the Lands were said to come to dead Mens Hands; for that by Alienation in *Mortmain*, they wholly lost their Escheats, and in effect, their Knights-Services for the Defence of the Realm. For a dead Hand yields no Service.

† 7 E. 1. De Religiosis.

But King *Edward I.* by a Parliament held in his Reign, wisely enacted a Statute, restraining People at the Time of their Death or otherwise, to give or make over any Lands or Rents to Churches or Religious Houses without the King's Leave first obtain'd, which was called the Statute of *Mortmain*. For the Clergy in those Times, under a Pretence of visiting the Sick, and assisting them on their Death-Beds with spiritual Advice, so artfully manag'd the matter, either by Threats or Persuasions, that they had acquired by Legacies to the Church, almost two Parts in three of the whole Lands of the Kingdom into their Hands, according to a Particular, which (my Lord *Coke* says) he had seen: and whatever they got, they could not part with either by the Laws of the Church or the Realm, tho'

tho' they might get what they could lay their Hands on. And, indeed, these pretended Religious liv'd such fat and lazy Lives on the Spoils of the Laity, having thus, by their insinuating Ways, gotten into their Possession the greatest part of the best Lands in the Kingdom, that the People began to grow very uneasy to see themselves live so poor to maintain a pamper'd Clergy: And these Lands being exempted from Taxes*, unless they voluntarily submitted to them, or the Pope, for the furtherance of his Designs, order'd the Payment of them; the Crown was thereby much disabled in times of War. So that this wise King was oblig'd to put a stop to these Superstitious Gifts. But the Clergy soon after this Act grew very restless at this restraint laid on the Weakness of the Laity, and labour'd to stir up his Subjects to a Rebellion against him; but failing in their Purpose, they demanded, That the Statute against *Mortmain* might be repeal'd by him: To which the King gave this resolute Answer, *viz. That as of himself he had not the Power of making Laws, so that without his Parliament's Consent he could not annihilate any.*

* X. 3. 39.
1 & 2.

Mortmain had its first Rise from the Monks persuading ignorant People into a Belief of Purgatory, from whence the Souls of the deceas'd might be redeem'd by Masses said for such as were in Torment there, which otherwise they would suffer; and this made them give Lands to the Religious Houses, to find a Priest to say Masses every Day for their Souls: And so great was the Superstition of former Ages, that these Monasteries would have got most of the Lands in *England*, if some Statutes had not been made to restrain such Gifts; the Purport of which were, *viz.* That Grants of Lands to Religious Houses should be void, if made without the King's Licence, that is to say, if they were immediately held of him; but if such Lands were held of an inferior Lord, then the Licence was to be had both from the King and him. And if there was no such Licence, then whoever had the Inheritance, might enter within a Year after such Alienation; and if he neglected, then the immediate Heir might enter in half a Year; and if he did not, then the King might †. But these Statutes did not entirely prevent the Inconveniencies intended; for the Kings seldom or never refus'd to confirm such Grants: For if they did, their Reigns were sure to be made uneasy to them by the Clergy.

† 7 F. 1. De
Religiosis.

The first Statute we meet with against *Mortmain* was that of *Magna Charta**, declaring, that if any one shall give Lands to a Religious House, the Grant shall be void, and the Land forfeited to the Lord of the Fee. The next was that of *Edward I.* already remembred. But Ecclesiasticks being thus debarr'd by the former Statutes from obtaining Lands in *Mortmain* by Alienation, they were resolv'd to acquire them by fraud, and to elude the aforesaid Acts by a Default in a Suit: And, therefore, it was in the 13th Year of *Edward I.* by a Statute † ordain'd in such Case, That it should be enquired by the Country, whether or no the Demandant had a just Title thereunto; and if so, then he should recover Seisin; but if otherwise, then the Lord of the Fee should enter, as aforesaid. And by this Statute, each mean Lord has a full half Year given him after the Lord next before him, till it comes to the King. The next Fraud the Clergy were guilty of, in order to obtain Lands in *Mortmain*, was the procuring them to be converted into Church-yards, and then they became of course to be annex'd to the Church, and unalienable as sacred Ground: And, therefore, a Statute was made in *Richard the 1st's* Time ‖, declaring, That it is within the Compass of the Statute of *Edward I.* * to convert any Land into a Church-yard, though it be done with the Consent or Connivance of the Ter-tenant, and confirm'd by the Pope's Bull.

* 9 H. 3.
c. 36.

† 2 West. 3.

‖ 15 Ric. 2.
c. 5.
* 7 E. 1.
ut sup.

† 23 H. 8.
c. 10.

There have been various Statutes, at several times, made hereupon, but the Ecclesiasticks always found some means or other to evade them till *Henry* the VIIIth's Reign †, when they were pretty well bound down by a Law then made, enacting, That if any Grants of Lands or other Hereditaments, shall be made in Trust to the Use of any Churches, Chapels, Church-wardens, Guilds, Fraternities, &c. to have perpetual Obits, or a continual Service of a Priest for ever, or for sixty or eighty Years, or to such like Uses or Intents; all such Uses, Intents, and Purposes, shall be void, they being no Corporations, but erected either of Devotion, or else by the common Consent of the People. And all collateral Assurances made for defeating this Statute shall be void; and the said Statute shall be expounded most beneficially for the Destruction of such Uses as aforesaid. But this Act was not to prejudice Corporations, where there is a Custom to devise Lands in *Mortmain*.



Of a Mortuary, and the Payment thereof.

* Lindw.
lib. 1. Tit. 3.
cap. 1.

A *Mortuary*, is a Gift which was left by a Man at the time of his Death to his Parish Church or Priest, as is said, for a Recompence of his personal Tithes and Offerings not duly paid in his Life-time*: and it is called a *Mortuary*, because in the Days of *Popery* here in *England*, it was left to the Church for the Soul of the Person deceas'd, and for that it was to be brought to the Church, together with the Corpse of the deceas'd, at the time of his Funeral or Burial; and it was paid of all kinds of Animals whatever, provided they were such as we could have a Property in, whether of a wild or tame Nature. For there are some sort of Animals of so fierce and wild a Nature, that we cannot have the Use and Custody of them; and, consequently, they are no Man's Property. Under the Name of *Animals*, we not only reckon Beasts on the Land, but even Birds in the Air, and Fishes in the Sea. Therefore, if the Person deceas'd, had three or more of these Animals ‖, whether they were Beasts, Birds, or Fishes, they were liable to become a *Mortuary*, provided they were found among the Goods of the Persons deceas'd.

‖ Lindw.
lib. 3. Tit.
15. cap. 2.

† A. D. 1216.

* Lindw.
ut supr.

Dugdale, in his *Antiquities of Warwickshire*, says, That in antient Times a *Mortuary* was stiled a *Corpse Present*, because the Beast was presented with the Body at the Funeral as aforesaid: And *Selden*, in his *History of Tithes*, speaking of the Constitution of *Robert*, Bishop of *Durham* †, is of the same Opinion; Rubrick *De rebus Liberorum decimandis & mortuariis inde solvendis*. And *Lindwood* in the Text of the Law, shews, that if there be a *Mortuary de bonis propriis*, it ought to be paid to the Mother Church*. But this Word *Mortuarium*, was sometimes used in a Civil as well as in an Ecclesiastical Sense; and was payable to the Lord of the Fee, as well as to the Parish-Priest. For, according to the Custom of *England* in those Times, if a Person had, at the time of his Death, three or more Animals among his Goods and Chattels, of what kind soever they were, the best was reserv'd for the Lord of the Mannor, and the second best was reserv'd for the Church where he usually receiv'd the Sacraments during his Life †; and this was to be paid without any Fraud or Contradiction whatsoever, as a Compensation for his sub-

† Lindw. ut
supr. v. Ec-
clesiæ sue.

subtraction of Personal Tithes and Oblations, and was given to the Church (according to the Fashion of those Times) *pro salute animæ*. But then this subtraction of Tithes and Offerings ought to happen thro' Ignorance; for if personal Tithes and Offerings were subtracted knowingly and wilfully by him, and these Tithes and Offerings amounted to a considerable Sum or Quantity, *viz.* If they exceeded the Value of the second best Animal; this was no just Recompence for withdrawing the same*; since to give an Animal of five Shillings Value could not be thought to be a satisfaction for Tithes and Offerings amounting to twenty Shillings or upwards. But tho' the Person had made no such Subtraction at all, yet so greedy were the Clergy in those days, that they would have this Chattel paid them, if they could find any Traces of a Custom that this had been practis'd for any length of Time: And so they had a regard to Usage for an unwarrantable Payment. And if a Person had a live or a quick Stock in common with another, he was (notwithstanding) bound to observe this Constitution in respect of Payment; especially, if the Person had living Animals of this kind in such a manner, as that he could reckon them among his own quick Stock; and if such a Chattel was reputed to be his in the Opinion of other Men: For by this Law, in favour of the Church, and relating to the Welfare and Salvation of Mens Souls (as pretended) the Church might, on the score of a Mortuary, claim even such a Chattel, as the Person deceas'd had in common with another Man, making (at least) entire Satisfaction to him, according to his Part for his Partnership therein†. But though if a Woman died before her Husband, no Mortuary was due; yet it was a good Law, that if she liv'd a Widow in her own House, or elsewhere, after his Decease for a Year, with the Government of her Family, she was bound to pay a Mortuary. And all such Persons as refus'd to pay this Debt of a Mortuary to the Church, whether it was founded upon Law or Custom, did incur the Censure of the Church; tho' it was originally establish'd upon the Good will and Superstition of Persons dying under an Apprehension of eternal Damnation for their subtracting the Priest's Dues, according to the Doctrine then preach'd up among them for filthy Gain and Lucre.

* Lindw. lib. 1. Tit. 3. c. 1. v. Subtractionis.

† Lindw. ut supr. v. in bonis.

|| Lindw. ut supr.

* In c. 42. X. 5. 3.

† Hoff. ut supr.

|| Lindw. ut supr. v. Ecclesie jure.

* Hob. Rep. p. 175 & 176.

*Hostiensis**, gives us an Instance of a Custom at *Venice*, where the tenth part of moveable Effects is paid to the Church upon any one's Death; and there says, that in *Britain* formerly a third part was thus given and paid thereunto: And hence it became a Custom in some Places, for the Church to have the wearing Apparel, and Bed on which the deceas'd Person died†. And if a Person, at the Time of his Death, had an Estate in Goods in several Countries and Provinces, they were to be distributed according to the Custom of each Country or Province, *viz.* That the Goods in one Place should be divided into three Parts; and the Goods in the other, likewise divided according to the Custom of the Province. There was a Duty paid at Funerals by our *Saxon* Ancestors, which was call'd the *Saxon Soul-shot*; and this Payment was not only enjoin'd by Councils, but by the Laws of *Canutus*, one of our *Danish* Kings: But I cannot find any Foundation of Truth for the Custom mention'd by *Hostiensis*, in all our antient Histories, tho' some think this to be the original of Mortuaries, and others, that of the *Saxon Soul-shot*.

A Mortuary was not properly and originally due to an Ecclesiastical Incumbent from any Person, besides from those of his own Parish: But, by an unwarrantable Custom in some Places of this Kingdom, they are now demanded by Parsons of other Parishes, as the Corpse passes thro' them*, under the false and fraudulent Name of *Obventions*, so called (as pretended) from meeting the Corpse; whereas an *Obvention*, properly

speaking

* Cok. 11.
Rep. fol. 15.
† D. 14. 1.
1. 15. D. 7.
1. 7. 1.

|| Lindw. ut
supr. v. Ec-
clesiæ sue.

* Lindw. ut
supr. v. cu-
jusunque ge-
neris.

† 21 H. 8.
cap. 6.

speaking, is a generical Term for all Church-Dues whatsoever; and so is the Word used in the *Common* *, *Civil* †, and *Canon* Law, to denote a general Revenue. For, by virtue of the Provincial Constitution, a Mortuary is only due to that Church unto which the Person deceas'd did belong as a Parishioner, tho' he died in another Parish, or was bury'd elsewhere. But if the Person dwelt at several times in divers Parishes, and was in his Life-time to receive the Sacraments in each of them, then as the Animal was but one, and could not be divided, it was to be valued, and each Church was to have its Share in Money according to the Rate thereof: But if the Person was only instructed in one of these Parishes, it was otherwise ||; for a Denomination ought to be made à Majori.

It has been already related, That Mortuaries were formerly payable in Beasts or Animals, as Horses, Cows, Oxen, Hogs and the like; and it was enough to render a Mortuary due, if there were three Animals of one and the same kind, as three Horses or three Cows; or if there were but two of the same kind, as two Horses, and the third of another kind, as one Cow *, (for the Clergy never wanted their Distinctions, if they could gain by them). And, according to *Lindwood*, it was the same Thing, if these three Animals were of three different kinds; as one Horse, one Ox, and one Sheep. And as the Payment of Mortuaries was enjoind by several Provincial Constitutions; so it was likewise commanded by the Statute of *Circumspectè agatis*; yet still left to Custom. But, by a Statute in *Henry* the VIII's Reign †, a Rate or Order is there set down for the Payment of Mortuaries in Money; which is now a standing Law concerning Mortuaries. The Preamble of which Statute recites, "That Doubts and Questions had been made not only on the Manner and Form of demanding, but of the Quantity and Value of Mortuaries:" And, therefore, it was enacted, That *no Person should demand a Mortuary, where by Custom it hath not usually been paid, nor by the Death of a Feme Covert*; and in this Respect, that Law was conformable to the aforesaid Constitution. But it was further enacted, *That it should not be demanded on the Death of a Child, or of a Person that was not a House-keeper, or of a Traveller, or of one not residing in the Place where he died, nor where the Goods of the deceas'd were not of the Value of ten Marks, his Debts being deducted: and no Person should take above 3 s. 4 d. where the Goods did not exceed 30 l. nor above 6 s. 8 d. where they exceeded 30 l. and not 40 l. nor above 10 s. where they amount to 48 l. or more, under the Penalty of forfeiting so much as he takes or demands more, and likewise 40 s. to the Party grieved to be recovered by Action. And if a Person should happen to die in the Place where he did not dwell, the Mortuary must be paid where he did most commonly live; and that such Mortuaries which then had been settled by Custom, if less than abovemention'd, should not be alter'd. No Mortuaries shall be paid in Wales or Berwick, or any of their Marches, save only in Wales and the Marches thereof, where they have been accustom'd to be paid; and such as are there paid, shall be regulated according to the Order prescrib'd by this Act. But the Bishops of Bangor, Llandaff, St. David's, and St. Asaph, and the Archdeacon of Chester, shall take Mortuaries of the Priests within their Jurisdiction, as has been accustom'd, notwithstanding this Act.*

Before this Act, it was the receiv'd Opinion, That a Mortuary could only be recover'd in the Spiritual Court; and if a Prohibition was brought, Consultations in such Cases had always been granted. For says *Fitzherbert* ||, where a Custom is alledg'd for the Payment of a Mortuary, it shall be try'd in the Spiritual Court, because that Court had the Original

Cog.

|| F. N. B.

Cognizance of Mortuaries: And, therefore, it was held reasonable, that all Dependencies on it should be try'd there. It cannot be deny'd but that there are some Cases in the Year-Books tending this way *. A *Pro munire facias* was brought against the Vicar of S. for suing in the Court Christian for a Heifer, &c. who pleaded a Custom in the Parish to have the best Beast for a Mortuary of every Parishioner dying there, and that such a Person died possess'd of the Heifer which the Vicar would have seiz'd, but the Plaintiff privately drove it away; and thereupon the Vicar sued him in the Spiritual Court to produce it: Now it was objected, that this was only a Chattel, and the Question was only about the Possession, and for that Reason it ought to be try'd at the Common Law; yet the Plea was held good, because the Temporal Courts have no Jurisdiction of Mortuaries, or of its Dependencies. So in an Action of Trespass for taking a Horse †, the Defendant pleaded to the Jurisdiction of the Court, † 2 H. 5. 10. for that he was Vicar of G. and the Plaintiff was Parson of the same Church; and that R. a Parishioner died possess'd of the Horse which the Vicar took as a *Mortuary*: And now this had been a good Plea, if the Property of the Horse had been admitted to be in the Parishioner at the time of his Death; but that was denied, he only having the Possession, but the Plaintiff claiming the Property. I might cite more Cases to this Purpose: But since the Statute, the Law has been adjudg'd to be otherwise. For if the Custom be deny'd, it shall be try'd at the Common Law ||; and a Prohibition shall be granted, unless it be for so much Money due for a Mortuary; and the Plaintiff suggests, that the *Quantum* is settled by the Statute, but does not alledge it to be of less Value: For in such a Case, no Prohibition shall go, because the Statute does not toll the Jurisdiction of the Spiritual Court. A Prohibition was pray'd on a Libel in the Spiritual Court for a Mortuary; and the Defendant suggested, that by the Statute *, no Mortuary ought to be paid but in such Places only where it had been usually paid before the making of that Statute; and there was no Custom in this Place to pay a Mortuary: for Mortuaries are not due by Law, but only by the particular Custom of Places ||. 'Tis true, a Prohibition was deny'd in *Mark and Gilbert's Case*, because 'twas admitted that a Mortuary was due there by Custom, tho' they differ'd in the Person to whom it was to be paid. The Court said, that Prohibitions had been granted and deny'd on such Suggestions: Wherefore, the Defendant was here order'd to take a Declaration in a Prohibition as to the Custom, and try the Custom at Law †. † Mod. Rep. ut supr.

In a Prohibition pray'd to the Court of Arches, in a Suit by an Appeal thither for a Mortuary begun at *Llandaff*, on the aforesaid Statute, viz. That after Debts and Legacies paid, he should, as Vicar, have a Mortuary, without setting forth in his Libel any Custom for the Payment of them as usual; because *Wales* and *Chester* are excepted out of the Statute: And the Suggestion was, that no Mortuary had been used to be paid; and that this Plea was refused in the Spiritual Court. And in the first of *Croke's Reports* || it be held, that the Custom is tryable in the Spiritual Court, and not at Common Law; yet the Court was inclin'd to think, that no Suit can be in *Wales* on the Statute of Mortuaries *. See *Keble's* Rep. pt. 3d. pag. 75. But *Lutwich* says, That where a Custom is deny'd, it shall be try'd at Law; because Customs are part of the Law of the Land †: as where 'tis alledg'd *de modo Decimandi* it shall be try'd at Common Law, 2 Roll. Abr. 307. But this seems to be a Fetch of our common Lawyers to extend the Cognizance of their own Courts, since Customs relating to Ecclesiasticals may be as well try'd in the Spiritual Courts.

* 10 H. 4. Plito. 2.

|| Crok. Eliz. p. 151. 3. Mod. Rep. 268.

* 21 H. 8. c. 6.

|| 2 Inst. 491.

|| Pag. 172.

* Kelw. Rep.

† Lutw. Rep. pt. 2. pag. 1069.



Of a Notary or Register, and his Office.

¶ Nov. 44.
cap. 1.
† In L. 1.
D. 5. 1.
* 16 Q. 3.
15. 4.

¶ vi. 1. 3. 9. 7.

THAT the Truth of Things may the better appear, the Law enjoins all Acts, which are sped either in an ordinary or extraordinary *judicial* Process, to be written by a *Notary Publick* or Register, in *Latin* sometimes stiled *Tabellio* ||; and, according to *Bartolus*, *Baldus*, and other Writers, sometimes term'd *Judex chartularius* †; because (say they) a Notary approaches and comes near the Nature of a Judge: or else it requires that two or three * fit and credible Witnesses be made use of to attest the Truth thereof in the Place of a Notary, whose Duty 'tis to write down whatever is transacted in Judgment, as it literally appears to them; and if the Judge shall neglect these Matters aforesaid, he shall be punish'd by his superior Judge; and no Presumption shall lie in favour of the Process, any further than the Cause appears by proper and lawful Documents. A Notary Publick, that writes the Acts of Court, ought not only to be elected by the Judge, but approv'd also by each of the Parties in Suit; for though it does of *common Right* belong to the Office of the Judge to assume and chuse a Notary for reducing the Acts of Court in every Cause into Writing ||; yet if a Notary be a suspected Person, he may be recus'd and set aside by the *Litigants*: For the Use of a Notary was not introduced so much on the Judge's Account, to help his Memory in the Cause, but that an innocent *Litigant* might not be injur'd by the Injustice of a wicked Judge; and likewise that Truth might appear, and Falshood be abolish'd in all *judicial* Pleadings.

† Abb. in
c. un. X. 1.
39. N. 8.
* Abb. in
c. 1. X. 2.
22. N. 4.

† C. 10. 69.
3. X. 2. 22.
15.

A Notary was anciently a Scribe or Scrivener, that only took Minutes and made short Draughts of Writings, and other Instruments, both publick and private. But at this Day, we call him a *Notary Publick*, who confirms and attests the Truth of any Deeds or Writings, in order to render the same more credible and authentick in any Country whatever: And he is principally made use of in Courts of Judicature, and in Business relating to Merchants. For a Notary Publick is a certain kind of Witness; and, therefore, ought to give Evidence touching such Things as fall under his corporeal Senses, and not of such Matters as fall under the Judgment of the Understanding: Because it only belongs to the Judge to pronounce Sentence and Judgment according to the Understanding, and not to Witnesses or Notaries and the like †. Nor can a Notary give Evidence of that, touching which he was not requested to make a *notarial* Act; and, therefore, he ought to be ask'd, and requested *: But 'tis otherwise in a *judicial* Production made in his Presence. And a Notary being requested by the Parties, ought to hear the Business in his own proper Person, and to write the Acts himself; and not to delegate this Matter to another †, under a Penalty to be inflicted on such Notary as shall act contrary hereunto. But though a Notary cannot delegate another Person to make an Instrument; yet if the Person be a Notary, such Instrument shall be valid, tho' the Notary delegating the same shall be punish'd. A Notary, after his Creation, cannot refuse to make an Instrument and to do other *notarial* Acts, without incurring the Guilt of Per-

Perjury, if he be requested thereunto; because he swears at the Time of Admission into his Office, that he will conform himself hereunto, if requested at any time; and if he fails herein without a sufficient Reason given to excuse himself, he shall (according to *Hostiensis* *) be depriv'd of his *notarial* Office.

* In sum de
fid. Instr.
§. ex quibus.

A Notary is in our Law-Books, therefore, said to be a publick Servant, because he serves in a publick Manner and Capacity ||; and on Request made to him, is bound to serve all Persons whatsoever, and shall be compell'd to make Instruments for them (as aforesaid) if need be: But he is not bound to do it *gratis*, but may lawfully demand a reasonable Fee in Money for the Execution of his Office *; and sue for the same if it be not paid him.

|| Paul. de
Castr. in
l. 2. D. 46.
6. N. 2.

* D. 2. 13.
10.

A Notary that has been requested to make an Instrument, ought to finish and compleat the same by his own Hand (as above hinted) unless the Judge orders it to be finish'd by another †: But in other Cases, if an Instrument be written by the Hand of one Notary, and subscrib'd and sign'd by the Hand of another, such Instrument shall be held and deem'd as a suspected Instrument ||. But a Notary cannot make an Instrument that concerns his own Act and Deed, since the Subject of his Business ought to be the Act and Deed of some Person that applies to him *. A Notary is oblig'd to make and publish all common Instruments by reason of the Matter therein contain'd; and, by Consent of Parties, Notaries have an ordinary Jurisdiction between such Parties. A Notary ought not to add any Thing to an Instrument without the Leave and Authority of the Judge, after such Instrument has been once publish'd and deliver'd to the Party: And this is more especially true, when such Instrument has been *judicially* exhibited.

† Abb. Conf.
68. vol. 2.

|| X. 2. 22. 6.

* Abb. in
conf. 37. X.
2. 21. N. 12.

Our Law-Books give a Notary several Names and Appellations, as *Ta- bellio* †, *Actuarius*, *Registrarius*, *Scriiniarius* ||, and the like; all which Words are put to signify one and the same Thing: tho' we here in *Eng- land*, confine the Word *Registrarius* to the Officer of some Court, who has the Custody of the Records and Archives of such Court, and often- times distinguish him from the Actuary thereof; but (I think) a Regi- ster ought always to be a Notary Publick, because it seems to be a ne- cessary Qualification to his Office *. Now the Office of a Notary in a *Ju- dicial* Cause is employ'd about three Things. *First*, He ought to register and enroll all the *judicial* Acts of the Court, according to the Decree and Order of the Judge, setting down in the Act the very Time and Place of Writing the same: For the Judge's Precept and Authority is necessary hereunto. *2dly*, He ought to deliver to the Parties, at their special Re- quest, Copies and Exemplifications of all such *judicial* Acts and Proceed- ings, as are there enacted and decreed. And, *3dly*, he ought to retain and keep in his Custody the Originals of all such Acts and Proceedings commonly called the *Protocols*; that in case any Dispute or Difficulty should afterwards arise touching the same, Recourse may be had there- unto. So that if the Judge should say, that he would have the Acts of Court remain with him, the Will of the Notary or Register herein is surely to be prefer'd, as I have already remembred under the Title of *ju- dicial Acts* †: For if any Doubt or Question should happen touching his own Writing of them, he may with more Truth and Certainty aver the same. Whereas otherwise he might incur the imminent Danger of Perjury and Falsification; and hence 'tis the Notary's Interest, that all such Acts and Proceedings shall continue with him. But if Notaries are Officers to Bishops, Counts and Rectors of Cities and the like, they may be com- pell'd to send all such Acts and Proceedings into the Office-Chamber, as soon as they have perform'd and finish'd their Duty herein.

† Nov. 44.

c. 1.
|| Nov. 41.

* Paul. t
supr.

† Vid. Pag.
29.

As

As to the Qualifications of a Notary, there are four Things principally requir'd thereunto, *viz.* *First*, He ought to be a Person of Trust and Fidelity. *Secondly*, A Person of some Worth and Dignity, and not a Person of a low Fortune and Station in the World. *Thirdly*, A Person well instructed in the Business of a Notary, and intirely *adroit* in framing Acts of Court, and in taking the Examination of Witnesses. And *Fourthly*, by the *Civil* and *Canon* Law he ought to be born in lawful Wedlock, and no Bastard. Now *Fidelity* consists in several Things. *First*, in Diligence, since every Notary at the time of his Creation, swears thus to execute his Office; and accordingly he is presum'd to execute the same with Diligence and Fidelity, and not presum'd to write any thing in the Acts of Court, but what the Witnesses have really depos'd, the Parties alledg'd, and the Judge decreed. *Secondly*, A Notary ought (according to some) to be a Christian Believer: for so they understand the Word *Fidelis* in the Text; and, therefore, an Infidel cannot be a Notary. *Thirdly*, A Notary, according to others on the Word *Fidelis*, ought to be a Liege-Subject; bearing Faith and Allegiance to him, who made him a Notary; which, by the *Canon-Law*, none can do but the Pope or Emperor*: And hence it is that the Archbishop of *Canterbury* did by virtue of his *Legatine*-Power create Notaries with us in *England*. And *Fourthly*, in respect of Fidelity, he ought upon demand, or request made to him (as aforesaid) to register all such things as he shall see or hear belonging to his Office (for on these two corporeal Senses his Business turns) making all Acts and Instruments without any diminution of Truth, or raising any Words out of the Registers and Records which he has in his possession. Yea, he ought to keep all Things committed to his Trust as the Apple of his Eye, and not to reveal any Secrets enjoin'd him. There are other Considerations, that respect the Fidelity of a Notary or Register, which I have not leisure here to mention. But 'tis to be noted further, that 'tis sufficient for a Person to have taken the general Oath of a Notary for the faithful Execution of his Office at the Time of his Creation, and shall not be compelled to take a particular Oath for the said Purpose, on his being assum'd and chosen to execute the Office of a Notary in respect of any special Act †.

* Ar. X. 5.
31. 12. ad
fin. Inn. 8c
Hoff. X. 2.
22. 15.

† Abb. in
c. 1. Cl. 5.
3. N. 23.

|| Oldrad.
Conf. Anch.
Conf. 217.
Alex. conf.
166.

* Bald. in
l. 2. D. 1. 14.

† Bart. in
l. 13. C. 4. 1.
Par. Conf.
149.

* Conf. 178.
N. 3. vol. 2.

I shall next consider, whether a Person who acts as a Notary, may be presum'd to be such, and when this Presumption lies. And, first, 'tis laid down as a Rule in Law, that no one is presum'd to be such, because this is not a Quality born with a Man himself ||: And, therefore, (as we say) that as no one is presum'd to be a Clerk; so in the like manner we may affirm, that no one is presum'd to be a Notary. But *First*, this Rule does not hold true, if we find such Person registred and enrolled in the Matriculation-Book of a reputed Notary: For then he is presum'd to be a Notary*. And thus we say, that he is presum'd to be a Scholar, who is found registred and enrolled in the Matriculation-Book belonging to the Scholars of any University †: And in the same manner he is presum'd to be a Merchant, who is found enrolled in the Matriculation-Book belonging to Merchants. For a Presumption lies in favour of a Matriculation-Book, which proves any one to be of the Number of those, who ought to be matriculated. I speak here of a Notary, that is dead, and whose Admission cannot be otherwise prov'd: For the Attestation of a Notary, even after his Death, shall be well regarded, if his Hand-Writing may be prov'd either by Witnesses, or the Matriculation-Book it self. *Socinus* the younger says*, that, according to the receiv'd Opinion of the Doctors, a Notary ought to be ask'd and requested to make a publick Instrument, in order to give Credit and Authority thereunto: As in a doubtful Case if he shall

shall say in the Instrument, *that he was asked*, according to *Bartolus* *, * In l. 30. and *Innocentius* †, he shall be presum'd to have been ask'd, and no one ought to doubt but that such Instrument shall have Credit given it. † In c. 1. X. 2. 22. N. 7. Nay, though he should not say in the Instrument, that he was ask'd, yet if he be still living, and will affirm that he was ask'd, he ought to be believ'd according to the latter ||. Therefore, the great Question is, Whether a Notary, that is dead, and who has not declar'd in Writing *that he was ask'd*, shall be presum'd to have been ask'd? And herein the Doctors differ very much. For the Gloss on the Law *, and several of the Doctors, as *Bartolus*, *Baldus*, *Angelus*, *Jacob. de Belvisio*, &c. † held, That such a Notary is presum'd to have been ask'd: And this is the receiv'd Opinion in our Law-Books. For the Office of a Notary being a publick Office, as that of the *Argentarius* was heretofore among the *Romans*, whose principal Business it was to reduce Accounts into Writing; and, therefore, whatever he wrote in such Accounts, he was presum'd to write the same by the Order and Command of him, that had an Interest therein ||: Wherefore, by a Parity of Reason, we say, That if a Notary has reduced a Testament into Writing, he is presum'd to have done it by the Order of the Testator, who has an Interest therein, viz. that he may have from such a Will an Heir or Successor to his Estate of his own Nomination and Appointment. || In c. 1. X. 2. 22. * Nov. 41. c. 1. † In l. 27. D. 28. 1. & in l. 1. C. 6. 47. || D. 2. 13. 4. D. 2. 13. 6. 4.

The Evidence of a Notary is so great, that two Idoneous Witnesses are not of equal Credit to the Writing of one publick Notary, if his Reputation and Character be free from any Taint of Falshood: But no Credit ought to be given to a Notary, who shall, at the Time of his Death, declare that he has made a false Instrument. And if a Notary shall be convicted or condemn'd of Forgery, or making a false Instrument, such Conviction, or Condemnation, shall prejudice the Person, at whose Instance such Instrument itself was made. And the Reason of this is to oblige all Persons to be careful what Notaries they employ. For the Business of a Notary is not so much a Dignity, as it is a Matter of great Trust and Duty: and, therefore, an infamous Person may (according to some Men) be a Notary *, unless his Infamy be such as arises from some Crime or Offence committed by him in his Office †; and 'tis on this Account, that a Bastard or spurious Issue, who is an infamous Person by the *Civil* Law, may (according to these Men's Opinion) be a Notary, tho' he be a Bastard. But a Notary charg'd with Falshood, or accus'd of Forgery, ought not (pending such Charge or Accusation) to be in the intermediate Time depriv'd of his notarial Office: Yea, Instruments made by a Notary, before he stands thus deprived of his Office by the *declaratory* Sentence of the Judge, are good and valid in Law; because he is not, *ipso jure*, deprived thereof, but a *declaratory* Sentence of the Court is necessary hereunto. * Bart. in l. 5. D. 48. 11. † C. 18. 70. 12.

Here in *England*, the Creation of publick Notaries belongs to the King's Majesty in his High Court of *Chancery*, as it does to most other Princes ||; because this is an Act or Thing done for the Advantage of the publick Weal, and is a Badge or Ensign of Sovereign Majesty reserv'd to the Prince alone, which we in other Terms stile the Royal Prerogative. And all Notaries at their entrance into their Office, ought to swear, "That they will not make out the Acts of such Persons as are not of sound Mind and Memory; That they will not deny Copies of Acts to any Person requesting the same; And that they will insert and put in to their Instruments all the proper and usual Clauses." Both a Layman and a Clergyman may execute this Office, tho' some will have it, that it does not become the Order of Clergymen to execute the same

† X. 3. 50. 8. *ob eorum insigne Ministerium* †; because (say they) the Office of a Notary is *vile Munus*. But this Rule (I think) seems to fail, unless there be a Custom to the contrary; especially if he was created a Notary before he became a Clerk. Others will have it, that he may execute this Office in Ecclesiasticals, but not in Temporals. But the Office of a Notary, according to some, is an honourable Employment, and an Office of Dignity: And therefore (say they) as 'tis just and fit that it should be conferr'd on a Man of Worth and Dignity, a Clergyman may (according to them) execute the same, tho' the *Canon* Law seems to disallow of it. And as the Office of a Notary is a publick Office respecting the Advantage of the State, he ought to have a House of his own, where he may be found and apply'd to, and not wander up and down without a fix'd Habitation. Notaries (says a certain Author) ought to have *proprias Bancas sive Scribanias*; and it matters not, whether they are their own in Propriety of Speech, or whether they rent or hire them of others. And these Houses they ought not to have in bye and secret Places, but in publick, and near the Streets.

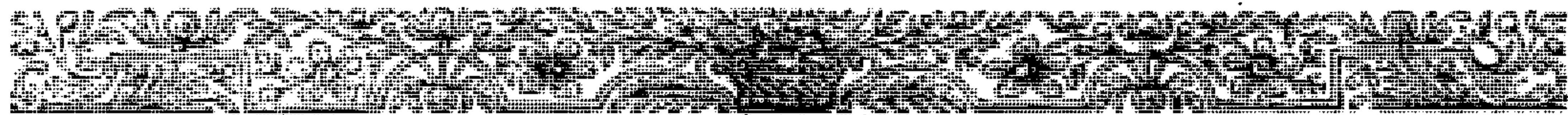
* Decius in
c. 11. X. 2.
19.
† X. 2. 19.
11. circ.
Med.

|| D. 54. 1.
3. 1.
* X. 1. 41.
5. 1. v. per-
speximus.

† In L. 7.
C. 2. 1.

|| C. 7. 52. 6.

As a Notary is a publick Person; so, consequently, all Instruments made by him are called *publick* Instruments *, as before remembred; and a *judicial* Register or Record made by him, is Evidence in every Court according to the *Civil* and *Canon* Law †: And a Bishop's Register establishes a perpetual Proof and Evidence, when 'tis found in the Bishop's Archives; and Credit is given not only to the Original, but even to an *Authentick* Copy exemplify'd, if the same be not any wise suspected; and we must abide by it ||. And 'tis the same Thing, when the *Exemplar* is registred and insinuated by the ordinary Judge *. But what shall be done in such a Case, where the Register-Book, touching the same Fact, shall be contrary to a publick Instrument sealed with the Judge's Seal? To which I answer, that in such a Case, we ought rather then to abide by the Original, according to the Doctrine of some Men †: But, I think, that the contrary seems to be the truer Opinion; since such *authentick* or *publick* Instrument is not extracted from the Acts of Court, but is repugnant thereunto ||; for (perhaps) else it would be otherwise. If a Notary has in the Protocol of an Instrument set down the Day of the Month, and has afterwards made out such Instrument without the said Day mention'd therein, such Day seems to be repeated in the Instrument, as is express'd in the Protocol, and it ought to be inserted therein. One Notary Publick is sufficient for the Exemplification of any Act, because there is no Matter that requires more than one Notary to attest it.



Of Notice or Intimation in Law.

AS there are many Cases in Law relating to Ecclesiastical Affairs, which depend purely upon Notice or Intimation, it will not be improper to inform the Reader in what Cases Notice is necessary, and where not: And this chiefly relates to Appeals, Avoidances of Ecclesiastical Livings, the Refusal of a Clerk by the Ordinary; and, lastly, to the Business of setting out Tithes. As *first* in respect of Appeals, that an Appeal should affect the Judge *à Quo*, in such a manner as to prevent and

and hinder him from proceeding any further in the Cause, Notice or Intimation ought to be given to him in a proper Way; otherwise, according to the receiv'd Opinion of the Lawyers*, a Process had in such Appeal is not valid, nor shall the inferior Judge be punish'd for an *Attentate* against such Appeal. Yea, an Appeal, whether it be *judicial*, or *extra-judicial*, ought always to be intimated by the Party *Appellant*, to the Party *Appellate*, if he be ignorant thereof, in order to affect him in the point of an *Attentate*†: But 'tis otherwise, if he has knowledge thereof, because an Intimation is only made to give him notice of the Appeal, that he may proceed no further in the Court below. Now to the end that such an Intimation or Notification may affect the Person to whom it is made, in such a manner, as to make him incur a Delay or Penalty for not observing the same, it ought to be made by a legal Person, having an Interest or Concern therein‖, or a Commission and Authority to make the Appeal known, otherwise such Intimation is not valid: And 'tis necessary, that the Person, who gives such Notice or Intimation, should shew his Warrant and Authority for so doing; and especially, when the Party that gives the same is a Proctor, for that, in such a Case, he ought to prove himself to be a Proctor, by producing his Warrant or Proxy.

* Anchar. Conf. 158. N. 31.

† Roman. Conf. 251. N. 9.

‖ Roman. Conf. 6. per tot.

As to the Avoidance of Ecclesiastical Livings, tho', generally speaking, the Law does not require any Notice to be given to the Patron, where a Benefice becomes void by Act of Parliament; because all Parties are virtually Parties to a Statute-Law: yet there are some Acts, whereby 'tis expressly required that notice should be given, as by a Statute of *Eliz.**, 'tis provided, That no Title to present by Lapse shall accrue on any Deprivation, *ipso facto*, 'till after six Months Notice of such Deprivation given to the Patron by the Ordinary. And by the said Statute, if a Layman, or one not in Deacon's Orders, and of the Age of 23 Years, be admitted to a Benefit with Cure of Souls, his *Admission is void*; and the Patron may present again without notice†. But because the Statute only makes the *Admission void*, and leaves the *Presentation* as it was before; therefore, in the Case of a Deacon (the *Presentation* being in force) no Lapse shall incur, if he be depriv'd for Incapacity without notice given. The like is required by a Statute of *Charles II.*‖ *viz.* That no Title or Lapse shall incur, if a Man be depriv'd for not declaring his Assent and Consent to the Book of Common Prayer, and Subscribing the Declaration, &c. without notice given of the Sentence of Deprivation. But where a Benefice is void by *Cession* or *Incompatibility*, the Patron is bound to take notice thereof at his own Peril. And so likewise he is upon a Voidance by Death; and in such a Case, the six Months are to be accounted from that Time, in which he might reasonably have notice, and not immediately after the Incumbent's Death*. But in Cases of *Deprivation*, notice must be given to the Patron by the Ordinary, before the Title can accrue to him by Lapse: And this must be personal notice, if the Patron lives in the same County; but if in another County, then notice must be publish'd in the Parish Church, and fix'd on the Church-Door, tho' *Dyer* calls this the *last Refuge*†; for if it be done in Person 'tis much better: and 'tis to be observ'd, that such notice must express the Cause of Deprivation‖. But in this Case, Notice or not seems chiefly to affect the Ordinary; for he shall have no Benefit of a Lapse, till notice given to the Patron, and his refusal to present for six Months: But the Church being actually void upon a Deprivation, the true Patron is, at his Peril, to take notice of it in respect to a Stranger, tho' not bound to it in respect to the Ordinary; for if a Stranger should present*, and his Clerk be admitted and instituted, and the six

* 13 Eliz. c. 12.

† March. Rep. p. 119.

‖ 13 & 14 Car. 2. c. 4.

* 2 Rolls Abr. 365.

† Dyer's Rep. p. 328.

‖ Yelv. Rep. p. 7. Cok. 6. Rep. 29.

* 2 Rolls Abr. 369. Hob. 318.

Months

Months past, he has got a Right by Usurpation. But where a Voidance is by taking a second Benefice, 'tis necessary to know wherein the *Canon* Law differs from the Statute-Law as to this Matter, *viz.* By the Canons of the Church, if a Clerk has a Benefice under eight Pounds *per Ann.* and is instituted into another of what value soever it be, whether little or great, the first is void *de Jure*, but not *de Facto*, till Sentence of Deprivation, and because the Voidance was by the *Canon* Law, therefore no Lapse can incur to the Ordinary till notice given to the Patron. But he may Present within the six Months, and before any Sentence of Deprivation, or he may refuse 'till the Clerk is actually depriv'd, and notice given*. By the Statute, if a Clerk has a Benefice of Eight Pounds *per Ann.* or upwards, and takes another of any Value, the first is, *ipso facto*, void; and the Patron is not to expect any notice from the Ordinary, because the Voidance in Cases of Plurality is now establish'd by Act of Parliament †; and of such Avoidances, the Patron must take notice at his Peril.

* Moor
Rep. 542.
Crok. Eliz.
601. Vaugh.
Rep. 131.

† 21 H. 8.
c. 13.

|| 2 Roll.
Abr. 369.

* Crok.
Eliz. 119.
1. Leon.
p. 31.
† 3 Leon.
Rep. p. 46.
Latch. Rep.
192. 253.
|| 14 H. 7.
21. a. Kelw.
Rep. 49.
v.

* Kelw.
Rep. 154.
31 E. 1.

† Styl. Rep.
p. 342.
1 Rolls. Abr.
643.

|| 2 Vent.
Rep. p. 48.
Noy Rep.
p. 19. 3 Bull.
Rep. p. 336.
Godbo. Rep.
229.

But in Cases of Resignation, notice must be given to the Patron, and that by the Ordinary into whose Hands the Benefice was resign'd; and if he should die before he gives notice, the Guardian or Guardians of the Spiritualties must do it, and if he or they refuse, then it must be done by the succeeding Bishop before any Title of Lapse shall accrue to him. Now in this Case, as well as in Cases of Deprivation, the Patron may take Notice of it, if he pleases; but if he suffers a Stranger to Present, and his Clerk gets Admission, &c. and the six Months pass, this Presentation and Incumbency make an Usurpation, because the Induction is a publick and notorious Act||: And, therefore, the true Patron ought to take notice of it at his Peril, that he may provide a proper Remedy within Time, and not lose his Presentation, unless the Resignation was made by Fraud and Contrivance, on purpose to defeat the true Patron, for then notice must be given of the Resignation. If the Bishop refuses to admit the Clerk presented to him, he must, in such a Case, give notice to the Patron, and shew for what Reason he refuses him*; and this must be in some reasonable Time, some think a Month too long. But the *Canonists*, as well as our Common Lawyers†, distinguish between a Clerk of a Spiritual Person and of a Layman: for in the first Case he is not bound to give notice||, because a Spiritual Person should have presented one qualify'd in all respects fit for the Cure*; but he is bound to give notice to a Lay-Patron, where he refuses his Clerk, because (say the *Canonists*) a Layman may vary his Presentation. But (I think) this distinction does not hold with us.

'Tis a receiv'd Opinion, that the Parishioners are bound to give the Parson notice of their setting forth their Tithes: 'Tis true, the *Canon* Law obliges them so to do; but 'tis otherwise by the *Common* Law, which prevails in this Case: For if the Parishioner sets out his Tithe fairly and truly†, he is not bound to give notice either to the Parson himself, or any general notice at the Church, of the Time when he shall set them out. But some think that he ought to give a general notice of the time when he begins his Harvest, and the Parson then is bound to look after his own Tithes; and this seems to be most reasonable. But the Parishioner cannot obstruct either the Parson or his Servant to be present||, when the Tithes are sever'd, who are bound to carry them away in a convenient Time after such severance; and if they neglect so to do, the Parishioner in such a Case must give notice that the Tithes are set forth, else he cannot have an Action of Trespass for not carrying them. But more of this Matter hereafter under the Title of Tithes.

By

By an Act of Parliament in the first Year of *William and Mary**, it is * Sess. 1.
enacted, That if any Trustee, Mortgagee, or Grantee, of any Right of c. 26.
Presentation, Collation, or Nomination to any Ecclesiastical Living, Free-
School, or Hospital, shall by way of Trust, present, nominate, or col-
late unto such Living, Free-School, or Hospital, belonging to a *Popish*
Recusant Convict, upon the Voidance thereof, without giving notice of
such Voidance in Writing to the Vice-Chancellor for the Time being of the
University, to whom the Presentation, Nomination, or Collation shall
belong, according to the true Intent of this Act, within three Months
after such Voidance, such Trustee, &c. shall forfeit to the respective
Chancellors and Scholars of either University to whom such Presentation,
&c. shall belong, the Sum of 500 Pounds.

There are many other Cases, wherein Notice or Intimation ought to
be given to the Parties that may have a Concern therein, as in Facul-
ties for granting Seats in Churches, and the like: But as I have handled
those Matters under their proper Titles, I need not repeat them here; only
thus much I must observe in concluding this Title, *viz.* That tho' notice
or Intimation may be expedient in several Matters, yet regularly it is not
necessary, but in such Cases where the Law expressly requires it †.

† Card. in
Clem. 2. § 1.
de appell.



Of an Oath, and the several Species of it in Judgment.

AN Oath, according to *Tully* in the third Book of his Offices, is a
Religious Affirmation of the Truth of what we say; or, accord-
ing to *Baldus*, 'tis an Assertion or Promise confirm'd to us by the At-
testation of something sacred; which seems to me to be but a *Heathen*
Definition of an Oath, tho' *Baldus* pretended to *Christianity*. Wherefore,
I shall here define an Oath to be an awful Invocation on the Name of God,
whereby we desire that he would be a Witness to the Truth of our Asse-
veration or Promise; and punish us if we declare any thing which is false,
or promise any thing which we do not design to perform. And though it
may be rightly enough taken by any Christian for the Confirmation of
Truth, in respect of things lawful and honest; yet if it be taken *contra*
bonos Mores, it is not only a Sin, but in no wise Obligatory, according to
the *Canon Law* *. The *Romans* were heretofore wont to swear by the
Genius of the Prince or Emperor, or by *Jupiter Lapis*; but good Chri-
stians only swear by the Name of the High God †, tho' the *Papists* swear
by their Altars, Saints, and the like. I say, by *Jupiter Lapis*, which
was the most sacred and holy of all Oaths among the old *Romans*: And
hence 'tis, that the Person swearing did pray some Evil might befall him,
if he was not just and true to what he had sworn. And this Oath they
took in the following conceiv'd Form of Words, *viz.* *Si sciens fallo, ita*
me Diespiter (salvâ urbe arceq;) bonis ejiciat, ut ego nunc hunc Lapi-
dem; and then (according to *Livy*, *Cicero*, and other *Roman* Writers)
he immediately threw away the Stone with all his Force. Among the
Greeks, the solemn way of swearing was by their Access to the Altars,
as we read in *Virgil* ||.

|| Deut. c. 4.
v. 10. Heb.
c. 6. v. 16.
Rom. c. 1.
v. 9.
* vi. de reg.
jur. § 8.
† Exod.
c. 23. Judg.
c. 11. Mat.
c. 5.

|| Æn. 12.
v. 201.

Tango aras, mediôsq; ignes et numina testor.

E e e e

Nor

† 22. Q. 1.
S. 9 & 10.

Nor did the Ancients only swear by the Gods they worship'd, but even by Men whom they principally lov'd; as *Brutus* in *Livy* swears by the chaste Blood of *Lucretia*; and *Caius Caligula*, by the Name of *Drusilla*, whom he lov'd and admired in the highest degree after her Death. And the Emperor *Claudius* thought no Oath could be more Holy than to swear by *Augustus*; and even in *Augustus* his Life-time, the *Romans* were wont to swear by his Name and Divinity. And hence 'tis, that the Lawyers often mention an Oath taken by the Name and *Genius* of the Prince or Emperor, the Breach of which Oath was severely punish'd among the *Romans*. But God has forbidden us Christians, as he formerly did the *Jews*, to swear by the Names and Titles of false Gods, since no Veneration ought to be paid them by any Means: And we are even forbid to use the Name of the true God on a false and trivial Account. The sacred Canons forbid us to swear *per Capillum Dei*, or by the Head and Members of God, as being the superstitious Fictions of Blasphemy and Idolatry: And yet the *Papal* Law allows of these Oaths, and the *Romanists* frequently swear by them. For according to *Aquinas* and the *Canonists* †, we may lawfully swear not only by the Members of God (as he styles them) but even by the Creatures too without Sin, since we do (says he) thereby acknowledge the Majesty of the Creator: And upon this Account the *Papists* allow Men to swear by the Virgin *Mary*, and the Cross of Christ, without Sin; since he who swears by the Cross (say they) swears also by God himself, who suffer'd Death upon the Cross for the Redemption of Mankind. But to this wicked Sophistry of theirs, our Divines are able to give a sufficient Answer, it being not my Business in this Work to take their Office upon me.

* Mat. c. 5.
v. 34.
; Ibid. v. 37.

|| 22. Q. 1. 2.
X. 2. 24. 26.

But yet, after what manner is a Christian permitted to swear, since Christ himself seemingly prohibits it? Saying, *Swear not at all**, &c. *but let your Conversation be yea, yea; and nay, nay*†. But these Words, we are well assur'd from other Texts of Scripture already quoted, do not forbid all manner of swearing, but only an evil Habit and Custom of swearing without a lawful Occasion and Necessity for so doing||. A just and lawful Oath has no Tendency to destroy our eternal Salvation; and, therefore, 'tis not contrary to God's Command to take such an Oath: but when we take such an Oath as cannot be kept without Hazard of our future Salvation, we ought not to take it. But I am running into the *Casualist*, instead of acting the part of a Lawyer. Wherefore I shall next consider, how an Oath is divided, and what are the *Species* thereof; and then proceed to shew what are the several kinds of Oaths that are usually taken in our Courts, according to the Practice of the *Civil* and *Canon* Law.

* Vid. Pag.
445.

As an Oath is commonly made use of for four Ends and Purposes, *viz.* *First*, For confirming the Faith of any one's Promise: *2dly*, For producing an Obligation: *3dly*, For the Confirmation of Contracts: and *4thly*, For the Decision of Law-Suits, by way of supply, or in defect of full Proof. So there are four *Species* of an Oath, the first stiled *Promissorium fidelitatis*, the second term'd *Introductorium Obligationis*, the third said to be *Confirmatorium contractus*, and the fourth is *Decisorium litis*; and this last is that which is reckon'd among inartificial Proofs, as I shall observe hereafter under the Title of Proof*, tho' the Lawyers, or some of them (at least) doubt, whether this very Oath may be said to be a proper *Species* of Proof or any Evidence at all. And thus an Oath is made use of either in respect of a Cause that is controverted, or in respect of a Cause not controverted. In respect of the first, 'tis used either for the sake of laying a greater Obligation of Religion on Mens Minds only, as the Oath of *Calumny*, the Oath of *Malice*, the Oath of

of *Testimony*, and the Oath of *Purgation*; or else on the score of deciding a Cause, as the *voluntary*, *necessary* and *judicial* Oath is, and likewise the Oath *in Litem* *. See *Donellus's* Treatise of an Oath. The Oath of *Calumny* is an Oath of Credulity, which the Litigants take touching the Conscience and Goodness which they suppose their Cause to have: And tho' it was heretofore taken in every part of the judicial Proceeding; yet 'tis now only taken at the Beginning of a Cause or Suit, as I have already remark'd under that Title ||.

* Dd. 8c
Gloss. in
Rubr. D. 12.
2.

|| Vid. Pag.
137.

But I shall here chiefly speak of the *necessary* or *suppletory* Oath, which is so called to distinguish it from the *voluntary* and *judicial* Oath, of which hereafter. And as 'tis given in supply of other Proof or Evidence, 'tis also stiled the *suppletory* Oath. As when the Plaintiff or Defendant has made an half Proof†, for then the Judge may, at the Petition of the Party, give this Oath to the Person that has made this half Proof; and the further Proof or Evidence being thus supply'd by his Oath, it is sufficient either for a Condemnation or an Absolution. And 'tis therefore called the *necessary* Oath, because 'tis given out of necessity at the Instance of the Party, tho' the adverse Party should oppose the same||, and it may be given even after a conclusion in the Cause, provided it be mov'd for before that Time. But the Judge may *ex officio*, even without any motion of the Party, by virtue of a saving Clause in the Libel imploring his Office, give this *suppletory* Oath, even after a conclusion of the Cause; and this he may do on the score of administering Law and Justice, as has been practis'd in the *Imperial* Chamber, in a Cause of great Importance †. But if the Plaintiff proves nothing, an Oath ought not be administered to the Defendant contrary to his Will and Inclination; for if the Plaintiff be entirely wanting in his Proof, the Defendant ought to be acquitted, tho' he himself proves nothing of his *defensive* Plea: But if there be a Presumption in the Plaintiff's favour, an Oath may be given to the Defendant to toll and destroy such Presumption, and to shew his own Innocence. And this is true, unless the Judge thinks fit, on due Consideration of the Circumstances of the Persons, and the Cause itself, to administer an Oath. In giving the *suppletory* Oath, the adverse Party ought to be cited or admonish'd to appear; and thus this Oath ought to be administered in the Presence of the Party appearing, or (at least) cited to be present*. And this Oath may also be demanded to be given in a Cause of Appeal, in defect, and for want of fuller Proof †. But the Judge ought not *ex officio* to give it in supply of fuller Proof to a Person making but half Proof, without the motion of the Party himself, because (according to some) it ought only to be given to the Party on his Petition, who ought to pray the same before the ministration thereof.

† Dd. in l. 3.
C. 4. 1.

|| C. 2. 59. 2.
7.

† Gail. Obs.
108. N. 6.

* Jaf. in
l. 9. D. 1.
16.
† Cornel.
Conf. 27.

|| Gail. obs.
108. n. 2.

'Tis the common Opinion of the Doctors, that the Party cannot after a conclusion in the Cause move the Judge to give him the *necessary* or *suppletory* Oath *in eventum probationis*, if he has not fully prov'd his Intention, this Oath being a *Species* of Proof: For a conclusion of the Cause being made on each side, a Renunciation of all further Proof is made, and the Mouths of the Parties are thereby closed ||; wherefore there is no room for a Petition after such Conclusion. For after the Publication of Depositions, the Party, or (at least) his Proctor, which is the same thing, ought to know, whether he has fully prov'd his Intention or not, or whether the Defendant has prov'd his *defensive* Plea; and if either Party doubts thereof, he ought to demand the *necessary* Oath to be given him (by imploring the Judge's Office) before such a Conclusion in the Cause; and if he neglects to do it, he is *in Morâ*, and must blame himself. Before this Oath be administered, the Judge ought to enquire into

* Socin.
Conf. 155.
N. 5. vol. 2.

† Socin. ut
sup. N. 9.

|| Glofs. in
1. 7. D. 13. 4.

* Dd. in
1. 31. D. 12.

† Glofs. in
1. 3. D. 12. 2.

into the Legality of the Person to whom 'tis to be given, and the Importance of the Suit or Cause wherein 'tis given ought to concur with such Legality *; and that Quality, which sets a Witness aside from giving his Evidence or Testimony concerning the Fact of another Man, does also set aside the Party from being admitted to take the *suppletory* Oath touching his own Fact †.

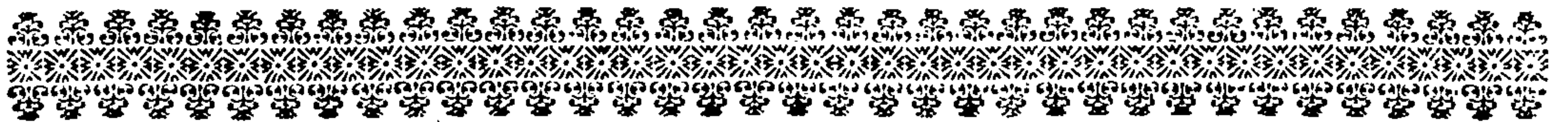
Six Things are copulatively requir'd, to the end that the *suppletory* Oath should be given; and if either of them is wanting, 'tis not to be administered, *viz.* *First*, The matter in Question must be half prov'd by one unexceptionable Witness. *2dly*, The Person to whom it is given, ought to have a probable Knowledge of the Truth of the Fact, by some corporeal Sense ||; because herein this Oath is equivalent to a Witness: And, therefore, it is not given to an Executor; because 'tis not likely he should know the Truth of the Case or Fact. *3dly*, He to whom 'tis given, ought to be an honest Man and of a good Fame for his Integrity; for it ought not to be given to a Person of a contrary Life and Character, or to any one suspected of Perjury. *4thly*, The Cause ought not to be of any great Importance, but of a light Concern *: For in a Criminal Cause, generally speaking, or a Cause of an arduous Nature, 'tis not administered †; yet in a Criminal Cause *civilly* commenc'd, *viz. ad privatum Interesse*, it may be given. *5thly*, The half Proof thus made, ought not to be obscured or defeated by contrary Proofs in any Part thereof; because then this Oath shall not be given. And, lastly, 'tis required, that this Oath should be pray'd and mov'd for (as already remembred) before a conclusion of the Cause, unless it be given in virtue of the Judge's Office. If the Judge does not give this Oath on the concurrence of these six Requisites, he makes the Suit his own; and the Party praying the same, may protest *de appellando*, &c.

D. 12. 2.
§ 28. 10.

† D. 12. 2.
§ 28. 10.

1. 2. 59.
1. 7.

The *voluntary* Oath is that which is given by a Party to a Party *extra-judicially* for the decision of a Cause *: And, therefore, in other Terms, 'tis sometimes in *Latin* stiled *Furamentum Decisorium*; but this Oath may be refus'd, tho' the other cannot. And when one of the *Litigants* gives this Oath to the other, he is said to put a great Confidence in his Adversary, because by this means he makes him a Judge and a Witness too in his own Cause. The *judicial* Oath is that which is given in Judgment by one Party to the other †, and which heretofore could not be refus'd as the *voluntary* might in an *extra-judicial* matter: But now a *judicial* Oath may be refus'd ||, if it shall not be receiv'd and taken according to the common Opinion. And thus the Reader has the three *Species* of an Oath usually stiled *Furamentum Veritatis*, *viz.* the *necessary*, *voluntary*, and *judicial* Oath.



Of Oblations, Obits, Obventions, and the like.

* Lindw.
lib. 1. Tit. 3.
cap. 1. v.
oblacionum.

UNDER the general Name of *Oblations* we may reckon all such Things, whether moveable or immoveable, as accrue to the Church by any Right or Title whatsoever *: But in a particular Sense of the Word that is only called an *Oblation*, which is made by the Priest and People at the Altar, at the Celebration of the Eucharist or Mass, as the *Papists*

Papists stile it; and such a kind of Oblation is due, according to the *Canon Law*, on all the chief festival Days of the Year. So that there is a Difference between Oblations made at the Altar, and elsewhere: For *Hostiensis* says *, that a Person may be compell'd to make Altar-Oblations on such Festivals, it being, as it were, a general Custom in all Countries for the People so to do; but other Oblations were free Gifts and Offerings made to the Church without any Compulsion at all. 'Tis probable *St. Paul's* Example might encourage the primitive Christians to offer these Gifts to the Church, when the Ministry was not provided for by a settled Maintenance, and the poor Saints that embraced Christianity were left expos'd to the inhuman Treatment of the Heathen People: For he appointed every one of his *Corinthians* and *Galatians* || to yield something to God for the Saints every Lord's Day. But this being thought too often, therefore *Tertullian* tells us, that it was afterwards done every Month, and then *ad Libitum*; but it was always the Custom for the Communicants to offer something at receiving the Sacrament, as well for holy Uses, as for the Relief of the Poor, which Custom is, or ought to be observ'd at this Day.

* In. c. 69.
con. Dist. 1.

|| Cap. 6. v. 6.

In the elder Ages of the Church, People were so free and liberal in respect of *Oblations*, that there were Persons who would build Churches on their own Land to have a Share in them, as is affirm'd in one of the *Spanish Councils* of *Bracara* †, and there forbidden with great Severity. It was not, as the Gloss on the *Canon Law* || understands it, to make a Bargain for the Right of Patronage, but it is express'd to have an equal Share in the *Oblations* of the People with the Clergy. And *Agobardus* observes*, *That the Devotion of Persons in the first Ages was so great, that there was no need to make Laws or Canons for the Supplies of Churches, since they were so amply provided for by the Liberality of the People.* *Tertullian* in his *Apologeticks* †, speaking of these *Deposita Pietatis*, says, That they were voluntary *Oblations*, and were receiv'd in lieu of Tithes; for the Christians, at that time, liv'd chiefly in Cities, and gave out of their common Stock, both to maintain the Church, and those that serv'd at the Altar: But tho' these *Oblations* were at first voluntary, yet they afterwards, by a continual Payment became due by Custom. These Allowances were then stiled *Stipes & Oblationes*, which were so considerable, that *St. Cyprian* blamed some of the Clergy for setting their Hearts too much upon them; *Stipes, Oblationes, Lucra desiderant, quibus prius insatiabiles incubabant*, says he ||; which could not be said of any meer necessary Subsistence. But when Christianity came to spread itself into the Countries, and the Emperors became Christian, a more fix'd and settled Maintenance became necessary; but still the Clergy retain'd somewhat of the ancient Custom in *voluntary Oblations*. Thus we read, That as soon as Christianity was settled in *France*, Lands were given to the Church by *Clodoveus* after his Conversion, as appears by the first Council of *Orleans* called in his Time*: And these Lands were put into the Bishop's hands, to distribute the Revenues arising from thence for the Repairs of Churches, Maintenance of the Clergy, and other pious Uses †. And besides these, we still read of *Oblations* made by the People on the Altar both in the *Mother Church* and in *Parochial Churches*. If in the *Mother Church*, then one Moiety went to the Bishop, and the other to the Clergy; if in *Parochial Churches*, then only the third Part to the Bishop.

† Conc. 3.
c. 6.
|| In c. 10.
Con. 1.

* De Dispens. c. 20.

† Cap. 39.

|| Epist. 64.

* A. D. 511.

† Can. 5. 14
& 15.

In the second Council of *Mascon* ||, all the People are required to make an Oblation of Bread and Wine at the Altar*; and the Payment of Tithes is immediately enjoyn'd as founded on the Law of God, and the

|| A. D. 585.
* Can. 4.

* Can. 5. *ancient Custom* of the Church, which is thereby reinforced *. In the
† A. D. '658. Council of *Nantz* †, Oblations and Tithes are mention'd together, as
|| Can. 10. making up the Church's Stock, which was to be divided into four Parts,
viz. to the Bishop, and to the Clergy, and to Repairs, and to the Poor ||.
There were many other occasional Oblations in those Days upon particu-
lar Services, according to the Superstition of the Times, and the Power
the Priesthood had over the Minds of the Laity. For an Explication of
which matter, we ought to consider, that there was one kind of Obla-
tion which was made to the Church out of the Lands and Goods of Per-
sons devoted to the Clergy by way of Donation *inter vivos*; and another
kind of Oblation, which was made after the manner of a Donation
* D. 39. 6. *mortis Causâ*. A Donation *mortis Causâ*, by the *Civil Law* *, is when
2 & 3. something is given *for fear of Death on thoughts of some present or fu-
ture Danger*; as when the Giver is sick or going into the Wars, or
when there is a Pestilence in the Neighbourhood, &c. And both these
kinds of Donations were gratuitous in the beginning, and no one could
be then compell'd to make them to the Church, tho' Men were often in-
veigled thereunto by the Subtlety of the Priests: But in respect of the
other Donations, every one was oblig'd to make them under the pain of
an Excommunication, after the Clergy had got the power of sending Men
to the Devil for not satisfying their Demands. But I must observe, that
such Oblations as are made on Sundays and Holidays, and other daily
Oblations made in the Parish Church, are, by the *Canon Law*, due to the
Minister or Curate of such Church, whose Duty it is to pray for the Sins of
† 10. Q. 1. the People †, and they are never due to Foreigners performing Mass or
13 & 15. Divine Service, tho' they should come to their hands; because the Per-
16 Q. 1. 21. sons, that offer them, are not their Parishioners: But the Law says this
is otherwise, if there be a Custom to the contrary. And 'tis also other-
wise if the Bishop celebrates Divine Service in Person in any Parish
Church of his Diocese; for he shall then receive the Oblations there
made into his Hands, and not the Curate or Minister of the said Church,
|| X. 5. 17. 1. it being the Bishop's Parish ||. Wherefore the Law enjoins the Bishop
not to prejudice the Curate herein, by doing this Office oftener in one Pa-
* Arg. X. 3. rish than in another; for if he does, he shall not have these Oblations *.
30. 9. Again, 'tis to be known, that a Person may be oblig'd to make these
Oblations in the *Romish Church* on a fourfold Account. *First*, By vir-
tue of some previous Agreement; as when the Occupier of an Estate in
Land or of a House, offers something certain at some stated Seasons of
the Year: And such an Offering has the Essence of a *Census* or Pension.
2dly, On the score of some previous Promise or Deputation; as when a
Man gives any moveable Estate to the Church by way of Donation, as
afore said: For as long as his Will continues in force, he ought to make
good his Promise. 3dly, On the Account of the Church's Necessity, *viz.*
when the Minister has not otherwise a sufficient Maintenance. And,
lastly, on the score of some Custom, in virtue whereof, Men are bound
to make some Customary Oblations on Holidays; and the Bishop may
compel the Parishioners to observe this Custom, tho' the Curate cannot
do it †.
† X. 5. 3. 42. But here in *England*, since the 25th of *Henry VIII.* which abolishes
Raym. in this part of the *Canon Law*, in respect of Altar-Oblations to the Priest,
c. 19. X. 3. all Oblations there made, are converted into Alms of Charity towards
30. the Maintenance of poor Parishioners, which ought to be distributed ac-
cording to the Discretion of the Minister and Church-wardens: But yet
there are some occasional Offerings still remaining, as at Marriages,
Churching of Women, &c. And these are due rather by Custom prescrib'd,
than

than by any written Law; as the Oblation of Fowls at *Christmas*, and the First-Fruits of Corn payable in some Places on *St. Martin's Day* are. The Offerings likewise at *Easter* are due by Custom; for they are not *voluntary* Oblations, but are paid as a Composition for personal Tithes due at that time, and not for *Sacramentals*, as some have imagin'd: For if such Offerings are not personal Tithes, then none are paid in *England*; for who pays any thing out of the Profits which arise by manual Occupations, Merchandize, &c. besides these customary Offerings at *Easter*? These are confirm'd by the Statute * to such Persons, and to be paid in such Places where the same have been usually paid for forty Years before the making of that Act, but Day-Labourers are excus'd. That Act likewise enjoins, that the Payment shall be made in the Place where the Party dwells at such four Offering-days as heretofore, *viz.* at *Christmas*, *Easter*, *Whitsontide*, and on the Feast Day of that Saint to whom the Parish Church was dedicated; and if no such Dedication, then it was to be at *Easter*. Thus the Profits of the Churches in *London*, and in other great Cities, were originally Oblations and Obventions, which for many Years have been call'd Tithes: But very falsely so stiled. For they could not be called *Predial*, unless the Houses grew out of the Ground: nor could they be stiled mix'd Tithes; for tho' something might arise by the Industry of Men, yet it was not out of the Earth. So that it must be a personal Tithe or nothing; and, therefore, those customary Offerings at Marriages, Churching of Women, &c. which were paid before the Statute, ought to be paid still, and are recoverable in the Spiritual Court.

* 2 Edw. 6.
c. 13.

An *Obit* was, at first, an Office perform'd at Funerals, when the Corpse was in the Church, and before it was bury'd; but by Superstition it afterwards came to be an *Anniversary*, and then Money or Lands were given towards the Maintenance of the Priest, who should perform this Office every Year.



Of the Office of the Judge.

THE Word *Office* in the *Civil Law*, from whence we borrow the Term, has divers Acceptations. For, *First*, It signifies *private Duties*, and Things of Conveniency to be regarded and practis'd in the common Course and Society of Life between one Man and another. And, *2dly*, It denotes some *publick Function*: And in this latter Sense we find it taken two ways. *First*, for a *ministerial Function* to some or other having Jurisdiction: And *2dly*, for the Power and Authority of such Court itself. Now there are three *ministerial Functions* in the *Civil Law* term'd by the Name of an *Office*. The *First* relates to such Persons as were publicly appointed to present Crimes to the Magistrates †. The *Second* denotes to us an Apparitor, as appears in these Words, *viz.* *Officio, quod tuis meritis obsecundat, non curialem quenquam, nec ex ceteris volumus aggregari, &c.* ‖. And the *Third* points out to us an *Actuary*, that entred the Acts of Court, as may be seen from the Words of the Laws here quoted *: In both which Laws, by the Word *Officium*,

† C. 9. 2. 5.

‖ C. 12. 56.
1.

* C. 12. 57.
11. C. 1. 54.
We 1.

* D. 19. 2.
56. D. 19. 1.
51.

† Lib. 1. de
Trist.

we understand an *Actuary*. But when the Word *Officium* imports the Authority and Jurisdiction of the Judge, it is that Power whereby he may of himself, without the Instance or Petition of either of the *Litigants*, proceed in judicial Matters: And this Office is exercis'd either in civil or criminal Actions. In civil Actions, the Judge does sometimes of *Office* decree a Thing which he finds to be equitable, besides the Action or Plea; and besides the Bond or Obligation whereon the Action arises*: And sometimes also he does, in a point of Equity, by virtue of his *Office*, relieve such as strict Law gives no Remedy or Action to. *Callistratus* reduces all Civil Causes, wherein a Judge has *extraordinary* Cognizance, to these two general Heads, *viz.* Either when he exercises this Cognizance in relation to such as bear civil Offices and Employments, or else when he exercises the same in respect to *Pecuniary* Causes. But in Criminal Causes, he exercises this Authority of *Office*, either when he sits to take Cognizance whether a Man's Honour or Reputation ought to be attainted; or when he makes Inquisition touching a capital Crime whereby a Man's Life, Liberty, or Country may be endamag'd; and this kind of Office *Ovid* mentions in these Words †, *viz.*

*Judicis officium est, ut res ita tempora rerum
Querere ———.*

|| Vid. Pag.
309, &c.

* Vid. Pag.
207, &c.

The *Office* of the Judge is of a very large extent, and is divided first into what the *Civilians* call the *noble Office* of the Judge, and the *mercenary Office* of the Judge: The first is that which is concern'd and mix'd with criminal Pleadings; and the second is that which is only serviceable to civil Actions. The distinct Parts or *Species* of the Judge's *Office* are, *viz.* *Cognizance*, *Determination* and *Execution*: But of these I have treated under their proper Titles, in speaking of a Judge, his Power, Duty, &c. || and of Sentences, and the Execution of Sentences*. The *noble Office* of the Judge is chiefly concern'd in *extra-judicial* Matters; and the *mercenary Office* of the Judge is employ'd in decreeing Citations, in admitting or rejecting Libels, in hearing Answers thereunto, in granting Terms-Probatory, and the like. The *noble Office* of the Judge subsists of itself, being mix'd with Imperial Authority, and which the Judge executes of his own Accord, as in Criminal Cases: And this is not serviceable to any civil Action, as the other is; but is executed by the Judge in virtue of that Authority which the Law gives him, tho' no Action be propounded or commenced. And this is sometimes exercis'd *ex mero facto Judicis*, as when the Judge interposes his Authority for the Advantage of the Publick alone, at his own proper Motion, without any one's Request or Petition to him for so doing; and this is by *Civilians* called *Officium Nobile*, &c. As in all Inquisitions and the Punishing of Evil-doers, where there is no particular Accuser promoting the Judge's Office; for the Judge may of himself enquire after Offences committed, it being the Interest of the Commonwealth that Crimes should be punish'd. But sometimes the Judge's *noble Office* is exercis'd at the Instance and Petition of a Party: As when a Judge imparts his Office to some Person imploring the same in a private Manner or Affair, and to such as has no ordinary Action or Remedy at Law; for then the Judge may interpose his Office *principally* in the Place of an Action; and thus it is, when a Person sues or demands Restitution *in integrum*. Also, if a Son be aggriev'd by an unkind and cruel Father, who denies his Son what is due to him by the Law of Nature; for such a Person having no Right of Action against his Father, he has his Remedy by the *noble Office* of the Judge, and may rightly have recourse thereunto. The *mercenary Office* of the Judge is that,

that, which does not subsist of it self, but is a Servant to some civil Action (as aforesaid): And it is in *Latin* term'd *Officium mercenarium* by a baser Appellation (in comparison of the former) from the Word *Merces*, a Reward or Hire; because the *Office* of the Judge, being here (as it were) hired and employ'd to the Advantage of a private Man, is at another's Beck to serve his Turn*.

* Cravet. conf. 238. N. 7.

What the *Civilians* term the *Noble Office* of the Judge, the *Canon* Law calls the *meer* Office of the Judge; and what they stile the *mercenary Office*, the *Canon* Law calls the *promoted* Office: which, among the *Canonists*, is of two kinds. The first is, when a Man voluntarily offers himself to prosecute an Offence or Suit; who is then call'd a *voluntary* Promoter of the Office: And herein he differs but little from a Party. The second is, when the Court assigns one to solicit the Office of the Judge, who is then term'd a *necessary* Promoter thereof; because he may not refuse this Employment: For when no Prosecutor stirs in the Matter, then the Court does it in Duty to the Publick, for the Punishment of Sin, and other Disorders in the State: For in Temporal Courts of other Realms, length of Custom has establish'd the very same Course of Proceeding in criminal Causes †, even at the Instance of a Party with that which may be done when the Office of the Court alone proceeds; yet the Law itself has given greater Privileges to Proceedings of *meer* Office, than to the other, which may be some reason why it was call'd the *noble* Office of the Judge. The first Privilege is, that whereas by Law, now alter'd by Custom, an *Accuser* or *Party* (properly so call'd) was in danger of the Punishment of *Retaliation*, if he fail'd in his Proofs, on a Presumption of *Calumny*: But no such Presumption or Intendment of Law lies against a Judge executing the publick Laws by virtue of his *Office*, as it does against a *Party**; and, therefore, he isn't subject to that Penalty as a Prosecutor was. The next Privilege the Law gives to Proceedings of *meer* Office in *criminal* Causes, which it denies to a Prosecutor, tho' he be not an *Accuser* or *Party* properly so call'd, is, that the Judge proceeding by virtue of his *meer* Office, may give the Defendant an Oath to answer some criminal Matter †: But 'tis otherwise when the Suit is at the Instance of a Party which promotes the Office; because the Defendant ought not to be forced to furnish his Adversary's Intention with Proof. But this Oath, *ex Officio*, is abolish'd by Act of Parliament with us here in *England*. *Thirdly*, When the Suit is at the Instance of a *Party*, contrary Proofs are admitted to prove the Defendant's good Fame and Reputation: But this need not be granted on a proceeding *ex Officio mero*; because no Presumption or Intendment of Law lies against the Judge's Sincerity ‖, as against a *voluntary* Promoter. *Fourthly*, On the Instance of a *voluntary* Promoter of the *Office*, Contestation of Suit or Issue is join'd in the Cause between the Parties*: But if a *necessary* Promoter of the *meer* Office of the Judge be assign'd by the Court to manage and carry on the Cause, a Contestation of Suit (properly so call'd) is not necessary, but only a kind of Contradiction (in lieu thereof) required, betwixt the *Fame* or *Denunciation*, &c. on the one side, and the Defendant's *negative* Answer on the other. *Lastly*, When the Proceeding is of *meer* Office, more Witnesses may be admitted, even after a Publication of Depositions †; because the fear of Subornation ceases in this Case: But now Witnesses may not be receiv'd after such Publication, when the Cause is prosecuted by a *voluntary* Promoter, for fear of suborning them in such Points, where he finds the Depositions of former Witnesses come too short of his Purpose.

† Alph. lib. 5. c. 11.

* Arg. in c. 4. X. 1. 38.

† Abb. in c. 24. X. 5. 1.

‖ Arg. X. 2. 26. 13. X. 1. 38. 4. * Host. in c. 53. X. 2. 20.

† Arg. X. 2. 20. 53.

* Abb. in
c. 2. X. 1.
32. N. 2.

It has been already noted, that the Judge's Office is sometimes put in the Place of an Action*, and hence I infer the Judge's Office and an Action to be two different Things in Propriety of Speech†. For an Action accrues to the Party, and is a right of prosecuting in Judgment that which is due to him: But the Judge's Office accrues only to the Judge, though he may sometimes lend it to the Party upon humble request; and though it be not the same as an Action; yet herein it has the similitude thereof. Where the Office of the Judge is *principally* had, and the Cause is commenc'd with it, Contestation of Suit is there necessarily required, as just now hinted; but not where the Judge's Office is *incidentally* made use of: And the Judge's Office may be *incidentally* implor'd both before and after Contestation of Suit. When the Judge's Office is implor'd, a Conclusion in the Libel is not always required; for the Judge does, by virtue of his Office, in all Criminal Causes conclude therein: But in Civil Causes, the Judge cannot, *ex officio*, supply the defect of any Libel, Exception, Action, Answer, and the like; for these Things are the Business of the Parties *Litigant*, and not of the Judge, whose Office consists in taking Cognizance of these Matters, in pronouncing Sentence in pursuance thereof; and in demanding the same to Execution. And the reason of this Cognizance, is, that all parts of a judicial Process may be preserv'd according to Order, that Right may be done to each Party without restraint, that their Allegations may be heard according to Equity, and without any Affection or Partiality to either side. But the Office of the Judge is extended *ad Accessoria*||, viz. to such Things as happen accidentally, and concern the Matter in Controversy (pending the Suit or *judicial* Process) tho' these Matters are not demanded or set forth in the Libel: But then these Things must happen after Contestation of Suit or Issue join'd, as our common Lawyers call it, else 'tis otherwise. And thus far of the Office of the Judge.

|| Abb. in
c. 2. X. 1.
32.



Of Orders and Ordination in the Church.

THE Apostles having appointed certain Persons to be the standing Governors and Teachers of the Christian Church, it was therefore thought necessary that there should be a Power lodg'd somewhere, to set apart some distinct Orders of Men for the Exercise of those publick Offices: And this Act of appointing or setting them apart for the Ministry of holy Things, is called Ordination. All Persons hold it necessary, that there should be such a Power; but Persons are not well agreed with whom this Power is intrusted. The *Presbyterians*, who dissent from Episcopacy, affirm, That a Man ought not to take upon him the Ministry, without a lawful Call: And they likewise agree, That Ordination ought to be continu'd for the Peace and Preservation of those Churches, which the Apostles had planted, defining it to be a solemn setting apart some Person in the Church. But they say, 'tis not only to be done by Imposition of Hands and Prayer, but with Fasting by *preaching Presbyters*; and that those, who are not set apart themselves for the Work of the Ministry, have no Power to join in setting apart others for that Purpose: And this Form of Ordination was propos'd to the Parliament in the Year

Year 1643, by an Assembly of those Persons, in order to be ratify'd. There are another sort of People dissenting from Episcopacy, who are stiled *Independants*: And they hold, That where there are no such *preaching Presbyters*, other Persons sufficiently qualify'd and approv'd for their Gifts and Graces by other Ministers, being chosen by the People, and set a-part for the Ministry by Prayer and Fasting in the Congregation, may exercise that Office; so that some place the Power of Ordination in simple Presbyters, and others in the People.

There are many other strange and modern Notions about Ordination, and sending out Ministers to preach the Gospel; but I shall not here enter into a detail of them, but rather content myself to follow the Practice of the ancient and primitive Church of Christ, since there is nothing sinful or contrary to the Holy Scriptures in Episcopal Ordination, as (I think) all good Men ought to do for the sake of Peace and Unity in the Church, and in compliance to the present Establishment of Bishops by the Civil Power: And, therefore, I shall proceed to consider Ordination in the manner that it has been deliver'd down to us by our Forefathers. And here I shall take a view of Holy Orders as a sacred Sign or Seal (as it were) of some Grant, whereby a spiritual Power is given to the Person ordain'd to exercise some sacred Office or Ministry in the Church: And this (I think) is almost uncontestably acknowledg'd to belong both to Priests and Deacons from the very Beginning of Christianity itself; tho' some Persons have deny'd Bishops to be a distinct Order from Presbyters or Elders in the Church. But as the Christian Church imitated the Jewish Synagogue in several respects which were not Sinful and Superstitious; so it is easy to believe that the Church follow'd the Discipline observ'd among the *Jews* in nothing more, than in that of their Ministers. The Synagogues were compos'd of a Ruler of the Synagogue, whom the Hellenistical *Jews* called *Archi-Synagogus*, and likewise of Priests or Elders, and of Levites or Deacons: And this is thought to be the Reason why the Apostles establish'd in Christian Assemblies those three Orders of Ministers under the Names of Bishops, Priests, and Deacons. The Bishop, in these Assemblies, had the same Honour as the Ruler of the *Jews* had in their Synagogues. The Superiority of the Rulers of the Synagogue, in respect of the Priests or Elders, consisted only in some Titles of Honour, as being the Chief amongst their Brethren: And, therefore, they are all comprehended under the Name of Priests or Elders, in the 107th *Psalms*, where we have these Words: *Let them also exalt him in the Congregation of the People, and praise him in the Assembly of the Elders*, which was the Place of their Meetings. So we find in the *New Testament*, that the Names of Priest and Bishop are indifferently taken the one for the other, and that Assembly or Council of the Elders, which was called the *Presbytery*, consisted of the Bishop, and the Priests or Elders. The Bishop or President, as the ancient Fathers call him, had indeed the chief Direction or Superintendency, from whence he was in *Greek* call'd *Επισκοπος*; and this Word is found in the *Greek Septuagint*: But he made up but one Body with the Elders or Priests, who in Quality of Judges had their Jurisdiction jointly. And hereunto St. *Peter* alludes in the 5th Chapter of his first Epistle, which is undoubtedly a genuine Epistle, saying, *The Elders which are among you I exhort, who am also an Elder*, or (as the *Greek* has it) a Fellow Presbyter * or Elder with you. And then he goes on, *Feed the Flock of God which is among you, taking the oversight thereof* †; where he joins himself as an Elder with the rest of the Elders in this Oversight or Superintendency; tho' by his Prerogative of exhorting them, he appears to be a Person of some
what

what more Honour and Authority in the Assembly or Church than the rest of the Elders. And from hence I infer, that in the Beginning of the Church, the management of Affairs, and the Jurisdiction, which is now called Episcopal, did not depend on the chief Elder or Bishop alone, no more than the distribution of the Offerings; but on the whole Senate or Assembly of the Priests. And this continu'd as long as there was but one Church in every City, one Altar, and one Consistory of Priests join'd to their Chief Priest, afterwards call'd a Bishop. But when it was necessary to increase the number of Churches, there was cause to fear, lest those who govern'd the new Churches, should ascribe to themselves the Quality of Bishops, finding themselves of a particular Church: Whereupon the chief Elders began to take to themselves Episcopal Authority over them, for which it was necessary to appoint, that there should be one Bishop in every City, on whom the Elders or Priests should depend for their Ordinations, and other Affairs in the new erected Churches, which were called *Titles*. St. *Jerom* strongly maintains this Opinion in his Comment on St. *Paul's* Epistle to *Titus*, where he affirms, that before this Division, each Church was govern'd by the common Council of the Priests: But for avoiding all occasion of Schism, one of these Priests or Elders was chosen to be the Chief, and to take upon him the Care and Government of the whole Church. He pretends that the Names of Priest and Bishop did not at all differ in the Beginning, and that St. *Paul* therefore made use of them indifferently: And then he subjoins, that 'tis only Custom which has made Bishops greater than Priests. *Episcopi noverint se magis consuetudine, quam dispositionis Dominice veritate, presbyteris esse Majores* *. And this may be confirm'd by the Authority of St. *Paul*, who, writing to the Churches under the Name of Elders, comprehends both Bishop and Priests. But to return to the Business of Orders and Ordination.

* Hieron
com. in
Epist. ad
Tit.

The exterior Act of Ordination, is in *Latin* stiled *Signaculum*, and the interior Act hereof is called a *Power* given thereby; and the Execution of this Power is term'd an *Office*. The Orders in the *Romish* Church, according to the Opinion of most of their Divines, are seven in Number, *viz.* That of the *Door-keeper*, the *Exorcist*, the *Reader*, the *Acolythist*, the *Sub-deacon*, the *Deacon*, and the *Presbyter*; their Divines do not reckon the *Psalmodist* and the *Tonsura* to be an Order, but only a preparatory Disposition to other Orders: Nor is *Episcopacy* itself an Order with them, but only a Dignity in the Church. The *Canonists* make nine Orders in the Church, reckoning the *Psalmodist* and the *Tonsura* into the Number; but still they exclude *Episcopacy* as strictly call'd an Order †. For (say they) the word *Order* is used in several Senses, *viz.* sometimes for a *Dignity*, and then *Episcopacy* is an Order with them; sometimes it denotes the Name of an Office, and then the *Psalmodist* is an Order in their Books; and sometimes it points out a spiritual Power among them, and then that of a *Deacon*, &c. is called an Order: And in this last Acceptation it is understood, when an Order is call'd a Sacrament in that Church. So that, according to this last Sense of the Word, that of a *Psalmodist* is no Order, but only a certain kind of Office annex'd to that of a *Reader* or *Lecturer*: For as a *Lecturer* by Reading excites the Understanding of the People, so does the *Psalmodist* by Singing stir up the Devotion of their Minds. But *Joh. de Ananias* maintains nine Orders in the *Romish* Church, among which he reckons that of a Bishop and of the *Psalmodist* to be two. But Orders, strictly taken, even in that Church, are only three in Number, *viz.* that of a Sub-deacon, Deacon, and Presbyter ||; tho' some Persons of nice Distinctions, will reckon

† 21 Dist. 1.

|| 2 Dist. 11.

reckon that of a Bishop among them: But, in a large Sense of the Word, all Orders, even the lowest in the Church, are stiled sacred Orders. And hence it was in the Times of *Popery* among us here in *England*, according to the Common Law of the *Romish* Church, that if a Person was ordain'd by a Bishop, that was not his Dioceſan, whether it were in reſpect of the greater or leſſer Orders, he did incur the Punishment of the Provincial Constitution, *viz.* a Suspension of the Orders thus taken, till ſuch time as he obtain'd the Favour of a Dispensation ||; which was all that Constitution pointed at. But now this Law is alter'd, and the Bishop shall be puniſh'd by his Superior, who ordains a Person not belonging to his Dioceſs without Letters *Dimiſſory*. And the Diſtinction of the higher and lower Orders in the Church is alſo loſt by the Reformation of Religion, as not grounded on any Scriptural or Apoſtolic Authority.

Holy Orders ought not to be given to any Perſon without a Title, that is to ſay, without a Benefice *, or having a Patrimonial Eſtate to live on: And heretofore, if an Ordination was otherwiſe made, it was ſaid to be void. But becauſe Bishops thought this to be no Punishment, a Proviſion was made thereupon againſt ſuch an Ordination, which may be ſeen in the *Decretals*, under the Title of *Prebends* †. Nor ought the Perſon, that is to be ordain'd, to make any Promise or Engagement to the Perſon that ordains him, or preſents him to ſuch Ordination, in order to indemnify him againſt the Force of the Canon; for if any ſuch Promise or Engagement be formally made, it is a *Species* of Simony on both ſides, according to the Papal Law *; and (I think) by the Law of our Church ‡. But a Biſhop may ordain any one with Impunity on the Title of a Patrimonial Eſtate alone ||, and ſhall not be oblig'd to maintain or provide for ſuch Perſon, tho' he ſhould be moleſted hereunto, as in the other Caſe he is. But if a Clerk ordain'd, ſhall aver himſelf to have a Patrimonial Eſtate ſufficient for his Support and Maintenance, when in reality he has none, or (at leaſt) but an inſufficient one, he ſhall, *ipſo Jure*, according to the *Canon* Law, be interdicted the Execution of his Orders, becauſe he has herein deceiv'd his Biſhop; and herein (I think) the ancient *Canon* Law ſtands uncorrected: But if the Perſon adminiſtring ſuch Ordination ſhall be in fault, then the modern Laws ſhall obtain their due Force, *viz.* That the Biſhop ordaining ſuch Perſon, ſhall be bound to maintain him.

As he is ſaid by the *Civil* Law to be guilty of a Fault, who commits any Cure, Order, or Office to an unqualify'd Perſon: So, according to the *Canonists* *, if a Biſhop, knowingly, ordains any unworthy Perſon, in the *Romish* Church, he is ſaid to be guilty of a mortal Sin; and ſo heinous a Crime is this in a Biſhop, by that Law, that he who commits the Miniſtry of the Goſpel to an unworthy Perſon, in detriment to the Church, and to the diſhonour of God, who is ſaid to be glorify'd by good Miniſters, ſhall be look'd upon and deem'd as an Infidel. And he who thus thruſts himſelf into Orders, and forces himſelf (as it were) upon the Church, the *Canon* Law rather accounts an Hireling than a Paſtor. For a Perſon legally ordain'd, ought to live as it becomes a good Steward to do, and not only to diſpenſe the Sacraments, but even the Goods of the Church with Frugality, and likewiſe to conſerve the ſame with Prudence; ſo a Perſon unworthily ordain'd (ſays that Law) does hereby become a Robber, and from a Paſtor, is turn'd into a rapacious Wolf, contrary to all Law and Equity: And as ſuch a Perſon abuſes the Name of a Paſtor, ſo he ought to go without the Fruits and Profits of his Calling. And, further, 'tis of dangerous Conſequence to ſuch as are ſubject to his Cure, and to whom he ought to adminiſter the Sacraments; for he ſeveral

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|| vi. 1. 9. 1.

* 70 Diſt. cap. 2.

† X. 3. 5. 2. 4. & 16.

* X. 5. 3. 45.

† 31 Eliz. c. 6.

|| X. 3. 5. 4. Gloſs. in hoc verb.

* Guid. in c. 43. 1 Q. 1.

ways infects their Morals by his bad Example, and blinds their Understanding thro' his want of Knowledge: And, therefore, if the Blind leads the Blind, they both of them fall into the Ditch*.

* Matt.
cap. 12.

§ X. 1. 29.

† X. 1. 12.
c. unic.

|| vi. 1. 9. 2.

† vi. 1. 9. 3.
72. Diff. per
tot.

Wherefore, such Persons, as desire to be promoted to Holy Orders, ought, before their Ordination, to subject themselves to an Examination (*of common Right*) to be made by the Archdeacon ||, who, after he has examin'd and approv'd of their Sufficiency in point of Learning, ought to present them to the Bishop for his Ordination: But with us, this is commonly done by the Bishop's Chaplains. And this Examination made by the Archdeacon or Bishop, is not only an enquiry into the Learning, but also into the Life, Morals, Faith, and Education, of the Person that desires Orders †. And the Person who confers Orders, ought to be the proper Bishop or Diocesan of the Person to be ordain'd, or (at least) the Person to receive Orders, ought to come with the Leave of his own Diocesan for so doing ||; which Licence we sometimes stile *Letters Dimissory*, and sometimes *Letters Commendatory* †, or Letters of Recommendation in plain *English*. But Persons inferior to Bishops Officials cannot grant these *Dimissory* Letters, unless the Bishop shall, by special Commission, have given this Power to his Vicar-General; or unless such Bishop be at a great distance from his Diocess, in which Case his Vicar-General, in Spirituals, may grant these Letters *Dimissory*; as the Chapter of a Cathedral Church may likewise do, *sede Vacante*: or, lastly, when the Bishop is taken Prisoner by the Enemy, for then the Chapter exercises the same Rights and Powers, as if the Bishop were naturally dead. But, in the *Romish* Church, other Persons besides Bishops may confer the lesser Orders on Men; as *Abbots* and the like, if the Question be touching such Monks as are subject to them. If a Bishop, in conferring Orders, shall so far approve of a Man of insufficient Learning, unlawful Age, or a dishonest and criminous Life, as to ordain him, he shall be suspended from receiving the Profits of his Bishoprick, till such time as he shall merit his Pardon, with us by making a due submission and acknowledgment of his Fault to his Superior; but in the *Romish* Church, by a Purchase of his Pardon from the Pope. Though, regularly speaking, no one ought to be promoted to Holy Orders without due Examination had of his Learning; yet a Person that is well known, and eminent for his Proficiency therein, may be ordain'd without any Examination, as having the Testimony of the whole Parish on his side*.

* 24. Diff. 2.
X. 2. 28. 45.

|| X. 1. 11.
15.

* X. 3. 41. 3.

† X. 1. 11.
15.

|| 63. Diff.
14. 75 & 76.
Diff. per tot.

* X. 1. 11.
8.

† X. 1. 11.
16.

No Person can have Deacons and Priests Orders both conferr'd on him in one and the same Day ||; and the Reason given by the Papal Law, is, because a Bishop cannot say more than one Mass in one and the same Day*: And the Person that acts contrary hereunto, shall be suspended from the Power of Ordaining, tho' he does this by the Leave or Order of the Metropolitan †. And tho' the Person that receives more Orders than one in the same Day shall be suspended, yet he may be dispens'd with on doing Penance. See the 32d Canon of the Church of *England*. 'Tis moreover to be observ'd, That, by the Laws of the Church, there are certain Times and Seasons of the Year specially appointed for Ordination ||, and that Persons that ordain out of these Times and Seasons proper for Ordination, ought to be depriv'd of the Power of Ordaining, according to the *Canon* Law*; but this is not regarded with us here in *England*: And again, tho' by the Papal Law, a Person that is ordain'd at an unreasonable Time, receives the Character of his Orders; yet by that Law he does not receive the Execution thereof, but ought to be depos'd for his Contempt of the Laws of the Church †. This Part of the *Canon* Law is also with us grown obsolete and out of use.

There

There are several Impediments to the Susception of Orders, according to the *Canon Law*, some of which I shall here set down. As *first*. That no Person maim'd in his Limbs, or defective in his Members, shall be admitted to Holy Orders: But a Person may, in some Cases, receive Ordination though he has lost his *Genitals**; since a Person that has caus'd his *Virilia* to be cut off upon a just Account, may exercise his Sacerdotal Office as before †. But why Castration, in the *Romish Church*, should be a Hindrance to Orders, I am at a loss to know, since that Church has prohibited Marriage to their Clergy; unless that Church would have its Priests, by debauching Mens Wives and Daughters, get themselves into the Secrets of Families, and govern the Master thereof. *2dly*, According to the Council of *Toledo* ||, no Bondman can be admitted to Orders, unless he has been first manumis'd: nor can any infamous Person be admitted thereunto, till such time as he has purg'd his Infamy*. By an infamous Person here, I mean such a one as labours under any criminal Accusation. *3dly*, Bigamy is another Impediment to Orders in the *Romish Church* ||, because a *Bigamist* (says the *Canon Law*) is presum'd to be an incontinent Person; for that he cannot contain, though he has had one Wife already: For *Bigamy*, in the Sense of that Law, is a passing to a second Marriage, after the Death of a former Wife, by marrying another Woman; and 'tis so highly condemn'd in that Church, that 'tis a kind of *Irregularity* in a Clergyman so to act. There are many more Impediments unto Orders by the Papal Law; but as they are altogether as ridiculous as these abovemention'd, I shall forbear to recite them, as being not allow'd of by our Church.

If a Person, that has not been ordain'd, shall take upon himself the Office of the Ministry, he shall never be ordain'd, but be thrown out of the Church with Disgrace †: And a Person that has been in remote Parts, ought to prove his Ordination, by the Seal of the Bishop that ordain'd him ||.

It has been said, that it is not lawful for a Bishop to ordain any one without a *Title*. Now this Canon was made not only to prevent a multitude of Clergy, which renders their Orders, or (at least) their Persons very contemptible; but likewise to hinder Persons in Orders from becoming Beggars, to the great disparagement of the Priesthood: But a Person may be promoted to Orders without any certain Title, if he has a sufficient Patrimony to live on and maintain himself; and such a Person is said to be ordain'd *in titulum sui Patrimonii*. Nay, if he has a sufficient Estate to subsist on, he may be ordain'd though his Estate be not expressly assign'd and given *in modum Tituli* *. The Word *Title* is, in our Law-Books, taken several ways; sometimes 'tis put for the Motive or Consideration, on which account Dominion or Property is transferr'd: sometimes a *Title* is stiled by the Name of *Necessity*; and sometimes 'tis called a *Token* or *Sign* of a Thing: Sometimes Ecclesiastical Orders, or any Church Dignity or Preheminence are call'd a *Title*; and, lastly, a Benefice itself is sometimes call'd a *Title*; in which Sense I use it here. The Archdeacon says, that a *Canonical Title*, is a spiritual Motive or Consideration, on which Account, a Person has a Right or Power given him of dispensing Matters relating to the Church: And such a *Title* is only agreeable to a Clergyman. But a *Title to Orders*, and a *Title to an Ecclesiastical Preferment*, are different Things: For a *Title to an Ecclesiastical Preferment* accrues several ways, as by Collation, Presentation, Nomination, Election, and by other ways and means of introducing a *Title* unto an Ecclesiastical Benefice, whereby the Person claims Institution, Confirmation, &c. but a *Title to Orders*, only arises from the

* X. 2. 23. 4.

† X. 1. 20. 5.

|| X. 1. 18. 1.

* X. 2. 20.

56.

|| X. 1. 21. 1.

† X. 5. 28. 2.

|| X. 2. 29. 1.

* Abb. in c. 23. X. 3. 5. N. 1. 2. 3. &c.

the Act of obtaining some Ecclesiastical Benefice, or having a Grant thereof (at least) whereby he may claim Ordination. There is also another *Title*, which we call a *Title to the Profits*; and this is a spiritual Right, accruing to a Man from having Institution given him to some Living.



Of a Parish, Parish-Rights, Perambulation and Bounds of Parishes, &c.

A *Parish*, in *Latin*, called *Parochia*, is a Place or District circumscribed by certain Bounds and Limits, wherein the People live that do belong to some certain Church: and it is so call'd from the *Greek* Word *παρῆχη*, importing the same as *Præbeo* in the *Latin*; which signifies the doing of some Service for the Publick, or rather the giving of something to the Publick, because the Priest makes a distribution of the Sacraments to every one belonging to such District *. But the *Latin* Word *Parochia*, which in *English* signifies a *Parish* in the aforesaid Sense thereof, is oftentimes, in the Books of the *Canon* Law, put to denote a *Diocess*: And hence it is, that every Person that dwells within the *Diocess*, is said to be the Bishop's Parishioner †.

* 16 Q. 1.
54.

† Arch. in
c. 3. Dist.
v. *Parochia*.

'Tis said, that Pope *Evaristus*, otherwise call'd *Anacletus Græcus*, was, about the Year 110, the first that began the Work of distinguishing Parishes, and dividing and allotting the Revenues of the Church to several Ministers. But the Infancy of the Church being under Persecution, this Work of the Distinction of Parishes ceas'd till the Year 260; and then it was undertaken again by Pope *Dionysius*, through a favourable Act of *Gallienus* the Emperor, though it was not perfected till *Constantine's* Time. But whatever the *Papists* may boast of the pretended Goodness and Power of several Popes, the first Division of Parishes was made by the Consent of the People, when a certain number of Inhabitants, that had receiv'd the true Christian Faith, built a Temple for the Exercise of their Religion, hired a Priest, and constituted a Church; which, by the Neighbours, was called a *Parish-Church*. And when the number increas'd, if one Church and Priest was not sufficient, such as were most remote, built another, and fitted themselves according to their Conveniency. In process of time, for the sake of Peace and good Order, this, by Custom, began to have the Bishop's Consent: But afterwards, the Court of *Rome*, by Reservations, assum'd the Collation of Benefices, and conferr'd them on such Persons as receiv'd their Provision of them from that Court. But when the Division of great Parishes began, and consequently a Diminution of their Gain was dreaded, the Clergy, by the Pope's Favour, oppos'd themselves thereunto; so that nothing could be done herein without going to *Rome*. And this gave the rise to that Fancy, that the Pope was the Founder of Parishes.

'Tis very well known to all, who consult History in these Matters; that, in the first Settlement of this Church of *England*, the Bishops of the several *Diocesses* had the Churches under their own immediate Care; and had a Clergy living in community with themselves, whom they sent abroad to several Parts of their *Diocesses*, as they saw occasion to employ them:

them: But that by degrees, they saw a Necessity of fixing Presbyters within such a Compass, to attend on the Service of God, among the People that were the Inhabitants; and thus came Parishes among us. But these Precincts, since called *Parishes*, were at first much larger than at present, being cast into such Divisions in each Diocess, as probably make up the several *Deaneries* now. In the *New Testament*, the Charge is general, *to feed the Flock of God, and to do it willingly, not for filthy Lucre, but of a ready mind, and to be examples to the Flock**. I do not mention this Text to reflect on the Avarice, Idleness, and Immorality of our Clergy, since we have many good Men among them; but to shew that *St. Peter*, who gives this Advice, does not determine who belong to the Flock; nor within what Bounds it is to be limited: and there were many Flocks in the *Jewish Dispersion*, and many Elders scatter'd up and down among them in *Pontus, Asia, Galatia, Cappadocia, and Bithynia*. So that we have here only general and excellent Advice for such who had the Care of the several Flocks, to carry themselves towards them with great Humility and Tenderneſs, with Charity and Goodneſs, as it becomes good Shepherds to do: And it were much to be wish'd that all Clergymen, for the sake of a holy and undefiled Religion, would follow this wholesome Instruction of the Apostle; that they wou'd content themselves with the Fleece, and not with Cruelty and Rapine flea the Backs and Bellies of their Sheep, as too many of them in the *Romish Church* are apt to do; for (I hope) we have none among us of that greedy Temper. *St. Paul*, in his Charge to those *Priests* or *Elders* whom he sent for to *Miletus*, tells them, That they *must take heed to themselves, and to all the Flock, over which the Holy Ghost hath made them Overseers, to feed the Church of God, which he hath purchas'd with his own Blood*†. 'Tis possible here might be a particular Designation of the Flock they were to oversee by the Direction of the Holy Ghost; but yet the Charge is general to take heed to *themselves* and to the *Flock*, and to promote the Good of the Church of God which he had purchas'd by the Blood of his own Son. We meet with many other Texts of Scripture, whereby the Priests are exhorted *to watch for the Souls of their Flocks, as they that must give an Account*‡; but no where with the Bounds and Limits of this Care in respect to Place: So that these Divisions of Parishes are not founded on Holy Writ. Nor were they so ancient as Christianity itself, but were afterwards, upon a general embracing of Christianity, establish'd to prevent an *Itinerant Clergy*, and an occasional going from Place to Place as very inconvenient, by reason of the constant Offices that were to be administred; and because the People ought to know, unto whom they should resort for spiritual Offices and Assistance. And hereupon the Bounds of Parochial Cures were found necessary to be settled in *England*, by such Bishops who were the great Instruments of converting the Nation from *Saxon Idolatry*. But such a Work could not be done all at once, as by a kind of *Agrarian Law*; and, therefore, this was done by several Steps, in order to establish these Divisions as we have them now.

In the latter end of the *Saxon Times*, if we may believe those called the *Confessors Laws*, after all the *Danish Devastations*, there were three or four Churches where there had been but one before. By which it appears, that the *Parochial Clergy* were numerous before the Conquest: And within the Diocess of *Worcester*, in two Deaneries of it, there were to be found in *Doomsday-Book*, above twenty Parish Churches; in the Deanery of *Warwick* ten, and in the Deanery of *Kington* fifteen*. *Bede* tells us †, That at first the *Saxon Christians* made use of any old *British Churches* they

* Pet. Ep. 1. c. 5. v. 2.

† Acts c. 20. v. 28.

‡ Heb. c. 13. v. 17.

* Stillings. Cues, pt. 1. Pref. p. 12. † Lib. 1. found cap. 26.

found standing; and thus *Austin* at first made use of *St. Martin's* near *Canterbury* †; and afterwards repair'd *Christ-Church*, which were both *British Churches* *. But *Ethelbert* gave all Encouragement both to repair *old Churches*, and build *new*. However the Work went on slowly; *Austin* consecrated but two Bishops, which were settled at *London* and *Rocheſter*, where *Ethelbert* built and endow'd two Churches for the Bishops and their Clergy to live together †. *Wilfred* converted the *South-Saxons*, and settled Presbyters in the Isle of *Wight*, but they were but two ‖. In the *Western Parts*, *Birinus* built ſeveral Churches about *Dorcheſter* where his See was fix'd *. In the Kingdom of *Mercia* there were five Dioceſſes made in *Theodore's* Time; and *Putta*, Biſhop of *Rocheſter*, being driven from his See, he obtain'd from *Saxulphus*, a *Mercian* Biſhop, a Church with a ſmall *Glebe*, and there he ended his Days †. In the *Northern Parts* we read of two Churches built by two Noblemen (*Puch* and *Addi*) on their own Mannors ‖: And the ſame might be done elſewhere; but *Bede* would never have mention'd theſe, if the Thing had been common. But in his Letter to *Egbert* Archbiſhop of *York*, a little before his Death, he intimates the great want of Presbyters, and Parochial Settlements; and, therefore, earneſtly perſuades him to procure more *. In the Council of *Cloveſhoe*, we read of *Presbyters placed up and down by the Biſhops in the Mannors of the Laity, and in ſeveral Parts diſtinct from the Epiſcopal See* †: All which Accounts plainly ſhew the Antiquity of Pariſhes among us, even before the Conqueſt. In the Laws of *Canutus*, we find a fourfold Diſtinction of Churches, *viz.* *First*, The *Head* or *Mother-Church*, otherwiſe called the Biſhop's See. *2dly*, Churches *ſecundæ Classis*, which had a Right of *Sepulture*, *Baptiſm*, and *Tithes*. *3dly*, Churches that had Right of *Sepulture*, but not frequented. And, *4thly*, *Field-Churches*, or *Oratories*, which had no Right of *Burial*. The ſecond ſort ſeem to be the original *Parochial* Churches which had the Endowment of *Tithes*, and were ſo large, that ſeveral other Churches were taken out of them by the Lords of Mannors; and thus Pariſhes came to be multiply'd in ſuch a manner with us, that in the Laws of *Edward the Confefſor*, 'tis ſaid *, *That there were then three or four Churches, where there had been but one before*. Some will have it, that this Diſviſion of Pariſhes was owing to the Cunning of the Clergy, for the more eaſy collecting of *Tithes* and other Church-dues: But with them I cannot agree, becauſe 'tis certain, there was this Diſviſion ſettled before *Tithes* were eſtabliſh'd here by any Law. Which leads me next to ſpeak of *Parochial* Rights.

Now a *Parochial* Right, according to the *Canon* Law, conſiſts in ſeveral Things ‖, *viz.* That the Pariſhioners ought on Sundays and Holidays to hear divine Service, or Maſs (as the *Papiſts* call it) in their own Pariſh Church, and not elſewhere. *2dly*, It conſiſts alſo (according to that Law) in Burials, Pennances, Benedictions, in Offerings of Marriage, and Payment of *Tithes* †. And thus a *Parochial* Right is the Power of adminiſtring the Sacraments, of celebrating Divine Service, and of diſtributing Holy Offices unto all People deputed and aſſign'd to one and the ſame Church, and alſo a Power of receiving yearly Profits and Oblations belonging to ſuch Church. For a *Parochial* Right conſiſts not only in the Right of Burying, Tithing, and receiving *First-Fruits*, but alſo in the Right of receiving Oblations, and all other Profits whatſoever, and whereſoever due ‖. And, according to the *Canon* Law, a *Parochial* Right is founded either on the Pope's Power; or elſe on ſome Law or Cuſtom; or, laſtly, on the Will of the Biſhop, and the Conſent of the Chapter, the Biſhop's Authority being join'd thereunto: For as they may

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constitute Parishes (says that Law) by a determination of certain Limits; so they may also grant *Parochial* Rights unto the Rectors and Vicars of them, tho' those Rights seem to be granted even *ipso Jure*, from this Maxim in Law, *viz. Qui vult Antecedens, velle etiam videtur Consequens*. Therefore, by erecting of Parishes, *Parochial* Rights seem to be constituted. The Right of Burying, is a *Species* or kind of *Parochial* Right which is granted to the Rectors of Parishes.

The Object of a *Parochial* Right, is the Cure of Souls committed to the Parish-Priest, and the Parish-Priest is bound to render an Account thereof unto God, if they perish and are lost through his Default *; and this Cure of Souls consists in the Celebration of divine Service, in teaching and instructing the People of his Parish, and in the Administration of the Sacraments, &c. The Form of Establishing a Parish, according to the Rules of the *Canon* Law, is, that some Precinct or Place limited with certain Boundaries, within which the People dwell, should be allotted to some certain Church, by the Consent of the Bishop, or some other superior Prelate; and that there should be a Rector or Parson to take care of the Souls of the People therein placed, by all wholesome Instruction, Administration of the Sacraments, and by a due Celebration of divine Service: And no foreign Parishioner ought to be admitted to divine Service or Burial in such Parish, without the Leave of the Parson, or Rector of such Parish-Church; especially, if such Person comes thither to hear divine Service out of contempt of his own Parish Priest†. And thus a Man is said to be a Parishioner in respect of his Dwelling or Habitation, and not in respect of Lands which he has in such a Parish: And hence it is, that if any one transfers his Dwelling or Residence, he shall be said to be a Parishioner of that Church, to which he transfers his Abode ||: but if a Man shall live in divers Places alike, he shall be deem'd a Parishioner of each Church*. But the Question is touching Scholars, or Non-resident Clerks, that travel on the score of Learning, unto what Parish they belong? And herein the *Canon* Law determines, that if they travel or go to a Place for the sake of Study, with the Leave of their Rector or Governor, they become Parishioners unto that Bishop, and are subject to him unto whose Church they resort†: But by the *Civil* Law, they do not seem to be subject to such Jurisdiction, unless they have been commorant there for ten Years ||.

Having already observ'd, that a *Parish* is a Cure of Souls limited as to Persons and Place within a certain District or Precinct, I shall next discourse of the just Bounds and Limits of such *Parochial* Cures, which are now certainly known by long Usage and Custom, and ought still to be preserv'd with great Care, since Duties due to, and from *Parochial* Churches, are equally expected on both sides, (for otherwise Confusion and Disputes will arise between several Ministers, and several Parishes with each other :) and this is best done by annual Perambulations. For *Rebuffus* says *; *That to prove a Church to be Parochial, it is first of all necessary, that it should have a certain Precinct or Boundary establish'd within which the People allotted to such a Church do live*. But some are against bounding of *Ministerial* Duties by distinct Parishes, who think themselves at Liberty to exercise their Gifts where-ever they are called; and that it were much better to have these *Parochial* Inclosures thrown open, and all left at Pleasure to chuse such Ministers whom they liked best, and under whom they can improve most. These Things seem to look plausibly at first Appearance, and to come nearest to the first gathering of Churches, before any such thing as Parishes were known. But to me, this Arguing looks like Persons now going about to overthrow all

* X. 3. 26.
15. X. 1. 23.
1. 16 Q. 1.
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† X. 3. 29. 2.

|| X. 3. 29. 5.

* D. 50. 1. 6.

† X. 3. 4. 4.

|| C. 10. 39.

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* Rebuff. ad
concord. de
Collat. Sec.
Stat. N. 2.

all Dominion and Property in Lands and Estates, because it seems not so agreeable with the first natural freedom of Mankind; who, according to the original Right of Nature, might chuse what serv'd most to their own Conveniency. But tho' this was the first State of Things, yet the great Inconveniencies that follow'd it, on the Increase of Mankind, made Division and Property necessary; and tho' we have no exprefs Command of God for it, yet being thought so necessary for the Good of Mankind, it was not only every where continu'd, but those Persons were thought fit to be punish'd by severe Laws, who invaded the Rights and Properties of others, either by open Rapine and Violence, or else by secret Stealth and Purloining. But I shall not here determine, whether the Constitution of a *Parochial Clergy* is more reasonable than that of an unsettled Clergy by Law, but I refer the Reader to *Stillingfleet's Ecclesiastical Cases*.

|| An. 26.
H. 8.

As to the Cognizance of the Bounds of Parishes, we are told in a small Treatise, printed by *Tho. Godfrey* in *Henry* the VIIIth's Reign ||, that it was the Opinion of Men in Times past, &c. "That the Division and Distinction of one Parish from another, was a Thing so *meerly* Spiritual, that no Man might do it but the Clergy". And tho' he disavows this Assertion, if the Clergy claim it *by any immediate Power given them by God*; yet (he says) that, doubtless, in times past they held Plea of these and of divers other Things, rather by Custom and the Sufferance of Princes, than by any *meer* spiritual Right they had, or *that they* of the Clergy *had Authority so to do by any immediate Power from the Law of God*. So that he allows the Division and Distinction of Parishes to have been antiently of Ecclesiastical Cognizance, according to the *Canon*

* X. 3. 29. 4.

† Lindw.
lib. 5. Tit.
15. c. 1.
|| A. D. 1260.

Law*; tho' to be deriv'd from the *Royal Prerogative*. And thus it appears by a Provincial Constitution † made in a Synod held at *Lambeth*, under *Boniface* the Archbishop of *Canterbury* ||, that the Clergy then, undoubtedly, held Plea touching the Bounds of Parishes, and that they *meerly* belong'd to the Cognizance of the Ecclesiastical Court. And *Lindwood*, living about 200 Years afterwards, in his Commentaries or Glosses thereon, makes no Question of it, but only quotes the *Canon Law* for it. But now the Cognizance touching the Bounds of Parishes is not allow'd, by our common Lawyers to belong to the Jurisdiction of the spiritual Court: For, at present, if a Suit be there commenc'd touching the same or any the like Matter, a Prohibition will lie from the Temporal Courts. See *Fisher and Chamberlain's Case* *. But tho' the Bounds of a Parish are not now tryable in the *Court Christian*; yet the Bounds of a Vill in the same Parish are tryable there, and no Prohibition will lie †. In some Places, Parishes seem to interfere with each other, when some Place in the middle of another Parish, belongs to one that is distant; but that has generally happen'd by an Unity of Possession, when the Lord of a Mannor was at the Charge of erecting a new Church, and making a distinct Parish of his own Demesns; some of which lay in the Verge of another Parish. But now Care is taken by annual Perambulations to preserve those Bounds of Parishes, which have been long settled by Custom: But no Ecclesiastical Prescription is current or good against the Bounds and Confines of any Diocess, Bishoprick, Province, Parish, &c. and Things incident thereunto, which cannot be lost but by length of Time beyond the Memory of Man ||, when there is no legal *Constat* touching such Bounds and Confines, as aforesaid. But, according to the *Abbot*, the Bounds of Parishes may be prov'd by *enunciative* Words express'd, in a Deed or Instrument made to some other End and Purpose.

* Mich. 14.
Jac. B. R.

† Levin.
Rep. pt. 1.
p. 78.

|| Abb. in
c. 4. X. 3.
29.

But as the Number of Parishes increas'd, and new Churches were erected, the Extent and Value thereof came to be different; tho' the Obligation,

gation, which the Law puts on the Parochial Minister, was the same; only where the Maintenance was greater, the Parish Priests might have the more Assistants: And therefore, from hence came the Difference among the Parochial Clergy; for those whose Parishes were better, endow'd, cou'd maintain inferior Clerks under them, who might be useful to them in the publick Service, and assist them in the Administration of the Sacraments. And this was the true Original of those we now call *Parish Clerks*; but were at first intended as Clerks-Assistant to him that had the Cure; and, therefore, he had the Nomination of them, as appears by the Ecclesiastical Law both here and abroad. And *Lindwood* says*, that every Vicar was to have enough to serve him, and one Clerk or more; and by the *Canon* Law, no Church could be founded, where there was not a Maintenance for *Assisting-Clerks*†. In the Synod of *Worcester*, under *Walter Cantelupe*, in *Henry* the III'd's Time, they are call'd *Capellani Parochiales*, and the Rectors of Parishes were requir'd to have such with them‡. And the *Canon* Law allows a Rector to give a *Title* to another, to receive Orders as an Assistant to him; and this without any Prejudice to the Patron's Right, because only one can have a Legal Title to the Cure. But *Lindwood* observes very well, that those who give Titles to others as their Assistants or Curates, are bound to maintain them if they want: But this (I think) cannot be understood of Parish-Clerks, but of Parochial Vicars, or Stipendiary Priests; of which hereafter. For the same Person in his Gloss on the Provincial Constitutions tells us ||, That a Parish-Clerk is in *Latin* stiled *Aquæ-bajulus*; and that his Office, which is Ecclesiastical, is called *Aquæ-bajulatus*, from carrying the Holy Water in the *Romish* Church: which Office is vile and mean even in that Church; and, therefore, it can have no Analogy with a Parochial Vicar, or Stipendiary Priest. And in this respect he might be a Layman, who is not in holy Orders, tho' otherwise he ought to be a Person of competent Learning*: Which is another Reason, why this cannot be understood of Parochial Vicars or Stipendiary Priests. *Lindwood* likewise informs us †, That the *Parson* and *Vicar* have the Nomination and Appointment of the Parish Clerk: who being so appointed, was to have the Customary Fees of the Parishioners for his Service, or he might sue for them in the Ecclesiastical Court, and compel the Parishioners to the Payment hereof, and this was enacted at a Provincial Synod in the 44th Year of King *Edward* III. by a Canon then made ||. But neither this, nor the gift of King *James*'s Canons, can take away a Custom, where the Parishioners or Church-wardens have been used to the Appointment of a Parish Clerk; because that is a Temporal Law, which cannot be alter'd by a Canon, especially where such a Custom is not particularly mention'd in the Canon, and provided against thereby. By a Book of Canons in Queen *Elizabeth*'s Reign*, Parish-Clerks are in *Latin* term'd *Æditui*; and are to be chosen according to the Parish Custom, by the Votes of the Parishioners, and the Minister of the Parish; and their Office then was to last no longer than one Year, unless they were re-elected; and were once every Year to render a just Account of all Moneys coming to their Hands. But now, what was then the Duty of the Parish Clerk, in some respect, is the Office of the Church-wardens. The Provincial Constitution calls these Clerks Fees, by the Name of *Eleemosynas consuetas* †; and (I think) they may be comprehended under the Words *largitiones Charitativæ* ||, for which the Register has a Consultation, as being of Ecclesiastical Cognizance. If the Church-wardens of a Parish have used, Time out of Mind, &c. to chuse the Parish Clerk, and a Suit be commenc'd in the Spiritual Court to remove such Clerk, and to put in one of the

* Joh. de
Arh. in Tit.
Ortob. 9.
† X. 3. 38.
30.

† Lindw.
lib. Tit. 6.
c. 2.

|| Lib. 3. Tit.
7. c. 2. v.
a nostris Ma-
joribus.

* 12 Q. 1.
7. X. 1. 14.
11.
† Lib. 3. Tit.
7. c. 2. v. a
nostris Ma-
joribus.

|| Lindw. ut
supr.

* A. D. 1571.

† Lindw.
ut supr.

|| Reg. fol.
52. b.

* 22 Jac.
B. R.

† 19 Jac.
B. R.

Parson's Choice, a Prohibition will lie; as in *Walpole's Case* * : But there the Prohibition was granted by consent of Parties to try the Custom. The like Prohibition was granted between *Brown* and *Grazshaw* for *White-Chapel* Parish † ; and the like was granted between *Beaumont* and *Westley* for the Parish of *St. Cuthbert's* in *Wells*.



Of Patrons, Right of Patronage, Presentation, &c.

* 16 Q. 7.
10.

† 16 Q. 7.
32.

|| 16 Q. 7.
32.

* Can. 2.

† Nov. 126.
cap. 18.

|| 16 Q. 7.
33.
* 18 Q. 2. 4.

WE read in the Books of the *Canon Law* *, that in antient Times, the Right of disposing of vacant Benefices depended absolutely on the Bishop of the Diocese, wherein such Benefices lay; who, after the People had (for the sake of Peace and Unity among themselves) transferr'd and given up the Right of electing their own Minister to their Diocesan, might confer such Benefices on whom he pleas'd, without any restriction whatsoever; provided the Persons were duly qualify'd for the Cure of Souls: For 'tis certain, That this Right did not originally belong to the Bishop, but was the Donation of the People to him, when Heats and Animosities grew frequent and high among them in their Elections thereunto, after Churches came to be richly endow'd; and when the Clergy contend-ed more for the Profits and Revenues thereof, than for the Cure of Souls themselves. And thus was the Bishop for a while universal Patron of all the Churches in his Diocese; 'till in Process of Time, for the sake of building and endowing a sufficient Number of Churches, the Bishops thought fit to part with somewhat of this Right to such Persons as were willing to found, erect, and endow new Churches on their Estates, when they admitted these Persons to a Nomination and Presentation of their own Clerks thereunto, as they did on the Authority of the 9th Council of *Toledo* †; but still reserving the Approbation of such Clerks in point of Fitness unto themselves: And this is what we now call a *Right of Patronage*. For *Gratian*, who quotes the Canons of the first Council of *Orleans*, others say the Council of *Rheims*, to prove that all the Churches of every Diocese were in the Power of the Bishop ||, makes in the same Place several Restrictions in favour of those that have founded Churches: And, amongst others, he asserts this Right of Nomination to be founded on a Decree* of the aforesaid Council of *Toledo*. Now this Right of Nomination or Presentation, which is the chief Advantage of Patronage, was granted long before the establishment of the *new Law*, and of Benefices, to such as founded Churches, and maintain'd the Ministers thereof: for we have it expressly mention'd in the *Novels* † by *Justinian* himself; That Bishops ordain'd for the same Churches, such as were recommended to them by their Founders; and the antient Canons of the Church mention the very same Thing. And as they are stiled Patrons of a Church, who have either founded, built, or endow'd the same; so there may be several Patrons of one and the same Church, by reason of different Benefits accruing from them, and for that the Church is oblig'd to several Persons, whether for having built it ||, or for having bestow'd Ground whereon it is founded *, or for having allotted Lands and Possessions for the

the Maintenance of such Ministers as serve the Cure thereof*. All these^{* 16 Q. 7. 31.} things (I say) acquire to the Benefactors a Right of Nomination or Presentation, which is term'd a *Right of Patronage*: and though it does not clearly appear by the Deed of Foundation, that they have reserv'd to themselves that Right; yet still they shall have it of *Common Right*, provided they have not renounced the same. Therefore,

This Right of Patronage is a Power of presenting some fit and proper Person to the Bishop or Ordinary for Institution into a *simple* vacant Benefice in the Church †: And if the Person presented be qualify'd for the Cure, the Bishop or Ordinary cannot refuse him; but is obliged to give such Presentee Institution upon a Tender of his Letters of Presentation; wherefore Bishops look upon this as a kind of Servitude annex'd to Benefices, which they would now get rid of, if possible. Indeed the Right of Patronage may be taken in several Senses; as *first*, by the *Civil* Law for that Right, which is acquired by the Manumission of any one's Bondman or Servant; and *2dly*, An Advocate is often call'd a *Patron* in the Cause he undertakes to plead, and wherein he exhibits his Patronage or Defence ||: But I shall here use it in the Sense abovemention'd, *viz.* *For the Right of presenting a fit Person to the Bishop for Institution into some Ecclesiastical Benefice.* And in this Sense 'tis defin'd to be *Jus Honorificum, onerosum & utile*, accruing to the Person himself, and to the Heirs of him who has founded, built, or endow'd a Church by the Bishop's Consent †: For though these three Things, or either of them, do contribute to make a Man the Patron of a Church, yet he cannot present a Clerk thereunto, unless such Church be founded and built with the Consent of the Diocesan, according to a Form prescrib'd by the *Canon* Law*. 'Tis in *Latin* call'd *Jus Honorificum*; *first*, because the Patron has the Honour of presenting a Clerk thereunto whenever it becomes void, either by Death, Cession, Resignation, Deprivation, and the like: For no Bishop or Prelate can institute a Rector or Parson thereinto, without the Patron's Presentation †. *2dly*, 'Tis so called, because the Patron ought in Preference to all others to have Honours done him in such *patronag'd* Church, as the best Seat therein, and the like*. 'Tis also in *Latin* said to be *Jus onerosum*; because, by the *Canon* Law, the Patron is bound to maintain and defend the Rights of such Church, lest that the Goods and Estate thereof should be unduly wasted and dilapidated ||. And, lastly, This Right is term'd *Jus utile*; because the Patron obtains several Advantages from his Patronage, and this in particular, *viz.* That if he should come to Poverty, the Church is bound to maintain him out of such Revenues of the Church as exceed the Necessities thereof, in a much better manner than it is oblig'd to maintain other Poor †. As three Patrons may concur in the Patronage of the same Church, *viz.* because one endow'd it, another caus'd it to be built, and a third gave Ground for erecting the same thereon; so several Persons may concur in the Endowment of a Church, &c. For if they all contribute towards the Endowment thereof at the same Time, they shall all of them (according to *Innocentius**) be deem'd Patrons, though one of them should bestow less on it than another.

* A Patron, at his first Founding of a Church or Benefice, may, by the Bishop's Consent, not only reserve to himself the Right of Patronage, but even a perpetual Estate or Pension out of the Endowment of such Church, because he may assign such Estate or Pension unto another Church, or to himself and his Family. And he may likewise, by the Bishop's Consent, reserve to himself the Fruits and Profits of a vacant Church, which he has founded and endow'd during the Time such Church

† Hostiens. in §. quid sit X. 3. 38.

|| D. 3. 1.

† Joh. Andran. in Rubr. X. 338.

* Con. 1. Dist. c. 9.

† 16 Q. 7. 32. X. 3. 38. 14. * X. 3. 38. 25.

|| 16 Q. 7. 31.

† 16 Q. 7. 30.

* Gloss. in 63 Dist. in sum.

Church remains void; and the same shall go to himself and his Family. But a Patron cannot, at the Time of Founding and Endowing a Church, reserve to himself the Right and Power of giving Institution thereunto; because this is prohibited by the *Canon Law* *: and, it being a Right accruing entirely to the Bishop, the Patron cannot appropriate it to himself: Nor can the Patron plead a Prescription of such Right of granting Institution; because 'tis an Episcopal Right, which cannot be prescrib'd unto by any inferior Persons, as endowing Patrons are: For such a Prescription requires a Title from the Superior; and not only so, but a *Bona Fides* too, and the space of Forty Years likewise in order to establish it. And both these Cases are true, whether the Patron be a Lay-
† X. 3. 38. 15. man or an Ecclesiastick †, or whether the Benefice be a *simple* Benefice, or a Benefice with Cure of Souls: For as the Institution to a Living does not of *common Right* belong to the Patron, but only the Presentation thereunto; so a Prescription contrary to the Law, in this Case, is not valid. And as he cannot reserve this Right of giving Institution to himself, so much less can he assign it to another, particularly in Prejudice to the Bishop's Right. And this holds true as well in Lay-Patrons as Spiritual; because a Patron can only present a Person to the Bishop for his Institution, and not give Institution to a Benefice by Right of Patronage, as just now hinted. And though a Patron can receive no other Advantage or Emolument from this Right of Patronage, but what he has reserv'd to himself, by the Bishop's Consent, on first Founding the Church ||; yet several Honours, Privileges, and Advantages are due to him of *common Right*, as Defence, Preference, Maintenance, and the like, as already related: all which Things accrue to him from the Nature of a *Jus-Patronatus*.

As a Patron cannot in his own Person present himself to a Benefice in his Gift *, so neither can he present himself by a Proctor, or by any other Person, to such a Living, unless he has the Right of Patronage in common with others, and a Proxy be made by several Persons to this end; for then he may do this in common and among the rest †: For as one Patron may present another, so may a Proctor thus constituted present one of the Patrons; and such Presentation shall be valid. Thus, though a Father and a Son be, in some measure, one and the same Person, and the Father, as Patron cannot present himself; yet he may present his Son, notwithstanding, because they are only one and the same Person by a Fiction of Law. In *England*, though a Patron cannot present himself to a Living *; yet he may pray the Bishop or Ordinary to admit him thereunto, and it shall be good; tho' some have doubted hereof, because there is no Presentation of a Clerk: But if he presents himself, tho' by a strange Name, he may be put out †. But the common Practice in this Case, is, that the Patron should assign over the next Presentation to another in Trust by reserving the Right of Nomination to himself; and thus the Patron is not at the Bishop's Beck, whether he will admit him or not, as in the former Case.

If two Persons shall be presented to one and the same Church by different Patrons, and each of those Patrons do pretend to the sole Right of Patronage, the Cure of the Church shall be committed to neither of the Presentees, *pendente lite* *: But the Right of collating to such Church did, by the Council of *Lateran*, devolve or lapse to the Bishop during such Suit, if the Patrons could not agree about the Right of Patronage within six Months from the Voidance of the Church, who might collate either of the Presentees, or a third Person ||, provided that neither of the Patrons were prejudiced in their Right of Patronage or Presentation by the Bishop collating thereunto, in case one of them did, in the Suit
or

* X. 3. 38. 10.

|| X. 3. 38. 4. 16 & 17.

* X. 3. 38. 15. & 26.

† Gloss. in c. 15. X. 3. 38.

* 14 H. 8. 3. a.

† 35 H. 6. 59.

* Lindw. lib. 3. Tit. 21. c. 1.

|| X. 3. 8. 2.

or Controversy between them recover or evince a Right of Patronage * But now by a Provincial Constitution 'tis ordain'd, That the Bishop shall confer such Church on neither of the Clerks at that Time presented, unless it be by the Consent of both Patrons, lest he should injure one of the Patrons claimant on a future Recovery of the Right of the Patronage † And the usual way at present, is for the Bishop in such a Case to award a Process, and summon each Patron before him, in order to enquire into the Right of Patronage before he grants Institution, lest otherwise he should be made a Disturber thereby: And this is called an *Inquisition* touching the Right of Patronage. By the Custom of *England*, a Cause touching the Right of Patronage, is heard and try'd in the King's Courts, according to the Common Law, tho' by the Canon Law ‖, the same belongs to the Cognizance of the Ecclesiastical Court; and upon an Eviction or Recovery of the Right of Patronage against any one in the King's Court, the King ought to write to the Bishop, or him to whom Institution belongs, commanding him to admit the Person presented by such Patron as has got the better in the Suit, if such Benefice be still vacant, whether it be *de Jure*, or *de Facto* so, lest an Injury be done to the Patron *; and the Presentee ought to be freely admitted without making any enquiry touching the Right of Patronage, because the King does, by his Writ or Letters, assure the Bishop, that the Patron has obtain'd this Right in his Court †. But if a Benefice of this kind be not vacant, the Bishop or Ordinary ought, in order to excuse himself from any Contempt, to certify to the King or his Judges, before whom the Patron obtain'd his Suit, either in his own Person, or else by a Special Messenger, or Letters Missive, that such Benefice is not void; and, therefore, he cannot comply with or yield Obedience to the Royal Mandate. But the Patron may present again, if he pleases; the Person now in Possession and instituted by the Bishop's Authority, tho' the Person was thus instituted or collated by the Bishop thereunto, by a Right of Devolution accruing to him ‖; so that, by such Presentation of the Patron recovering his Right of Patronage, the Patron's Right of Patronage may be declar'd to belong to him for the future. See *Lindwood* hereupon *.

A Dispute sometimes happens not about the Right of Patronage, but about the Person to be presented; and then he ought to be preferr'd who has the Voices of the greater number of Patrons †, where there are several Patrons, provided he be a qualify'd Person; and if this may be done without Scandal and Offence to them: and this is true, where there are more Patrons than two. But if there are only two Patrons contending not about the Right of Patronage, but about the Person to be presented, and one of them presents one Person, and the other presents another, the Bishop may, in such a Case, gratify which of them he pleases, or himself, according to *Joh. de Ananias* ‖; but *Anchoranus* opposes this Doctrine, because tho' there be room for Gratification when one Patron presents several Clerks; yet this ought not to be (says he) when two Clerks are presented by two Patrons, because where one Patron presents two, the Will of the Person, who is sole Patron, concurs in both; but where there are two Clerks presented by two Patrons, neither of the Presentees has the Presentation *in solidum*, but only in part, *viz.* the Voice or Suffrage of one of the Patrons, which is not sufficient according to him. And hence it is, that even in this Case, if they do not agree within the Time limited for a Presentation, the Bishop shall collate according to the Form of the Canon Law *.

If there be two Persons presented by one and the same Patron, and the Patron presenting be a Clergyman, who cannot vary or change his Pre-

* X. 3. 38. 12
& 27.

† Lindw.
lib. 3. Tit.
21. c. 1.

‖ X. 2. 1. 3.

* Lindw. ut
sup. cap. 2.

† Dd. in
c. 9. X. 2. 22.

‖ X. 3. 38. 12.

* Lib. 3.
Tit. 21. c. 2.

† X. 3. 38. 3.

‖ In c. 24.
X. 3. 38.

* X. 3. 38. 2.

sensation, the first Presentee shall be Preferr'd, if qualify'd : But if the Person thus presenting be a Layman, who may vary his Presentation, the Bishop may then, by way of Gratification to himself, admit which of them he pleases *. For 'tis a sound Conclusion of Law among the *Canonists*; That a Lay Patron, though he has presented one, may (notwithstanding) present another afterwards, and thus vary his Presentation †. And the Reason given for this, is, because that no Title and Property, which are the Effect of a Presentation, is conferr'd by a Lay Presentation, if the Bishop does not thereupon give an Admission. And, therefore, before the Consummation of the Effect, there is room for Repentance ‡. But it had been otherwise, if the Patron's Will and Election had drawn its Effect along with it, because a Variation would not then be admitted and allow'd of. An Example hereof appears in a Bishop collating to a Benefice. Moreover, 'tis to be observ'd, that a Lay Patron may present several Persons to a Benefice successively, and the first shall not be remov'd by the Presentation of the second, but the second is an Accumulation to the first. Hence 'tis, that if he can present several Persons successively, he may *a fortiori*, do this in the Beginning, to the end that the Bishop may chuse one of the several Presentees *.

There are several Distinctions and Differences in the *Canon* Law between Ecclesiastical and Lay Patrons, many of which are little or in no wise regarded with us here in *England*. For first, as I have already observ'd, the space of six Months is allow'd to an Ecclesiastical Patron to present in to a Benefice : But a Lay Patron, according to that Law, has only four Months Time given him †. And the Reason, why Ecclesiasticks have a longer time indulg'd them to present in than Laicks have, seems to be founded on this Bottom, *viz.* Because as soon as Ecclesiasticks have made a Presentation, 'tis in no wise proper and convenient for them to vary their Choice of the Person presented, as being presum'd to understand his Merits and Qualifications : But 'tis decreed otherwise in respect of Laicks, who are not presum'd to know the Learning and Proficiency of their Presentee, but to leave that Matter to the Bishop; and tho' they may not vary by a foregoing of the first Presentee, yet they may present another by way of Accumulation, that the Bishop may have his Choice. 2dly, A Legate *de latere*, may collate to a Benefice, where the Papal Power domineers, in Prejudice to an Ecclesiastical Patron *, which he cannot do in Prejudice to a Lay Patron. And 3dly, The Temporalities, during the Vacancy of the Church, ought to be given to an Ecclesiastical Patron : But 'tis otherwise in respect of a Lay Patron; unless he has reserv'd the same to himself at the Time of Founding, Building, and Endowing the Church.

The Right of Patronage is in the Books of the *Canon* Law called an *Ecclesiastical* Right, because 'tis annex'd (say the *Canonists*) to a Thing Sacred or Spiritual, as those Things are deem'd to be *Religious*, which belong to *Religious* Places : But yet this is not an Ecclesiastical Right in its own Nature *. And hence 'tis, that it may accrue unto Laymen, who are otherwise forbidden to meddle with Things sacred or spiritual. And as something spiritual is annex'd hereunto; so Episcopal Institution is necessary to compleat the same. For no one may receive a Church, or the spiritual Government thereof from a Layman, according to the *Canon* Law; no, not even from the Patron who has built and founded the Church at his own Charge †. And as a Spirituality is annex'd hereunto, it happens, That by the Papal Law, the Right of Patronage cannot be sold thro' the imminent danger of Simony; and likewise, for that Things sacred do not in their own Nature admit of any valuable Consideration ‡; for Bargain and Sale is establish'd by an equality

* X. 3. 38.
24.

† Dd. in
c. 24. X. 3.
38.

‡ Arg. D. 2.
1. 18. & D.
24. 3. 22. 5.

* Joh. de
An. in c. 24.
X. 3. 38.

† X. 3. 38.
22 & 27.

* X. 1. 30. 6.

‡ Arch. in
c. 26.
16 Q. 7.
* Lindw.
lib. 2. Tit.
6. c. 1. v.
pactionem.

† X. 3. 38.
10. 15 & 23.

‡ X. 3. 38. 16.

equality of Price, according to the Value and Estimation of the Thing bought and sold. Nor ought the Person, who confers or presents to a Church *Jure proprio*, retain any of the Profits arising from thence unto himself in consideration of such Presentation, because this would be a kind of Simony: For the Profits of a vacant Church ought to be apply'd either to the Advantage of the Church, or else reserv'd for the next Successor thereunto; unless there be a Custom or Privilege to the contrary †. † vi. 16. 9.

This Right of Patronage, in a Layman, however crude and undigested it may sit on the Bishop's Stomach, is founded upon Equity itself: For since the Patron has either built the Church from the Foundation, or endow'd the same which was not endow'd before, or repair'd the same on its falling into Decay; it is but reasonable, That he should have this Right of Patronage or Presenting a Clerk, as it were, by way of Remuneration; and that Institution should be granted to his Clerk on his Presentation of him, without any Lett or Hindrance, provided he presents a fit Person. And in respect of this Fitness or Qualification of a Person to be promoted to a Benefice with Cure of Souls (among other Things) we ought to consider first the Age of the Person to be thus promoted, who ought to be twenty four Years of Age compleat, or twenty five *anno corrente* *. 2^{dly}, He ought to be well recommended for his Knowledge, * X. 1. 6. 7. Learning and Morals. And 3^{dly}, He ought to be such a one, as either is † or may be promoted to Priests Orders within a Year †. And 4^{thly}, By † vi. 1. 6. 14. the Papal Law, he ought to be in some Clerical Orders at the Time of his Presentation †. But a Person to be admitted to a Vicaridge, ought to † X. 3. 7. 2. be a Deacon (at least) at his Admission; so that he may be promoted to Priests Orders at the next Ordination. With us here in *England*, the Person ought to be in Orders at the Time of tendring his Letters of Presentation to the Bishop *. Now a *Presentation*, in Propriety of Speech, is the Act of the Patron, when, by Letters Missive, he offers his Clerk to the Bishop for Institution into some Benefice, which is in his Gift as Patron, and the Form thereof we have in *Lindwood* †, as well as in the *Original* † Lindw. ut Register. The *Presentee* is the Clerk, that is thus presented by the Supr. Fol. Patron. In a Statute of *Richard II.* mention is made of the King's *Pre-* 322. *sente*, viz. the Person whom the King presents to a Church. And a Person, that has the Right of presenting, may make his Presentation by Letters to the Bishop, tho' the Person presented is bound to exhibit himself *personally* before him †: And the Patron may present several Persons to the Bishop, though he can only give Institution to one, as he shall think qualify'd. When a Presentation belongs to many Persons, as being Individuals, 'tis not necessary that all should agree to the Act of Presentation, but they may present *separately* †: But a Presentation, which belongs to † Abb. Conf. a College, or an aggregate Corporation, cannot be made by the Head of 76. N. 1. such College or Corporation alone, without the Consent of the greater fol. 103. part of the College, Chapter, or Common Council *. The Person pre- * X. 3. 10. 6. senting, and the Person presented, may by the Common, as well as the *Canon* Law †, have an Action to remove him, whom the Bishop has in- † Abb. in stituted in contempt of the Patron's Presentation. c. 1. Cl. 5. 6.

In the Practice of admitting a Presentation, it is enough to say, That we receive such Presentation, or in *Latin* thus, *Talem presentatum recipimus* †. Tho' this Right of Presentation belongs to the Patron in † X. 1. 30. 6. virtue of his Right of Patronage *, especially when Admission and Insti- * X. 3. 38. tution belongs to another Person; yet such Presentation is, by the *Canon* 31. X. 2. 21. Law, said to be a spiritual kind of Right, since the Power and Authority of presenting in respect of the Thing itself, to which the Presentation is made, is in some measure Spiritual, tho' strictly and properly speak- ing,

ing, neither the Right of Patronage, nor a Presentation is a spiritual Thing: But as this Power and Authority is not the principal Thing, but only a Preparatory Act to the Principal, which is Institution or Investiture, and is extrinsically added to the Principal, as being previous thereunto, it may in this manner be said to be annex'd to a spiritual Thing. A Presentation gives a Man *Jus ad rem*; but 'tis the Institution of the Bishop or Ordinary, that gives him *Jus in re*: And thus the Grant of the Bishop or Ordinary induces what we call *pinguius Jus* *. A Presentation made to any other than to a vacant Church, is not valid; nor shall the Presentee have any Benefit from thence †; but a Person presented to a vacant Church by the Patron, acquires a Right to such Church, tho' the Patron may afterwards vary in his Presentation; and the Person presented ought to sue for Dispatch of Institution with all Humility, lest that another Person should in the mean while be presented by that or some other Patron, pretending a Right thereunto; for since a Lay Patron may vary his Presentation, all Delays are dangerous.

* X. 1. 30. 6.

† X. 3. 8.
2 & 3.

|| Lib. 3. Tit.
21. c. 3.

By a Provincial Constitution in *Lindwood* ||, every Dean of a Cathedral or Collegiate Church, and all other Deans, to whom it does by Custom, Privilege, or otherwise, belong to grant Institution to Ecclesiastical Benefices, are forbidden to make any enquiry touching the Business of any Presentation to such Benefice, unless it be in a full Chapter on a Legal Citation of him to whom the Possession of the Church belongs, till such time as he may, by prudent Advice, justify himself herein; and by a sufficient Remedy provide for his own Defence: And whatever future Attempt shall be made against this Canon, shall be deem'd invalid. And such Dean or Prelate thus proceeding in his enquiry in a Clandestine manner out of a full Chapter, and without a Summons, shall be bound to make the Possessor Satisfaction, and suffer three Years Suspension *ab Officio*. But the Bishop's Power and Authority is not hereby limited and restrain'd.

If a Bishop being seized of the Right of Patronage in virtue of his Bishoprick, dies, and the Temporalties of the Bishoprick are seiz'd into the King's hands, in Right of his Prerogative, the Vacancy of a Church, in such Bishop's Gift, shall not, by his Death, go to his Executors, as it does on the Death of a Common Person: For the King being thus seiz'd of the Temporalties, shall not only present to such Benefices as become void during the Seizure *, and as were void after the Bishop's Death, and before the Seizure †; but also of all such as were void when the Bishop died ||; and likewise to such to which the Bishop had at any Time presented or collated, if his Clerks had not taken Induction, as well as Institution or Collation, before the Bishop's Death, because nothing but Induction fills the Church against the King *; and much more to such to which the Bishop had only presented, and to which his Clerk was not instituted †. In antient Times, as well as at present, all Bishopricks in *England* were of the King's Gift; and tho' he afterwards gave leave to the Chapters to elect their Bishops, yet the Patronage did (notwithstanding) remain in the King ||, and so does the Nomination of the Person to be elected now.

* 18 E. 3.

31. b. 21 E.

3. 5. a. 29.

a. 30. a. 24.

E. 3. 26.

† 12 E. 3.

|| 50 E. 3. 26.

9 H. 6. 16.

b. 24. E. 3.

26.

* 24 E. 3. 30.

† 44 E. 3. 3.

|| 17 E. 3. 40.

* 14 H. 4. 22.

But tho' Presentation and Nomination are oftentimes, in Law, used for one and the same Thing, yet they may be so distinguish'd, that one may have the Presentation, and another the Nomination unto such Presentation vested in him, as two distinct Estates *. And this may come to pass, by the Grant of him that is seiz'd of the Advowson or Right of Patronage: For if he that is so seiz'd, grants unto another and his Heirs, That the Grantee and his Heirs, every time the Church becomes void, shall nominate to the Grantor, and his Heirs, a Clerk, to be presented to the

the same, and that the Grantor and his Heirs shall present the Clerk so nominated to the Ordinary of the Place to be admitted and instituted accordingly into the Church; and this is a good Grant. And he who has the Right of Nomination, is the only Patron of the Church, and may maintain a *Quare impedit* in his own Name; and he that is to present such Person so nominated, in presenting, shall be but as an Agent or Servant to him that has the Nomination*. And thus, tho' the Right of Patronage, and a Nomination unto the Benefice, do vary in Name; yet in Nature, they are, as it were, the same, so that the Grant of the Nomination to the Patron's Presentation, is, in substance, a Grant of the Right of Patronage in respect to the Clerk presented; for the Profit and Commodity of a Right of Patronage chiefly rests in the Nomination, or Disposition of the Benefice. But a Nomination, according to the *Canon Law*, is a Recommendation of two or three fit Persons, made for the sake of an Election unto some Benefice†: And this is done either by their Christian or Surnames, or by some Means which may certainly demonstrate and point out the Persons thus put in Nomination‡. I say *two or three or more*; because if only one Person be put in Nomination, as it sometimes happens, it is rather an Election than a Nomination; and hence the Person nominated acquires some kind of Right unto the Benefice to which he is thus named*. Thus at this day, the *French King*, by several *Concordats* and Agreements made between him and the Pope, ought to name one grave Master or Licentiate in Divinity, or Doctor of Laws, or of one of the Laws, being of Lawful Age, unto all Prelacies and Elective Benefices in the Church; and to recommend him then to the Pope for his Confirmation.

There are several Ways, by the *Canon Law*, by which the Right of Patronage is lost. As by Cession, when the Patron confers his Right on the Church itself. 2dly, *Patentia reformata Ecclesie*, as when the Patron suffers the Church, without a Reservation of the Right accruing to him, to become a Collegiate Church. 3dly, By a total Ruin of the Church, either by an Earthquake or by Fire, or any otherwise. 4thly, When such Church shall be seiz'd by Infidels. 5thly, If the Patron shall commit any notorious Crime, for which, as a Punishment he shall forfeit the Right of Patronage, as Heresy†, and the like: For Hereticks forfeit all their Goods and Estates, among which we may reckon the Right of Patronage. Upon an Outlawry here in *England*, the King presents to a Living in Right of the Patron, if the Patron be outlaw'd. But the Right of Patronage may be transferr'd by Succession, Donation, Permutation, and Sale too, if the same be sold by a Lay Patron, who has the Bishop's Consent hereunto: But if a Clergyman purchases the Right of Patronage, or next Presentation, he shall be depriv'd of it *ipso Jure*‡. And thus much of the Right of Patronage.

* 24 E. 3. 69.
b. 14 H. 4.
11. a. 1 H. 5.
1, 2, & 16.
5 E. 4. 123.
a.

† 85 Dist. 1.
Arch. in
c. 8. vi. 1. 6.
‡ D. 28. 2.
1 & 2.

* X. 2. 27.
12. Gloss. in
c. 10. Dist.
63.

† X. 5. 7. 13
& 15.

‡ X. 3. 28. 6.

Of Peculiars, or exempt Jurisdictions, &c.

HAVING already treated of Jurisdiction in general, and at large, I shall here say something of *Peculiars* or exempt Jurisdictions, because we have many of them here in *England*, to the great Inconvenience and Hardship of the Subject: But these are not called *exempt Jurisdictions*.

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jurisdictions, because they are under no *Ordinary*, but because they are not under the *Ordinary* of the Diocese, but have one of their own. They were first founded upon *Papal Usurpations*, when Appropriations were made to Religious Houses, in order to diminish the Power of Bishops over the Secular Clergy: And of these *Peculiars*, or *exempt Jurisdictions*, there are now several Sorts, *viz.* First, *Royal Peculiars*, which are the King's *Free Chapels*; and these are exempt from any Jurisdiction but the King's: And, therefore, such may be *resign'd* into the King's Hands as their proper *Ordinary*, either by *ancient Privilege* or *inherent Right* *. But how far Resignations may be made into the King's Hands as supreme Ordinary, as in *Goodman's Case*, 'tis not here a Place to examine. 2^{dly}, Archbishops had and have still their *Peculiars*; which are not only in the Neighbouring Diocesses, but dispers'd up and down in remoter Places: For it appears by *Eadmerus* †, That *wherever the Archbishop had an Estate belonging to him, he had the sole Jurisdiction as Ordinary*. 3^{dly}, Deans and Chapters had likewise their *Peculiars*; which are Places, wherein by *ancient Composition*, the Bishops have parted with their Jurisdiction as *Ordinaries* to those Societies; whose Right was not *Original*, but deriv'd from the Bishop; and where the Composition is lost, it depends upon Prescription ||; as in the Deans and Chapters of *St. Paul's* and *Litchfield*, which are mention'd in the Year-Books *. And, lastly, Monasteries had also their *Peculiars* belonging to them. For the richer Monasteries were very uneasy, till they had obtain'd either from the Bishops or from the Popes (which prov'd the most effectual, tho' more chargeable way) an Exemption from ordinary Jurisdiction: And those Churches which the Monasteries had procur'd to be annex'd to their Houses, were called *Appropriations*; as I have remembered under that Title ||. But these *Peculiars* belonging to Monasteries, &c. were not wholly exempted from the Bishop's Jurisdiction; for he gave Institution upon any Avoidances; and in the old Appropriations, therewas always a *salvo Jure Episcopali*. 'Tis true, no Appropriation could be made without the Bishop or Pope's Confirmation: For such as were poor, and could not be at the Charge of a Papal Confirmation, had always Recourse to the Bishop, and he might express his Consent in different Forms: For if he only confirm'd the Grant of the Lay Patron, in such Case he retain'd his proper Jurisdiction; and nothing passed by such a Confirmation but the Right of Patronage. But if he was made a Party and join'd in the Grant, then he gave up all his Right to the Church: But when an Appropriation was confirm'd by the Pope, then it carry'd along with it a total Exemption from the Ordinary Jurisdiction.

I have said before, that Deans and Chapters have their *Peculiars* by ancient Composition from the Bishops, as *Ordinaries* to those Bodies of Men: But where these Compositions are lost, and there has been a constant Usage Time out of mind for these Societies to grant Institutions, they may in such Cases maintain their Right by Prescription †, and this is done by the *Dean and Chapter of St. Paul's* in London, and by the *Deans and Chapters of York and Litchfield*. But yet if the Archbishop, in whose Province such a *Peculiar* is, should grant Institution, it is not void, but voidable: For he has two concurrent Jurisdictions, one as superior Ordinary to every Diocesan Bishop, the other, as Superintendant over all Ecclesiastical Things within his Province; and, therefore, it shall be intended that he granted Institution upon the Failure of the Dean and Chapter to do it; and thus it will be good, till avoided by Law. In respect of *Royal Peculiars*, as at *Westminster*, the King may, upon a vacancy of any Prebend there, present a Person by his Letters Patents, and

* Lindw. lib. 2. Tit. 1. c. 1. Gloss. ibi.

† Hist. in Anselm. p. 22.

|| Rolls Abr. pt. 2. p. 357.

* 11 H. 4. 9.

|| Vid. p. 86, &c.

† 2 Roll. Abr. p. 357.

and by virtue thereof he shall be intitled to the Possession *, without Institution or Induction, and he cannot be depriv'd by any Ecclesiastial Authority, but by the Lord Chancellor or those bearing that Office †.

* 2 Roll. Abr. p. 356.

† Dyer's Rep. 294.

All such Parishes and Places which we call *Peculiars*, are exempted from the Jurisdiction of the proper Ordinary of the Diocess where they lie, not only in respect to the Probate of Wills, and granting of Letters of Administration, which are Matters of *voluntary* Jurisdiction, and the like; but also exempt from the Cognizance of all Matters of *Contentious* Jurisdiction: and whenever they have Reason to appeal a Cause from their own Ordinary, it is to the King in his high Court of *Chancery*, and not to the Bishop of the Diocess, or the Provincial Archbishop.

Though a Church and the Clergy thereof be exempt from the Jurisdiction and Visitation of the Bishop; yet the People or Parishioners belonging to such a Church, are not thereby exempt according to the *Canon Law* ||: But Custom and Prescription may extend itself to some Things unto which a Privilege does not extend itself; and, therefore, it is by Custom and Prescription, that some whole Parishes are exempt from the Bishop's Jurisdiction and Visitation, and not by virtue of a Papal Privilege, tho' (perhaps) such Custom was founded thereon at first. For, though a Person who is a Subject, cannot prescribe not to be visited, or not to pay Procurations annex'd to a Visitation, which is founded on a Prescription *; yet an Abbot exempt may prescribe to a Visitation, and to have Procurations paid him by all the People, that are subject to his Church or Chapel not exempt; because Persons that are exempt, may prescribe unto Episcopal Rights †. But though a Person of an exempt Jurisdiction cannot be called out from thence to answer in a Cause before the Bishop, yet he may be compell'd by the Ordinary to give his Testimony or Evidence in a Matrimonial or any other Cause, wherein the Truth of some Matter of Fact is depending, and cannot be discover'd by other Means: For 'tis a great Sin for any Man (at least) in a Court of Judicature, to conceal the Truth; and, therefore, no Privilege or Exemption can excuse his Crime of not attending the Court, if request-ed thereunto; no, not even the Command of the Prince or Law itself, nor even any Pretext of Piety whatever. But there is this Difference to be observ'd betwixt Persons privileg'd and not privileg'd, *viz.* That if Persons not privileg'd are nam'd as Witnesses, and have their Costs and Charges tender'd them, though Evidence may be otherwise had; yet they shall be compell'd to become Witnesses, if they refuse to appear as such upon a Monition or Citation to them: But Persons privileg'd or exempt shall not be compell'd to be Witnesses, unless their Malice and Disingenuity appears to be manifest, and the Truth cannot be made known by any other Persons. But it has been a Question, Whether a Bishop can correct and punish Persons of an exempt Jurisdiction committing an Offence within his Territory or Diocess? Some of the *Canonists* say, that he may do this (at least) in Crimes notorious and exorbitant, though it seems contrary to a *Decretal* ||: And the Reason they give for it is, because the Pope does not privilege such Persons in their Offences; and, therefore, in this respect they still remain under the Power of the Ordinary. But (I think) in this Case the Ordinary ought to catch them by a Summons in his own District, since he cannot send a Citation into a foreign or exempt Jurisdiction, unless it be in the Business of Heresy: For the Cognizance and Punishment of Heresy belongs to the Bishop of the Diocess, where such Hereticks dwell, tho' they live in Places exempt: but then this Jurisdiction is delegated to them by the Pope *.

|| vi. 5. 7. 9. X. 5. 33. 16.

* X. 2. 26. 16.

† X. 2. 26. 18.

|| vi. 5. 7. 1.

* vi. 5. 2. 11 & 17.



Of publick Pennance, and Commutation of Pennance.

AMONG such Punishments as relate to Ecclesiastical Crimes, we may reckon *Penance*, which is enjoin'd in several Cases by way of Punishment for the Correction and Purgation of some Offence or Crime committed *. Therefore, we may define *Penance* to be a certain Act of Punishment or Vengeance, whereby the Party offending is punish'd for some Crime committed by him in the Ecclesiastical Court; or repenting thereof, afflicts and punishes himself: And it is in *Latin* called *Pœnitentia*, as it were from the two *Latin* Words *Pœnam tenere*, according to some Persons; because *pœnam tenet, qui semper vindicat, quod commississe dolet* †. Now *Penance*, as it is an Ecclesiastical Censure, and a private Sorrow of Mind inflicted by the Sense of Sin committed, is twofold, *viz.* *External* and *Internal*; for so the *Romanists* and the *Canon* Law distinguish it. *External* *Penance*, they define to be that which shews itself by external Signs, as by Confession, Tears, Fasting, and other outward Means; and an *Internal* *Penance*, they say, is only a simple Conversion of the Mind from Sin, as it consists in these three Acts of the Penitent, *viz.* in a Contrition of the Heart, a Confession of the Mouth, and a Satisfaction of Works made for Sin. And this last kind of *Penance* they acknowledge to be no Sacrament. For 'tis the first, which they make a Sacrament, for the Interest and Advantage of the Priesthood, as it consists in the Absolution of the Priest; which is made by a judicial Act, and on the Sentence of the Judge, the Priest hereupon declaring a Remission of Sins to the Penitent. But we *Protestants*, who deny *Penance* to be a Sacrament, say, That a true and salutary *Penance* consists first, in these Acts, *viz.* In a Contrition or Sadness of Heart, as it arises from a filial Fear of God, and as it only respects him, from the Love we ought to bear to Virtue, and his Detestation to Sin. 2dly, In such a Confession as is made to God *in Foro conscientie*; not only consisting in an Accusation of ourselves, but even in a Condemnation too, and in a Deprecation of Punishment. 3dly, In a Purpose and Resolution of Amendment, and in a Desire of leading a new Life: or in brief, in a Confessing of our Sins to God in Prayer, in doing Acts of Charity, Fasting for Humiliation-sake, and making Restitution to such as we have injur'd or oppress'd; and the Effects of such a *Penance* are a sincere Reformation of our Lives. And of this kind of *Penance* St. *Austin* speaks, when he says, *Everyone, that is made a Judge of his own Will, cannot begin a new Life without repenting himself of the old.* And St. *Ambrose* speaks of it in his Comment on St. *Paul's* Epistle to the *Romans*, saying, *The Grace of God in Baptism does not require Sighs and Groans, nor any other Work but a Contrition of Heart alone, which pardons all Things, gratis, viz. without giving Money to the Priest.* For whatever Things are said of doing *Penance*, ought not to be referr'd to *external*, but to *internal* *Penance*; namely, a Contrition of Heart, without which no one can be reconcil'd to God.

* X. 5. 38.
1. Pœn. 3.
Dist. 1.

† Pœn. 3.
Dist. 1.

But this would not serve the Purposes of some Men : And, therefore, *external* Pennance was enjoin'd by the Church, and made a Sacrament too as well as a Punishment, which they might redeem with Money to the Priest. For besides the general Censures already mention'd under that Title †, which respect Ecclesiastical Discipline, and Communion, there is another Censure whereby the Body is affected, *viz.* Corporal Pennance, when any one is compell'd to confess and lament his Crime in a publick manner, that he, who has given Scandal and Offence by his Sinning, may give an Instance of his Amendment by performing Pennance || : And this kind of Pennance is perform'd by putting on, with us, a certain Garment, and making an open Acknowledgment of his Fault in the Church; and sometimes for greater Crimes a more solemn Pennance is enjoin'd him by the Bishop. But if the Fault be of a private Nature, then he shall only undergo a private Pennance. So that there are three *Species* of external Pennance, *viz.* *solemn*, *publick* and *private*. Solemn Pennance is inflicted *in capite Quadragesimæ*, with great solemnity, as describ'd in the first Part of the *Decretum* * : which says, that in solemn Pennance, all the Penitents, that undergo publick Pennance, ought to appear before the Church-doors bare-footed, and cloath'd in Sack-Cloth; and thus, with Looks fix'd on the Ground, to represent themselves to their Bishop, praying his Forgiveness. And at this solemn Pennance, there ought to be present rural Deans, or Parochial Arch-Priests (as they are called) and likewise all the Presbyters belonging to these Penitents, who are to make a diligent Inspection of their Conversation, and to enjoin them Pennance by certain degrees, according to the Measure of their Sins or Crimes committed. After which the Bishop is to introduce them into the Church, and lying prostrate, he ought, with Tears for their Absolution, to sing or read the seven Penitential Psalms. Then rising from the Ground, according to the Direction of the Canons, he ought to lay his Hand on them, and sprinkle them with Holy Water before he throws the Ashes on them. Then covering their Heads with Silk, he ought with frequent Sighs and Groans to declare to them, *That as Adam was cast out of Paradise, so are they for their Sin cast out of the Church.* After which he orders the Ministers to expel and shut them out from thence. Then the Clergy pronounce the following Sentence against them, *viz.* *In the Sweat of thy Brow thou shalt eat thy Bread, &c.* which the Reader may see in the *Distinctions* †.

The ordinary corporal Pennance, if the Party Delinquent to whom it is enjoin'd desires it of the Judge, may be changed into a pecuniary Penalty or Fine || ; and this was seldom or never deny'd the Person, if he was a Freedman and could pay the Money : But then, according to the Opinion of some Men, the Bishop or Ordinary was not to receive the same to his own proper Behoof, but it ought to be apply'd to the Advantage of the Church *, as Fines in Cases of civil Punishment are converted to the Use of the Publick †. For we read in the Books of the *Canon Law*, that there are five kinds of corporal Pennance enjoin'd for Sin. The first is Fasting or Abstinence for a proper Season, in order to macerate and subdue the Flesh ||. The second is Confiscation of all a Man's Estate *. The third is Banishment †. The fourth is Servitude ||. And the fifth is Whipping *. But as Persons of Quality and Distinction were not willing to undergo any of these kinds of Pennance, they were wont to redeem them by paying a Sum of Money ; and hence came *Commutation* of Pennance into the Church about the end of the eighth Century, which has brought great Profit to the *Romish* Clergy ever since : And then, instead of Fasting, Prayers, *Pater Nosters* and *Masses* were enjoin'd the Penitents ; and such as had Money might, by Com-

† Vid. p. 155.

|| Lind. lib. 5.
Tit. 16. c.
12. v. *Solen-*
tus.

* 50 Dist.
64.

† 50 Dist. 64.

|| 9 E. 2. c. 2.
& 4.
Lindw. lib.
3. Tit. 28.
c. 4. v. *Re-*
demptiones.
* Gloss. in
cap. 2. X. 5.
37.

† C. 1. 54.
1.

|| 90 Dist. 10.
* 63 Dist. 22.
† 63 Dist. 23.
|| 36 Q. 1. 3.
* 23 Q. 5. 1.

mutation, save their Penance; and this was receiv'd by the Priest under the innocent Name of Alms-giving. Some Endeavours were used at the Beginning of the Reformation to retain the antient Discipline of Penance; but, the People having been disused so long to open and publick Censures, this could not be effected without the Concurrence of the Civil Power, which not being obtain'd, they let private Confession drop, there being no Command for it in Scripture; and instead thereof, the Reformers order'd a general Confession to be made in the Church.

By an Ecclesiastical Constitution made and agreed upon by the Convocation of the Province of *Canterbury**, and afterwards confirm'd by Royal Approbation under the Great Seal of *England*, it was ordain'd, That for the future there should be no Commutation of solemn Penance, unless it were in Causes of a great and important Nature, and that very seldom too; and only when it appear'd to the Bishop himself, that this was the safer and more wholesom Method of reforming and reconciling the guilty Person to the Church. *2dly*, That the pecuniary Mulct, which was given by way of Commutation, should either be laid out for the Relief of the Poor of the same Parish, or else apply'd to other Pious Uses, and that the same should be solemnly notify'd to the Church, and approv'd of by the same. But if the Crime was publick and notorious, then the Person ought himself in his own Person to make Satisfaction to the Church offended thereat, by professing a sincere and hearty Repentance thereof; or else that the Minister of the Church shall, in the Defendant's Presence, in a publick manner from his Pew, denounce his Submission, and the Performance of his Penance, before his Ordinary; and likewise declare what Sum of Money he has given to be laid out in Pious Uses, as a Testimony of his Sorrow and Repentance. And whoever shall commute Penance without the Knowledge of his Diocesan, or convert any Sum of Money paid by way of Commutation to any other Uses than that, as aforesaid; or shall any otherwise violate this Constitution, he shall be suspended from the Execution of his Office by his Diocesan for the Space of three whole Months.



Of Plurality of Benefices, &c.

† Luke
cap. 16. v. 13.

SINCE *no Man can serve two Masters* (as the Scripture observes) *but that he will love the one, and despise or hate the other* †; the Canon Law has, therefore, forbidden a Beneficiary to hold two Livings with Cure of Souls, out of a Presumption that he will prefer the one and neglect the other: And as this Law very often mentions Plurality of Benefices with great Abhorrence and Detestation, I shall here open the Vein, which that Law has tapped, a little wider; and consider what Ecclesiastical Benefices those are, which may be lawfully held together at one and the same time; and *first*, distinguish between such as are term'd *supreme* or *superior* Benefices, as Bishopricks and the like are; and such as are stiled *inferior secular* Benefices, which are twofold, *viz.* *Dignities* and *Benefices with Cure of Souls*, which are manag'd by Curates or Rectors. As to the superior Benefices, no one can hold more than one at the same Time (says

(says the *Canon Law*) without the Pope's Dispensation †; because it is a spiritual Matrimony, and no one can have two Wives together at the same time: And a Pluralist in this Case is by the *Canonists* called an infamous Thief, and an Adulterer, who ought not to be chosen to any Preferment in the Church; and so odious is such a Person even in the Understanding of the *Canon Law*, that if he shall purchase to himself several Benefices at the same Time without a Dispensation, his Collation to the second shall be of no validity at all, unless he freely and voluntarily resigns the first ||. But if we speak of *simple* Benefices, *viz.* of such as have not the Cure of Souls annex'd to them, or of one *simple* Benefice, and another in our Books called *Duplex Beneficium*, then we ought, 2dly, To distinguish: Because if a Person desired to have one with a Title, and another without a Title, as a Prebend with its Corpse or Pensions thereunto belonging is, which does not give a Title by Canonical Institution *, he may lawfully retain several Benefices of this kind together ||. Or if we speak of two Benefices with Titles, then if the Question be *de fructibus eorum lucrandis*, he cannot retain the same, according to the Opinion of all the Doctors on the *Canon Law*; unless he resides either by himself or another on each Benefice *. And thus was this excellent Law, which requires personal Residence, distinguish'd away by the Sophistry of the *Canonists*.

For by the *Canon Law*, antiently, all benefic'd Persons were strictly bound to Residence, how small soever their Benefices were, under pain of Deprivation †, as I shall observe hereafter under the Title of *Residence*; and were oblig'd, in their own Persons, to execute the great Trust and Charge required by their Office, in the Place where their Benefices were, because a Benefice is given on the account of the Office and Duty that attends it: wherefore if the Office cannot be perform'd without Residence, it follows from hence, that the Beneficiary is bound thereunto; for according to a Maxim of eternal Truth, *qui tenetur ad finem, tenetur etiam ad media*. And hence 'tis, that Persons having Parish Churches, or even Canonries in Cathedral or Collegiate Churches were bound formerly to *local* Residence, where their Preferment lay, tho' there should have been an evil Custom introduc'd contrary to the Canon: All which (I think) sufficiently destroys the Notion of Pluralities.

But *Lindwood* observes *, that the Ecclesiastical Law had varied in this Matter: And proceeded by these Steps, (which are more than *Lindwood* mentions). *First*, It was absolutely forbidden any one to have two Parishes, if there were more than ten Inhabitants in them; *because no Man could do his Duty in both Places* ||: And if any Bishop neglected the Execution of it, he was to be excommunicated for two Months, according to the 16th Council of *Toledo* *, and to be restor'd only upon a Promise to see this Canon executed †. So that a Bishop was highly concern'd to suppress all Pluralities. And this Rule was allow'd to hold as to Cities, but an Exception made hereunto in respect of small and remote Places, where there was a greater scarcity of Persons to supply them ||. Again, if a Person had two Benefices, it was left to his Choice which he would keep: But he could not hold them both *. This kind of Option was allow'd by the *Ecclesiastical Law*, then in Force. *Thirdly*, If a Man takes a second Benefice, such Institution is void by the third Council of *Lateran* †. *Fourthly*, That by taking a second Benefice, the first is void; which is the famous Canon of the fourth *Lateran* Council ||. *Fifthly*, That if he were not contented with the last, but endeavour'd to keep both above a Month, he should be depriv'd of both. And this was the *Ecclesiastical Law* as it was declar'd in our *Provincial Constitutions*. But the general Practice was to avoid the former, according to the

† X. 1. 7. 2.
X. 5. 31. 8.

|| vi. 1. 16.
3.

* 16 Q. 1.
6.
|| vi. 1. 3. 7.

* Arg. X. 1.
2. 6.

† X. 3. 4. 6.

* Lib. 3.
Tit. 5. c. 2.
v. *fit centu-*
tus.

|| 10 Q. 3. 3.

* Can. 5.

|| 21 Q. 1. 1.

* X. 3. 5. 7.

† X. 3. 4. 3.

|| X. 3. 5. 8.

* Lib. 3. Tit. 5. c. 2. the *Lateran* Council. For *Lindwood* informs us*, That all Benefices with Cure of Souls are, by this *Constitution*, declar'd to be void *ipso Jure*, according to the 29th Canon of the Council of *Lateran*, held under Pope *Innocent* III. which Persons are, *defacto*, possess'd of without a Papal Dispensation touching *Plurality of Benefices* †, by an Admission to a second Benefice, tho' they are not inducted into either, but have only Institution thereinto, if it be by their Means that they have not Induction; and this, whether such Benefices be with or without a Title; for even in this Case, according to *Ancharanus**, the first Benefice is void †. But if the second Benefice become litigious without the Privity of the Beneficiary, the first Benefice shall not be void, provided the Suit was commenc'd before he was in Possession of the second Benefice by Institution: But 'tis otherwise, if it becomes litigious after such Possession, whether he recovers in the Suit or not; for he cannot retain the first, but must impute it to himself, that he made no better enquiry touching this matter. But *Joh. de Ananias* solves this Difficulty by a Distinction*, and advises the Parson to hold the first *in commendam*, till the Suit be determin'd touching the second; and says, that this is a just Cause of a *Commenda* †.

These were very severe Laws and Canons against Pluralists; but that one Clause of the Pope's *Dispensing Power* made them to signify little, unless it were to advance his Revenue and Authority in the Church: For when the Dispensing Power came to be own'd, the Law had very little Force; especially, as to Mens Consciences. For if it were a Law of God, how could any Man dispense with it? unless it were as apparent that he had given a Power in some Cases to *Dispense*, as that he had made the Law. Those *Casuits* are very hard put to it, who make *Residence Jure Divino*, and yet say the Pope may dispense with it; which at last comes only to this, That the Pope can *authoritatively* declare the Sufficiency of the Cause: So that the whole matter depends on the Cause, and whether there can be any sufficient to excuse a Man from personal Residence, I have consider'd hereafter under that Title. 'Tis the general Opinion of *Divines and Lawyers*, says *Lessius**, That no Man is safe in Conscience by the Pope's Dispensation for *Pluralities*, unless there be a just Cause for it: And *Panormitan* says †, That no Man can with a safe Conscience take a Dispensation from the Pope for more Benefices than one merely for his own Advantage: And from him *Sylvester* †, and *Summa Angelica**, do both copy. A Dispensation, says Cardinal *Tolet* †, secures a Man from the Law; but as to Conscience, there must be a good Cause for it; and that is when the Church has more Benefit by it, than it would have without it. But to heap up Preferments merely for Riches, Luxury, or Ambition, is (doubtless) a crying Sin before God, as it is a manifest Robbery of several deserving Men that want a Subsistence. But in some Cases, a Plurality of Benefices may be well enough justify'd in point of Conscience as well as Law, as when the Benefices are so poor that a Clergyman cannot live upon either of them singly, and they lie near each other in such a Manner as that he can serve them both in Person, or else by an able and sufficient Curate. But for Men to put in Curates merely to satisfy the Law, without any regard to the Duties of their Function, and the Cure they serve, is a horrible Scandal to Religion: And the loosest of all the *Popish Casuits* look upon this as a very great Sin, even those who attribute to the Pope the highest *dispensing* Power in this Case.

But when the great Liberty of *Dispensing* had made the Ecclesiastical Laws in a great measure useless, then our Law-Makers thought fit to restrain and limit it by a Statute made in *Henry* the VIIIth's Reign, where-

in

* Lib. 3.
Tit. 5. c. 2.

† X. 3. 5. 28.

|| Cl. 1. 2. 4.

* In c. 28.
X. 3. 5. v.
tertio Nota.
† vi. 3. 4. 18.

|| X. 1. 5. 32.

* In c. 6.
X. 3. 5.

† In c. 12.
X. 5. 1.

|| Vid. p. 466.

* Lib. 1.
c. 34. Dub.
27.

† In c. 54.
X. 1. 6.

|| De Ben. 4.

* De Ben. 35.
† Sum Caf.
5. c. 8.

in it is enacted, *That if any Person or Persons having one Benefice with Cure of Souls, being of the yearly value of eight Pounds or above, accept, or take any other with Cure of Souls, and be instituted, and inducted into Possession of the same, that then and immediately after such Possession had thereof; the Benefice shall be adjudged to be void. And all Licences and Dispensations to the contrary are declar'd to be void and of none Effect.* Hobart calls this Statute a Religious and most Politick Law of the Church, and almost a Redintegration of those antient Canons which had slept so long, and a Restoration of the Church ruin'd by the Popes *Tot Quots*, Unions, Dispensations, and Tolerations *. The Scope of this Law was to appropriate to every Flock his own proper Pastor, both in Body and Mind. *In Body*, That he should be the Husband of one Wife, *una Ecclesia unius Rectoris*. *In Mind*, that having but one Benefice (saving in some special Cases of Favour and Consideration) he should not farm, graze, nor mingle himself with secular Affairs, which might distract and draw his Mind from his Cure of Souls. The Policy of this Law may be seen in this, *viz.* That the time when this Parliament was held, inclining against the Pope (for it continu'd to the 25th of *Henry VIII.*) they did not yet immediately take away from the Pope the Power of dispensing with Pluralities (which was one of the greatest Enormities of his Power, and the *Pellis Introitus* of his Revenue) but they provided, that his Dispensation should not be sufficient of itself, but should only second a Qualification, which must come from Lords and Great-Men, whereby the King drew the Nobility to his side from the Pope, by dividing his Power in this among them. This Law, one would have thought, had been an effectual Remedy against all such *Pluralities and Dispensations* to obtain them; and, so doubtless, it had, if there had not follow'd so many *Proviso's* of qualify'd Men to get Dispensations, as take off a great deal of the Force and Effect of the Law: And, therefore, I shall in the next Place consider, who these qualify'd Persons are. And,

* Hob. Rep. p. 157.

First, 'Tis provided, that every spiritual Person of the King's Council may purchase a Licence or Dispensation to keep three Benefices with Cure; and the Chaplains of the King, Queen, the King's Children, Brethren, Sisters, Uncles or Aunts, may so keep each of them two. *2dly*, An Archbishop and Duke may each of them have six Chaplains; a Marquess and Earl five; a Viscount, and other Bishops, four; the Chancellor, every Baron, and Knight of the Garter three; every Duchess, Marchioness, Countess and Baroness, being Widows, two; the Treasurer and Comptroller of the King's House, the King's Secretary, and Dean of his Chapel, the King's Almoner and Master of the Rolls, each of them two; and the Chief Justice of the King's Bench, and Warden of the *Cinque Ports*, each of them one: And each of the aforesaid Chaplains may purchase a Licence or Dispensation to keep two Benefices. *3dly*, The Brethren and Sons of Temporal Lords (born in Wedlock) may purchase such Licence or Dispensation to keep as many Benefices with Cure as the Chaplains of a Duke or Archbishop: And the Brethren or Sons (born in Wedlock) of every Knight may keep two. Provided, that every of the aforesaid Chaplains shall exhibit (where need shall be) Letters under the Sign or Seal of the King, or other their Lord and Master, testifying whose Chaplains they be, or else not to enjoy such Plurality of Benefices. *4thly*, All Doctors and Batchelors of Divinity, Doctors of Law, and *Batchelors of the Canon Law*, admitted to their Degrees by either of the Universities of this Realm, and not by *Grace only*, may purchase such Licence to keep two Benefices with Cure: But by this Law, the Degree of a Master of Arts or Batchelor of the

[M m m m m]

Civil

† Can. Jac.
41.

Civil Law simply is no Qualification for such Dispensation (though it has been often used for such on the Strength of the Canon†, and through a mistaken Notion, that such Person is a Batchelor of *both Laws*, which is not true in Fact, because no Degree in the *Canon Law*, has been taken since the Reformation). And, therefore the Patron may, in such Case (I conceive) present another Clerk to the Bishop, if the Beneficiary shall think to qualify himself for a Licence, by such Degrees *simply* taken, whatever Construction or Weight the Canons may have with the Bishops: And, consequently, if the Bishop shall refuse to admit such Clerk presented to him, it seems to me, that a Process at Law will lie against the Bishop for such Refusal; but this Matter I leave to the learned Judges, who are the Expounders of the Statute Law. And, lastly, because Archbishops must use (at the Consecration of Bishops) eight Chaplains, and Bishops (at giving of Orders and Consecration of Churches) six; every one of them may have two Chaplains over and above the number limited: But then Bishops can qualify no more than four for a Licence or Dispensation.

* Cok. 4.
Rep. fol. 75.
fol. 78.

|| Moor's
Rep. p. 434.

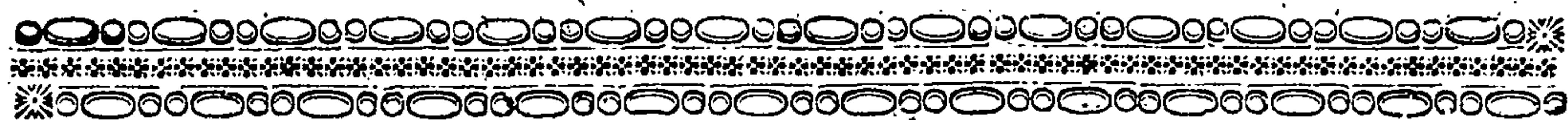
* 21 H. 8.
c. 13.

† Moor ut
supr.

|| 21 H. 8.
cap. 13.

It has been receiv'd in *Holland's* * and likewise in *Digby's* Case, and often before and since the Council of *Lateran*, That a Man who has a Benefice with Cure of Souls, of whatever value it be, and is admitted and instituted into another Benefice with Cure of Souls of what Value soever, having no Dispensation, the first Benefice is *ipso Jure* so void, that the Patron may present another to it, if he pleases, without waiting for the Incumbent's Induction into his second Benefice; for that may be delay'd (peradventure) through Fraud, and he is Parson before Induction, and the Church full against all common Persons ||. So that tho' the Statute mentions *Induction*, yet the Judges, for wise Reasons, have expounded that Word out of the Act, as being contrary to the primary Design of the Legislators themselves, which was to hinder *Pluralities* and Non-Residence. But if the Patron will not present, then if under the Value of eight Pounds *per Ann.* in the King's Books, no Lapse shall incur till Deprivation of the first Benefice, and Notice given to the Patron by the Ordinary: But if it be of the yearly Value of eight Pounds or above, the Patron must present at his Peril within six Months*. To strengthen this Law against *Pluralities*, there seems to be wanting some other Penalty to be added, or Encouragement given to the Informer, by reason of the frequent Collusion between the Clerk and his Patron; and sometimes the Ordinary himself falls into it. Note, That a Dispensation for a *Plurality of Benefices*, which comes after Admission, and Institution, though before Induction, comes too late; and is not aided by the *Proviso* of the Statute of *Henry VIII.* For the Words of the Act are, *shall have, retain, and take a second Benefice*; and, therefore, Admission and Institution do make him full Incumbent as to the Patron, and to the Parson himself †, as before hinted. This Dispensation ought to be entred on the Parchment-Roll in *Chancery*, and not in the Paper-Book: But if it be not, it shall not affect the Incumbent in his Right, because the Officer such Case is fineable for his Negligence. But this Statute of || *Henry VIII.* is more favourable to the Clergy, than the *Canon Law* was before, in this Particular, *viz.* In declaring, that no *simple* Benefices, or *mere* Dignities (as the *Canonists* stile them) are comprehended under the Name of *Benefices having Cure of Souls, viz.* 'No Deanery, Arch-deaconry, Chancellorship, Treasurership, Chantership, or Prebend, in any Cathedral or Collegiate Church, nor Parsonage, that has a Vicar endowed, nor any Benefice perpetually appropriate.' But all these before were within the Reach of the *Canon Law*; and a Dispensation was necessary in order to hold them.

Of



Of a Prebend and Prebendaries.

A *Prebend* is in *Latin* stiled *Præbenda*, from the Verb *Præbeo*, which signifies to *allow*; so that a Prebend is that Allowance or Allocation, which a Person receives from his Dignity in the Church: And it differs from a *Canonry* strictly speaking. For a *Canonry* is a spiritual Right which a Person obtains in the Church by being admitted into the Society or Brotherhood, and having a Stall assign'd him in the Choir, and a Place in the Chapter*, as already noted under that Title: But a *Prebend* in our Books is a Spiritual Right of receiving certain Profits, which do accrue to the Person receiving them, according to his Merits, on the Account of attending and performing divine Service in some Cathedral or Collegiate Church, and is born from the *Canonry* as a Daughter is from the Mother†. And, therefore, a *Prebend* is only a Term of Law, according to the *Canonists*, which is not created or constituted from the Possessions alone, but likewise from the Right of the *Canonry* to which it is annex'd, which cannot be created without a Revenue belonging to it, because by this means there would be no Allowance to the Prebendary||. || 1 Q. 3. 7.

But we here in *England* do not observe this Distinction; and only distinguish a *Canonry* from a Prebend, as it belongs either to the old or new Foundation of the Church. A Prebend is not an Ecclesiastical Benefice, according to the *Canonists*, because a Layman, according to them, is capable of a Prebend: For *Calderinus* says, that the Assignment of a Prebend may be made to a Professor of Divinity, or to the Sacrist of a Church, whether in Orders or not, if it be not given *in Titulum Beneficii*; and then 'tis no Benefice. But in my Opinion, a Prebend, as it is annex'd to some sacred Office or Employment, is a Spiritual Thing: But when it only respects the Commodity of the Fruits and Profits thereof; and such Commodity is temporal, then (I say) it is a temporal Thing; as the Prebend belonging to the Professor of the *Civil Law* at *Oxford*. For if a Prebend be granted to a Person not capable of Spiritualties, as to a Layman; it is then necessarily understood *de merâ commoditate temporali*; but if it be granted to a Clerk, then 'tis otherwise. *Zabarella*, by way of Distinction will have a Prebend *properly* to be a spiritual Thing, but *improperly* taken to be a temporal Estate, and something of a profane Nature. *First*, says he, 'tis a spiritual Thing, when 'tis annex'd to a Title or a spiritual Office. *2dly*, 'Tis a temporal Thing, when only the Commodity of the Fruits attend it; and a Layman is capable of it: And, therefore, when a Prebend is sued for, a Spiritual Right is not always desired, but only Temporals in some Cases; because a Canon suing for a Spiritual Prebend, retains that same Prebend which he first acquired, though the Temporalties of his other Prebend be united to his Spiritual Prebend, and the Estate which he had before his Option be added to the other Prebend, which he sued for. But if the Question be about conferring a Title, we always understand a Spiritual Right, as aforesaid, under the Appellation of a Prebend. Hence 'tis, that when the Pope declares a Prebend vacant, and collates to it, 'tis always meant of a Spiritual Prebend: wherefore, I think, according to the *Canon Law*,
and

* Will. in Clem. 3. 2. N. 6.

† Will. ut supr. v. *Præbendam*.

and the proper Essence of a Prebend, it is a Spiritual Right not accruing to a Layman. But,

Tho' the Estates and Revenues of Cathedral or Collegiate Churches were divided heretofore by Prebends; yet the Canons or Prebendaries of such Church, cannot possess these Estates as their own Properties, but only as *Usufructuaries*, and as a certain Provision arising out of such Estates for the necessary Maintenance of the Canons, &c. and the Surplusage shall be laid out on the common Wants of the Church: But tho' the Canons or Prebendaries have not a Property in such Estates, yet as they have a *simple Usufruct* in their Prebends, and not a *nude Use* alone, they may, in that respect, bring an Action*. Canons or Prebendaries cannot regularly litigate or go to Law with one another about their Prebends, because they are not the Prebends of the Clergy, but of the Church only. But it sometimes happens in Collegiate Churches, that tho' the Estates therein are in common, yet, for the avoiding of Complaints, and other Dissatisfactions, each Person has a separate Maintenance or Portion allow'd; and in this Case, they may sue for their Allocation. Prebends, which are newly settled in a Church, ought not to be of lesser Value than the antient Prebends: For all Prebends, according to the *Canon Law*, ought to be of equal Value, as well the Prebends of Canons newly founded, as those on the old Foundation.

Of *common Right*, a Person cannot have two Churches or Prebends in the same or in different Bishopricks, unless it be in such Cases as are expressly allow'd by Law †: And in respect of a Church with Cure of Souls, these Cases are six in number, *viz.* *First*, When the Churches have but small Revenues belonging to them. *Secondly*, When one Church depends on another as its Mother-Church ‖. *Thirdly*, When the Parson holds one Church *in Titulum*, and another *in Commendam* *. *Fourthly*, When the Bishop dispenses with his Pluralities †. *Fifthly*, When there are but a few Inhabitants in his Parish, or a paucity of Clergy to serve the Cure of Souls: And this is the same, whether this paucity be in or out of a City; since in such a Case, all the Benefices may be conferr'd on one good Clergyman ‖. And, *Sixthly*, When one Church is annex'd unto another. And 'tis the same thing in respect of a Prebend: For if a Person having a Prebend, receives another Prebend or Dignity either in that, or in any other Church, the first Dignity or Prebend shall become void *, even tho' the same should be confirm'd to him by his Superior †: And this I hold to be good Law with us in *England*, tho' Modern Practice be against me, which has been introduc'd by the Avarice of the Dignitary, and the Connivance of the Bishop, to whom of *common Right* the Collation belongs; as this part of the *Canon Law* is in no wise repugnant either to the Statute Law of the Realm, or the Royal Prerogative, and was once receiv'd here by our Church. But tho' one Person may not be admitted to two Prebends; yet two Persons may be admitted to one Prebend when 'tis void, if it be sufficient for the Maintenance of both of them ‖, but not otherwise; tho' I think, this Conclusion to be contrary to another Text of the Law *, which says, That a Prebend shall not be divided into two. Though a Prebend ought not to be promis'd before it becomes void; yet when it becomes void, it may well enough be promis'd without any Inconvenience to the Church; and then it ought to be fill'd up and collated to within six Months †. A Person may have the Profit of a Prebend by the Papal Law, tho' he be not a Canon of the Church, as a Parish Priest and the like ‖; and these were called *Parochial* Prebends: But then such Persons having a Parish Church annex'd to their Prebends, ought to put in a Vicar, and reside at the greater Church himself *. Of

* Arg. D.
10. 1. 4.

† 21 Q. 1.
1. 2. 3 & 4.

‖ 70 Dist. 2.

* 21 Q. 1. 3.

† 70 Dist. 2.

‖ Host. in
c. 29. X. 3.
5.

* 70 Dist. 2.

† X. 3. 8. 9.

‖ X. 3. 5. 20.

& 26.

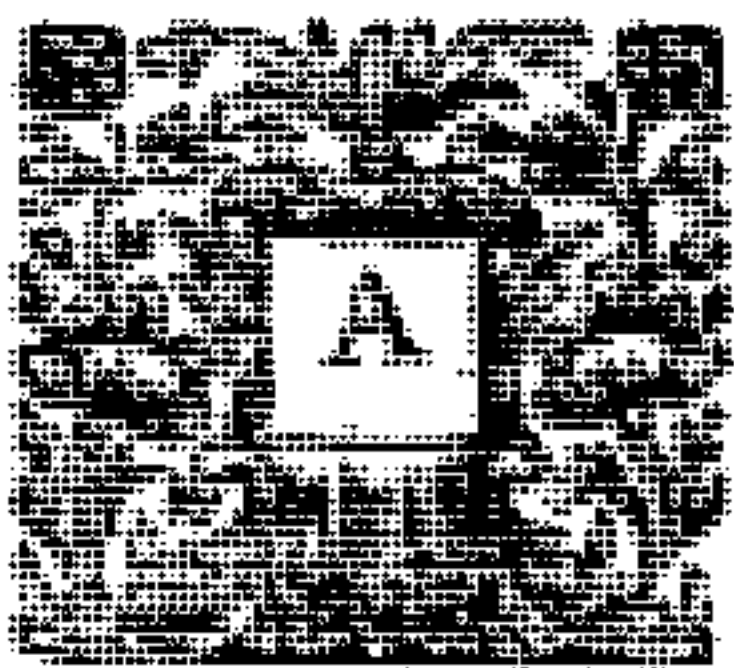
* X. 3. 5. 8.

† X. 3. 8. 2.

‖ X. 3. 5. 4.

* X. 3. 5. 30.

Of a Proctor and his Office, &c.



Proctor is a Name of a large and general Signification, including all such Persons as have the Concern of other Mens Affairs committed to their Care and Direction: Wherefore, under this Title I shall not only treat of such as have the Management of Business *Extra-judicially*, but even of such Proctors to whose Direction the Care of *Ju-*

dicial Causes is committed. And, *First*, Of *Judicial* Proctors, as they supply the Place of other Men in the Business of Law-Suits, and Judicial Pleadings: And of the others I shall discourse hereafter in their proper Place. Now a Proctor constituted in Judicial Matters is sometimes known by one Name, and sometimes by another, according to the Diversity of Affairs entrusted to him; and likewise in respect of the several Persons that employ him: For if one Person sends another to the Court to excuse his Absence only, he is in *Latin* stiled an *Excusator*; and such a Person being sent without a Commission or Proxy, does not differ from a Messenger, tho' otherwise there is a wide Difference between a Proctor and a Messenger. But if any one undertakes the Judicial Defence of another without a Proxy or Mandate, or not being requested thereunto, he is then stiled a *voluntary Defensor*: And sometimes an Advocate himself is called a *Defensor*.

A *Judicial* Proctor then is he, that has the Management of another Man's Business committed to him in Law-Concerns by the Warrant and Authority of his Client or Principal*, which we in *English* call a *Proxy*, * D. 3. 3. 1. and is the same as a Warrant or Letter of Attorney. I say *another Man's Business*, because he who transacts his own Business is no Proctor, tho' he does it by the Perswasion and Advice of another: And I say by the Warrant and Authority of his Client, because a Proctor that has not a *Mandatum* or Warrant, is not admitted in the Plaintiff's Name †, † X. 1. 37. 1. if the Defendant dissents thereunto, unless such Proctor appears *pro conjuncta Persona*, as I shall shew by and by. So that a Proctor may be a *true* or a *false* Proctor: The latter being he, that has no Proxy or Mandate to act by, or (at least) a very insufficient one. Now Proctors are such either by the Judge's Order at the Request of the Parties themselves‡, or else become such by the Act and Ratification of private Men ||; ‡ Gloss. & Dd. in 1. 1. D. 3. and every one, that is not prohibited as a Pupil or Minor is, may constitute a Proctor. But if a Pupil or Minor have no *Guardian* or *Curator* assign'd them, they may constitute a Proctor in Respect of *Extra-judicial**, tho' not in Respect of *Judicial* Matters. But a *Syndick* of † C. 2. 13. 8. & 22. D. 3. a Corporation cannot constitute a Proctor before Contestation of Suit or Issue joyn'd †, nor can a *Guardian* or *Curator* do it till that Time; ‡ C. 2. 13. 8. & 22. D. 3. because they are till then made Principals in the Suit ‡: But they may constitute a Person called an *Actor* or Agent for themselves||. ‡ C. 2. 13. 11. in fin. || D. 50. 17. 123. * C. 2. 13. 28.

Heretofore it was not lawful in all Causes to sue and act by a Proctor, but only in some certain Cases. But afterwards the *Imperial* Law decreed*, for the Advantage of Litigants, that all Men might in Civil

or Pecuniary Causes litigate by their Proctors ; to the end that a Person who could not attend his own Cause thro' Age, Sicknefs, Travelling, Unskilfulness in Law-Matters, and the like, might have his Absence supply'd and reliev'd by another Person : And the *Civil-Law* compels all Persons of high Birth and Station in the World to constitute a Proctor, looking upon it as a very indecent Thing for Men of high Rank and Dignity to be present at the noisy Brawlings of Lawyers in Courts of Judicature, and to manage their Suits in their own Persons *. So that the use of Proctors was first introduc'd in *Obsequium Judicii* to the end aforesaid. And in order to have a Proctor *ad lites* admitted and heard as such, he ought in the first Place to exhibit his Proxy and prove the same ; and if there be any doubt about it, he ought to give Caution *de Rato* †, unless he be the Son of him in whose Name he appears in Judgment, or be his near Relation, in which case he shall be admitted *sine Mandato*. If there be more Plaintiffs than one in a Cause they may all of them (if they please) constitute one and the same Proctor.

But tho' Pupils and Minors under Twenty five Years of Age cannot by the *Civil-Law* constitute a Proctor *ad lites* ‡ ; yet they may do this well enough even by that Law, if they have their *Guardian* or *Curator's* Consent to this end. But if a Proctor appointed by a Minor shall obtain a Sentence in the Suit in Favour of him, such Sentence shall subsist, notwithstanding such Prohibition ; because, in Matters managed with Success, want of Age shall not prejudice a Minor, lest that which was introduc'd for his Advantage should redound to his Disadvantage †. But, according to some, a Sentence thus given in Favour of a Madman without his Curator's Appointment of a Proctor, is not valid. For tho' Pupils and Minors are in some Respects compar'd unto Madmen, yet there is a vast Difference between them : For Minors have some Judgment and Understanding ; but Madmen have none, being entirely depriv'd of their Senses during the Course of their Madnefs. So 'tis no Wonder, that if they cannot make a Contract or stand in Judgment, they should have a Sentence in Favour of them revers'd as invalid ‡.

A Proctor or Syndick after Contestation of Suit may substitute another Proctor or Syndick in their Stead, but cannot do it before Issue join'd in the Cause ; unless the Client has in a special manner by the Proxy given them Power of so doing *: Because before that time a Proctor is not *Dominus litis* ; and without such a special Proxy the Action cannot be try'd. But 'tis otherwise in a Proctor constituted in *Rem suam*, and not *ad lites* ; since he may appoint a Proctor before Contestation of Suit †. A Proctor in *Rem suam* is he, to whom another Person assigns a Right of Action to sue in his Name ‖. And 'tis the same Thing of a Proctor in *Extra-judicial* Matters, who may freely substitute another to do his Business, without a special Mandate*. It has been a Doubt, Whether a Person substituted by a Proctor after Issue join'd be *Dominus litis* ? And the better Opinion is in the Negative ; because by his not joining Issue he has not contracted with his Client. But some think, that if a Proctor, to whom a Power of substituting is given, shall before Issue join'd substitute another, and no Exception be made against the Person substituted before joining Issue in the Cause, such Substitution is so valid, that the Person thus substituted cannot afterwards be set aside : But I am of another Opinion. For the Text says ‖, That an Enquiry ought to be made in the Beginning of the Suit, whether the Person has a Proxy or not. For if he be a false Proctor, no *Judicial* Proceeding can subsist : And he is equally deem'd a false Proctor, who wants a Proxy,

as

as much as he is who receives a Proxy from him who has no Power of giving it.

I proceed in the next Place to consider, what Person may be constituted and made a Proctor *ad litem*, and who not. And here I must observe, that all Persons may be thus constituted that are not particularly forbidden in Law ‡; the Law touching Proctors being a Prohibitory Law. Therefore, *First*, 'tis said, That all Persons in high Stations of Power are forbidden to give Patronage or Protection to *Litigants*, in Fraud or Oppression of the Adverse Party. *Secondly*, Women are forbidden to execute a Proctor or Defensor's Office; because as this is the Office of a Man, it is contrary to the Modesty of the Female Sex, or (at least) not very suitable thereunto *: But a Woman may be a Proctor *in Rem suam*, and act as such in her own Cause †. *Thirdly*, Soldiers cannot discharge a Proctor's Office even *pro Conjunctis Personis*; because such Attendance would be an Avocation to them from their Military Exercises and Employments ‡: But they may be Proctors *in Rem suam*, and act in the Name of their Cohort; or when they cease to be Soldiers, as growing *Veterans*, and the like. *Fourthly*, A Person impeach'd or found Guilty of a Crime, cannot be a Proctor, so as to manage a Cause, till he has purg'd his Innocence ||: Nor can a Person be a Proctor, that purchases the Interest of Law-Suits, in *Latin* called *Litium Redemptor*; because 'tis contrary to good Manners to bargain for any part of the Interest subject to a Law-Suit †. And, *Lastly*, No Madman can be a *Judicial* Proctor thro' a Defect of Mind, and a vicious Understanding; nor a Proctor to any other Purposes *. But a deaf and a dumb Man may be assign'd a Proctor *ad administrandum*, but not *ad agendum*, for the Management and Administration of ordinary Business, but not to sue and bring Actions at Law †. But a Son under the Power of the Father might be a Proctor both for the Plaintiff and Defendant, as Occasion serv'd; and might constitute a Proctor in all Causes and Matters, which he could try without his Father's Concurrence ‡.

Some fancy, that a Minor under Twenty five Years of Age cannot be made a Proctor; grounding this Opinion both on the *Civil* and *Canon-Law*. By the *Canon-Law* 'tis certain that he cannot ||, but by the *Civil-Law* 'tis otherwise; tho' this was the Opinion of the old Lawyers, founded on the *Digests* *: Where 'tis said, that such a Person was not so qualified, because he could not be restor'd *in integrum* to the Prejudice of the Adverse Party; and thus the *Judicial* Process would be render'd Elusory. But the modern is the best Opinion, *viz.* That a Person under that Age may be a *Proctor ad lites*; provided he be full Seventeen Years of Age. For our Ancestors thought this Age, which is stiled *full Puberty*, ought to be so order'd and settled, that a Person might then proceed in publick Business of an inferiour Nature †. Nor is the Law in the Margin ‡ any Bar to it; where 'tis said, that a Son who has not compleated his lawful Age as yet, may for this Reason be repell'd by the Judge from the Office of a Proctor: For here the Words *Ætas legitima*, are not taken for the Twenty fifth Year of his Age, but (according to the subject Matter of the Law) for the Seventeenth Year compleat, or (as *Cujas* || says) for the Eighteenth Year begun. Nor is the Opinion of the Ancients repugnant hereunto; namely, "That *Judicial* Proceedings may not be render'd Elusory by the Restitution of a Minor, &c." For that is true, when a Minor pleads his own Cause in Judgment, or defends the Causes of other Men without a Proxy: But when a Minor manages the Causes of other Men by a previous

previous Warrant or Proxy, his Clients ought to impute it to themselves if they have committed their Business to a Proctor, who thro' his Minority is not capable of managing the same as it ought to be; nor can they be restored *in integrum* on the Score of this Mismanagement of so young and raw a Proctor *. Therefore, tho' a Minor may be assign'd a Proctor, notwithstanding he has not *Legitimam Personam standi in judicio*; yet no Person can be compell'd to take on himself another's Business against his own Inclination, or to undergo the Defence of an absent Person †. And 'tis sufficient for the Plaintiff to have an Action *ex Stipulatu Judicati* to compel a Proctor to make good his Damage, if the Proctor shall refuse to defend his Cause after a Retainer ‡. But if a Client has given Caution or Security for his Proctor in his Presence and Privity thereunto, for the payment of the Sum or Matter adjudg'd, the Proctor is strictly bound to undertake the Suit, to defend the Cause, and not to desert it after he has undertaken it. For if he acts contrary hereunto, he shall not only lose the Benefit of the Action ||, but shall even be remov'd from his Procuratorial Office, as a Tutor from his Guardianship, who neglects to defend his Pupil or refuses to give an Answer to a *Judicial* Plea.

A Proctor may be appointed to all Causes in general, or to one in particular alone; provided, such Causes be of a *Civil* or *Pecuniary* Nature*: Nor is there any need of the Judge's Leave or Permission hereunto, because the Law it self impowers the *Litigants* on both sides in Civil Causes to act by their Proctors †, unless (perchance) the Quality of the Cause will not suffer the same to be manag'd by a Proctor, requiring the *Litigants* to be present, and answer personally. And in such a Case the Judge, being certify'd of the Cause thereof, shall compel their Presence in every part of the Suit ‡. If several Proctors are assign'd or retain'd even without this Clause, *viz. Quod unus sine altero agere potest*, one Proctor may act alone: For when several Persons are *simply* constituted, each of them seems to be constituted *in solidum*. But some will have the contrary to be the better Opinion, *viz.* That when several Proctors are constituted, one cannot execute his Proxy without the other. But 'tis otherwise (say they) if a Man constitutes more Proctors than one under this Form, *viz. I constitute Titius and Seius, & utrumque eorum*; for tho' he does not say *in solidum*, yet these Words *& utrumque, &c.* do admit this Interpretation; and each of them is understood to be constituted *in solidum*. A Proctor ought to be cited after Contestation of Suit, and not the Client himself.

In the Prosecution of a publick Crime, *Papinian* says||, the Intervention of a Proctor is fruitless; because in Criminal Pleas and Controversies regularly no Proctor is admitted: And the *Canon-Law* maintains the same Doctrine. And this is true, according to each Law, when the Prosecution is commenc'd after a *Criminal* Manner; but 'tis otherwise, if the Crime is prosecuted *Civili Modo* in order to inflict a Fine or a pecuniary Penalty. For then nothing hinders, but that the Defendant may answer by a Proctor, since the Reason to the contrary ceases; namely, That the Judge's Sentence might not be render'd Elusory: For, *Cessante ratione legis, cessat ipsa lex*. For an absent Person may suffer a Fine or pecuniary Punishment in his Goods, but in his Absence he cannot suffer a corporal Pain *.

* Fachin. lib.
1. Controv. c.
24. &c.

I come in the next Place to consider what Exceptions will lye against Proctors. Now it must be observ'd, that Procuratorial Exceptions do arise as well from the Person that constitutes a Proctor, as from the Person constituted, *viz.* That either he has constituted a Proctor, who can-

not make such a Constitution, or that such a one has been assign'd who ought not : And Exceptions of this kind ought to be made in the beginning of the Suit * ; for if they are not then made, they ought not to be propounded after Issue join'd † : Which is true (I think) if such Exception does not render the Process, which went before, null and void; as every Exception does that arises from a Disability by reason of some intrinsic Quality adhering to a Thing. In which Case a Pupil, who cannot so much as stand in Judgment for himself, may not be a Proctor : For if he should bring an Action, his Plea would not be valid, tho' this Exception were not propounded. And 'tis the same Thing, if a false Proctor intervenes, meaning him who has no Warrant or Proxy for his Appearance, or if his Proxy be found insufficient in Respect of the Cause or Matter in Controversy ; or, *lastly*, if his Proxy has been revok'd ‡.

* I. 4. 13. 11.
† C. 2. 13. 13.

‡ C. 2. 13. 24.

Now this Exception of a *false Proctor* may be made even after Sentence, because Judgment ought to consist of three Persons, *viz.* the Judge, Plaintiff and Defendant : For if there be no Plaintiff or Defendant, and no lawful Proctor made in his Stead, the whole past Proceeding is null and void. And, consequently, neither Contestation of Suit, nor a Conclusion made in the Cause is of any Force to establish and confirm the Process ||. Therefore, if such an Exception be made after Sentence, it is deem'd to have been made in the beginning of the Cause, and before Contestation of Suit. Hence this Question arises, *viz.* Whether Acts done by a *false Proctor* may be ratified by a Client after Sentence ? Some hold the Affirmative, whether the Sentence be in Favour or against the Client, whether the Client be a *Major* or a *Minor*, and whether it be within or after ten Days, it matters not, say they. For when any Thing is null and void from a want of Consent alone, 'tis render'd valid again by a supervening Consent. And, consequently, this is then the same Thing as if the Proxy had been had *ab initio*. So that an Action *ex Mandato* hereby lies as well for a *false Proctor*, if he has been at any Expence, as it does for the Client to bring him to an Administration *. On the contrary, others say, That this only holds good when the Client ratifies his Proxy before Sentence, and when no Exception of a *false Proctor* has been made in the *Interim* : For after a Sentence pronounc'd, or an Exception made, the Client may ratify what has been done to his own Prejudice, tho' not to the prejudice of the adverse Party, who has purchas'd a Right by a Nullity of Sentence ; and the Client of a *false Proctor* cannot take this Right from him by his Ratification ; since 'tis not in a private Man to make a Sentence, which is null, to be valid and consistent. Nor can any Strefs or Force be placed in the Defendant's Silence, since a Nullity does not prejudice him, because he might make the Exception at any time †.

|| C. 2. 13. 24.

* Gail. lib. 1.
Obs. 47.

† Fuchin. lib. 3.
§. Contr. c. 1.

There is another Exception stiled an Exception of *not giving Satisfaction* or Security. For if it be a Doubt, whether the Plaintiff has committed his Cause or not to such a Proctor, he shall be set aside, till he gives Caution by Sureties for his Client's ratifying what he shall do in his Behalf in such Cause ‡. I say, *if there be a Doubt* ; because if the Proctor swears to the Truth of his Proxy, he is not bound to give this Caution for the Ratification thereof, since his Client has sufficiently declar'd the same in his Procuratorial Mandate, *viz.* *That he will ratify, whatever his Proctor shall do for him.* And on the contrary it appears, that if the Proctor has no Proxy given him, he shall not be heard as a Proctor, tho' he be willing to give Caution for the said Ratification ; unless he be what the *Civilians* stile *Conjuncta Persona*, who may try a

‡ C. 2. 13.

Cause without a Proxy or Mandate. Formerly all such were term'd
 * D. 3. 3. 35. *Conjunctæ Personæ* as are enumerated in the Law quoted in the Margin *.
 But now it depends on the various Customs of each Country, who shall
 † Costal. in l. be so stiled †. But a Husband is surely *Conjunctissima Persona*, and in
 55. D. 3. 3. a *Prejudicial* Prosecution of his Wife's Affairs he may be a Proctor
 without a Proxy; because 'tis *tacitly* understood to be given to him:
 And this he may do in all Matters for his Wife, unless he has once re-
 ceiv'd a Proxy from her in some Suit or other; for, by such an *express*
 Proxy, his *tacit Proxy* seems to be taken from him in all other Suits
 ‡ C. 2. 13. 21. and Matters whatever ‡. Yet in this Case, wherein a Husband tries a
 Cause for his Wife without a Proxy, he must give Caution that his
 Wife shall ratify the Matter; or if his Wife be summon'd, he ought to
 give Security for his Wife's satisfying the Judgment ||, unless (perchance)
 || C. 2. 13. 2. & 21. the Suit be on the Score of her *Paraphernalia*, or Dower. For in this
 Case the Wife shall be admitted without Security, since he has the Ad-
 ministration of Things vested in him as being in a Civil Sense the Pro-
 prietor thereof *. But here in *England* this Distinction of Husband and
 * C. 5. 12. 3. Wife is not made use of; for in all Civil Causes here the Husband and
 Wife are deem'd as one Person. Moreover, the Defendant's Proctor, in
Latin often stiled *Defensor*, is not admitted even with a Proxy, unless
 he gives Caution by Sureties *de Judicato solvendo*; for no one can be a
 † C. 2. 13. 12. Defender of another's Cause without such a Caution †: But yet the
 Defendant's Proctor is not bound to swear to the Truth of his Proxy;
 and herein the Defendant's Proctor differs from the Plaintiff's.

Both the Plaintiff's and Defendant's Proctor ought strictly to observe
 ‡ C. 2. 13. 10. the Limits and Bounds of their Authority ‡, and if either of them shall
 do otherwise than in their Commission warranted and directed to do,
 their respective Clients shall not be oblig'd to ratify and confirm the
 same. But if a Proctor shall only act according to the Instruction of his
 Proxy, the Client is bound to ratify the same; and a Sentence pro-
 nounc'd against a Proctor shall bind his Client, as being valid. But the
 Client may have an Action *ex Mandato* against his Proctor, if he acts
 fraudulently or deceitfully by him ||. A Proctor *ad lites* may com-
 ‡ D. 3. 3. 10. & 42. 1. mence and propound an Action, exhibit a Libel, give in *Exceptive*
 Matter, conclude in the Cause, hear Sentence, appeal from it, &c. But
 he cannot enter into Pacts, References and executive Contracts, nor pray
 Restitution *in integrum*, nor give or receive an Oath, &c. because in
 these and the like Cases, besides his general Warrant, he ought to have
 * D. 3. 3. 60. a special Proxy *. Therefore, if he acts in such Affairs as these, he
 shall be said to exceed the Bounds of his Commission; and, consequent-
 ly, his Client is not bound to ratify his Proceedings herein. Nor ought
 a Proctor *ad Negotia* to sell or alienate the Effects of his Client by a
 ‡ C. 2. 13. 16. general Proxy *omnium bonorum* ‡, unless they are such Fruits or Effects
 || D. 3. 3. 63. as may easily be spoil'd by keeping ||. But he who has a special Proxy
 or general Commission with *free Administration*, may sell his Clients
 Goods or Estate, provided he does it *animo administrandi*, and not
donandi Causâ. He may also make Pacts and Agreements, &c. provi-
 ded it be without any Diminution of the Patrimony; and give an Oath,
 make a Demand, barter one Thing for another, pay Money, and (in
 * D. 3. 3. 54. & 63. general) do all Things which his Client or Principal may do *. And
 tho' the Proctor should not have a Commission for so doing; yet what
 he does shall be valid from his Client's Ratification of it: For such
 † C. 2. 13. 19. Ratification is Equivalent to a Proxy †. And much more, if a Man be a
 Proctor *in Rem suam*. And an Action lies for him, because he is here
 in the Place of his Principal, and may lawfully transact and do all
 Things

Things as his Principal may do *: And herein he differs from a Proctor not made *in Rem suam*, because he cannot recover the Expences which he has been at in obtaining his own Right, according to *Faber* †.

* D. 3. 3. 61.

† Cod. h. t. Defin. 20.

But some Things ought necessarily to be express'd in some Kinds of Proxies, as to contract Marriage, take the Oath of Calumny, demand a Debt, to pray Execution of a Sentence, Taxation of Expences, Restitution *in integrum*, &c. otherwise the Proctor cannot act, if such Restitution be *principally* and not *incidentally* pray'd ‡. A Proxy may be revok'd before Contestation of Suit, without any reasonable Cause assign'd: For the Client may attend the Cause himself, especially if he be jealous of any fraudulent Dealing in his Proctor ||. But if a Proctor has by his Proxy a Power to substitute another Proctor, he cannot revoke a Substitution made by him, after the Person substituted has taken the Substitution on himself, tho' he does not make use of the same, unless he has also a Power granted him of revoking such Substitution. But if a Person be made a Proctor in several Causes, and in one of these Causes makes a Substitution, he does (notwithstanding) remain a good Proctor in all the other Causes ||.

‡ Mynf. cent. 2 Obf. 26.

|| VI. 1. 19. 2.

|| VI. 1. 19. 2.

As soon as a Proctor has finish'd his Office or Business, an Action *ex Mandato* lies according to the *Civil-Law* *, in order to compel a Restitution of whatever he has received from or out of the Suit, tho' received thro' a Mistake, or by the Iniquity of the Judge. He shall likewise hereby be compelled to restore all such Writings and Instruments as he had concerning the Cause; and be obliged to make good whatever Damage his Client has sustain'd by his Neglect or Deceit †. And by a cross Action of the same Kind, a Proctor may recover his lawful and honest Charges spent in the Suit *bona fide* ‡; or if he has paid any Money, or engag'd himself in any Bond on his Client's Account, he may do the same. But if he suffers any Penalty hereby thro' his own Default, he shall not recover that ||, nor the Costs he has been at as a Proctor *in Rem suam* *.

* D. 3. 3. 42. 1.

† C. 2. 13. 10.

‡ D. 3. 3. 42. 2.

|| D. 3. 3. 46. 4. 5 & 6.

* D. 3. 3. 42. 2.

† D. 3. 3. 27.

C. 2. 13. 3.

Salycetus ibi.

If a Proctor commits any Iniquity in his Office, his Client is no otherwise answerable for the same than as he particularly ratify'd or commission'd the Fact †: But a *Curator*, *Guardian* or *Proctor in Rem suam* obtaining an unjust Demand do bind themselves in their own Persons. Thus if I sell to *Titius* an Estate of Inheritance given me; and making him my Proctor do assign over to him all my Actions (for Incorporeal Rights cannot otherwise be transferr'd) to the end that he should sue in my Name, and pay all Charges tho' to his own Behoof, and not to my Damage, such Person is said to be a Proctor *in Rem suam*. A Proctor *simply* constituted shall not prejudice his Client by virtue of such *simple* Proxy, tho' he should sue an unjust Demand in his Client's Name: And this is true (I think) not only in a *simple*, but also in a general Proxy *cum liberâ potestate*. But tho' a Proctor be fully made with a free Power of doing all Things without Controul; yet he ought not to sue an unjust Demand on his Client's Behalf, as being not bound thereby: Because, in a Proxy how general soever it be, only such Powers are deem'd to be granted as relate to the Management of his Concern. Nor can a Proctor with a general Proxy do such Things as require a special Warrant, unless he be a Proctor with a free Power: But if a Proctor has a general Power, he may do all Things which his Client might do in his own Person; provided there be no Fraud in the Case ‡.

‡ D. 3. 3. 52.

D. 3. 3. 40. 4.

X. 2. 16. 1.

|| D. 3. 4. 1.

As a Proctor has the Management of the Business of particular Individuals; so a *Syndick* manages the Affairs of aggregate Corporations ||: And

Cause without a Proxy or Mandate. Formerly all such were term'd
 * D. 3. 3. 35. *Conjunctæ Personæ* as are enumerated in the Law quoted in the Margin *.
 But now it depends on the various Customs of each Country, who shall
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 ‡ C. 2. 13. 21. and Matters whatever ‡. Yet in this Case, wherein a Husband tries a
 Cause for his Wife without a Proxy, he must give Caution that his
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 || C. 2. 13. 2. the Suit be on the Score of her *Paraphernalia*, or Dower. For in this
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 mence and propound an Action, exhibit a Libel, give in *Exceptive*
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 he cannot enter into Pacts, References and executive Contracts, nor pray
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 * D. 3. 3. 60. a special Proxy *. Therefore, if he acts in such Affairs as these, he
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 ‡ C. 2. 13. 16. as may easily be spoil'd by keeping ||. But he who has a special Proxy
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But some Things ought necessarily to be express'd in some Kinds of Proxies, as to contract Marriage, take the Oath of Calumny, demand a Debt, to pray Execution of a Sentence, Taxation of Expences, Restitution *in integrum*, &c. otherwise the Proctor cannot act, if such Restitution be *principally* and not *incidentally* pray'd ‡. A Proxy may be revok'd before Contestation of Suit, without any reasonable Cause assign'd: For the Client may attend the Cause himself, especially if he be jealous of any fraudulent Dealing in his Proctor ||. But if a Proctor has by his Proxy a Power to substitute another Proctor, he cannot revoke a Substitution made by him, after the Person substituted has taken the Substitution on himself, tho' he does not make use of the same, unless he has also a Power granted him of revoking such Substitution. But if a Person be made a Proctor in several Causes, and in one of these Causes makes a Substitution, he does (notwithstanding) remain a good Proctor in all the other Causes ||.

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* D. 3. 3. 42. 1.

† C. 2. 13. 10.

‡ D. 3. 3. 42. 2.

|| D. 3. 3. 46. 4. 5 & 6.

* D. 3. 3. 42. 2.

If a Proctor commits any Iniquity in his Office, his Client is no otherwise answerable for the same than as he particularly ratify'd or commission'd the Fact †: But a *Curator*, *Guardian* or *Proctor in Rem suam* obtaining an unjust Demand do bind themselves in their own Persons. Thus if I sell to *Titius* an Estate of Inheritance given me; and making him my Proctor do assign over to him all my Actions (for Incorporeal Rights cannot otherwise be transferr'd) to the end that he should sue in my Name, and pay all Charges tho' to his own Behoof, and not to my Damage, such Person is said to be a Proctor *in Rem suam*. A Proctor *simply* constituted shall not prejudice his Client by virtue of such *simple* Proxy, tho' he should sue an unjust Demand in his Client's Name: And this is true (I think) not only in a *simple*, but also in a general Proxy *cum liberâ potestate*. But tho' a Proctor be fully made with a free Power of doing all Things without Controul; yet he ought not to sue an unjust Demand on his Client's Behalf, as being not bound thereby: Because, in a Proxy how general soever it be, only such Powers are deem'd to be granted as relate to the Management of his Concern. Nor can a Proctor with a general Proxy do such Things as require a special Warrant, unless he be a Proctor with a free Power: But if a Proctor has a general Power, he may do all Things which his Client might do in his own Person; provided there be no Fraud in the Case ‡.

† D. 3. 3. 27.

C. 2. 13. 3. Salycetus ibi.

‡ D. 3. 3. 52.

D. 3. 3. 46. 4.

X. 2. 16. 1.

|| D. 3. 4. 1.

And

As a Proctor has the Management of the Business of particular Individuals; so a *Syndick* manages the Affairs of aggregate Corporations ||:

And that there is this Difference between a Proctor and Syndick appears from the Diversity of Titles in the *Civil* and *Canon-Law*; for if there was no Difference, there would be no Diversity of Titles. The *Greeks* indeed stile those by the Name of *Syndicks*, who undertake any personal Employment, as well as those the Litigants make use of for the Management of their Causes: But in Propriety of Speech, according to the *Civil-Law* *, Syndicks only manage the Affairs of Colleges or Secular Corporations. But this Distinction is often confounded, as appears from the Title of a Syndick in *Gregory's* Decretals here quoted †; where the Word denotes him who manages the Cause of a Convent or Ecclesiastical Body Politick. And as this Person is commonly called a *Syndick* in Secular Corporations; so in Ecclesiastical ones he is often in *Latin* term'd an *Oeconomus*: For Religious Persons have their Syndick or *Oeconomus* to manage the Causes of their Monasteries, with an appointed Salary settled on him ‡. A Proctor and a Syndick differ from the *Administrator* of a State or Republick; the one being employ'd in the Administration, and the other in the Law-Suits thereof: But a Proctor assign'd by a Corporation of Townsmen is in *Latin* called *Astor Universitatis*; because he intervenes in the Business of the Publick, and not of particular Men. A Syndick may be assign'd to all Businesses, and to all Causes, whether they be Civil or Criminal, present or future, and the like ||; but then it ought to be by a special Authority.

A Proctor, Syndick, and the like, ought to be well instructed in the Cause, and if not, it ought to be imputed to his Client. For if a Proctor or Syndick should upon their Examination say, *That they desired longer Time to consult their Client*, a Term shall not be assign'd them without a very just Cause subsisting *; or if either of them shall say, *That he is ignorant of those Things, touching which he is interrogated, and that they belong to the principal Matter in the Suit*, he shall be condemn'd in the Expences made on this Account †, unless it be upon some new and emergent Article, or something his Client cannot be charged with, wherein he did not instruct his Proctor.

As a Proctor is constituted by mutual Consent, since no one can be such against his Will, unless it be in a Case of great Necessity, when no voluntary Proctor can be found to appear; so is his Proxy revok'd by the like Consent; and his Client may revoke the same at pleasure before Contestation of Suit (as before related) without any Cause shewn ‡, unless he be a Proctor *in Rem suam*, who stands in the place of the Principal to all Events. But 'tis otherwise after Contestation of Suit; for that the Matter then ceases to be *Res integra*: And the Proctor being thereby made *Dominus litis*, his Proxy cannot be revok'd without a just Cause given ||. And these are said to be just Causes for so doing, *viz.* an unfit Age for the Business of a Proctor, want of Health in him, evil Suspicions of his Integrity, other Employments, and the like, as mentioned in the *Digests* *. And tho' the Effect of such a Revocation is, that such Proctor shall not meddle in the Business for the future; yet such Things as he did before such Revocation, remain firm and valid. A Proxy may be revok'd *viva voce*, tho' it was made in Writing. A Proctor's Mandate or Warrant expires also by his own Death, but not by a Client's Death, if Suit has been contested, or Issue join'd by or with the Proctor †, which the *Civilians* stile an *Acceptance of Judgment*. And, *lastly*, this Proxy ends on a Determination of the *Instance* by a diffinitive Sentence. For a Proctor cannot be compell'd to give his Assistance in the *second Instance*, otherwise call'd a Judicial Appeal, having already fulfill'd the Trust undertaken

* D. 3. 4. 1.

† X. 1. 39. 1.

‡ X. 1. 39. 1.

|| D. 3. 4. 10.

* C. 2. 13. 28.

† Hostiens. & Andr.

‡ D. 3. 3. 31.

|| C. 2. 13. 22.

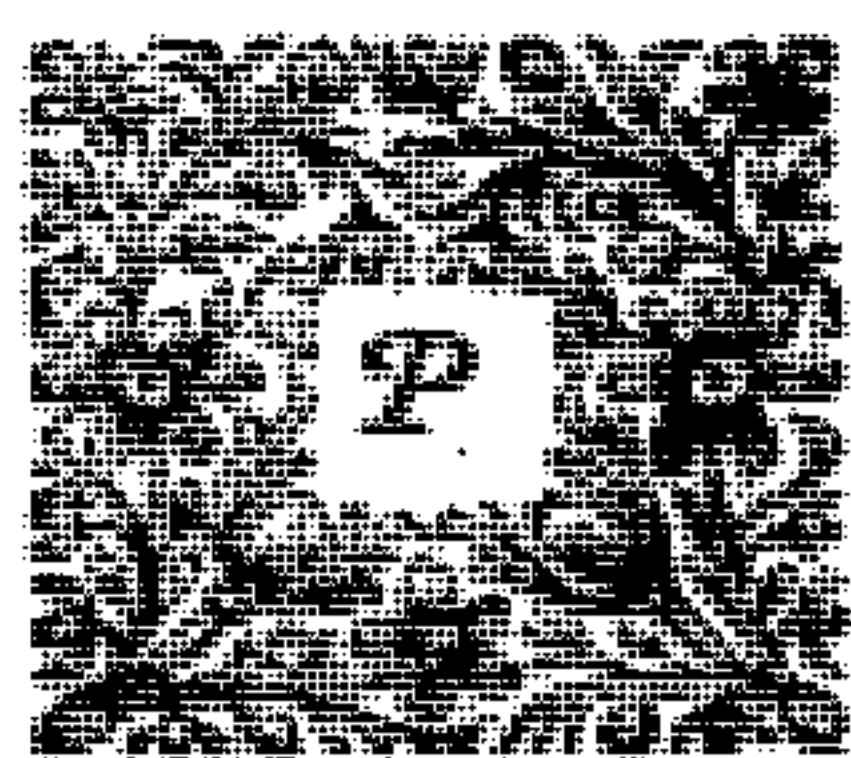
* D. 3. 3. 16 & 17.

† C. 2. 13. 23.

undertaken by him †. But if the Proctor shall be constituted *ad integram* † C. 2. 13. 17. *Causam*, and be cast in the Suit, he shall be oblig'd to appeal in his Client's Behalf: For tho' the Judge has discharg'd and finish'd his Office, by pronouncing Sentence; yet the Proctor is not adjudg'd to be at Liberty by a Sentence pronounc'd, since he has not gone thro' the whole Cause, to which an Appeal is an *Appendix* *. For the Proctor ought * C. 2. 13. 27. to appeal within ten or fifteen † Days after Sentence, or (at least) to † 24 H 8. c. 12. give his Client Notice that Judgment is gone against him. But such Proctor is not forc'd to prosecute the Cause of Appeal to its Extremity, because the Prosecution thereof has no Dependence on the Appendix, or what is connected to the *first Instance*.



Of Procurations, Synodals and Pentecostals.



PROCURATIONS, in *Latin* stiled *Procuraciones*, are certain Sums of Money which Parish-Priests pay Yearly to the Bishop or Archdeacon *ratione Visitationis* ||: For so they were anciently paid, tho' now they are demand- || X. 3. 39. 25. ed whether the Bishop or Archdeacon visits or not in Person. These *Procurations* were anciently paid in necessary Victuals and Provisions made for the Reception and Entertainment of the Visitor and his Retinue, but were afterwards turn'd into Money. *Vallenfis* defines a * *Procuracion* to be an exhibiting and pro- * De Cens. §. 3. viding of all Necessaries for an Entertainment, which in respect of Visitation is due from the Church or Monastery visited to him, who (according to his Office) has the Right, Power and Charge incumbent on him of visiting the same, whether he be a Bishop, Archdeacon, Dean, or even the Pope's Legate. And there is a *Memorandum* in the Year 1290. that the Bishop of *Worcester* did on the Feast of St. *Luke* the Evangelist (being *Wednesday*) take Procuracion in Meat and Drink at *Bordesly*, and lodge there all Night †. See *Stevens's* Historical Discourse † CH. 1. c. 25. of *Procurations* and *Synodals*, printed Anno 1661.

In *England* the common Usage was for the Archdeacon to receive for himself and Retinue Seven Shillings and Sixpence, *viz.* for his Horse Eighteen Pence, and for every other Carriage with its Rider Twelve Pence: But a Custom does not limit the Sum of Procurations, since we ought herein to have Recourse to what is laid down in the *Extra-vagants* †. In the Time of *Hubert* Archbishop of *Canterbury*, which † Extr. lib. 3. de Cens. was about the Beginning of King *John's* Reign, the Canons of the Church took Care †, "That Bishops should not be burthensome to † Stilling. Eccl. Cases, pt. 1. "their Clergy by the Number of their Attendants in their Visitations, "which were then Parochial, and not from Deanery to Deanery, as at pt. 1. "present; and the Number then allow'd being twenty or thirty Horse, "it was thought too heavy for the Clergy to bear ||:" And, there- || X. 3. 39. 6. fore, by Degrees it was thought fit to turn that Charge into a Certainty, which was the Original of our present Procurations. The Council of *Cavaillon* in *France* * fix'd no Sum, but only desired the Bishops * A. D. 831. not to be burthensome to the Clergy in their Parochial Visitations. And

- Lindwood* says, the ancient Procurations here in *England* were a *Day and a Nights Entertainment*, which became afterwards to be a Customary Payment in Money*. And by a Provincial Constitution in *Lindwood*†, no one ought to receive from any Church, or demand any Procuration to be paid him in respect of his Visitation without a diligent Visitation thereof; which he ought to make by a Personal Enquiry, and by an effectual Inspection of such Things as ought to be inspected and enquired into by him: Which plainly shews, that Procurations were not due without a personal Visitation †. And then the Constitution goes on and says, That if any one has a Mind to visit several Churches in one Day, he might cause all and each of the said Churches thus visited by him in one Day, ratably to contribute only one Procuration in Money or Victuals for them all; and herewith he ought to be content, according to the *Canon-Law* ‡. And the Reason the Gloss assigns for this is, because the Visitation is the Principal, and the Procuration paid is only an Accessory: And, therefore, an entire Procuration due from several Churches ought not to accede to a Visitation of them; since the Accessory ought not to be greater than its Principal ||. By Money in this Case the Constitution does not only mean Money in Tale, but it may be understood of any certain Measure, which consists in *aridis vel liquidis*, according to a Composition or Custom prescrib'd, or in giving any Thing else according to a Quantity rated and taxed; or without any Taxation at all; provided the same be moderated according to the Text of the *Canon-Law* *.
- † X. 3. 39. 23. We read in the Books of the *Canon-Law* †, that some Prelates were become so very Burthenfome in their Visitations by their stately and pompous Retinue, that the Parishioners were compelled to sell the Plate and Ornaments of their Churches to maintain the Pride and Grandeur of such as visited them: And, therefore, the Council of *Lateran* ‡, to limit this Excess in Procurations, decreed, That no Archbishop in his Provincial Visitation should carry with him more than forty or fifty Horse, a due Regard being had to the Diversity of the Provinces, and the Estates of the Churches they visited; and a Bishop should not travel with more than twenty or thirty; and Archdeacons with more than five or seven. A very wise Provision according to the Excess of those Days.
- Indeed, it might have been some Ease to the Clergy, if the Number of Dishes had been limited as well as their Retinue; for the Visitors gaped after *sumptuous Entertainments*, as the Canon tells you, tho' they were directed only to take a Competency, and that with *Thankfulness* too: And such a great Equipage being a heavy Expence to the poor Clergy, (for they might stay a Day and a Night as aforesaid) Pope *Boniface* the Eighth to remedy this Mischief made a Constitution ||, That the Visitor might receive Money instead of Procurations in Victuals, if the Persons visited were willing to pay the same, and not otherwise. But still the Clergy were oppressed by the Exorbitant Demands of the Visitors; for tho' this Canon made it lawful for them to compound for Money instead of Victuals, yet the Sum was not limited. Therefore about sixteen Years afterwards *, a Complaint was made in the Council of *Vienna*, under Pope *Clement* the Fifth, but it was not redress'd till about Twenty six Years afterwards †, viz. by a Decree made by *Benedict* the Twelfth already quoted; whereby the Sum was proportion'd according to the Quality of the Visitors, and the Circumstances of the Persons visited ‡; but still leaving them at liberty to pay so much in Money or Victuals. And this voluntary Payment being continued in many Places, in Time grew into a Custom, by which the *Quantum* is now settled and paid at this Day. Indeed there was a Constitution made by Pope *Innocent* the

* Lib. 3. Tit. 22. cap. 1. v. *die Visitationis.*
† *ut sup.* cap. 5.

‡ VI. 3. 20. 3. 2

|| VI. 5. *de reg. Jur.* 42.

* VI. 2. 20. 3.

† X. 3. 39. 6.

‡ A.D. 1180.

|| A.D. 1295.

* A.D. 1311.

† A.D. 1337.

‡ X. 3. 39. 25.

the Fourth *, and afterwards ratify'd by a General Council at Lyons * VI. 3. 20. 1. under Pope Gregory the Tenth †, forbidding (under a Malediction) the taking of Money in lieu of Procurations even from such as were willing to pay the same: And the ordinary Penalty in this Case against Visitors of any Rank inferiour to Patriarchs, Archbishops or Bishops, that should presume to receive *Procurations* otherwise than in *Viſtuals*, was Suspension *ab Officio & Beneficio*; but Patriarchs, Archbishops and Bishops were obliged within a Month's Time to restore Twofold of what they had received in Money to the Church from whence they had taken it, under Pain of an Interdict *ab Ingressu Ecclesie*. But this Penalty (I think) was only inflicted on them, when they received Money in lieu of Procurations without Visiting: For if they visited the Church, they might make the Person visited easy by a Composition, and so the Canon seems to imply; that Council well knowing, that if they receiv'd their Procurations in Money, they would take the Money and never visit the Church.

It has at times been smartly controverted, Whether Procurations are only due *ratione Visitationis*, or whether the Payment thereof may be legally demanded without the Act of *Visiting*, and not exclusively to Archdeacons in the Years of Episcopal Visitations? For if so, then the aforesaid Description which *Vallensis* gives thereof is not adequate enough to the Nature of the Thing: For as these Procurations were anciently exhibited in *Viſtuals* only, they could not be perform'd without the Act of *Visiting*. But 'tis now suppos'd, that they are and may be otherwise due than in respect of *Visitation*; and, therefore, Archdeacons may receive Procurations in the Bishops *Triennials*, and yet not visit as being inhibited: For at this time Custom seems to have set aside a written Law; and a just Claim may be laid to this Ecclesiastical Payment of Procurations without any Visitation at all, which has been the Occasion of much Mischief to the Church in letting the Manse and Parish Church go to decay. *Lindwood* says ‡, That Time was when Archdeacons had a Right of Visiting every Year, and so accordingly did visit and receiv'd Procurations *ea ratione*: And sometimes they visit not, as in Bishops *Triennials*; yet by Custom do and may receive their Procurations. But this ought to be understood only of some, and not of all Archdeacons. Indeed the *Canon-Law* says, that the Archdeacon is to go *Personally* to the Place to be visited, and not send another for that Purpose: For if he does not go himself, he shall not receive in *Denariis* the Procurations due *ratione Visitationis* §. But, notwithstanding this, the Person whom he commissions for that Purpose *non sine suo*, shall receive the Procurations for himself and his Attendants in *Viſtuals* *.

‡ Lib. 1. Tit. 9. cap. 1. v. *Visitatione*.

§ X. 3. 35. 25.

* Dd. in c. 1. X. 2. 50. VI. 3. 20. 5.

But now this Payment is become a certain and settled Revenue on the Archdeacon, and 'tis in effect his Subsistence, and rated to him in the King's Books, for which he pays Tenths: And in several Grants of impropriate Rectories these Procurations are still left as a Charge upon the Impropiator. And tho' some Canons have been formerly made in this Kingdom, forbidding Archdeacons to take Procurations without a personal Visitation; and that they should not presume to receive Fees or Presents for not visiting †: Yet Custom has so far prevail'd against these Canons, that an Archdeacon ought not to be depriv'd of this Profit by his submitting to the Bishop in his *Triennial* Visitation, since this would be to punish him for his Obedience to the Inhibition of his Diocesan. Therefore, these Perquisites having been enjoy'd for so long a Time by Archdeacons, and paid by the general Consent of the People to them, when

† Lindw. lib. 3. Tit. 20. cap. 1. v. *Visitatione*.

when they do not visit in Person, they may be justly due to them at such Times as they are usually paid, whether they visit by themselves or by their Officials. There ought not to be more than one Procuration paid for the Mother-Church and Chapel thereunto belonging, when they are visited, according to *Lindwood* * : But *Joh. Andreast* †, and other *Canonists*, do positively assert, That every Chapel dependant (if Peopled and of Ability) shall pay its proper Procuration at the usual Times of the Ordinary's Visitation ; because the Bishop is to have a Respect to every Individual Member of his Diocese ‡. But this is only true, when such dependant Chapel has a Curate proper of its own, and distinct from the Curate of the Mother Church : But 'tis otherwise, when the Rector of the Mother-Church is Parson of them both, and serves the Cure of the said Chapel by a Vicar Temporal, and removable at Pleasure, as I have already remember'd under the Title of *Chapels* ||.

I shall next consider how and in what Courts these Procurations are to be recover'd, if refus'd to be paid ; and as to this Matter we ought to consider how the Law stood before the Act of *Henry the Eighth* *, and what Alteration has been made since by that Statute, which enacts, *That all Pensions, Portions, Corrodies, Indemnities, Synodics, Proxies, and all other Profits due out of Religious Lands and Houses dissolv'd, shall be paid to Bishops, Archdeacons, and other Ecclesiasticks, by the Occupiers of the said Lands, if such Ecclesiasticks were seiz'd thereof within ten Years before their Dissolution. And if upon Suits in the Ecclesiastical Court for the same the Defendant be convict, the Plaintiff shall recover the Value thereof in Damages, together with his Costs.* So that from hence it appears, that Procurations, which that Statute styles Proxies, may be sued for in the Ecclesiastical Courts. And before the making of that Statute they were recoverable in the Spiritual Court and not elsewhere ; unless where the Plaintiff claim'd them by Prescription ; and then they were triable at the Common Law : But it has since been doubted, whether a Bill in the Exchequer might not be proper in such a Case † ; but that must be intended where they have been paid within Time of Memory, and this by Virtue of the *Saving* in the Statute of *Henry the Eighth* ‡, whereby the Monasteries are given to the Crown, and the Lands belonging to them were order'd to be under the Government of the Court of *Augmentations*, which Court is now annex'd to the Exchequer. For there is a *Proviso* in the 34th of *Henry the Eighth* above cited, *viz. That if the King had demis'd any of these Lands for Life or Years with a Covenant to discharge the Lessee from the Payment of Procurations, that the Party claiming them shall sue in the Court of Augmentations, and not elsewhere ;* so that it must be now in the Exchequer. But this *Proviso* does not extend where any Lands were granted by him in Fee, but only to such Cases where the King had granted any particular Estates thereof. And, therefore, a Prohibition was deny'd to stay an Excommunication for not paying Procurations upon suggesting this Statute, and that the Party ought to be sued in the Exchequer ||.

Guilder sued the Plaintiff *Kirton* in the Ecclesiastical Court at *York* for Procurations belonging to him as Archdeacon ; and in his Libel declar'd, That for 10, 20, 30 and 40 Years last past there has been paid Six Shillings Annually for the said Procurations by the said *Kirton* and his Predecessors Parsons of *D.* Whereupon *Kirton* pray'd a Prohibition, suggesting, that the said Procuration has not been payable, and denying the Prescription ; and so the Ecclesiastical Court cannot have Cognizance of the Prescription, it being properly tryable at the Common Law *.

But

* Lib. 3. Tit. 22. cap. 5. v. una Ecclesia.

† In c. 4. x. 1. 14.

‡ X. 1. 31. 13.

|| Pag. 165.

* 34 H. 8. c. 19.

† Hard. Rep. 180.

‡ 31 H. 8. c. 13.

|| Hardr. Rep. p. 388.

* Raft. Entr. 483. 2. Roll. Rep. 293.

But it was said, That Procurations were payable of *Common Right*, as Tithes are : And no Action will lye for the same at the Common Law. And a Prescription in the Ecclesiastical Court may have a different Commencement from what it has at the Common Law ; and that a Pension may be sued for in the Ecclesiastical Court *. The Court herein granted a Consultation as to Procurations demanded generally : But if the Plaintiff had deny'd the *Quantum*, a Prohibition had been awarded †.

* F. N. B. 151. b.

† Raym. Rep. p. 350.

The next Thing, I shall here treat of, is of *Synodals*, which is a Pecuniary Tribute paid by the Inferiour Clergy to the Bishop ; and it is so called, because it was usually paid at the Bishops Synod or Visitation : And it differs from Procurations, because those were Pensions, but Synodals are a *Census* or Tribute. Indeed the Word *Synodale* seems to have three Significations, as we meet with it in our Books : For, *First*, It is taken and used for the Meeting or Synod itself. See *Gregory's* third Epistle to the Bishops of *Almany* and *Baiory*, which *Baronius* cites in the eighth Tome of his Annals about the Year 738. And, *Secondly*, In the *Tripartite* History it seems to denote the Acts done at a Synod, as well as the Synod itself, where mention is made of a Synod of Bishops assembled at *Antioch* out of divers Provinces, who sent the Emperor *Jovinian* a Copy of the *Nicene Creed*, saying, *Hunc Libellum* (meaning the said *Creed*) *in Collectione Synodali Sabini conscriptum invenimus*. In the second Part of the *Appendix* to the third *Lateran* Council, we meet with Pope *Alexander* the Third's Letter to certain Archdeacons and Deans, reproving them for extorting Money from the Clergy in a fraudulent Manner, under different Names : *Et hujusmodi Exactionem* (says that Epistle) *ut eam liberius videamini exigere, quandoq; consuetudinem Episcopalem, quandoq; Synodalia, quandoq; Denarios Paschales appellantes*. And in this Sense the Word is here used.

But tho' this Duty was only paid to Bishops, as appears from this Pope's reprimanding Letter ; yet afterwards in Process of Time it became due to Archdeacons, not so much *de Jure communi Ecclesiastico*, as by Composition with, or Grant from the Bishop. And since Episcopal Synods have been discontinu'd and turn'd into meer Visitations, this Tribute has been usually claim'd by, and paid unto Archdeacons at their *Easter* Visitations. Some will have it to be a Contribution towards the Archdeacon's Charges in these Diocesan Synods, they being elected by their Deacons as their Representatives at such Assemblies : But with them I cannot agree for many Reasons. But 'tis now become a Church-due ; and the Statute of the 34th H. 8. c. 19. provides for the recovering the same, where 'tis deny'd or neglected to be paid under the Word *Synodies* ; as it does of *Procurations* : And 'tis fit it should be so ; because it is valu'd in the King's Books, and a Yearly Tenth is taken from thence.

This Synodical Duty was anciently known by two other Names now grown obsolete : The first was stiled *Cathedraticum* *, probably from the Original Cause thereof, being the Sum of two Shillings paid to the Bishop by the Inferiour Clergy, as a Token of their Subjection to him & *ob honorem Cathedre Episcopalis* † ; and the other was term'd *Synodaticum* ‡, from the Time of Payment, it being at the Synod. *Panormitan* says, That this *Cathedraticum* was a Pension paid formerly to the Bishop from every Church of his Diocess, according to the Custom of the Place ; and it began when the Revenues of the Church first came to be divided and allotted to several Ministries ; for then it was that this Payment was first made to the Bishop by the Benefic'd Clergy

* X. 1. 31. 16.

† 10 Q. 3. 10.

‡ X. 1. 31. 16. Gloss. in v. duos solidos.

* Lib. 1. Tit. 11. cap. 2. v. *Onera Ecclesiastica.*

within his Dioceſs. *Lindwood* informs us *, That tho' the Payment of the *Cathedraticum* and *Synodaticum* were *Onera Ecclesiastica*; yet they were not *Onera Innovata*, but *Onera Ordinaria*, and by Impoſition of Law.

† 33 H. 8.

‡ *Stev. Hiſt. de Proc.*

Pentecoſtals, otherwiſe called *Whitſon-Farthings*, were Oblations made by the Pariſhioners to the Pariſh-Prieſt at the Feaſt of *Pentecoſt*, commonly ſtilled *Whitſontide* †. But becauſe theſe Oblations were firſt made to the Cathedral Church, and not to the Pariſh-Prieſt, it may be brought as a good Reaſon to ſhew why *Deans* and *Prebendaries* in ſome Cathedrals are intitled to receive theſe Offerings; and in ſome Places the *Biſhop* and *Archdeacon*, as at *Glouceſter*. They were paid to the Mother-Church at *Worceſter* before the Diſſolution of it; and when *Henry* the Eighth endow'd that Church after the Diſſolution thereof ‡, he reſtor'd them their *Pentecoſtals*; as may be ſeen from the ſaid King's Grant now in the Archives of the Church of *Worceſter*, as is ſaid. Some conceive theſe Annual Payments to be nothing elſe but a Continuance or Repetition of an ancient Penſion, iſſuing out of the Oblations brought by the People to their Churches on the Day of founding or dedicating them to ſome Saint, or at ſome other great and ſolemn Time of Divine Worſhip ‡; and that a Moiety or third Part of them being reſerv'd unto the Biſhop by a Contract made between him and the Founder of ſuch Church, the ſame was ſettled upon the Episcopalian See, and became payable Yearly at or about the Feaſt of *Pentecoſt*: But afterwards when the Biſhop admitted a Prieſt to officiate in a new built Church, he might appoint the Payment of the *Pentecoſtals* to him who had his Maintenance before out of the common Stock or the Treafury of the Cathedral or Mother-Church: And where this has continu'd for any length of Time, and has been uſually paid, the Parochial Clergy have a Right of receiving the ſame. Some have fancy'd, indeed, that theſe were the ſame as *Peter-pence* here anciently paid; but that cannot be true, becauſe *Peter-pence* were uſually paid either at the Feaſt of *St. Peter* and *St. Paul*, or elſe on *Lammis-Day*. But theſe *Pentecoſtals* ſeem to be paid on or about the Time from whence they have their Denomination, viz. at the Feaſt of *Pentecoſt*. At which Feaſt there was in ſeveral Places here in *England* an Oblation *anciently* made by the Inferiour Churches to the Principal or Cathedral Church; and hence ſome Deans and Chapters (as aforeſaid) come to have *Pentecoſtals*. Theſe Offerings by the *Canon-Law* were and are only due to the Clergy, and interdicted to the Laity *ſub diſtinctione Anathematis* ||.

|| 10 Q. 1. 13. & 14.



Of a Prohibition, where it ſhall lye and where not.

* 27 E. 3. c. 1.



WHEN any Court exceeds its due Bounds, and acts otherwiſe than the Law of the Land will authorize it, there lye in ſome Caſes Writs at the Common Law, which are ſtilled Writs of *Prohibition*, or *Indicavit*; and in other Caſes a Writ introduc'd by a Statute, called the *Statute of Proviſion* and *Præmunire* *. And tho' a *Prohibition* and a *Præmunire* do lye as well againſt the Temporal

poral as the Ecclesiastical Courts, if they transgress their Jurisdiction ; yet I shall here confine my self to speak only of such *Prohibition* and *Premunire* as respect the latter. And first of a Prohibition. Now a *Prohibition* in this Sense is a Charge by the King's Writ directed to the Spiritual Court, forbidding them to proceed further in any Cause there depending, upon a Suggestion that the Cognizance thereof does not belong to the same ; and likewise forbidding them to hold Plea in some Point, which a Man is suppos'd to deal in beyond his Jurisdiction, or otherwise than the Law will warrant him so to do ||: And thus 'tis most commonly taken for that Writ which lies for one that is impleaded in the Court Christian for some Cause belonging to the Temporal Jurisdiction, or the Cognizance of the King's Courts of Common-Law ; whereby the Party and his Counsel, as well as the Judge himself and the Register, are forbidden to proceed any further in that Cause. And every Prohibition is either a Prohibition of Law, that is to say, such a Prohibition as is given by the Law it self, or else it is a Prohibition of Man, as where the Ministry of a competent Judge is requir'd and made use of. Every Statute *Prohibitory* is a Prohibition of Law, that is to say, it carries a Prohibition along with it ; and 'tis a Contempt to commence or manage a Suit contrary thereunto *.

|| F. N. N.

* 21 E. 3. 29.

In a Prohibition we are to consider, in what Matter, and at what Time it lies not ; where, and when it lies ; and how it ceases or loses its Force. For the first 'tis provided by the Statute †, and the King there determines thus, *That no Prohibition shall go out of Chancery, but in such Case where he has the Cognizance, and of Right ought to have it.* And, therefore, *Thirning* said ‡, “ That when we see that the Jurisdiction belongs not to us, we will grant a Consultation.” So that if the Matter be *meerly* Ecclesiastical, there lies no Prohibition. *Bracton* says ||, That a Prohibition does not lye after Sentence given in any Cause, unless it be in some particular Cases : And the Statute ordains, that there shall lye no more than one Prohibition in any one Cause. As to the second Point, a Prohibition is not to be granted, till by sight of the Libel there appears sufficient Cause for granting it : For *Henkstone* held *, That by the Statute *de regia Prohibitione, &c.* a Man shall not have a Prohibition before Contestation of Suit, or Issue join'd in the Spiritual Court, viz. till a Libel be exhibited, and the Defendant put to answer to it, and till this is certify'd to the *Chancery* by a View of the Libel, which *Fortescue* granted to be true. But this admits of two Exceptions. The first is, when a Copy of the Libel is deny'd to the Defendant, contrary to the Statute † : For hereon we find a Prohibition granted ‡, *That the Ordinary should surcease till a Copy of the Libel was deliver'd according to the Statute* here cited||. A second Exception is, where a Surmise or Suggestion is made, That the Suit in Truth is for other Matters than are express'd in the Libel : For a Person, according to *Brooks* *, may have a Prohibition in the King's Bench on such a Surmise. As for Example, when a Man surmises the Suit to be in *Fact* for great *Timber*, tho' the Tithe demanded in the Libel be for Coppice-Wood, or *Sylva Cadua* ; yet *Brooks* says, 'tis otherwise in the Common Pleas.

† 18 E. 3. c. 5.

‡ M. 2 H. 4. fol. 15.

|| lib 5 Tract. 5. c. 3. 4. 5. 6. 7. &c.

* 31 H. 6. 14.

† 2 H. 5. c. 3. ‡ M. 4. E. 4.

17. || 2 H. 5. c. 3.

* Tit. Prohib. n. 17.

A Prohibition may be granted either in respect of some of the Parties to the Suit, or in regard of the Judge before whom the Suit is, or for the very Matter itself in Judgment. In respect of the first of these three Reasons, it was held †, That if a Parson of a Church sues another Parson's Farmer or Servant for Right of Tithes, being not such as can try the Right, a Prohibition may be granted ; as I shall further observe under

† T. 12. H. 7. fol. 22.

under that Title. In respect of the second Reason it may be granted either for the Judge's Contempt in not delivering the Copy of a Libel, as aforesaid; or because he has in Truth no Jurisdiction *. Touching the third Reason, a Prohibition will lye, if the Matter be Temporal, that is, if it be such as there lies a Redress for by some Writ from the Court of *Chancery* †. Yet this has two Exceptions, viz. *First*, Wherever the Spiritual Court holds Plea quite to another end. For when one and the Self-same Cause is debated before Judges Spiritual and Temporal (as for beating of a Clerk) there the Statute is, that (notwithstanding the Spiritual Judgment) the King's Court also shall debate it. For both these Cognizances may well enough consist together; as the one tends to the making of Amends, and the other to an Excommunication. The second Exception seems to be when one Clerk sues another in the Spiritual Court for the Goods of his House ‡: For in ancient Times one Abbot might thus sue another, and no Prohibition would lye. But a Prohibition lies, where a Matter that is Originally of Ecclesiastical Cognizance at last brings a meer Temporal Matter with it into Debate to be determin'd in the Spiritual Court. Therefore, it was held, That as soon as it appears, that the Right of Tithes comes in Debate, the Lay-Court shall cease, and be ousted of its Jurisdiction ||; and the same Law is of the Spiritual Court: For if it appears, that the Right of Advowson may come in Debate, the Spiritual Court must surcease, tho' it did not appear at first. This may happen (for Example) when a Suit is commenc'd at first for Right of Tithes, and it falls out by Depositions or otherwise, that the Tithes demanded amount to the fourth Part of the Yearly Profit of the Benefice *: In which Case 'tis adjudg'd, that the Temporal Court shall have Cognizance, in the same manner as if the Right of Patronage was principally in demand.

It has been said, That a Prohibition lies where the Party may have his Redress by some Writ out of the Court of *Chancery*: But a Prohibition lies not only in such a Case, but even in a Cause where no Action at all lies in the Temporal Courts, if the Matter be such, as that it never did of Custom belong to the Ecclesiastical Court †: As when the Spiritual Court would hold Plea against an Executor upon a bare Contract made by his Testator; for the Ecclesiastical Court cannot have Cognizance of it, tho' no Action lies for it at the Common-Law. Again, a Prohibition lies, when the Suit tends to determine and give Execution in Temporal Matters; as Money, and the like, being otherwise due than by Judgment in the Ecclesiastical Court. Therefore, if a Composition by Indenture be made by an Ordinary between two Ecclesiastical Persons, that the one shall have Tithes, and the other an Annuity with a Penalty annex'd for Default of Payment: The Suit for this shall be at the Common Law ‡; tho' the Suit for any Thing that ariseth upon a Judgment given in the Spiritual Court shall be there. For tho' Amends be to be made by a certain Sum of Money; yet this is no necessary Cause for granting a Prohibition, no more than when the Suit is for Tithes, yet the Condemnation is in Money, being the Value of them §; nor when a Pennance is redeem'd by the Party for Money, which may be sued for in the Spiritual Court. Because when an Offence is done to a Man, 'tis fit he should have Amends for it; and as there is no more proper Amends than Money, whereby every Thing may be valu'd: Therefore, it has been held, that Money may be awarded in an Ecclesiastical Court for *Diffamation* ||. *Sed Quare*. 'Tis also said, that a Prohibition lies, when the Party in Suit has an Action given him

at the Common Law for the *original* and *principal* Matter, whereon the Suit in the Ecclesiastical Court did grow. The Case was thus, *viz.* A Man reported, that the Abbot of St. *Albans* detain'd his Wife in the said Abbot's Lodging against her Will, with a Design of making her his Harlot. The Abbot hereon brought his Action of Diffamation in the Spiritual Court; and the Husband his Prohibition. Now because the Husband might have his Action of false Imprisonment at the Common-Law against the Abbot, it was held, that a Consultation should not be granted *.

* T. 22. E 4.
fol. 20.

A Prohibition also lies, where one Ecclesiastical Court intrudes on another's Jurisdiction; as in Dr. *James's* Case, which you may see in *Hobart's* Reports †; who being Judge of the Audience of the Archbishop of *Canterbury*, used to keep a Court in *Southwark*, and cited Men thither from the most remote Parts of the Diocess of *Winchester*, that Diocess reaching to the Borough of *Southwark* in *Surrey*. For the Reason of granting Prohibitions is not only to preserve the Right of the King's Courts and Crown, but also to establish the Ease and Quiet of the Subject, it being the Wisdom of the Law to support both, these being best preserv'd when every Thing runs in its proper Chancel according to the Original Jurisdiction of every Court. So that by the same Reason one Court might not be allow'd to incroach on another, which can produce nothing but Confusion and Disorder in the Administration of Justice.

† Pag. 17.

A Prohibition ceases and loses its Force after a Consultation is once granted, as appears by the Statute *de Consultatione* ‡: For the *King's Chancellor* or *Chief Justice* upon the Sight of the *Libel*, &c. if they can see no Redress by Writ, &c. shall write to the Spiritual Judges, &c. to proceed, notwithstanding the *King's* Prohibition directed to them before. But more plainly after: Where a Consultation is once duly granted, the Judge may proceed in the Cause, notwithstanding any other Prohibition thereupon to him to be deliver'd, provided the Matter in the *Libel* be not changed. In all Writs of Prohibition the Surmise or Suggestion ought to be made in *Præjudicium Coronæ Regis & Gravamen partis*: And it has been resolv'd, that the six Months, which are allow'd for proving a Surmise or Suggestion in a Prohibition, shall be reckon'd according to the Calendar Months, and not according to Twenty eight Days to the Month *. In the Case of *Keech* against *Pots* it was the Opinion of Chief Justice *Foster* and *Twisden*, that the Court ought *ex debito Justitiæ* to grant a Prohibition, where it appears to them, that the Court Christian or Admiralty has no Jurisdiction, tho' Sentence has been given there, provided such Sentence has not been actually demanded to Execution, for then a Prohibition ceases: Which was agreed unto; and a Prohibition was awarded accordingly, *nisi Causa*. And this was in a Case, where Sentence had been given eight Years before by Consent of Parties †. But notwithstanding what is here said, it is in the Discretion of the Court to deny a Prohibition, when it appears to them that the Surmise is not true.

‡ 24 E. 1. p. 59.

* Hob. Rep.
p. 179.

† Keb. Rep.
pt. 1. p. 5.

If the Ecclesiastical Court proceeds upon a Canon, that is contrary to the Statute or Common-Law of this Realm, or any particular Custom thereof, a Prohibition will lye to such Court: And so it will, if a Person be there libell'd against for these Words, *viz. Thou art a Drunkard, and art wont to get Drunk twice a Week* ‡. And so a Prohibition will be granted on a *Libel* there for Tithe of Conies, if there be no special Custom for Payment thereof §. A Prohibition was pray'd on Articles *ex Officio* in the printed Book of Enquiry, the Oath being to

‡ March. Rep.
p. 6. & 66.

§ Ibid. p. 56.

present all Offences contrary to the Ecclesiastical Laws, which the Court granted, saying, That by an Agreement in the *Exchequer* with the *Civilians* it was stated, That the Oath should only be *to present all Things presentable by the Laws Ecclesiastical of this Land*. And a Prohibition will likewise lye, if the Ecclesiastical Court proceeds to examine a Delinquent upon Oath to excuse the Truth of some Crime from him *, tho' the Original Cause does belong to them. But no Prohibition lies to the Spiritual Court in any Case, unless there has been a Suit commenc'd therein and Proceedings had thereupon †. A Prohibition will lye in short (according to *Hobart*) upon every Statute, that has Prohibitory Words therein contain'd, tho' there be a Penalty annex'd thereunto: But 'tis otherwise, where there is only a Penalty inflicted.

* Hob. Rep.
p. 84.

† Pag. 187.

‡ Marsh. Rep.
p. 92 & 98.

|| Ibid. p. 96.

* Ibid. p. 93
& 94.

‡ Ibid. p. 45.

|| Ibid. p. 13.

* Ibid. p. 73.

† 11 H. 4. 2.
27. H. 6. 30. S.
E. 4. 6.

‡ Crok. 2
Rep. p. 234.

|| 25 H. 8. c. 9.

* Crok. 3
Rep. p. 332.

If the Ecclesiastical Court proceeds against any Man without a Citation, where they have Jurisdiction, no Prohibition lies: For where the Ecclesiastical Court has the Cognizance of a Cause, the Remedy is there by way of Appeal, if they proceed Erroneously, and not by way of a Prohibition ‡. A Legatee may sue an Executor in the Ecclesiastical Court to assent to a Legacy, and no Prohibition shall lye, because they have Cognizance of Legacies in the Personal Estate; and, consequently, Assets or not Assets may be try'd by them; and no Prohibition shall be awarded ||. The Ecclesiastical Court may likewise hold Cognizance of an Excuse for not going to Church, and a Prohibition shall not lye: But if the Spiritual Court will not admit of a reasonable Excuse, a Prohibition will be granted *. Thus a Man may be compell'd by the Ecclesiastical Court to repair a private Way leading to the Church, and no Prohibition shall lye: But a Prohibition lye will upon a Libel to repair a Highway tho' leading to the Church ‡. If a Baron and Feme recover Costs in the Spiritual Court for defaming his Wife, this will not bar the Wife from suing there for Expences of Suit, tho' the Husband should release the said Costs of Suit ||. And 'tis the same Thing, where many Persons suing there do recover Costs, and one of them releases, and the other sues in that Court: This (I say) is no Cause for a Prohibition *. Two Churchwardens sued in the Spiritual Court for a Rate or Levy of Money towards the Repairs of their Church, and had a Sentence to recover the same with an Assessment of Costs made. The one releas'd and the other sued for the Costs; and this Release being pleaded and disallow'd of in that Court, a Prohibition was thereupon pray'd, and all this Matter being disclos'd in the Prohibition, the Defendant demurr'd hereupon in Law: And it was mov'd that this Release by one being in the Personalty, should be an entire Discharge. But 'twas resolv'd by the Court to the contrary: For Churchwardens have nothing but to the Use of their Parish, and, therefore, as the Corporation consists in the Churchwardens, one of them solely cannot release nor give away the Goods of the Church; and the Costs are in the same Nature, which one without the other cannot discharge †; and all the Court being of this Opinion, it was adjudg'd against the Prohibition ‡.

A Prohibition was pray'd to the Court of *Arches* on a Libel there for calling a Woman *Whore* and *Bawd*, because these are only Words of Heat: And, moreover, the Plaintiff in the Prohibition suggested, that he was an Inhabitant within the Diocess of *London*, and was here cited to the Court of *Arches* contrary to the Statute ||. For the Defendant it was urged, that a Prohibition should not go, and *Gobbet's* Case was cited *, where a Prohibition in such a Case was deny'd; because there had been a Composition between the Archbishop and Bishop of *London*, for

for such Jurisdiction ; and the Archbishop visits not in the Diocess of *London* for that Reason. As to the Words, the Court refus'd to grant a Prohibition : For tho' formerly there have been divers Opinions touching these Words ; yet *Twisden* said, that ever since the eighth of King *Charles* the Law has been taken, that they may punish such Words for the Reformation of Manners. But to the other Point *Keeling* said, That the Diocess of *London* is not within the Jurisdiction of the *Arches*, but the Archbishop has a peculiar Jurisdiction there consisting of several Parishes, and the Mischief here was intended to be prevented by the Statute ; and so is *Croke** and *Hobart*† : And, therefore, a Prohibition lies. *Wyndham*, a Prohibition does not lye, because the *Arches* is within the Diocess of *London* ; and if there be any Cause to remit the Jurisdiction of the Bishop of *London* to the *Arches*, it ought to be determin'd by the *Civilians* according to the Statute ; and the Composition in *Gobbet's Case*‡ amounts to a License. *Twisden*, a Prohibition lies ; for tho' there was a Composition before, yet now the Statute takes it away, and an Agreement between the Ordinaries shall not prejudice the People, for whom the Statute was made. As to *Gobbet's Case*, the Reason there is not good ; for the Bishop of *London* cannot agree, that the Archbishop shall not visit. And, *Thirdly*, the Composition ought to be pleaded. Chief Justice *Hyde*, a Prohibition does not lye, because 'tis a Writ *ex gratia*, and not *ex debito Justitiæ* ; but *Keeling* and *Twisden* positively deny'd that. And because the Court was divided, the Matter rested as before ||.

* *Cadwalader's Case.*
† pag. 185.

‡ *Crok. Car.*
247.

|| *Raym. Rep.*
p. 91 & 92.

A Prohibition was pray'd on a Prosecution in the Spiritual Court for Tithes, a Sentence being given there against the Defendant : And an Appeal being sued thereupon, *B.* was thereby made a Promoter of the Suit, without being a Party to it. And herein the first Sentence was confirm'd in *November*, 1623. and Costs were then awarded to *B.* tho' not tax'd till *Hilary Term*, 1623. when a Pardon came, which pardon'd all Offences before *December*, 1623. Whereupon this Offence, and the Costs tax'd thereon, were also pardon'd (as is pretended) tho' they were awarded before this Pardon, in the Spiritual Court. And tho' a Prohibition was pray'd, because they would not allow of such Pardon, yet it was deny'd : For those Costs, being awarded to the Party before the Pardon, are not taken away by a Pardon, tho' tax'd afterwards*. If there be two Joint Tenants of Tithes, and one sues in the Spiritual Court without the other† ; or if a Feme Covert *solusly* sues there for *Diffamation* without joyning her Husband in the Suit, no Prohibition lies ; for by the *Canon-Law* a Feme Covert may in such a Case sue without her Husband‡.

* *Crok. 3*
Rep. p. 6.
† *March. Rep.*
p. 23.

‡ *Ibid* 47.

A Prohibition was pray'd, for that the Bounds of two Vills, *viz.* *D.* and *S.* in the Parish of *A.* were in Question, *viz.* one claims the Tithes in Question, lying in the Vill of *D.* and another claims them, as lying in the Vill of *S.* : But a Prohibition was deny'd by the Court. For tho' the Bounds of a Parish are not tryable in the *Court Christian* ; yet the Bounds of a Vill in the same Parish are tryable there ||. If an Administration be granted to *A.* whereas it ought not to be so granted ; and afterwards the Administration is repeal'd and granted to *B.* as being next of Kin : *B.* may sue *A.* in the Spiritual Court to account for the Profits of the Chattels of the Deceas'd, during his Time of Administration, and no Prohibition shall be granted ; for *B.* cannot have an Action of Trespass against him, nor any other Remedy for them at Law ; and, consequently, the above-mention'd Rule may have Place *,

|| *Levinz.*
Rep. pt. 1.
p. 78.

* *Vid. p. 436*
viz.

viz., where no Redress lies by a Writ from the Court of *Chancery*, &c. A Prohibition was pray'd to the Spiritual Court at *Chester* to stay Proceedings there on a Libel against one *Bayles* for teaching School without a Licence; and it was deny'd, because that Court had Jurisdiction in the Cause*. A Prohibition was likewise mov'd for to stay Proceedings in the Spiritual Court on a Libel for calling the Plaintiff *Whore*: But upon Argument it was deny'd; because that Court has Jurisdiction in Causes of Whoredom and Adultery. It was urg'd, that *Whore* was a Word of Heat and Passion; but the Court answer'd, That the Ecclesiastical Judges were Judges of that Matter†. A Prohibition was also mov'd for to the Spiritual Court in the Behalf of *Madox*, Incumbent of a Donative within the Diocese of *Peterburgh*, who was cited into the *Court Christian* there for marrying without Banns or License: But the King's Court deny'd the same‡. A Sentence was pronounc'd in the Spiritual Court on the Account of a Will, against which the Defendant appeals. The Appellant dyes. And now the Appellant's Brother comes in, and prosecutes the Appeal in his Brother's Stead. And a Prohibition was sued, because by the Appellant's Death (says he) the Appeal is abated, and the Commission ceases: But a Prohibition was deny'd; because the Delegates are the proper Judges to determine, whether an Appeal abates by their Law or not: And tho', according to the Rules of the *Common-Law*, it does abate; yet by their Rules it does not abate, and the Matter is wholly of their Cognizance; and the Commission is not determin'd by the Appellant's Death.

The Churchwardens of *Ridgwel* in *Essex* presented in the Archdeacon's Court there one *Pannel* for being a *Railer* and *Sower of Discord* among his Neighbours, whereupon he was enjoin'd Purgation: But the Temporal Court awarded a Prohibition; for the Cause (they said) did belong to the *Leet* and not to the Spiritual Court*, unless the Offence was committed in the Church or Church-yard, and the like, according to the Statute. *Elizabeth Wats*, Wife of *Edward*, libell'd in the Spiritual Court against *Jane Coningsby* for a Legacy of One hundred Pounds, and the Defendant pleaded *Wats* the Husband's Release given after Marriage, and both the Witnesses being dead the Release was not allow'd in the *Court Christian*: Whereupon a Prohibition was granted touching this Averment, *viz.* *That the Witnesses being dead, they offer'd to prove their Hand-writing, and that tho' Wats acknowledg'd his subscribing the Release, yet the Spiritual Court disallow'd of the Evidence*†. A Prohibition was likewise pray'd to the Ecclesiastical Court, because a Parson libell'd therein against one for calling him *Knave*, and it was granted; because it did not appear to relate to any Thing touching his Function: And a Case was cited to be adjudg'd the 24th of *Eliz.* a Suit being in the Spiritual Court for these Words, *viz.* *Sir Priest, you are a Knave*; and a Prohibition was granted‡. And thus much of a Prohibition for the present. I shall beg leave to close this Title by saying something of a Writ called a *Præmunire facias*, because it respects the Clergy and their Courts very often; and they may be in frequent Danger of it.

Now some think, that this Writ came to have its Name and to be call'd a *Præmunire*, because it fortifies the Jurisdiction of the Crown against all foreign Jurisdictions whatsoever, and likewise against all such Persons as shall at any time usurp thereon, either by presuming to make Laws without the Royal License, or by proceeding in the Execution of Laws already made contrary to the known Practice of the Realm,

as

* Mod. Rep.
Vol. 1. p. 3.

† Mod. Rep.
Vol. 1. p. 21.

‡ Mod. Rep.
Vol. 1. p. 22.

* Hob. Rep.
p. 246. 247.

† Hob. Rep.
p. 247.

‡ Ventr. Rep.
pt. 1. p. 2.

as appears by several Acts of Parliament *. But my Lord *Coke* says, That it is so called from a Word in the Writ it self: For the Words of the Writ are, *Premunire facias præfatum A. B. &c. quod tunc sit coram nobis, &c.* where *Premunire* is used for *Pramonere*; and thus divers Interpreters of the *Civil* and *Canon-Law* use it: For they are *præmuniti*, that are *præmoniti*. By the Statutes here quoted in the Margin the Reader may see what Statutes have been made at several times to make Offences in danger of a *Premunire*: Which I have cited, that Men may avoid the Judgment of so heavy a Punishment. For the Judgment in a *Premunire* is, that the Defendant shall from thenceforth be out of the King's Protection, and his Lands and Tenements, Goods and Chattels forfeited to the King, and that his Body shall remain in Prison at the King's Pleasure. And so odious was this Offence of a *Premunire*, that a Person attainted thereof might be slain by any Man without danger of Law; because it was provided by Law, that a Man might act by him as by the King's Enemy; and any Man might lawfully kill an Enemy: But Queen *Elizabeth* and her Parliament †, disliking this extream and inhumane Rigour of Law in that Point; provided, that it should not be lawful for any Person to slay another in any manner attainted, as aforesaid.

By a Statute made in *Richard* the Second's Reign, called the Statute of *Premunire* ‡, it was enacted, That whereas the Bishop of *Rome* § under a Pretence of an Absolute Supremacy over the Church, took upon him by his Mandates to dispose of most of the Bishopricks, Abbacies, and other Ecclesiastical Benefices of Worth in *England*; and if the Bishops did upon the legal Presentments of the Patrons of such Benefices, institute any Clerks to them, they were therefore excommunicated by the Pope, to the great Damage and unjust Wrong of the King's good Subject. And whereas the Bishop of *Rome* took upon him to translate and remove the said Bishops either out of the Realm, or from one See to another within the Realm, without the Knowledge of the King, or the Consent of the Bishops themselves. Therefore if any Person shall purchase or cause to be purchas'd in the Court of *Rome* any such Translations, Sentences of Excommunication, Bulls, or other Instruments, to the Detriment of the King or the Realm, both they and such as bring, receive, notify, or put them in execution, shall be put out of the King's Protection, and their Lands and Tenements, Goods and Chattels shall be forfeited to the King, and their Bodies attach'd, if they can be found, Process being made out against them by the Writ called *Premunire facias*, as is ordain'd in other former Statutes of Provisors. This Statute was receiv'd at the Court of *Rome* by the Pope and Cardinals with the greatest Grief imaginable, who were before grown very peevish and angry on the Account of the Statute of *Mortmain*, and other less severe Acts against the Papal Inroachments not long before made here in *England*: But this Act put the Pope into such a Fury, that he called the Act it self by the Name of *execrabile Statutum*, a cursed Statute, and the Passing of it *factum & turpe facinus*, a base and wicked Act.

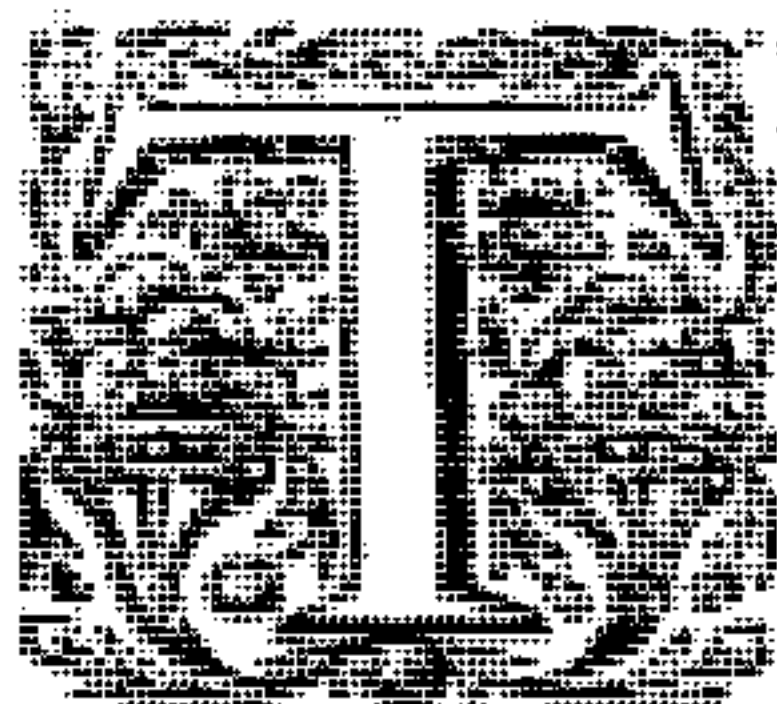
* 35. R. 2.
25 H. 3. c. 12.
25 H. 3.
27 E. 3. c. 1.
38 E. 3. c. 5.
2 R. 2. c. 3.
12 R. 2. c. 5.
16 R. 2. c. 5.
2 H. 4. c. 3.
24 H. 8. c. 12.
25 H. 8. c. 19.
&c. 20. 26.
H. 8. c. 16.
1 Eliz. c. 1.
5 Eliz. c. 1.
13 Eliz. c. 2.
&c. 8.
27 Eliz. c. 2.
39 Eliz. c. 18.

† 5 Eliz. c. 1.

‡ 12 R. 2. c. 12.



Of Proof, or Judicial Evidence in general, &c.



HERE is no Truth better known throughout the Law than this, *viz.* That no Suit or *Judicial* Controversy whatever should want its proper Evidence for the just Determination thereof, however such Suit may stand in need of other Parts of a *Judicial* Process: And, therefore, I shall here treat of *Judicial* Proof or Evidence in general, and hereafter speak of *Witnesses* under a particular Title, as I have already done of *Instruments*; the two great *Species* of legal Evidence. Now Proof, in *Latin* stiled *Probatio*, is (according to some Persons) the Evidence or Demonstration of some doubtful Matter made clear and known to us by fit and proper Arguments or *Mediums* *. But *Goffredus* impugns this Definition, because it does not follow from hence, that Proof is made by Witnesses or Instruments, it being *simply* said herein *by fit and proper Arguments or Mediums*: For (says he) under the Word *Argument* we cannot comprehend Witnesses and Instruments, since an Argument only displays the Truth of Things by a *logical* Search and Investigation thereof; it being so called according to the Etymologists, because it is *argute inventum*, a kind of subtle Invention, or the Discovery of Things by means of Subtlety †. Wherefore he defines Proof to be the shewing of a Thing which is doubtful, by the Means of full Evidence made by Witnesses, Instruments, and frequently by Indications, Presumptions and Conjectures: Using the Word *frequently*, because Presumptions and Conjectures are not used in every Cause (as in Criminal Cases) unless they are very strong and powerful, and even vehement against the Person accus'd. But *Hostiensis* dislikes this Definition, because Proof may be made several other ways than therein contain'd. But setting aside both Definitions of *Judicial* Proof (I think) it may be defin'd to be a clear and evident Declaration or Demonstration of a Matter which was before doubtful, convey'd to us in a *Judicial* manner by fit and proper Arguments, and likewise by all other legal Methods. *First*, By fit and proper Arguments; such as Conjectures, Presumptions, *Indicia*, and other adminicular Ways and Means. And, *Secondly*, By legal Methods, or Methods according to Law; such as Witnesses, Publick Instruments, and the like.

* Gloss. Bart.
Azo & Sich.
in Tit. 19. c. 4.

† X. 5. 40. 10.

‡ Calv. lex.
Jur. v. proba-
tio.

|| Abb. in
Rubr. x. 2.
19. n. 2.

Some deriv'd the *Latin* Word *Probatio* from the Adverb *Probè*; because, according to a *Latin* Maxim, *Probè facit, qui probat*, or in *English*, *He does well that proves a Matter of Fact*: For he, that manifests a doubtful Fact or Thing, subdues and gets the better of his Adversary; and escapes the Penalties of such as fail in their Proofs. Others derive it from the *Latin* Word *Propalatio*, which denotes a Manifestation of something that is doubtful. And, *lastly*, others derive it from these two *Latin* Words, *viz.* *Proba* and *Actio* ||. But these are School-Subtleties, and below the Gravity of a sober Writer; and, therefore, I shall leave them to the *Grammarians* to chew on.

Now

Now of Proofs there are two *Species* according to the general Division thereof: The first is stiled *Inartificial*, and the other *Artificial* Proof. *Inartificial* Proof is that Kind of Evidence which some call *direct* Proof and Evidence, or, in other Terms, *true* and *proper* Proof: And this does not want the Art of an Orator, nor a Lawyers Assistance to manage and support it, because it strongly proceeds from its own Nature and Quality, and not from the Wit and Invention of either of these Persons; it being withal extrinsically true and clear. But, notwithstanding this, it requires the Management of a Lawyer and an Orator too in order to set it forth, if the Matter be deduc'd and discuss'd in a Court of Judicature. *Artificial* Proof is that which exists and entirely depends on the Rules of Art: For when certain Principles and Propositions are laid down as the Foundation of this Proof, 'tis the Art and Prudence of a Lawyer or Orator to examine and try what may be inferr'd from thence as certain Consequences and Deductions. *Aristotle* in his *Rhetorick** gives us five *Species* of *Inartificial* Proof, viz. *Law*, *Witnesses*, *Compacts*, *Oaths*, and *Examinations*: But *Cicero*† adds to these five *the Decrees of the Senate*, the *Answers of the Lawyers*, the *Res Judicata*, *Covenants*, &c. But *Quintilian*‡ does not reckon *Laws* among them, saying, That they are *Sentences*, *Definitions*, *Determinations*, &c. by the Means whereof the Matter for which Proofs are introduc'd, is it self determin'd. *Aristotle* and *Cicero* may be well enough excus'd for reckoning the *Laws* among the several *Species* of *Inartificial* Proof, since they deem'd all such Things to be Proofs, whereby Advocates and Patrons of Causes, lead Judges to their Sentences. *Milo* says, "That the Judges ought to acquit him of the Death of *Clodius*; for "if he murder'd him, when he only defended himself, then he was "guilty of Murder. But the Law of Nature grants a Man the Right "of Self-defence: For (says he) from the Law of Nature, if an Ad- "versary lays Snares for another's Life, let him be slain." This Law proves *Milo's* Assault or killing of *Clodius* to be lawful. But *Inartificial* Proof is not properly and truly Proof, or (at least) in the Sense made use of among Lawyers: Therefore, passing by this *Species* of Proof I shall endeavour to explain the other in the sequel of this Title.

* lib. 1. c. 15.

† lib. 2. de Orat.

‡ lib. 2. de Inst. Orat. c. 2.

And, *First*, I shall consider the several *Species* of *Artificial* Proof, in other Terms called legal and judicial Evidence, as they are comprehend- ed under the second Branch of this my general Division of Proof. For this seems most properly to belong to a Discourse of this Nature, where- in we have to do with the Business of Judicature. Now legal or cano- nical Proof consists of several *Species* or Kinds of Evidence*. As for Example: There is one Kind of Proof, which we call *Evidentia facti*, as when the Person is taken in the very Act of committing a Crime†; which is also stiled a *Notoriety of Fact*. A second Kind of Proof is that, which is made by the Party's own Confession‡, which is Threefold, viz. that which is in *Latin* stiled *vera Confessio*, as when 'tis made *Ore pro- prio*||; and this is the strongest of all Evidence in respect of Condem- nation. The other two ways of Confession are what we stile a *feigned* and *presumptive* Confession, as by Flight, Contumacy, and the like. A third *Species* of Proof is made by Deposition of Witnesses*, of which I shall discourse hereafter. A fourth is by exhibiting of both publick and private Instruments†, which I have already handled under that Ti- tle. And the Gloss on the Law adds a fifth *Species*, viz. that of a violent Presumption. But *Hostiensis* subjoins four others, viz. a *Consen- tient* Fame‡, the giving of an Oath||, the Ocular Inspection of the Judge*, and ancient Books and Records†. And he also says, that Proof is some-

* X. 2. 13. 15. fin.

† 50 Dist. 29. 51 Dist. 10.

‡ X. 2. 13. 15.

|| 15 Q. 6. 1.

* X. 2. 21. 7.

† 16 Q. 3. 15. 2.

‡ 4 Q. 3. 2. 2.

|| 10 Q. 3. 7.

* X. 4. 15. 6.

† X. 2. 19. 13.

times

* X. 2. 19. 7. times made by Letters under the Episcopal Seal *. *Rebuffus* reckons up no less than twenty *Species* of *Judicial* Proof or Evidence. But I shall not here trouble the Reader with so great a Number; but divide this Kind of Proof into what we call *full* Proof, and that which we term a *half* Proof.

Now that is called *full* Proof, which gives so great an Assurance to the Judge, that he seems to himself to be fully instructed in the Merits of the Cause: And this Kind of Proof is made by two or three Witnesses at the least. For there are some Matters, which according to the *Canon-Law* do require five, seven or more Witnesses to make full Proof; yet full Proof cannot be said to be made by one Witness alone. A publick Instrument is said to be full Proof, which has the same Force in all *Judicial* Proceedings, as the Deposition of Witnesses have. And the Lawyers do likewise affirm that to be full Proof, which consists of two half Proofs or more, that are well grounded; as that of one Witness and the Oath of the Party in *Civil* Causes; for in these Cases an Oath administered on a half Proof made in Defect of a full Proof makes a full Proof *, if the Person sworn be a Man of Integrity. And, again, full Proof may be made by the Testimony of one Witness, and a well-grounded Fame concurrent thereunto. For tho' it seems to be laid down as a Rule in Law, *viz.* That two imperfect Things do not make one perfect one; yet this Rule is only to be understood in that Sense, when two imperfect Things do tend to different Ends; as when two different Things do tend to divers *Species* of Excuse. But it ought to be taken in a contrary Sense, when the end of two imperfect Things is one and the same end, as in the Case here of making a *Judicial* Proof, which the Judge may collect not only from one Kind of Proof, but from various and several *Species* thereof: And thus, *Singula quæ non prosunt, cumulata juvant † vel efficiunt*. A half Proof is that which does not make full Proof; and of this Kind we may reckon the Testimony of one Witness, Fame, private Writings, and the like.

Sometimes Proof accrues to the Plaintiff only, and sometimes to the Plaintiff and Defendant: For 'tis incumbent on each of these Parties to prove their Matters and Allegations deduc'd in Judgment. For 'tis the Duty of the Plaintiff to prove his Libel or Declaration, if the Defendant denies the Fact, &c. therein contain'd: For if the Plaintiff shall not prove the same, the Defendant shall be acquitted ‡, tho' he has prov'd nothing at all; but if the Adverse Party confesses the Plaintiff's Intention, he is reliev'd *ab onere probandi*. But in several Cases it's only incumbent on the Defendant to make Proof, as I shall shew in the next Section. He that alledges a Thing to be lost, ought to prove the same, and that by clear and manifest Evidence, according to the Gloss, and the Opinion of the Doctors. But 'tis otherwise, if it does not appear that the Thing came to the Hands of him that is impleaded in the Suit. As when an Executor (as we call him) is conven'd *de redendo legato*; for if it does appear that the Legacy came to his Hands, 'tis enough for him to declare upon Oath, that upon diligent Search he could not find the Thing in Dispute: For when a Thing is not found on such Search, 'tis presum'd to be already lost. *Secondly*, 'Tis otherwise if the exhibiting a Thing, which is said to be lost, be sued for *Officio Judicis* and not by Right of Action; for then 'tis sufficient for the Person to swear, That he lost it by Chance: But, in a Suit by Right of Action, the Defendant may be allowed by his Oath to prove the Thing lost. Thus, if a Man shall found his Intention by a Plea *super re amissâ*, as a Banker, who prays to have the

Copy

Copy of an Account exhibited, because he has lost the Original, *viz.* his Book of Accounts, he shall not in such a Case prove the same by his Oath, but by clear and manifest Proofs. A Fact deduc'd with a Quality ought to be prov'd with that Quality: For 'tis not enough, that the Fact be prov'd without the Quality, or the Quality without the Fact; because a Fact deduc'd with a Quality is the Foundation of the Plaintiff's Intention *.

The Defendant is bound to make Proof, when by way of Exception he propounds some Fact or Matter, which peremptorily destroys the Plaintiff's Libel or Petition †: For Example, in such Exceptions as these, *viz.* when a Prescription or Limitation *de non petendo*, a Novation, Payment of Debt, or a Release thereof, and the like, are propounded in Judgment. The Defendant is also oblig'd to make Proof, when the Common Law or a Presumption favours the Plaintiff. For Example, As Plaintiff I demand of my Brother that Right which is due to me by Reason of my Succession to a certain Estate belonging to my Father in his Life-time. My Brother denies any Right accruing to me in such an Estate. In this Case my Brother must set forth and prove, how I was barr'd from such Estate of Inheritance: For the Common Law here militates for me the Plaintiff; and, according to the *Civil-Law*, adjudges the Inheritance to accrue to me in common with my Brother. By the *Common-Law* here I mean *Common-Right* according to the *Civil-Law*. *Thirdly*, The Defendant is likewise bound to make Proof when the Cause of Suit is a Privileg'd Cause in the Plaintiff's Favour. For Example, If the Plaintiff, being a Pupil or other privileg'd Person, has paid a Creditor too much, and is willing to recover what he has paid in his own Wrong. In this Case the Creditor ought to set forth and show by Articles, That he has only receiv'd what was due to him; or if he cannot do that, he ought to prove what was first due to him, and what Payments have been since made him thereupon. But when contrary Facts or Matters are alledg'd, 'tis the Duty of each Party to prove the same; and so likewise in Matters relating to Possession: For in such Matters each Party becomes both Plaintiff and Defendant.

If the Violation of an Oath be made on the Score of any Contract or Partnership enter'd into in Prejudice of the Rector or Vicar of a Parish, on the Account of any Pact or Conspiracy, such Breach of Oath may be well prov'd by the Instrument wherein such Pact or Conspiracy was establish'd; provided the same be discuss'd by giving an Oath: For otherwise Proof cannot be made by an Instrument in a *Criminal* Cause without the Aid of some adminicular Proof *. But the Proof of a Will may be made by an Instrument as well in a *nuncupative*, as in another Will which is not *nuncupative*, as to the Probat of its Solemnity, tho' not as to the Proof of the Will it self. For it may be prov'd by two Witnesses of Integrity produc'd thereon, unless the Custom of the Place, where the Will was made, requires a *Notarial* Act. For 'tis enough in Respect of *Canonical* Equity, that the Will of the Deceas'd appears by the Testimony of two consentient Witnesses superiour to every legal Exception, in order to demand the same to Execution, whether such Will be made to Charitable Uses or not. The Pregnancy of a Woman is well prov'd by the Search and Examination of Midwives, and by their Report and Averment thereof; by whose Declaration we ought to abide, as being Persons well skill'd in an Affair of this Nature: As we likewise abide by their Depositions, when the Matter in Question is touching an immature Birth, the Life of a Child born, and other Things of this Kind belonging to their Office and Employment ‡; because Credit

* Gail. lib. 1. Obi. 3. n. 5.

† D. 22. 3. 19.

* Lindw. lib. 2. Tit. 6. c. 3. v. probaciones legitimas.

‡ Ang. in l. 3. D. 5. 4. n. 2.

ought to be given to every one in the Art and Business wherein he has been conversant, and is therefore presum'd to have Skill and Knowledge*. But there ought to be three Witnesses (at least) called together, to inspect the Pregnancy of a Woman, and if two of them agree in their Verdict, 'tis sufficient Proof of such Pregnancy: For according to *Andreas*, two of them (at least) ought to agree in their Report, else they prove nothing at all. For to prove a Matter referr'd to many, two of the Persons skill'd in the Thing referr'd to them ought (at least) to agree in their Verdict, especially if their Presence may be had. But the Depositions of Midwives have only Force, when they depose upon Oath; it being otherwise if they give their Evidence without an Oath taken, since then they prove nothing at all. According to *Baldus*, a Woman's Pregnancy may also be prov'd from her Milk, and this he calls a conclusive Proof from the Necessity of Nature; for it naturally happens, that a Woman who has Milk in her Breast is either Pregnant, or else has been so lately.

According to the *Civil* and *Canon-Law* Proofs are arbitrary, and depend on the meer Discretion of the Judge: For the Judge may *ex animi sui motu* give Credit to Witnesses, tho' their Depositions be not clear. But (I think) the more equitable Way would be for the Judge to call upon such Witnesses to explain themselves in such a Point of their Depositions, as appears obscure to him, if the Witnesses were not examin'd by him, and their Depositions taken in his Presence. But tho' all Proofs are arbitrary, and left to the Judge's Discretion †, yet the Judge's Discretion ought to be consonant to Law and Equity‡. The Judge may give Credit to Proofs that arise only from single Witnesses, or from Presumptions and Conjectures in some particular Cases: For these sort of Proofs obtain in a special manner in such Matters as are difficult to prove, or cannot be prov'd *directly*, because then the Law is content with less Evidence, and satisfied with such Proofs as may be had in such a Case †. In *Holland* and other trading Countries, full and entire Credit is given to Merchants and Tradesmens Books, if they are sworn to, or confirm'd by the Death of the Party, which is Equivalent to an Oath: But this only holds good in such Matters as relate to Trade and Merchandize, and not in other Matters‡. And, therefore, if a Merchant shall in his Book of Accompts write down *Titius* to have bought several Wares and Commodities, and therein says that *Maxius* has given Security for the Payment, or set down that he has lent so much Money to *Sempronius*: I say, that as to the Security or Money lent, such Accompt-Book shall be deem'd no Proof or Evidence in Law. In all Cases wherein a certain and determinate Knowledge of Things cannot be had and acquir'd, Testimony made by Credulity is admitted as sufficient Evidence. And 'tis to be observ'd, that a Witness deposing on his certain Knowledge touching any one's Fitness and Qualification, does *eo ipso* undergo the Risk of Perjury, since no certain and determinate Truth can be assign'd and given thereof; and, therefore, such Witnesses ought only to speak touching his Belief. 'Tis further to be observ'd, that a Person is said to know that which he only knows by Credulity, or a strong Presumption, when the Truth thereof cannot be otherwise assign'd and made known: But then he is not said to know it *simpliciter*, but only as the Nature of the Thing permits and allows of. For a Man can only be oblig'd to Operations according to the Bounds of Nature, and cannot be compell'd to go beyond such Bounds to Things impossible, or in some Measure impossible. And thus Evidence is good in this Case, and the Testimony of one Witness is not vitiated, if he says, *that he knows that,*

† Castr. in l.
31. D. 12. 2.
‡ Rom. Conf.
376. Hipp.
Conf. 8. n. 25.

† Gail. lib. 2.
Obf. 93. n. 18.

‡ Greenv. de
Ll. abrog. C. 4
19. 6.

that, which he has, only receiv'd from Credulity, or a strong Presumption, if he tempers his Evidence *ad metas Naturæ*: But if a Man either *expresly* or *tacitly* avers a Person to be fitly qualified for such a Preferment, he does not commit Perjury, if he does not know him to be unworthy of such Preferment.

Tho' the Writing of a Notary Publick be what we stile an *approv'd Evidence* *, yet the free and *Judicial* Confession of the Party himself is nevertheless the best Proof that can be produc'd †: And such a Confession made in open Court is equally sufficient Proof in Criminal as 'tis in Civil Causes; since there can be no stronger Evidence than that which proceeds from a Man's own Mouth confessing his Crime. But Proofs and Evidences by Writing, especially that of a private Hand, are but half Proofs; because a Similitude of Hand-writing may easily deceive a Witness: But yet a private Writing shall be good Proof against the Writer himself ‡, if his Hand-writing be known and prov'd; and so likewise it shall be against the Subscriber thereof. An *Almanack*, wherein a Father has wrote his Son's Nativity, in *England* has been allow'd as good Evidence to prove his Son's Nonage.

In the Business of Proof, a Judge ought first to have a great Regard to the Probability thereof. For he that deposes and gives Evidence touching a Thing not probable and likely to be true, is not far distant from Falshood it self, in such his Deposition. *Secondly*, All Proof ought to be *simple* *, *certain* † and *concludent* ‡. And such Proof is said to be *simply* made, when the Deposition of the Witness is made *sine plicâ*, without Reserves and Limitations: But if any Thing be asserted in any Deposition or Instrument with Foldings and Subterfuges, Proof is said not to be *simply* made. Nor is a Proof said to be *concludent*, unless the Quality thereunto annex'd be also prov'd; and, therefore, such a Proof is not relevant. For an inconcludent Proof is so far from being good Evidence, that it renders the Matter still more doubtful and uncertain. Now a concludent Proof or Evidence is said to be that, when a Witness assigns some conclusive Reason for his Knowledge or Belief of the Thing attested by him; as that he saw it with his own Eyes, or heard it with his own Ears, and the like. Nor, *Thirdly*, does a doubtful Proof relieve the Person that produces such dubious Evidence ||; but it is so far from being of any Advantage to him, that it is always interpreted against him *, according to this Maxim, *viz. Aliquid non esse & esse & non apparere paria sunt*.

There is one Kind of Proof, which is from the Nature of it stiled *notorious*; another which is term'd *manifest*; and a third which is called *liquid* Proof: Now that Thing is said to be notorious, which appears unto all Men alike, and cannot be darken'd or shadow'd by any Colour whatsoever; nor does it stand in need of any Proof properly so called; as that there is such a Church as *St. Paul's* in *London*, or such a Palace as *St. James's* in *Westminster*. And the same may be said of that Thing, which the Judge perceives and knows by Inspection alone: As when any one is accus'd of killing *Sempronius*, and *Sempronius* is at the same time exhibited to the Judge alive in Person. And as such an Allegation of the Notoriety of Fact may be sometimes made, it is deem'd in Law to be strongest of all Proof, if we may properly call it *Proof*. But that is called *manifest* Proof, when the Fact alledg'd is of such a Nature, that it may be prov'd beyond all Contradiction: As when 'tis alleg'd and prov'd, that *Titius* was killed in the View of all the People, or that *Seius* exercises the Business of a Publick Banker or Usurer; and so of other Things of the like Nature: But some will have it, that

* Bald. in l. 3.
C. 7. 52.
† X. 3. 2. 7.

‡ Dd. in l. 3. l.
D. 12. 2.

* X. 2. 19. 6.
† X. 2. 19. 8.
‡ Alciat. in l. 13. C. 2. 4. n. 11.

|| Aret. Conf. 23. n. 3.
* Abb. in c. 8. x. 2. 19. n. 34.

manifest

manifest Proof is said to be that which is collected from evident Conjectures and Presumptions; from whom I beg leave to differ. *Liquid Proof* is said to be that which appears to the Judge from the Act of Court; since that cannot properly said to be *manifest* or *notorious*. By the *Canon-Law* a *Few* is not admitted to give Evidence against a *Christian*, especially if he be a Clergyman; for by that Law the Proofs against a Clergyman ought to be much clearer than those against a Layman*. Tho' Proofs introduc'd to one Effect are good Evidence to another Effect between the same Persons; yet if Proof be made against one Person (among several others) accus'd of one and the same Crime, such Proof is no Evidence against the rest, but such Proof ought either to be re-examin'd, or else fresh Evidence must be had†. As in all Criminal Causes Evidence or Notoriety of Fact is full Proof, so likewise in such Causes all manner of Proofs ought to be clearer than the Light of the Sun at Noon-day: And herein according to the *Civil* and *Canon-Law* two Witnesses of entire Credit and Reputation do make full Proof. For two or three Witnesses are sufficient for the Proof of any Matter of Fact, unless it be in some particular Cases, where a greater Number of Witnesses are requir'd, as I shall hereafter observe under the Title of *Witnesses*. All Proof ought to be made before a Conclusion in the Cause; for afterwards there is no Room left for Proof made by Instruments.

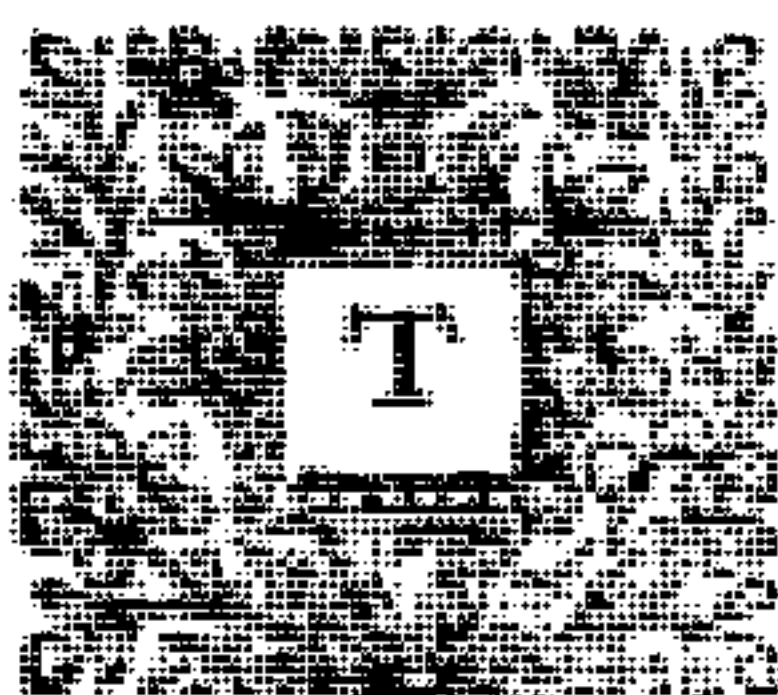
* Abb. inc. 23
x. 2. 19. n. 1.

† Abb. inc. 5.
x. 5. 16. n. 5.



Of Canonical Purgation, &c.

* D. 48. 1. 5.



THE Word *Purgare* in *Latin* signifies the same as *Excusare**:

So that *Purgation* is the Means, whereby a Man excuses himself from a Crime imputed to him, and shews himself innocent. Indeed the Verb *purgare* in the *Civil-Law* has several Significations, as *purgare Moram*, which is the same as *emendare*†: And a Debtor is then said *purgare*

† D. 45. 1.
91. 3.

moram, when he has for some time refus'd to pay a Debt demanded of him, and yet afterwards makes a Tender thereof: Whereupon he is properly and usually said *purgare moram*, which is the same as *emendare*, *eludere*, and *delere moram*.

‡ D. 49. 14. 22

|| D. 47. 10. 1. 6

* D. 3. 3. 25

† D. 43. 22. 1. 6

Purgare innocentiam‡, *purgare estimationem*||, *purgare pudorem**, *purgare rivum*†, *purgare fontem*‡, &c. In the *Prator's* Edict it signifies to level a Publick Way, and to cleanse a Street, &c. But in *Judicial* Matters, as I shall here handle

‡ D. 48. 1. 5.

the Word, it imports the same as to excuse and blot out a Crime‡ (as aforesaid). For heretofore such as were suspected of any Crime were

|| X. 5. 35. 1.

* X. 5. 34. 8.

† 5. 35. 1.

went to purge themselves; sometimes by Duelling or single Combat||; sometimes by cold or boiling Water, into which they were thrown*; and sometimes by walking on a red hot Iron†. And tho' we read of

‡ C. 11. 43. 11

x. 5. 4. 35. 2.

the Example of Duelling in the 17th Chapter of the first Book of *Samuel*, touching *David* and *Goliath*, yet such single Combat is not admitted now-a-Days‡: For when Men tempted God with such Afflictions of Torments and Cruelty, they were rightly abrogated and repeal'd: And afterwards such a Form of Purgation was introduc'd, that when

any,

any Person was by an Information brought before any Magistrate for a Crime, he was to bring seven Persons or fewer, according to the Nature and Quality of his Crime, to give their Testimony and Evidence touching his Innocence: And these being credible Persons, and living within his Neighbourhood, they may be presum'd to have a pretty good Knowledge of the Truth of the Matter. Then the suspected Person was to swear himself, That he had not committed such a Crime as was objected to him; after which his Compurgators took an Oath, *That they believ'd the principal Party swearing did speak the Truth* ||. So that a *Canonical Purgation* is now, when Persons that are defam'd or accus'd of a Crime, and cannot be convicted thereof, are compell'd to shew their Innocence by their own Oaths, and the Oaths of their Compurgators, as afore said: And it is called *Canonical Purgation*, because it was invented and introduc'd by the *Canon-Law*. || X. 5. 34. 16.

This Purgation may be enjoyn'd a Person on the Account of vehement Suspicion, or by reason of any publick Infamy or Scandal arising from a probable Conjecture: For either of these Things is of it self enough to command a Purgation, tho' no legal Enquiry has been previous thereunto. But tho' Purgation may be enjoyn'd upon a bare Suspicion of the Judge or Superiour only; yet a Suspicion of the Judge or Superiour, which admits of Proof, is not sufficient for this end*: And a Person deficient in his *Canonical Purgation* is by a Fiction of Law deem'd as a Person convict†. But Purgation ought not to be enjoyn'd any one, unless he be defam'd *apud bonos & graves*: For 'tis requir'd, that this Infamy should not have its Rise from Enemies or malicious Persons‡: Nor ought *Canonical Purgation* to be enjoyn'd a Man on the Account of any light Suggestion, Detection or Denunciation ||. And 'tis the same Thing, if a Person be in no wise defam'd; for then Purgation shall not be enjoyn'd him: And if Purgation be enjoyn'd him, that is in no wise defam'd, there is room for an Appeal*. And tho' the Ordinary may proceed to an Enquiry against any Person subject to his Jurisdiction, even without any previous Infamy or bad Report of him, where the Suspicion is likely and admits of Proof with him and others†; yet 'tis otherwise, when he will proceed to Purgation, which is a Proof of the Person's Innocency. For Purgation is a negative Kind of Proof, with which the Defendant ought not to be onerated without sufficient Cause; that is to say, without some previous Infamy‡. But the Suspicion of a Bishop alone is sufficient to the End, that he may enjoyn a Man *Canonical Purgation*. For when any Scandal or grievous Suspicion lies against any one, his Prelate may proceed to an Enquiry; and if he does not find full Proofs against the Person, he may enjoyn him *Canonical Purgation* ||: And if he shall perform his Purgation, then he shall be pronounc'd to be a Man of good Fame and sound Testimony; and acquitted of the Infamy charg'd upon him. But tho' the occult and private Suspicion of a Bishop only be not sufficient to induce such a Purgation*; yet 'tis otherwise, where the Suspicion is likely and probable before the Bishops and others: And this Opinion is commonly held good. Indeed *Hen. de Bowick* says†, That he does not believe the Suspicion of a Bishop and others to be enough to enjoyn a Man Purgation without some ill Fame previous thereunto; that is to say, unless the Person has given some Scandal by his Behaviour: But 'tis otherwise, if he has given such Scandal, as may induce a Suspicion: For then Purgation may be enjoyn'd him for the sake of clearing himself, and avoiding such Scandal‡. And thus (according to him) we may understand the Opinion of those Men, who say, That where any one is sus- * X. 5. 34. 12.
† X. 5. 1. 23.
X. 5. 34. 7.
X. 5. 34. 10.
‡ 11 Q. 3. 52.
|| 2 Q. 5. 8.
* X. 5. 34. 6.
† Gloss. in c. 2. VI. 5. 1.
‡ Arch. in c. 6. 2 Q. 5.
|| X. 5. 34. 6.
* 6 Q. 2. 3.
† In. c. 5. X. 1. 31.
‡ Arg. v. l. 6. 10.

|| Dd inc. 2. 7 Q. 2. suspected of an enormous Crime; tho' there be no Accuser and no evil Fame subsisting, yet the Person suspected shall be oblig'd to purge himself ||: And an enormous Crime is said to be that, which begets and engenders Scandal, though otherwise of it self it be not enormous; for Men ought to keep themselves free from all Criminal Imputations.

Before the Judge proceeds to enjoin *Canonical Purgation*, and to receive the same, he ought to give a publick Intimation or Denunciation, to the end, That if any one will accuse the Person now ready to purge himself, he should come and proceed within a certain Time prefix'd *, And these Solemnities of Law ought not to be omitted even by the Consent of Parties†; because, as they concern the Utility of the Publick they ought not to be remitted by the Parties. Though (according to the ancient Laws) the Number of the Compurgators was limited in many Cases ‡, yet at this Day the Number is arbitray ||: And where the Assignment of a Number is arbitrary, 'tis here provided, that such *Arbitrium* should not be extended beyond the Number six, when Purgation is enjoin'd for Fornication, or for a Crime equal or inferiour to it. Now, among such Crimes as are greater or equal to Fornication and Adultery, the *Canon-Law* gives us several Examples: As *Heresy* *, *Homicide* †, *Treason* ‡, *Sacrilege* ||, *Incest* ‡‡, *Conspiracy* ||||, *False-witness* *, *Simony* †, *Usury* ‡, and the Sin against Nature commonly called *Sodomy* || or *Buggery*. For one Sin is greater than another in several Respects. As, *First*, in Respect of a Lapse or Fall from a greater Good. *Secondly*, In Respect of the Measure and Bulk of the Punishment assign'd to it. *Thirdly*, In Respect of the Example which it administers and gives unto others from thence. *Fourthly*, In Respect of its Condition, Place, Time and Person. *Fifthly*, In Respect of the Turpitude and Pravity thereof: And, *Sixthly*, in Respect of the frequent Repetition of it.

A Person ought not to be called or drawn out of the Deanery, where he is commorant, or has offended, to perform his Purgation *; because the Law seems to favour as well the Labours and Expences of the Person to undergo *Purgation*, as it does the *Compurgators* themselves. And another Reason may be assign'd for this, viz. Because *Purgation* ought to be perform'd in that Place, and among the Inhabitants, where he has been defam'd, to the end that such evil Report may dye, and be extinguish'd in the Place where it first happen'd to have its Rise ‡. Altho' it be regular for a Person to purge himself by the Oath of his Peers, and such Persons as are of the same Order, State and Condition with himself; yet for want of such Persons, or they being his Enemies, he may purge himself by the Means of such Persons as are Inferiour to himself, viz. by Laymen and Women; and even those of the Consanguinity may be his Compurgators: For 'tis enough if the Compurgator be tollerated by the Church †. But yet only such Persons ought to be admitted to be *Compurgators*, as are of the Neighbourhood, and Men of good Reputation and Credit ‡. In Cases that are notorious, Purgation ought not to be enjoin'd; but a Sentence of Condemnation ought to be pronounc'd ||: Nor ought Purgation to be enjoin'd at the Election of him, who is to undergo such Purgation, but at the Election of the Judge alone. *Compurgators* ought to be Persons of great Honesty and Integrity; and ought very well to know the Person whom they would purge from any Infamy or Suspicion: And herein they ought not to be hindred either by the Judge or any other Person. I have said it is a Rule in Law, that every one ought to purge himself by the Oath of his Peers, and of such Persons as are of the same State and Order of himself *; and

* Lindw. lib. 5. Tit. 14. c. 4.

† Bern. inc. 5. x. 1. 41. v. *Instantiam*.
‡ X. 5. 1. 23.

|| X. 5. 34. 9.

‡ X. 5. 34. 11.

|| X. 5. 34. 12.
X. 5. 34. 15.

† X. 5. 34. 7.
* X. 5. 34. 5
&c. 8.

and for want of such Persons, or if they are Enemies, he may purge himself even by the Means of Women and inferiour Laymen, and even by those of his own Consanguinity*: This is to be understood of Clerks as well as Laymen. But touching the Oath of *Compurgators*, and what is the Oath of him that is enjoyn'd Purgation, see the second Part of the *Decretum* †; and touching what is to be done in case the Person enjoyn'd Purgation cannot meet with proper *Compurgators*, see the *Decretals* ‡.

* 2 Q. 5. Gloss.

† 2 Q. 5. 18.

‡ X. 5. 1. 16.



Of the Recusation of a Judge, and the Reasons for it, &c.

HERE being several Exceptions in Law, whereby *Judicial* Acts and Proceedings are suspended for a Time, I shall here treat of the *Recusation* of a Judge, as one, which tho' regularly speaking ought to be first in Point of Time; yet as it best suits this Place, according to the Method of my Proceeding in this Work, I was oblig'd to leave it to the last Exception. Now this *Recusation* obtains, when a Judge has either before the Suit commenc'd, or in the Cause it self, render'd himself suspected to the Parties in Judgment on some Account or other: For then he may be recus'd and set aside, and his Jurisdiction is in the mean while suspended, till such Time as the Cause of such *Recusation* is examin'd and determin'd by Arbitrators chosen for that Purpose; and if he should proceed to do any Act in the Cause (pending such Recusation) the Process is null and void *ipso Jure**. For as the *Civil* and *Canon-Law* know no such Thing as a *Jury* of Twelve Men to try the Fact, as is done here in *England*, the Proof of the Fact, according to those Laws, is left to the Arbitrary Determination of the Judge, who ought to be an upright and impartial Umpire thereof. And, therefore, if he administers any Suspicion of Malice, Corruption, want of Knowledge, and the like, he may be set aside by a Recusation from taking Cognizance of the Cause; and this Recusation is a Challenge to his Integrity, &c.

* Arch. in c. 8. VI. 1. 14.

Now among many other Things to be observ'd in the Recusation of a Judge, some *Recusatory* Exception ought to be alledg'd in the first Place†, not only before Contestation of Suit, but generally speaking it ought to be the first Exception made in a *Judicial* Proceeding, even before all other *dilatory* Exceptions; because if any other *dilatory* Exception be objected, and the Judge pronounces thereon, it fairly induces a Consent to the Judge and his Jurisdiction‡, so that afterwards he cannot be set aside by any Recusation, unless the Cause of such Recusation afterwards came to the Knowledge of the Party recusing him: Wherefore, every Person ought to take Care how he appears before a suspected Judge without a Recusation or Protestation (at least) against his Jurisdiction, lest he should be deem'd to consent therunto.

† C. 3. 1. 16. X. 2. 25. 6.

‡ X. 1. 29. 25. X. 2. 20. 25.

There are various and several Causes for which a Judge may be recus'd as suspected: Some of which I shall here subjoin. And, *First*, A Judge may be recus'd on the Score of great Familiarity, and an intimate

mate Acquaintance or Friendship with the Adverse Party ; for a moderate Familiarity and Acquaintance is not sufficient hereunto * : And great Familiarity is included under the Notion of Friendship and Domesticity, as living together in the same House, and the like. A *second* Cause of Suspicion is, when the Judge is of † Consanguinity or ‡ Affinity to the Adverse Party ; which (notwithstanding) does not proceed, if the Judge be of equal Kindred unto each Party, because then he cannot be recus'd as suspected of Partiality ‖. When a Judge is of Consanguinity or Kindred to any Prelate or Rector of a Church, he may by the *Canon-Law* be recus'd as a suspected Person in the Cause of that Church *. *Thirdly*, When any *Ordinary* Judge is suspected upon a just Account, his Vicar or Surrogate may be recus'd on the same Account, tho' there be no other Cause of Suspicion in particular assign'd against him †. A *fourth* Cause of Recusation is, when any one desires to be a Judge in his own Cause ‡, since no King or Emperor can be a Judge in his own Cause, but ought to delegate the same to another Person, if the Suit be with one who is not his Subject : But he may be a Judge between himself and a Subject, if he recognizes no Superiour ‖. A *fifth* Cause is, when the Judge is a capital Enemy to the Party * ; and, according to *Decius*, any Enmity is sufficient to set him aside, tho' not capital. And the *Abbot* says, That he who is of Kindred by Consanguinity to the Enemy of the Adverse Party, may be recus'd : For, according to him †, he who couples any Family, Pedigree, Kindred or Friendship with my Enemy, is said to be an Enemy to me ; because he is adjudg'd to be a Person of the same Intention ; and, consequently, of the same Malice with the Enemy of the Adverse Party ‡. A *sixth* Cause is, when the Judge sojourns, boards and diets with the other Party, or with the Adversary of the other Party ‖. A *seventh* Reason is, when the Judge is a Fellow-Countryman with either of the Parties, as being born in the same City *, &c. But this only holds true, when such Fellow-Citizens are known to be out of their own City or Country : for in remote Parts Men are apt to love each other as Brethren. But tho' this be a just Cause of Suspicion in a Delegate, as being of the same Country or City ; yet it is none of an *Ordinary* Judge. An *eighth* Cause is, when a Judge is subject to my Adversary in respect of Jurisdiction, *viz.* because he is either his Suffragan or his Vassal ; for in such a Case I may refuse him as suspected † : And 'tis the same Thing, when the Judge is in any other respect a Subject to the Adverse Party contending with me ; because he is thereby apt to deviate from the right Path of Justice thro' Fear of his Superiour ‡. A *ninth* Reason is, when the Judge has been an Advocate to the other Party in that very Cause wherein he would be a Judge ‖ : But 'tis otherwise, if he has been an Advocate to the other Party in some other Cause entirely distinct and independant from the Cause in Hand ; because an Advocate in one Cause may be a just Judge in another of mine entirely distinct and independant from the Cause now before him ; and, therefore, he shall not be recus'd ; nor is it a sufficient Cause for the Recusation of a Judge to say, That the Judge's Son or Kinsman, or one that boards with the Judge, is an Advocate in the Cause. A *tenth* Cause is, if the Judge shews too much Favour to the other side, by aggrrieving one Party, and exhibiting too great Demonstrations of Friendship and Kindness in the Cause to the other * : But moderate Favour and Friendship is not enough to recusé a Judge. Another Reason is, if one of the Parties frequently visits the Judge at his Lodgings, or secretly whispers in his Ear by private Conversation with him ; since he may

X. 1. 29. 25.
Abb. & Gloss.
ibi.

† X. 2. 28. 36.
‡ D. 2. 1. 10.
X. 2. 6. 4.

‖ Bart. in l. 10.
D. 2. 1.

* Decius in c.
36. X. 2. 28.

† Felin. in c.
25. X. 1. 29.
‡ D. 2. 1. 10.

‖ Soc. Conf.
120. Vol. 1.
* Abb. in c. 4.
X. 2. 6.

† Abb. ut sup.

‡ Felin. in c.
4. X. 2. 6.
‖ Abb. in c.
4. X. 2. 6.

* Abb. ut sup.

† X. 2. 6. 4.
Abb. & Dd.
ibi.

‡ Abb. in c.
4. X. 2. 6.

‖ D. 2. 1. 17.
A lex. & Dd.
ibi.

* Abb. in c.
4. X. 2. 6.

may for this be recus'd by the other Party *. A *twelfth* Cause of Suspicion is, if the Judge behaves himself with any Animosity or Injustice, or proceeds *Extra-judicially* against the Person, or threatens the Party to do him an Injury, and the like †. And another Cause is, if the Judge himself has a Suit like unto that, wherein he would sit as Judge; because he is from hence render'd suspected, on a Presumption that he will give the like Judgment in that Cause, as he would have given in his own ‡. A *fourteenth* Reason is, if the Party *Recusant* has any Cause himself depending with the Judge, in the Judge's private Capacity; as that he is at Law with him in some other Court: For such Law-suit often engenders Hatred and Enmity, which are sufficient Reasons to refuse a Judge ||. Again, if the Judge has shewn himself unwilling to exercise any Act of Humanity with the Party in Judgment, refusing to admit him *ad osculum pacis*: For he is upon this Account presum'd to be an Enemy, and may be recus'd *. For the *Abbot* says, that this is one way of proving a Man's Enmity, it being usual in the Christian Church heretofore to give the Kiss of Peace to each other: And if any one refus'd to admit another hereunto, he was from hence presum'd to be an Enemy. And 'tis the same Thing, if the Judge will not salute or put off his Hat to the Party; for the Law from hence deems him an Enemy †: Or if the Judge has formerly been an Enemy to the Adverse Party, and now reconciled, he may be recus'd as a suspected Judge, since an Enemy reconciled still remains under some Danger of Suspicion; and, therefore, may be set aside from giving Evidence in the Cause ‡. Another Reason is, if a Prelate Endeavours to be a Judge in the Cause of his Church ||. For tho' *de Jure* he may be a Judge, if not recus'd; yet still he may be recus'd as a suspected one on the Score of a presumptive Interest and Affection to such a Cause. A Judge is also render'd suspected, if he has been only so far engaged in a Cause as to be consulted therein, and to have given his Opinion for one of the Parties, tho' he has not been an Advocate in the Cause, since Pride and Ambition may prevail with him to leave the Paths of Truth and Justice for the Sake of Victory: But 'tis otherwise if he has not declar'd his Opinion on the Merits of the Cause, tho' he has been consulted therein in some particular Point *. If a *Canon* of the same Church with the Judge litigates before him, he may be in such a Case recus'd by the Adverse Party †: But if both the Litigants are *Canons* of the same Church with him, 'tis otherwise, because the like Consideration of Affection excludes all Suspicion ‡. A Judge may likewise be recus'd, when it has been appeal'd from the Judge's Sentence, because he has only injur'd and aggriev'd the Appellant. For (pending the Appeal) he is render'd suspected to the Party appealing as well in every other Cause, as in that appeal'd ||. If a Judge shall receive any Bribe, Present or Gift from either of the Parties, he may be set aside as a false Judge *: And so he may, if the Cause does in any respect regard the Advantage or Disadvantage of such Judge; as because he is liable to an Eviction of the Thing in Controversy, or is a Surety for one of the Parties †. And 'tis the same Thing if the Judge has been prevail'd on by the Prayers and Sollicitations of either of the Parties, or has been corrupted by any Price or Reward for his Sentence, or any wise stands in fear of my Adversary, or has too great a Love for him on some Account or other. Another Cause is, if the Judge be an illiterate Person or not skill'd in the Law, and the Matter be a Cause of a subtle and arduous Nature; for that, according to *Baldus* ‡, Causes of Subtlety ought not to be committed to gross and fat-headed Judges; and *Jason* says ||, That this is a

* Lanfr. in c. 11. x. 2. 19.

† Abb. in c. 7. x. 2. 13.

‡ Gloss. & Dd. in c. 18. x. 2. 1.

|| Abb. in c. 23. x. 1. 29.

* Abb. ut sup.

† Jass. l. 16. c. 3. 1.

‡ Dec. ut sup. Dd. in c. 36. x. 2. 28.

* Dec. ut sup. Dd. in l. 17. D. 2. 1. † Dec. ut sup.

‡ Dd. in c. 35. x. 1. 29.

|| Dec. ut sup.

* Dec. ut sup.

† Dec. ut sup.

‡ In l. 14. C. 6. 24. || In l. 16. C. 3. 1.

just Cause of Suspicion. A Judge may likewise be recus'd, if he be too severe and cruel in his Proceeding: For in this Case, according to *Fa-son* *, his Jurisdiction may be taken from him on the Score of such his Cruelty; and, according to *Baldus* †, he may be recus'd, if he wants Discretion, in the same manner as if he were guilty of Iniquity; for if a Judge has been accusom'd to Iniquity, he may be set aside ‡. Again, according to *Lanfrank* ||, a Judge may be recus'd as a suspected Judge, if he refuses to hear an Advocate, tho' the Cause be clear in itself. And, lastly, Every Cause that is sufficient to remove and set aside a Proctor, is, according to *Panormitan* ||, sufficient to remove and set aside a Judge.

This Exception of Recusation ought to be propounded before Contestation of Suit, as already related; unless there be some Cause or Matter of Suspicion arising, which supervenes afterwards *: And in such a Case Recusation may be made in any Part of the Suit, even after a Conclusion in the Cause, according to *Felinus* †. But 'tis to be observ'd, that it ought not to be objected *ore tenus*, according to the *Canon-Law*, but in Writing, as an Appeal is from an *Interlocutory* Sentence, unto which 'tis liken'd and compar'd ‡: But the *Civil-Law* (I think) leaves it in the Breast of the Party, whether he will do it in Writing or not; but then his Reasons ought either to be inserted in the Acts of Court, or else given in Writing to the Arbitrators chosen on each side. There is also this Difference between the *Civil* and *Canon-Law*, viz. the *Canon-Law* requires, that the Cause of Suspicion be specially and particularly express'd in the Recusatory Libel ||: But the *Civilians* say, that the Cause of Suspicion need not to be thus express'd, but that an Allegation of Suspicion in general is enough before the Judge recus'd, according to the Form of recusing set down in the Gloss *: provided the Party recusing takes the Oath of Calumny, viz. That he does not make this Recusation thro' Calumny or Malice. And this Oath of Calumny is a *Species* of Proof for the present †, till the Cause and Matter of such Recusation is laid before the Arbitrators chosen to hear the same. For the Judge recus'd does not take Cognizance hereof, because he may be presum'd to be Partial in favour of himself: But he ought to name his Arbitrators, and compel the Parties recusing him to do the like within three Days *, who ought to be admonish'd or cited hereunto †. And if the Arbitrators cannot agree among themselves, but are divided in their Proceedings or Opinions about the just Grounds of such Recusation, the Judge recus'd may oblige them to chuse a third Person for the Decision hereof; and we are to abide by the Judgment of two of them; and if the Arbitrators elected shall refuse to take the Award on themselves, they may likewise be compell'd hereunto by the Judge recus'd ‡. But 'tis the Business of the Arbitrators to assign the Term-Probatory for the Proof of the *Recusatory* Allegation, and to do other Matters of the like Nature ||. The Law has appointed no Term certain for the Determination of such Recusation, but has left the same to be prefix'd by the Judge recus'd; and if the Arbitrators shall not determine the Matter within the Term prefix'd by him, he may proceed to take Cognizance of the principal Cause, notwithstanding such Recusation propounded: But if the Judge recus'd shall prefix'd too short a Term for the Hearing of this Matter, the Party recusing him may appeal to the Superiour Judge; and an Appeal lies to the Prince, if the Arbitrators themselves shall pronounce an unjust Sentence, or aggrieve either Party *. Regularly speaking, every *Delegated* Judge may be recus'd, but an *Ordinary* Judge cannot by the *Civil-Law* †; but yet in such a Case he ought not to sit himself in Judgment, or (at least) without an Assessor or an Associate.



Of the Repairs of Churches, Chancels, &c.

IT not only becomes the Care of the Church, to have its Clergy well instructed in Religion, and handsomely provided for in Respect of their Maintenance, but it adds much to their Credit and Reputation among the People, to see their Edifices well supported, and the House of God kept in decent Repair: And therefore, in ancient Times, when Churches came to have fix'd Revenues settled on them by the Bounty and Liberality of well dispos'd Persons, it was always provided in the Endowment of Churches, that some Portion should be set aside, and put into the Bishop's Hands for the Repairs of the Edifice, and not entirely consum'd on the Bellies of the Priests. And we meet with several Canons in Councils to this Purpose. In the first Council of *Orleans* *, a third of the Revenues was allotted for this end, and afterwards it came to a fourth Part (for one fourth Part went to the Repairs of the Manse); but still it was collected by the Bishop, and laid out as design'd, as long as the Bishops were wont to go on frequent Visitations in their Diocesses, and to view each Parish Church in their own Person: But when they either grew lazy, or else spent their whole Time in the Care and Management of Temporal Affairs, into which they had let themselves contrary to the Institution of their Office, they devolv'd this Care on their Archdeacons †; and they also becoming Negligent herein, the Bishops were at length oblig'd to transfer this Care on the Rectors of Parishes themselves, with the Allocation annex'd to it, but yet subject to the Bishop's Cognizance and Direction; and thus the Repairs of the Church does at this Day of *Common-Right* belong to the Rector of such Church *. So that of *Common-Right* the Laity are not compellable hereunto †; tho' the *Canon-Law* will have it, that even Lay-Parishioners may be compell'd to repair their own Church by Virtue of a Custom, since they ought to observe every laudable Custom of the Church ‡: And thus by the Custom or Common-Law of *England*, it belongs to the Parishioners to repair the *Nave* or Body of the Church, where they sit and hear Divine Service; and the Repairs of the Chancel only belongs to the Rector ||. The *Nave* or Body of the Church is that Part of it which is *extra Cancellum*, or out of the Chancel.

And as the Bishop had always the Cognizance and Direction of this Matter committed to him, the Spiritual Court may even now compel the Parishioners to repair their Parish-Church in Virtue of such a Custom, if it be in Decay and out of Repair, and may excommunicate every one of them severally, till the greater Part of them do agree to assess and levy a Tax for the Repairs thereof; and such as are willing to contribute thereunto shall be absolv'd *: But the *Court Christian* cannot levy a Rate, or assess them towards it. And tho' the Churchwardens ought to summon the Parishioners to meet for this end, before the Ecclesiastical Court can proceed against them; yet this Summons need not be from

* Can. 5. 14.

† X. 1. 23. 1. & 7.

* 10 Q. 10 & 11. 10 Q. 2 & 3. † 12 Q. 2. 27.

‡ Joh. Andr. in c. 1. x. 3 48.

|| Med. Rep. pt. 1. p. 236.

* Med. Rep. ut sup.

House

House to House, but a general Publick Summons is sufficient, and the major Part of them that appear may bind the whole Parish: But the Churchwardens cannot of themselves impose a Tax for the Repairs of the Church; but the greater Part of the Parish may make a By-Law, and to this Effect they are a Corporation. It is like the Repairs of a Bridge at the Common-Law, where a *Distringas* shall issue against the Inhabitants to make them repair it; but neither the King's Court, nor a Justice of the Peace can impose a Tax for it. And tho' a Tax should be illegally impos'd, as by a Commission from the Bishop to the Parson and some of the Parishioners to assess a Tax; yet if it be assented to by the greater Part of the Parishioners, and confirm'd by them, they may in the Spiritual Court proceed to excommunicate the Persons refusing to pay it *.

* Mod. Rep.
pr. 1. p. 235.
237.

† Hob. Rep.
p. 67.

† 16 Eliz.
30 Eliz.

‡ P. 66.

‡ Hob. Rep.
p. 67.

|| Pasch. 17.
Car. 1. B. R.

* March. Rep.
p. 91.

Though two Parochial Churches should be united; yet the Reparations of them shall be several, as before such Union †: But if there be a Mother-Church, and a Chapel of Ease within the said Parish, unto which the Inhabitants of a certain Precinct within the said Parish do resort to hear Divine Service, and tho' the Inhabitants of such Precinct should at their own Costs and Charges repair such Chapel; yet this shall not exempt them from contributing towards the Repairs of the Mother-Church; nay, tho' they should Christen and receive the Sacrament therein, and have Churchwardens of their own. And so it has been frequently adjudg'd in the Ecclesiastical Courts †: And tho' there have been some Sentences on the contrary, viz. on the Behalf of the Parishioners of such Chapel, yet they have always been disannull'd upon an Appeal. See the Case of the Parish of *Aston* against *Castle-birmidge* Chapel in *Hobart's Reports* ‡. For as the Parishioners had these Chapels at first for their own Ease, so they may resort (if they please) to the Mother-Church, bury, christen, marry, and have all other Services and Advantages from thence; and the Rector or Vicar may serve them in Person (if he thinks fit) at their Chapel, as well as his Curate. But this is much stronger against such Parishioners, if they reserve unto themselves a Right of burying, christening, &c. at the Mother-Church. Yet if such Inhabitants have been discharg'd Time out of Mind from contributing towards the Repairs of the Mother-Church, and they shall be proceeded against in the Spiritual Court, and sentenc'd hereunto, a Prohibition will lye ‡. If a Town or Vill having a Chapel of Ease buries at the Mother-Church, and has, therefore, Time out of Mind repair'd Part of the Church-Wall; such Parishioners may in this Case be excus'd from repairing the whole Church. The Inhabitants of such a Place prescribe to repair a Chapel of Ease, and for this Reason they have been Time out of Mind free from the Reparations of the Mother-Church; and their Plea was likewise held to be good: But if such a Chapel has been built within Time of Memory, they ought then to prove such an Agreement, by Virtue of which they are discharg'd from all Reparations to the Mother-Church ||. The Inhabitants of *H.* having a Chapel of Ease, and a Custom that those within such a Precinct ought to find a Rope for the third Bell, and to repair Part of the Mother-Church; in Consideration of which they have been freed from the Payment of any Tithes to the Mother-Church. *Quære*, Whether this be a good Custom or not? For the Matter was adjourn'd *. If it be libell'd in the Spiritual Court upon a Custom, that a Chapel of Ease has Time out of Mind paid one Third Part towards the Repairs of the Mother-Church, and such a Custom is deny'd, a Prohibition will lye thereupon, if the Spiritual Court proceeds.

If a Libel be exhibited against a Parish for not repairing the Church, tho' the Word *Ecclesia* may include the Chancel also, yet no Prohibition lies: But if a Rate or Tax be expressly impos'd for the Repairs of the Body of the Church and of the Chancel, a Prohibition will lye ||. For the Reparation of the Chancel belongs to him that receives the fourth Part of the Church's Income, which was anciently allotted for the building of the Church, as already observ'd; and thus of *Common-Right* it belongs to the Parson, that has this fourth Part*, and not to the Parishioners, tho' Custom has now with us transferr'd the Body of the Church on the Parishioners, and likewise the Repairs of the Chancel in the City of *London*, and some other Places †: And the Parishioners may be compell'd to observe this Custom, where the Custom is such. It has been the Opinion of some Men, that if a Tax be made and allow'd of by the greater Part of the Parish, *pro Reparatione Ecclesiae*, and afterwards the Money thus rais'd be laid out on the Repairs of the Chancel, it is well enough, and the Parish ought to allow it on the Churchwardens Accounts: But I hold the Law to be quite otherwise; for this was a manifest Misapplication of the Parishioners Money given for the Repairs of the Body of the Church; and so it has been adjudg'd in the King's Courts.

If a Church be fallen down, and the Parish so increas'd, that of Necessity they must have a larger Church, a Tax may be rais'd by the major Part of the Parish, as well for enlarging as repairing of it. Nor is the Consent of every Parishioner necessary to the imposing of a Tax in such a Case for enlarging the Church; for the greater Part of the Parish shall conclude the lesser for enlarging a Church as well as for repairing it.

|| Mod. Rep. ut sup.

* 10 Q. 3. 3.

† Mod. Rep. ut sup. Lindw. lib. 1. Tit. 10. c. 4. v. Reparatione.

A Person liv'd in one Diocess; and occupy'd Lands in another, where he was tax'd towards finding of Bells for that Church where his Lands were situated; for Non-payment of which a Suit was commenc'd in the Spiritual Court, where the Lands were lying. And he suggested to the King's Court the Statute of *Henry* the Eighth*, That no Man shall be cited out of his Diocess, except for some Spiritual Cause neglected to be done therein: And a Prohibition was granted. For this was not a Spiritual Cause neglected to be done; because Church-Ornaments are a Personal Charge of the Inhabitants, and not on the Land-owners dwelling elsewhere: But the Repairs of the Church it self are a real Charge upon the Land †.

* 23 H. 8. c. 2.

† Mod. Rep. pt. 3. p. 211. § 115. Tit. 27. cap. 4.

By a Provincial Constitution in *Lindwood*‡, all Persons, as well Clerks as Laymen, having Lands, Rents or Possessions, &c. which do not arise from the *Glebe* or Endowment of Churches to be repair'd, in whatever Parishes they lye within the Province of *Canterbury*, or shall hereafter have such Lands, Rents, Possessions, &c. whether they live in such Parishes or not, ought together with the rest of the Parishioners to contribute (as oft as Need shall require) to all Charges that concern the Parishioners themselves in respect of repairing their Church and adorning the same, and likewise to all Duties incumbent on them upon this Account either by Law or Custom (a due Regard being had to the true Value and Portion of their Lands, Rents, Possessions, &c.) And hereunto the *local* Ordinaries may compel them by Ecclesiastical Censures, if it shall be deem'd necessary. So that according to this Constitution, Church-Ornaments, (which ought to be decent according to the Estate and Abilities of the Church) are a Charge on the Land-owners dwelling elsewhere, as well as on the Inhabitants of such Parish. But if Lands lying within a Parish do belong to another Church, and are Parcel of the *Glebe* or Endowment of another Church, the

|| Gloss. in c. 1. Cl. 3. c. 3. v. Canonice.

Persons having Lands, &c. of this Kind shall contribute to the Repairs and Ornaments of that Church within the Parish whereof they are situated, notwithstanding the Law here quoted in the Margin *, which ordains, that such Lands as are of the *Glebe* or Endowment of a Church, shall be free and Exempt from the Payment of every Tax: But this is only in Respect of a Secular, and not in Regard of an Ecclesiastical Rate or Assessment: Therefore in this Case a Person having Lands and Possessions, which are Part of the *Glebe* or Endowment of another Church, shall be rightly oblig'd to contribute such Tax as is of an Ecclesiastical Nature, according to *John de Athon* on the *Legatine* Constitutions †; where he seems to hint, that a Tax or *Onus* for the Repairs of a Church, and which concerns the Parishioners, is an *Onus* in the Realty affecting Lands, and the like, saying, That every Parishioner is bound to repair the Church, according to that Portion of Land which he possesses within the Parish, and likewise according to the Number of his quick and living Animals which he has therein ‡.

* X. 3. 39. 1.
X. 3. 30. 2.
† Outb. Tit. 17.
‡ Joh. de Arh. in Tit. eund. v. hoc tenentur.

I have already remembred, that the Parson is chargeable with the Repairs of the Chancel, not only in respect of the Profits which he receives from burying therein; but also in respect of the *Canon-Law* obliging him to repair the whole Fabrick of the Church: And it was the Opinion of the *Common-Pleas* that the Spiritual Court may grant a Sequestration upon an Improprate Parsonage for not repairing the Chancel of the Church. *Sed Quare*, Whether they can do it for not repairing the Parsonage-House? For 'tis clearly held, that they may excommunicate the Improprator for both, notwithstanding the Statute of Dissolutions. But tho' Custom has discharg'd the Parson from paying towards the Repairs of the *Nave* of the Church on his Repairing the Chancel, yet Custom does not excuse him from taking Care that the Church and Chancel be repair'd ||: Besides, 'tis not only the Interest of the Parson to see this done on the Score of Decency, but because the Parson ought Yearly to render an Account hereof to the Bishop, if such Account be demanded of him ‡. And, moreover, he is by the *Canon-Law* bound to audit the Accounts of all Moneys, Revenues and Expences laid out and left for the building and repairing thereof. If the Parishioners will not repair the Church according to the Canon provided in this Behalf, they ought to be punish'd, according to some *, by an Ecclesiastical Interdict, and not by a general Excommunication, since the Repairs of the Church concerns the Parishioners as a Collective Body or Corporation, on which the Punishment of Excommunication cannot lawfully be inflicted, tho' it may on the particular Members being severally culpable herein.

¶ Arg. D. 8. 2. 21.

‡ II Q. 3. 1.

* Lindw. lib. 1. Tit. 10. c. 4. v. sub pœn. 2

Now that Parishioners ought to contribute, and may be cited in a Cause of *Contribution* towards the Repairs of the Body of the Church, and to the Charge of furnishing Books and other Utensils requir'd (by Law) to be bought at the common Charge of the Parish, appears partly by the *Register*, and partly by *Fitzherbert* in his *Natura Breccium* †, who gathers it from the *Register*. For if a Bishop (says he) cites any of the Parishioners of a Church to be Contributory to the Reparations of the Parish Church, or of any Chapel annex'd to it, and the Party sues a Prohibition directed to the Bishop, upon a Surmise that he is impleaded (touching a Lay-Fee) in the *Court Christian*, the Bishop shall have a *Consultation* granted on this Matter being shewn in his Behalf. And this Cognizance is likewise confirm'd unto the Spiritual Court by the Royal Injunctions set forth in the first Year of Queen *Elizabeth's* Reign under the Great Seal of *England* ‡ for a better Record of the Matter, the Queen being authorized thereunto by *Act of Parliament*.

† F. N. B. Tit. Consult. fol. 50.

‡ A. D. 1559.

ment. For in these Injunctions we have mention made of sundry Utensils, Ornaments, Books, and other Things, which ought to be provided at the Common Cost of every Parish, and to be supply'd thereunto from Time to Time: And whether they be wanting or no, is to be enquir'd into by the Ecclesiastical Judges, who ought to urge the Observation of the Injunction against the Infringers by Processes and Censures Ecclesiastical, according to the Course of that Law. And herein these Injunctions only follow the Common-Law: For if a Ter-Tenant, who holds Land, has usually paid for such Tenement a Pound of Wax, or the like, unto the Church, and does with-hold the same, the Churchwardens may sue him for it in the Ecclesiastical Court. And likewise if a Man that with-holds Church-Goods, does by his last Will enjoin his Executors to deliver the same, any of the Parish may sue the Executors for them in the Ecclesiastical Court. But to affirm the Right of Proceeding in the Ecclesiastical Court against such as refuse to contribute towards the Repairs of the Church, we have a Judgement in a *Consultation* (recorded in the *Register* *) to this Effect, *viz. Vobis significamus, quod super Reparatione & Emendatione defectuum corporis Ecclesie (juxta consuetudinem approbatam) faciendâ, procedere poteritis, & ea facere quæ ad forum Ecclesiasticum noveritis pertinere, dictâ Prohibitione non obstante.* And Money it self may be lawfully sued for in the Ecclesiastical Court on this Account, as appears by another *Consultation*. And so 'tis also provided by a Statute in this Behalf (among other Things) *viz. That Prelates may punish for leaving Church-yards unclosed, or for that the Church is uncovered, or not conveniently decked; in which Cases, none other Penance can be enjoyn'd but Pecuniary*†. But I need not prove that the Sun shines at Noon-day to any Person that has his Sight.

* Reg. p. 45. a.

† Circum-
spectatiff.
13 Edw. 1.

And whereas divers Persons did formerly, out of a covetous Temper of Mind, (and, I fear, do still) neglect the Repairs of their Parsonage-Houses, and other Buildings belonging to their Benefices (tho' they receiv'd large Profits from thence) which such Persons are immediately bound to repair in such a manner that they do not go to Ruin and Decay: Therefore, all Clergymen, of whatever Denomination they be, are enjoyn'd by a *Legatine* Constitution in *Lindwood*‡, to keep the *Manse* and other Edifices belonging to their Livings, in decent Repair; and hereunto they ought to be admonish'd by their Bishops and Archdeacons, in case of Failure; and compell'd if they are inferiour Clergymen. For if any one shall after such Admonition for two Months neglect such Repairs, the Bishop may either proceed against him by Censures, according to the *Canon-Law*; or else cause the same to be done out of the Fruits and Profits of such Benefice, by way of Sequestration, only causing so much to be receiv'd from thence as is sufficient for such Repairs: But if he shall cause more than is sufficient to be thus receiv'd, the Party aggriev'd may be reliev'd by the Benefit of an Appeal. Among these Church-Buildings here mention'd, the Constitution reckons the Chancel: So that a Sequestration will not only lye for the *Manse* or Parsonage-House, but for the Chancel also. And, *lastly*, 'tis to be observ'd, that in all Repairs, whether of the *Manse*, or of the Church and Chancel, the Expences laid out thereon ought rather to be necessary according to the Quality and Wants of the Thing to be repair'd, than costly and magnificent *: But yet in a richer Benefice the Buildings ought to be more sumptuous and stately than in a poor: and so likewise ought the Ornaments of the Church†.

‡ Ottonon.
Tit. 1.

* Arg. D. 27.
l. 1. c. 1.
† Dd. l. 1. c. 1.
Cl. 1. l. 1. c. 1.
Ind. c. 1. l. 1.

Of



*Of Residence, the Duty of it, and the Punishment
of Non-Residence, &c.*



* X. 3. 4. 11.

So a Husband is presum'd to live with his Wife, so is a Clergyman, who is married to his Church, presum'd by Residence to be Incumbent on his Living^{*}; and the Danger as well as the Sin is great, if he unlawfully absents himself from thence: For a Clergyman is not only oblig'd to abstain from such Things as may divert his Mind from the Service of God, and the Celebration of Divine Service in his Parish-Church, but ought also to reside on his Cure, to discharge the Duty enjoyn'd him by his Function with all possible Industry and Integrity of Life, in respect of the Benefice and Cure of Souls he is possess'd of; and not to absent himself from thence without evident Necessity. Now the *Residence* of a Clergyman in the Possession of an Ecclesiastical Benefice is nothing else but a constant Attendance, and continued Abode of such Person in the Parish where he has any Ecclesiastical Benefice, with a firm Mind and Purpose of performing that Service, which is requir'd at his Hands; and as this is *local*, he is consequently said to be Non-Resident who does not inhabit and dwell in the Place, where his Benefice or Dignity is situated, (for a *Dignity* is here compriz'd under the Name of a *Benefice*) but absents himself at a Distance from thence. For he cannot be called a Resident, who is so far distant from the Bounds and Borders of his Parish or Church, that the Parishioners cannot have a ready and easy Access to him; since he can neither said to be corporally or virtually present, who lives at such an inconvenient Distance; or, in other Terms, he cannot be said to be Resident for the End and Purpose, for which the Duty of Residence is enjoyn'd him, who thus absents himself from his Church. But, according to the Papal-Law, 'tis otherwise, if he only betakes himself to a Place, whereunto the Parishioners may have an easy Recourse to him as their Parish Minister for the Relief of their Spiritual Necessities, and receiving the Sacraments. And the Reasons of this is, (say the *Canonists*) not only because he that is at so small a Distance from his Cure seems to be at no Distance at all, but because (say they) an Absence of this Kind is not contrary to the End, for which Residence is commanded.

And hence it follows, *First*, according to them, that he may be said to be Resident who dwells even out of the Verge of the Parish, provided he lives within reach thereof: Yet, notwithstanding this indulgent Doctrine for the Sake of Gain to the *Apostolick Chamber* or *Exchequer*, all the *Canonists* agree, 'tis much better for the Minister of a Parish to dwell near his Church, whereby he may administer Divine Service, and give the Sacraments to the People with more Readiness and Convenience. And hence 'tis also according to them, that he, who has two Parishes united ought to live in that which is the Principal and of the greater Dignity of the two, than at the other: But if they are both Principal and of equal Dignity, he may reside on which he pleases.

Secondly,

Secondly, It follows, according to *Beia*, that he is said to be Resident, who is only at a small distance from the Precinct of his Parish, because this kind of Distance seems not to tend to any notable Disadvantage of the Parishioners, naturally speaking: But 'tis otherwise, if the Parson lives three or four Miles distant from the Borders of his Parish; for then it may happen, that his Parishioners may suffer some great Damage and Inconvenience by such a Distance. In has been a Question among some strict *Casuits*, Whether he may be said to be Resident, who goes out of the Bounds of his Parish some Hours in the Day? But tho' this idle Doubt deserves no Solution, yet the better *Casuits* answer in the Affirmative, tho' he should do this for the Sake of Recreation; provided his Parishioners suffer no Spiritual Damage from hence, because *Modicum pro nihilo reputatur*. In *England* no one is said to be Resident at his Living, who does not dwell at the Parsonage-House, according to *Coke* *: But the better Opinion (I think) is, that if the Parson be Resident in any House in his Parish, 'tis sufficient †; for the Parsonage-House may be alienated by a former Parson by the Consent of the Patron and Ordinary, or leased out in such a manner as that his Successor cannot live in it: Or who absents himself from his Parish more than Eighty Days in one Year *, *Continuis vel interpolatis vicibus*, or two Months, according to another Statute †.

* 6 Rep. fol. 21.
† Vid. Crok. Moor, &c.

* 13 Eliz. cap. 20.
† 21 H. 8. c. 13

The Word *Residence* imports a Personal Residence; and, therefore, a Man that has a Benefice in a Parish-Church, with Cure of Souls, is strictly bound to such a Residence, unless it be in some certain Cases, wherein such Beneficiary may serve the Cure by a Deputy or Substitute ‡. As, *First*, for Example sake, *Ratione perplexitatis* (as the *Canonists* stile it) *viz.* when a Man has two Benefices, and each of them require a Personal Residence: For as he cannot divide himself into two Parts, so he can only serve one of his Benefices. *Secondly*, In respect of some Occupation or Employment; as in the Case of a Bishop, who has Archdeacons, Vicars-General, and the like ||. *Thirdly*, In Regard of some Constitution or reasonable Custom; as because the Beneficiary is a *Pauper*, or in indigent Circumstances, not having where withal to maintain himself, on one small Living; and is, therefore, oblig'd to seek out for the Remainder of his Livelihood elsewhere *: But because Customs may vary in such Cases, 'tis to be noted, That he, who absents himself from his Benefice (perhaps) in regard of such a Custom, where his Living is poor and beggarly, is bound to appoint a Vicar or Curate to perform and Discharge the Duty of his Cure in his Absence. *Fourthly*, In respect of a Dispensation for Non-Residence †: For tho' Residence be so strictly enjoyn'd the Clergy as well by the Laws as in Point of Conscience; yet their Residence may be dispens'd with in several Cases by their proper Bishops or Ordinaries, to whom this Power of dispensing with them herein does of *Common-Right* belong. *Fifthly*, In respect of a Man's Removal from one Place to another, for the Sake of a better Air towards the Recovery of his Health, and the like *. *Sixthly*, On the Account of such an Absence as the Law approves of, *viz.* Absence on the Score of Study; but then this Absence ought to be with the Bishop's Leave †. *Seventhly*, On the Score of propagating the Faith, and improving the true Worship of God ‡. And, *lastly*, according to the *Romish Church*, in respect of going a Pilgrimage to the Holy-Land ||, entring into some Religious Order *, and the like. But a Personal Residence, according to the *Canon-Law*, is not requir'd of such Rectors as have Vicars placed under them in their Benefices: But this is only true, when their Parish Church is annex'd to

‡ Dd. inc. 30. x. 3. 5. 2.

|| X. 1. 23. 1.

* X. 3. 4. 16.

† X. 1. 17. 6.

* X. 3. 48. 6.
x. 3. 6. per tot.

† X. 3. 4. 4.
& 12.

‡ 7 Q. 1. 15.
& 16.

|| X. 3. 34. 11.
* X. 3. 24. 4.

some Prebend or Dignity ; for then the principal Person is excus'd from a personal Residence by reason of his Vicar *, who is bound to constant Residence ; and because such Principal is oblig'd to reside on his greater Benefice : But this reason does not obtain, when there is a Rector and Vicar in same the Church, and such Church has no Dependence on another Church : And hence it is, that a Parson who has an independent Church is not excus'd from Residence, by reason of a Vicar which he has there. Nor is it any Objection hereunto (perhaps) to say, that such Rector has not the Cure of Souls, but the Vicar has it : For the Cure is *habitually* and (as we say) *quoad Proprietatem* lodg'd in the principal Rector, tho' as to the Exercise and Effect of that Cure it is in the Hands of the Vicar †.

† Anch. in c.
30. x. 3. 5.

A Bishop is of *Common-Right* oblig'd to a Personal Residence at his Church on all *Sundays* or *Lord's-Days* in the Year : But by *Otho's* Constitution 'tis said *, That Bishops ought to reside and attend their Churches, particularly, on *Sundays* and *Holidays* during the Time of *Lent* and *Advent* †. And in another Constitution 'tis specifically express'd, *viz. de die Cene* : For then they ought to be present at their Churches, according to the *Romish* Worship and Discipline, *ad conficiendum Christma* ; and tho' we have in our Church rejected the Superstitious and Idolatrous Part of their Worship, yet an equal Reason holds for the Bishops frequent Presence at his Cathedral, and in his Diocess, not only for the Administration of the Lord's-Supper, but for the other Duties of his Office. And if a Bishop has several Cathedrals and Sees, as in the Diocess of *Bath* and *Wells*, and of *Litchfield* and *Coventry*, he may at certain Seasons, and on certain *Holidays*, be Resident at the one, and at certain Seasons and *Holidays* be Resident at the other : For Cathedral Churches are in our Books stiled *Episcoporum Sponsæ* ‡, with whom the Bishop ought to reside ; and, therefore, in this Case (some say) a Bishop may have two Spiritual Wives, tho' this seems absurd ; for the whole Diocess is his Care, and not his Cathedral Church alone.

‡ X. 1. 7. 4.

I have already remember'd, that the Residence of a Beneficiary is his *constant* and *continued* Abode in his Parish, *with a firm Mind and Purpose of performing that Service, which is required at his Hands* ; because 'tis to little Purpose for a Clergyman to reside at his Benefice, if he neglects the Cure and Service of his Church ||. And, *as to the constant and continued Abode at the Place of his Benefice*, this ought not to be understood with that Severity, as that he should never absent himself from thence ; for Words ought to be taken in a *Civil* Acceptation *. And this is true as well in respect of such as have Dignities, as in regard of those that have a Diversity of Benefices ; as one Benefice with a Title, and another in *Commendam* † ; and also in respect of such as have dependant Benefices ‡. But where a Benefice has an *Onus* or Charge annex'd to it, or has only one Minister, there the Word (*Residence*) is taken in a strict Sense || : But in a Place or Parish, where there are more Ministers than one, it is not taken in so confin'd and strict a manner *. Hence it is, that tho' the Word *Residence* may be understood several ways ; yet we ought never to use a subtle or cunning Interpretation thereof to the Prejudice of the Church ; but such an Exposition of it only, as to avoid all Frauds, Collusions, and Negligences whatever †.

|| X. 3. 5. 30.
x. 3. 4. 3.

|| D. 8. 1. 9.
Arch. in c. 14.
VI. 1. 6. v.
Residentiam.

† X. 1. 6. 54.
‡ X. 3. 5. 30.
& 33.

|| X. 3. 5. 11.
& 30.

* S2 Dist. 2.

† X. 1. 23. 3.

If a Dean of a Cathedral Church, Archdeacon or Benefic'd Clergyman does not reside at his Church wherein he has a Deanery, Archdeaconry or Ecclesiastical Benefice, he ought to be cited and admonish'd to return to his Church by a Time prefix'd in the Citation ‡ ; and if

‡ X. 2. 4. 8.

he

he shall not then return thither within the said Term, or alledge some just Cause of Impediment, he shall be depriv'd of his Deanery, Archdeaconry, or Benefice, and another Person substituted in his room * : * X. 3. 4. 8. And this is more especially true, if he has been absent from thence for any length of Time, and the Interest of the Church requires the Aid and Presence of the Person thus contumaciously absenting himself †. But † X. 3. 4. 8. v. *decem anni.* if he has been only absent from thence for a small Space of Time, a Term peremptory is not readily prefix'd; nor shall he presently undergo the Punishment of Contumacy on this Account. But besides the Punishments which are inflicted *in Foro Contentioso*, on Non-Resident Clerks, who rather chuse to follow their Pleasures than attend the Discharge of their Duties; they do by the *Canon-Law* commit a mortal Sin, and have no Rights to the Profits of their Ecclesiastical Livings: And according to the Archbishop of *Florence*, if they receive such Profit they shall be oblig'd to refund the same, since the Revenues of the Church are the Stipends of such as do Service therein ‡. For the principal End of a Clerk's Residence ought not to be the collecting the Fruits and Profits of his Benefice, but for the Sake of administering Divine Service, &c. and only in consequence hereof he obtains the Profits of his Benefice. For if a *Canon* comes principally to Church for the sake of obtaining filthy Lucre, *viz.* his *Daily Distributions*, it will in the *Romish* Church be deem'd *mental* Simony in him at least. By a Statute of the Realm of *England* *, every Spiritaul Person promoted to any Archdeaconry, Deanery or Dignity in any Cathedral or Collegiate Church, or being benetic'd with any Parsonage or Vicaridge shall be personally Resident and abiding upon his said Dignity, Prebend or Benefice, or one of them at least; on Pain to forfeit for not being so Resident by the Space of one Month together, or of two Months (to be accounted at several times) in any one Year, the Sum of Ten Pounds to be divided between the King and the Prosecutor. But by the *28th Hen. 8. cap. 12.* the Chancellor, Vice-Chancellor, Commissary, Rulers of Colleges and Halls, Doctors of the Chair, and Readers of Divinity in either of the Universities, are excus'd from a Personal Residence, provided they reside in the Universities: and so likewise are Persons under forty Years of Age living in the Universities, with their Bishop's Licence on the Score of Study: But all other Persons are liable to the Penalty of the Statute of the *21st Hen. 8. cap. 13.* And by an Act in the Reign of Queen *Elizabeth* †, no Lease made of any Benefice or Ecclesiastical Promotion, with Cure, or any Part thereof, (and not impropriated) shall endure any longer than while the Lessee shall be Ordinarily Resident and serving the Cure of such Benefice, without Absence of eighty Days in any one Year, but that every such Lease, *as soon as it or any Part thereof shall come into any Possession or Use above forbidden*, or immediately upon such Absence shall cease and be void: And the Incumbent so offending shall lose a Years Profit of his Benefice, to be distributed by the Ordinary among the Poor of the Parish. ‡ Par. 3. Tit. 2. cap. 1. || X. 3. 4. 3. * 21 H. 8. cap. 13. † 13 Eliz. cap. 20.

It has been a Doubt among the Schoolmen, Whether Persons may be excus'd from Residence in Point of Conscience; because an Obligation in this respect once purchas'd, cannot be taken away, as Estates and Things Ecclesiastical cannot be alienated *. But as we ought often to forego a Right, because the Laws whereby we acquire a Thing, may sometimes be limited and restrained on a good Account, the Legillators Mind being always to be regarded: So (say these *Casuits*) we ought sometimes to depart from the Rigour of the Law, and to follow the Equity of it, which allows of Non-Residence in many Cases reckon'd up in the *Canon-Law*. * X. 3. 13. 3.

Law. As, *First*, a Clerk may be absent from his Church, if he be in the Pope's Service *; or waiting on his proper Bishop †: For those that are in the Pope's Service (says the Abbot ‡) seem to be in the Service of the whole Church. Thus a Bishop may, according to the *Papal-Law*, make use of the Service of his *Canons*, and withdraw them from their Duty in Divine Service; and they shall be reckon'd as present at their Church. But some will have it, that the Bishop can only call two of these *Canons* to his Assistance || as Chaplains; and others hold this to be left entirely to his Discretion. Again, a Clerk may absent himself from his Church if he be in the faithful Prosecution of his own Rights, as at Law, and the like *; or if he shall be absent on the Score of his Studies in the Law or Divinity †: But, according to the Council of *Trent*, no Person shall absent himself any longer than five Years on any Account. But yet, in all the aforesaid Cases of Absence, the Clerk ought to acquaint the Bishop with the Reason thereof; and to desire his Approbation.

If a Clerk does not reside on his Benefice, he is presum'd in Law to be Non-Resident upon an unjust Account ‡; unless he alledges and proves a just Cause for his Non-Residence ||: And, therefore, 'tis from hence inferr'd, That a Clergyman ought to be cited at the Church where he is presum'd to keep his Residence, as is prov'd from the aforesaid Chapter quoted in the Margin. See also *Alciatus* his Treatise of *Presumptions* *. And a Rector or Parson who does not reside at his Parish-Church, or puts not in a perpetual Vicar, when his Church is annex'd to a great Prebend or Dignity (as aforesaid) shall be depriv'd thereof: For he that has a Parochial Church, ought regularly to serve the same in his own proper Person according to due course of Law †, and not by a Vicar; unless (perchance) such be annex'd to a greater Benefice, in which case he may serve the same by a perpetual Vicar canonically instituted thereinto; and hence came *Sine-Cures* among us. And the Vicar was to have a suitable Portion out of the Profits of such Church under Pain of the Rectors Deprivation, if he did refuse the same: And such Church was to be conferr'd on some other Person, who was both willing and able to fulfil the said Duty of Personal Residence therein himself. Indeed, our Pluralists have urged many Reasons and Pleas in Favour of Non-Residence, as that there is an Allowance given by the Law to several Persons to hold more Benefices than one, and since the Distribution of Benefices is not by the Law of God, but by the Law of the Land, what Fault is there in using the Privileges which the Law gives? But there cannot be a constant Personal Residence in more Places than one. Again, the general Service of the Church is more to be preferr'd than taking care of a particular Parish; because the necessary Duties of a Parish may be supply'd by Persons approv'd by the Bishop, and a single Living seldom affords a sufficient Competency for Persons to be capable of Publick Service. *Thirdly*, That the way of the Clergies Subsistence now is much alter'd from what it was when Celibacy was enjoyn'd them: For a Competency was always suppos'd, where Residence was strictly commanded; and what was a Competency to a single Person is not so to a Family. *Fourthly*, That the Church has a Power of relaxing the Severity of ancient Canons from the different Circumstances of Things; and when the general Good of the Church may be more promoted therein: And in the removal of Clergymen from one Diocess to another, and the Translation of Bishops. *Fifthly*, That the case is now different, as to Dispensation, from what it was in the *Romish* Church, as to the Number of Benefices, and the manner of obtaining

* Abb. in c.
16. x. 5. 40.
† X. 3. 4. 7.
‡ In c. 16. x.
5 40.

|| X. 3. 4. 15.

* X. 3. 4. 14.

† X. 3. 4. 12.

‡ Abb. in c.
11. x. 3. 4.
n. 11.
|| Inn. in c. 4.
x. 2. 15. n. 3.

* Reg. 1. n. 1.

† Lindw. lib.
3. Tit. 4. cap.
2.

tainin'g them: That a general Restraint is laid on Pluralities, and the Metropolitan is now the Judge, when Dispensations are fit to be granted. These are the chief Arguments for Non-Residence with us. But on the other side 'tis objected, That in the first Constitution of Parochial Churches every Incumbent or Possessor was bound to a strict Residence, as appears by the several Canons expressly made in Councils, enjoyning this Duty. But why do I mention the Canons so frequently decreed about Residence, since the very Nature of the Cure of Souls indispensably requires it: And this is the reason which the *Casuits* give * why a Personal Residence is not commanded in Scripture, as otherwise it might.

* Reginald. prax. t. 3. c. 5 p. 52.

For if a Person be requir'd to do such Things which cannot be done without it, *Residence* is imply'd. As a Pilot to a Ship needs no Command to be in his Ship; for how can he do the Office of a Pilot out of it? Let none think to excuse themselves by saying, *That our Church only takes them for Curates, and that the Bishops have the Pastoral Charge*: For by our old *Provincial Constitutions* (which are still in Force so far as they are not repugnant to the Law of the Land) even those who have the smallest Cures are called *Pastors*; and *Lindwood* there notes ||, that a Parochial Priest is said to be a *Pastor*, and not only by way of Allusion, but in respect of the Cure of Souls. And the *Canon-Law* declares, that a Pastor cannot excuse himself, *Si Lupus Oves comedit, & Pastor nescit* †. The Provincial Canon says, that the Care of the Lord's Flock ought not to be committed to such Persons, who are either *negligent* or *ignorant* of the Charge or Guardianship committed to them, or know not how to be watchful over them, as they ought to be: So that the great Duty of a Pastor consists in watching over his Flock, and knowing the Condition thereof, that he may awake the sleepy and secure Sinner, instruct the Ignorant, reclaim the Vicious, rebuke the Profane, convince the Erroneous, satisfy the Doubtful, confirm the Wavering, recover the Lapsed, and be useful to all, according to their several Circumstances and Conditions ‡. 'Tis not to preach a Sermon or two in a Week's time to their Parishioners, that is the main of the Duty of Parish Priests, but to apply themselves suitably to the Condition of their Flock: But he, who is a Stranger to his Flock, and only visits them now and then, can never be said to watch over it; he may watch over the *Fleeces*, but he understands little of the State of his Flock, viz. of the Distempers they are under, and the Remedies proper for them.

|| Lib. 3. Tit. 4. c. 2.

† X. de Reg. Jur. c. 10.

‡ Lindw. lib. 1. Tit. 11. c. 3.

Every Parish Priest is admitted to the *Cure of Souls*, and at their Ordination they solemnly promise to teach the People committed to their Care and Charge. 'Tis true, the *Canonists* have distinguish'd between *Rectories* and *Vicaridges*, as to Personal Residence: But we are to consider these Things. *First*, The *Canon-Law* strictly obliges every one that has a *Parochial Cure* to *perpetual Residence* †; and excepts only two Cases, viz. when the Living is annex'd to a Prebend or Dignity (as aforesaid, and then he who has it is to appoint a perpetual Vicar instituted with a sufficient Maintenance: And, *Secondly*, after this Liberty obtain'd for dignify'd Persons to have *Vicars* endow'd in their Places, the Point of Residence was strictly enjoyn'd to them: And we find in *Lindwood* a difference made between a *Personatus* and *Vicaria* ||; but this was still meant of a Vicaridge endow'd. And in another Provincial Constitution we read *, that an Oath of *Personal Residence* is required from all such Vicars, tho' the Value of the Vicaridge did not exceed five Marks *per Ann.* which, as appears by *Lindwood* elsewhere, was then deem'd sufficient for *Maintenance* and *Hospitality*. And to cover the shameful

† X. 3. 5. 32

|| Lib. 2. Tit. 5 cap. 1. v. 1. c. 1. *Personatus*.

* Lib. 2. Tit. 4. cap. 2.

* Tit. 10. *Dispensations* that were commonly granted to the higher *Clergy*, under the Pretence of the *Papal Power*, the poor *Vicars* were by a *Constitution* of *Otho** bound to take a strict Oath of *continual Residence*; and without it their Institution was declar'd to be null and void. But even in that Case the Gloss there says, *That they may be some time absent for the Benefit of the Church or State*, but not for their own particular Advantage. But the Obligation in Point of Conscience still remains the same, tho' *dispensing with Laws* may take away the Penalty of *Non-Residence* in some Cases. *John de Athon*, Canon of *Lincoln*, who wrote the Glosses on the *Legatine Constitutions*, does not deny but Rectors are as well bound to *Residence* as Vicars; but these are more strictly ty'd by their Oath; and because a *Vicar* cannot appoint a Vicar, but a Parson may †.

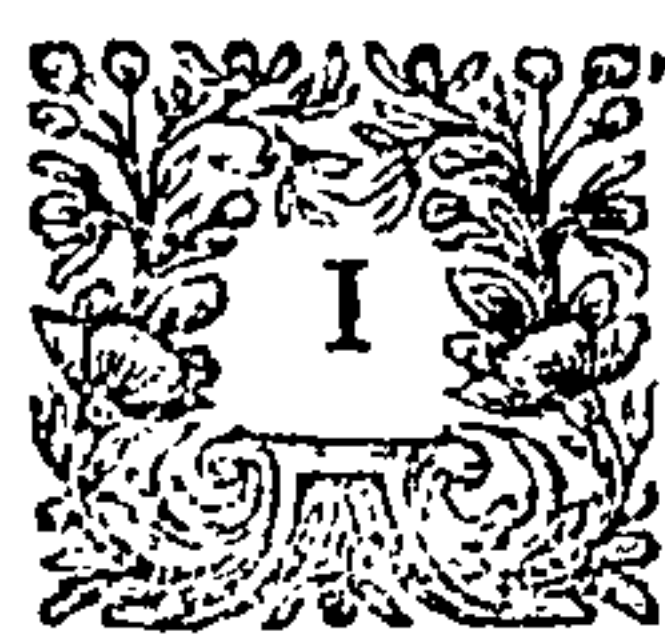
† Joh. de Ath. in Tit. 10.

‡ X. 1. 11. 15. A *Faculty* for Non-Residence is in respect of any other Person than the Pope himself, by the *Canonists* stiled a *Licence*: But in respect of the Pope 'tis called an *Indulgence* ‡. And hence I infer, that, according to the Papal-Law, no other Person but the Pope can grant an *Indulgence* touching *Non-Residence*; because as this is contrary to the Common Law of the Church, and in Prejudice of the Papal Power; so a Bishop cannot grant an *Indulgence*, tho' he may grant a *Licence*; because this Word *Licentia* does not import a *nuda voluntas*, but a Grant made on some good Cause or other ||. Therefore, tho' no Person inferiour to the Pope can grant an *Indulgence* for a Parson to absent himself from his Benefice, which the Pope can do without any Cause existing; yet such an inferiour Prelate may without the Pope grant a *Licence* for a Parson thus to absent himself, provided it be granted on some good Consideration or other. The *Canonists* likewise make a Distinction between Absence *a Choro* (as they stile it) and *Non-Residence*: Because he is said to be *Non-Resident*, who does not live in the Place where his Church stands or his Benefice lies; but he is said to be absent *a Choro*, who is not present at, and attending on Divine Service, tho' he lives in the Town or Parish where his Benefice or Dignity is situated.

|| Bart. in l. 9. D. 34. 1



Of the Resignation of an Ecclesiastical Benefice.



IT sometimes happens that a Prelate or Rector of a Church does renounce the Right which accrues to him either by Election, Translation, Institution, and the like: And this Act of Renunciation induces a Quitting or Relinquishing of the Church or Prelacy, which such Person has claimed by Election, Translation, Institution, &c. And it is commonly called with us a *Resignation*. Now a *Resignation*, therefore, is defin'd by the *Canon-Law** to be an Abdication or a Departure from that Right, which a Bishop, Prelate, Dignitary or Benefic'd Person has in his Bishoprick, Prelacy, Dignity, Benefice, and the like, made by the Permission and Consent of his Superiour, or the Chapter of the Cathedral Church, on some just Grounds or other †. And such Resignation is by the same Law ‡ said to be Twofold, *viz. Spontaneous* and *Coacted*. The first is, when the

* X. 1. 9. 2.

† X. 1. 9. 4 & 9.

the

the Person renouncing does with a free Mind and Will, and for some lawful Cause or other, resign his Right into the Hands of his Superiour *. * X. 1. 9. 5. A *coacted* Resignation is that which is not made freely, but is extorted thro' Fear, Force or Oppression, or procur'd by the Intervention of Money, or by the Means of some unlawful Promise, without any just Cause or Consideration whatsoever†. The efficient Cause of a *Spontaneous* Resignation is the Will of the Person to whom the Right belongs, which he quits and departs from‡: And the Form of such a Resignation is, that the Person renouncing should freely and voluntarily with the Consent of his Superiour resign the Right, which accrues to him, into the Hands of such Superiour *simply* by a Term of Resignation or Surrender, as *Resigno*, and the like; reciting the Cause which moves him hereunto, and making Oath touching the Truth thereof. And if the Person be a Bishop, then by the Papal Law it is made into the Hands of the Pope; and if he be an inferiour Prelate or Clerk, then 'tis made into the Hands of the Bishop, Chapter or other inferiour Ordinary, that has the Power of confirming or giving Institution unto the Benefice or Dignity thus resign'd ||.

† VI. 1. 7. 2.
x. 1. 9. 5.

‡ X. 3. 31. 16
& 23.

|| X. 1. 9. 5.
18 Q. 2. 8.
7 Q. 1. 19.
33 Q. 5. 5.

Now there are six just Reasons on which Account a Superiour ought to admit of a Resignation, *viz.* A Conscioufness of any Crime committed, Debility of Body, Defect of Knowledge, great Scandal given, when the People are intractable, or maliciously bent against the Person quitting; and, according to the Papal Law, Irregularity of the Person *. *First*, * X. 1. 9. 10. A Conscioufness of some Crime committed; but then this Crime ought & 11. only to be such which may hinder and impeach him in the execution of his Office after a Performance of Penance, as Simony, Apostacy, Schism, and the like; for 'tis not every Crime that will justify a Resignation, but only such as will render a Man infamous *ipso Jure* †, or which is committed in not observing the Form of an Election‡. *Secondly*, A Debility of Body is a good Cause to warrant a Resignation; but then it ought to be such as proceeds from Infirmary or old Age, or from such Cause only as renders a Man incapable of executing his Pastoral Office ||. *Thirdly*, A Man may pray to be discharged from his Benefice for want of Knowledge or sufficient Learning, *viz.* if he has not obtain'd a Knowledge of those Things which relate to his Office: And here the *Canonists* observe, That tho' a Defect of Knowledge be no Sin, but only a Punishment†; yet a neglect of learning those Things which he ought to know, is a Sin‡. *Fourthly*, the Malice of the People may oblige a Person to resign his Benefice, *viz.* when the People are of so stubborn a Temper, that they will not profit themselves by his Instructions or good Example ||; or when the People persecute their Pastor with open Force and Violence, or with an inward implacable Hatred. A *fifth* Reason is *grave Scandalum*, as when a Pastor is become so odious for his Crimes, or for an ill Conduct of Life, that he has no Hopes of doing any Good in his Parish or Diocess *. The *sixth* is every *Irregularity* in a Parson, which is an Impediment to the Ordination of a Clerk, without a Dispensation, as Bigamy, Bastardy, and the like†. But few or none of these are regarded with us; for in *England* it is entirely in the Bishop's Breast, whether he will accept of a Resignation or not. And if a Person thus willing to surrender his Benefice, shall on the Bishop's Non-Acceptance of his Resignation, withdraw himself, and the like, the Bishop may proceed to Deprivation, or put his Living under a Sequestration for Contumacy, as by the *Canon-Law*.

* X. 1. 9. 10.
& 11.

† 2 Q. 7. 2. 17.
‡ X. 1. 6. 42.

† 15 Q. 1.
‡ 58 Dist. 1.

|| X. 1. 9. 10. 5.

* X. 1. 9. 10. 6.

† X. 1. 6. 7.
50 Dist. 59.

I have said, *That the Resignation of a Benefice ought to be made into the Hands of him who has the Power of admitting or instituting a Clerk there-*

thereinto, commonly called the *Ordinary* or *Superiour*, who ought to be such a Person as may also deprive the Incumbent thus resigning his Benefice, whether he will or not, on the Score of some Ecclesiastical Crime, whether such Person be the Bishop to whom of *Common Right* it belongs in his Diocese to grant Admission and Institution, &c. or whether he be an inferiour Prelate, who may have this Power either by Custom prescrib'd, or else by some special Privilege *. And hence it is, if such a Resignation be made into the Hands of a Layman, though it be made *Sponte & pure*, yet it is not binding in Prejudice of the Church or of him, to whom the Admission of such Resignation belongs, in such a manner, but that the Church or Superiour may reclaim the Person thus resigning: But yet 'tis valid in Prejudice to the Person making such Resignation, if the Ordinary will ratify and confirm the same; so that he cannot recover his Benefice again (especially) if the Ordinary admits of such Resignation †. For by such a Resignation the Possession of the Benefice is lost, tho' not the Property thereof; because Possession is lost by Intention alone ‡, but Property is not so departed from: And again, because a Resignation is not binding without the Bishop's Consent ||. But note, where the Ordinary does not receive and admit a Resignation made in respect of some Benefice, it being made into some other Hands than his who ought to receive it; and is in Debate with himself whether he shall admit it or not; and if the Person tendering the same shall in the mean while repent thereof, (the *Matter remaining entire*) he may without any new Institution occupy and repossess himself of such Benefice, in the same manner as he enjoy'd it before *. And thus in like manner a Resignation made into the Hands of a Proctor does not make the Church void, without the Bishop's Acceptance thereof.

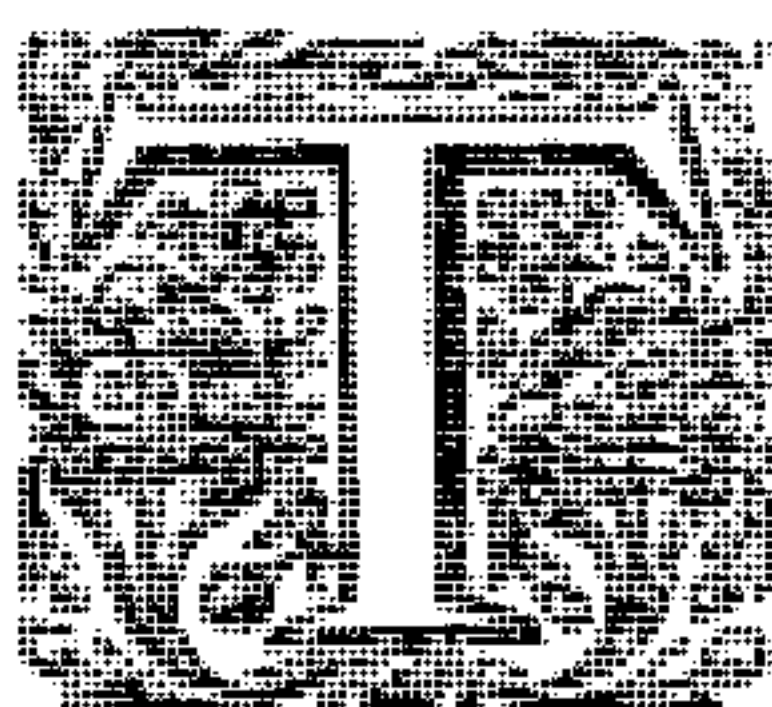
Every Person may, on the aforesaid Terms, resign his Benefice (if he pleases) in order to make a Provision for another Man; provided, he does not deduce this Act of Resignation in *Pactum*, that is to say, provided he makes no Covenant relating thereunto, but does it *pure & liberaliter*; for if he makes any Covenant in relation thereunto, such Resignation is with the *Canonists* deem'd Simony †. There is a *tacit* and an *express* Renunciation of a Benefice, &c. And this express Resignation is either *simple* or *conditional*. A *pure simple* Resignation is made without any Pact or Condition at all: But, on the contrary, the other is made by some Pact or Condition or other. Upon a *pure* Resignation a Benefice is immediately void, and the Ordinary or Patron may (if he pleases) collate a fit Person thereunto. But a *conditional Resignation* is seldom admitted; tho' it may be sometimes allow'd, when 'tis made in Favour of some Person, whom the Person quitting the same desires should be collated or instituted thereunto, and not otherwise: Which Condition ought not to be made before the Ordinary, because such a Resignation favours of Simony ‡. And tho' the Person leaving the same may intreat the Ordinary to confer it on such a one without any Taint of Simony, provided it be a fit Person (for else 'tis Simony ||): Yet the Ordinary is not bound to confer it on the Person thus recommended, since a Collation after a Resignation is entirely in his own Disposal, if the Church be vested in his Gift as Patron. It has been said, *That every Resignation ought to be spontaneous, and without Fear, Fraud, Force, and the like*; for if it shall be made thro' any Impulse of Fear, Force, &c. it shall be revok'd and annul'd; and this also holds true, and is to be understood in a Person constituting a Proctor to make a Resignation in his Behalf. But then this ought to be

a just and well-grounded Fear, and not a light and vain Act of Cowardice, but such as may happen to a Man of Constancy and Resolution. And, therefore, if a Man be dispossest of a Temporal Estate, or an Ecclesiastical Living by Force or Fear, he may be re-instated by a Possessory Action or Remedy; and if a Surrender or Resignation be pleaded thereunto, the Judge may and ought (notwithstanding such Surrender or Resignation) to restore him to the Possession thereof: And so says the *Civil* and *Canon-Law*. But, *First*, 'tis necessary to prove, that an *unjust* Force was inflicted on him; for such a Force as is accounted just is deem'd no Force at all: As when, in a Controversy about a Benefice the Judge finds *Titius* to be unjustly possess'd of such a Benefice; and, therefore, compels him by a Sentence of Excommunication to quit and abjure the same. And by the *Civil-Law* when a Man is order'd to make Restitution, he may be compelled thereunto *manu Militari*, if he refuses to yield Obedience to the Judge's Decree.

The Resignation of a Benefice, and the like, may be prov'd by Witnesses, whether it be *spontaneous* or not; and those Witnesses that depose *de non spontanea Resignatione* are prefer'd to such as depose touching a *spontaneous* Resignation: Because the first are the Plaintiff's Witnesses, which may prove a *coacted* and not a *spontaneous* Resignation: But 'tis difficult to prove a *spontaneous* Resignation, since the Heart of Man appears to none but God alone. The Resignation of a Benefice is not presum'd to be made *voluntarily*, since 'tis procur'd (perhaps) with much Labour and Expence; and, from such Labour and Expence, the Resignation of such a Benefice may be presum'd to be Simoniacal: Wherefore, Bishops in such a Case ought to be very careful how they admit of such Resignation; and may lawfully require the Person resigning to make Oath, that he does not quit the same with any unlawful or simoniacal View. The Effect and Consequence of a Resignation is, that whatever is done after such Resignation, which respects the Office and Power of the Person that makes it, is null and void; and in no wise subsistent: Wherefore, a Person that receives Holy Orders from a Bishop that has resign'd his Bishoprick, shall not execute the Office of a Parson. But yet 'tis first necessary, by the *Canon-Law*, that such Person should not only have resign'd the Place of his Bishoprick, but his Dignity likewise as well as his Diocese: But we maintain nothing of the *indelible* Character here with us in this respect. Again, by that Law the Person ordain'd ought to have Knowledge of the Bishop's Resignation; for if he be ignorant thereof, say the *Papists*, he shall be reliev'd by a Dispensation, as being not culpable herein. And 'tis the same Thing if a Person knowingly or ignorantly receives Holy Orders from an excommunicated Bishop. Thus by a Resignation an Incumbency to a Living is determin'd, if the Bishop receives the same: And in a Donative a Resignation to one of the Founders or Patrons of the Church, (as it may be here made) is sufficient, where there are more than one; for it enures to them all. *Vide* Title *Donative*. And where there is a Resignation, it extends to all the Lands and Profits belonging to such a Church; for the Lands and Profits belonging thereunto are thereby given up as passing with the Church itself, tho' the Letters of Resignation only mention the Church. See the Case of *Fairchild, v. Gaire*.



Of the Sabbath, otherwise called Sunday or Lord's-Day, and Feasts, Holidays, &c. in the Church.



THE Word *Sabbath* is sometimes with us taken for the Seventh Day of the Week; and in this Sense it stands properly, and is interpreted to be the same Thing as *Rest*, because on that Day the Author of all Things, according to the *Scriptural* Phrase, rested from all his Works. The Word *Sabbath* is sometimes put for the whole Week in

* Luk. c. 18.
v. 12.

† Marc. 16.
v. 2 & 9.

* Tertull. de
Jejun.

† Gen. cap. 1.

‡ 75 Dist. 5,

Scripture *, as *Jejuno bis in Sabbato*, or, I fast twice in the Week: And sometimes 'tis used for every Day in the Week, as *primâ die Sabbati* †, that is to say, the first Day after the Sabbath, *secundâ Sabbati*, &c. For the ancient *Christians* having receiv'd a set Account of the seven Days of the Weeks from the *Jews*, nam'd them as the *Jews* did *: And, therefore, stiled them the *first Day of the Sabbath*, the *second Day of the Sabbath*, &c. Sometimes they called them by the *Latin* Word *Feria*; for *Feria* is the same with the Word *Sabbath*, denoting *Rest*. And it was so called from the Verb *ferior*, either because the Sacrifices were killed on those Days, and Men apply'd themselves to Divine Worship, or else a *Ferendis epulis*, from the Banquets prepared. Therefore, as the *Jews* term'd the Week-Days the *first*, *second* and *third* of the *Sabbath*, so the ancient *Christians* also term'd them the *first*, *second* and *third Feria*, making an Alteration only in this respect, viz. That they kept the proper Sabbath *holy*, as the *Jews* did; but observ'd their Sabbath on the first Day of the *Sabbath*, or Week, which they call *Sunday*, or the *Lord's-Day*; and sometimes the *Christian Sabbath*. And this is called the *Lord's-Day*, or the *Christian Sabbath*, because God did on that Day raise up his Son *Jesus Christ* from the Dead, as on the *Jewish Sabbath* he rested from all his Works † or Labours (if I may so call them). For the Reason why the Church has constituted the *Lord's-Day* in the Place of the *Jewish Sabbath* is manifold, viz. *First*, Because *Christ* rose on that Day from the Dead ‡, as just now hinted. *Secondly*, Because the *Christian Church* would not seem to symbolize and agree with the *Jews* in that Day, and to observe their Ceremonies. *Thirdly*, On the Score of various and several Prerogatives, which this seems to have above other Days, as the *Papists* imagine. And hence we may observe, this Observation of the *Lord's-Day* is not a Matter of *Divine Right* but only founded on the *Canon-Law*, as all the Doctors do confess in Opposition to the Opinion of *Angelus* and *Sylvester*: And, consequently, the Observation of this Day may be abrogated either by Custom or Human Authority, and changed into another Day, since a legal Custom and human Authority may each of them repeal any human Law. And the same Thing may be said touching Festivals or Saints-Day, as we call them, of which I shall treat by and by.

But tho' the Church may change the Day of the *Christian Sabbath*, yet we know by the Light of Nature, that some certain Day ought to be

be (especially) deputed and set aside for Divine Worship; and that all Persons resting from their Labour ought to assist at this Worship: And hence 'tis, that some call the fourth Commandment of the Decalogue a moral Precept, because it does not from the Nature of Things appoint and determine some certain Time of Rest from our Labours, ordaining one Day in the Week to be delightfully spent in the Worship of God alone; and this (they say) belongs to Morality. But as this Commandment (I think) is only a Ceremonial Precept, it does not oblige Men entirely to cease from all Labours even on a *Sunday* itself; but only from such as are not Servile and of Necessity; and this, because the Ceremonials of the old Law and (particularly) of the *Jewish Sabbath*, are abolish'd by the Death of *Christ*. By the ancient *Civil-Law* Persons placed in the Country and assign'd for the Husbandry or Tillage of Lands might freely exercise their Calling on the *Lord's-Day* *. But this is forbidden not only by the Law of *Moses* †, the *Novels* ‡, and the Council of *Orange* ||; but *Amesius* and other learned Divines think it to be unlawful according to the Law. But by the Custom of *Holland* the Matter is so temper'd, that 'tis lawful in *Harvest* Time to cut and gather the Fruits of the Earth, which are ripe, on the *Lord's-Day*; and to do all other necessary Works, lest some Damage should ensue to them by any Delay. This Privilege was granted to the People by *Ralph* Bishop of *Utrecht* *, and afterwards confirm'd by *Keur van Delft* on the 15th of *January*, 1592. And *Mornacius* says, that the same holds good according to the Custom and Usage of *France*. As to us here in *England* all *Sundays*, and other great Festivals, were observ'd by our Ancestors the *Britains*; and we find that in the *Saxon* Times, King *Ina* made a Law, That if any Servant did work on the *Lord's-Day* by his Master's Command, it was a sufficient Cause to discharge him from his Service, and to make him Free: But if he worked without such Order, the Servant was to be whipp'd. So likewise if a Freeman worked on that Day, he was to be made a Bondman, or to pay Sixty Shillings. King *Alfred*, after him, made a Law, That Freedmen should enjoy their Liberties on the *Lord's-Day*, and certain *Holidays*. And when the *Danes* had subdu'd the *Saxons*, *Canutus* made a Law at *Winchester*, That there should be no Market, Hunting, or Meeting of the People for *Civil* Affairs on that Day, unless in Cases of Necessity. Yet in the *Norman* Times Markets were generally held on the *Lord's-Day*; and Ecclesiastical Synods and Councils for State Affairs were so held, as they may be still. But it was afterwards decreed in a Provincial Council held at *Oxford*, That *Sunday* should be observ'd with all Reverence, and that no Servile Work should be done on that Day, only Tillage and Sailing were allow'd, if need requir'd it: And about 130 Years afterwards, it was in a Synod decreed, That there should be a general Restraint from all manner of Work on that Day. But, notwithstanding these Restrictions and Decrees, Fairs and Markets were still kept on that Day, and usually in the Church-yards, because the Parson had the Benefit thereof, where they are kept in many Places at this Time; and particularly St. *James's* Fair held Yearly at *Bristol* is kept in St. *James's* Church yard. The first Restraint of keeping Markets and Fairs on *Sunday*, was in King *Edward* the Third's Time, when a Statute was made †, enacting, That Wools might be expos'd to Sale at the Staple every Day, except *Sunday*: And the like Restraint was afterwards made by Parliament in *Henry* the Sixth's Reign ‡, on Pain of forfeiting the Wares thus expos'd to Sale in such Fairs, &c. to the Lord of the Franchise. But tho' Markets and Fairs might not

* C. 3. 12. 3
Exod. c. 4
v. 21.
‡ Nov. 54.
§ A. D. 550.
Can. 21.

* Febr. 28.
A. D. 1434.

† 28 Edw. 3.
cap. 14.

‡ 27 H. 6. c. 5

be

be kept on *Sundays*, yet People might expose Goods to Sale in their
 * 4 Edw. c. 7. Shops on those Days; and, therefore *, a Statute was made to prohibit
 Shoemakers in *London*, or within three Miles round that Place to sell
 any Boots or Shoes on the Sabbath-Day, which implies that they might
 be sold elsewhere. But afterwards a Law was made †, That all *Sun-*
 † 5 & 6 Ed. 6. *days* in the Years should be kept Holy. 'Tis true this Law was re-
 c. 3. peal'd in Queen *Mary's* Reign ‡, and stood repeal'd till the first of King
 † Ann. 1 Mar. *James* ||, who repeal'd Queen *Mary's* Act, but did not by express Words
 § 1 Jac. c. 25. revive the Act of *Edward* the Sixth; and therefore it was a Doubt
 whether King *Edward's* Act was in Force: But the Law seems to be,
 that where one Statute which repeals another is repeal'd it self, it makes
 the first Act which was repeal'd to be still in Force. By an Act of Queen
 * 1 Eliz. c. 2. *Elizabeth* *, no Distinction is made between *Sundays* and *Holidays*;
 for all Persons are enjoyn'd by that Law to resort to their Parish-
 Churches, or upon Let thereof to some other Church on those Days.
 Which brings me next to speak of *Holidays* or Church-Festivals.

The Celebration of *Holidays* or Church-Festivals (as we call them)
 on a Religious Account, is a Matter of Divine Institution, according to
 the *Canon-Law*, being founded (as the *Papists* pretend) on the Old
 Testament; and in Proof hereof they quote the fifth, twentieth and
 thirtieth Chapters of *Deuteronomy*; and the twentieth Chapter of *Eze-*
chiel; and would likewise infer it from the Words of the fourth Com-
 mandment. Indeed in all these Places of the Old Testament we are
 commanded to sanctify the *Sabbath*, and to keep the *Seventh Day*.
 † Exod. cap. 31. v. 14. *The Seventh Day* (says the Lord) *shall be Holy unto you, a Sabbath*
and a Day of Rest †. But I find no express Command for the Cele-
 bration of *Holidays*: And, therefore, this must be by the Institution
 and Appointment of the Church, as really it was, not only to exhibit
 some Token of our Joy for the Glory of departed Saints, but in order
 also to induce other Men to lead holy and virtuous Lives; and to
 † X. 2. 9. 5. follow their Example ‡. But the *Romish* Church has added another
 Reason hereunto, *viz.* That we may by the Intercession of the Saints,
 whom they pray to and we commemorate on those Days, obtain of
 God a Remission of our Sins, and all that we wish for, whilst we ho-
 nour and worship his Saints. And by the *Canon-Law* the Pope and a
 general Council have a Power of appointing *Holidays*, and also of ab-
 rogating such as the whole Church has receiv'd: But they have abro-
 gated but few; the Business of that Church being rather to multiply
 and increase the Number of them, than to diminish the same, on the
 Score of that great Profits their Priests make to themselves on those Days
 by Masses and other ways.

These *Holidays* or Saint's-Days (as some term them) as well as the
 Lord's-Day, were in the ancient Church called *Festivals*, not only in
 Imitation of the *Jewish* Feasts, but likewise on the Account of drinking
 Wine and eating Flesh, which the Primitive *Christians* might or were
 † 44 Dist. 1. commanded to eat and drink on these Days ‡. For there were in those
 Times some Men so Superstitiously given, that they placed Religion in
 fasting upon those Days. Wherefore by the 58th Apostolical Canon,
 Clergymen were forbid to be found fasting on the Lord's-Day, or on
 any Sabbath-Day (except that of *Easter-Eve*) under Pain of Deposition
 from their Orders: And if any Layman was criminal herein, he was
 to be suspended from Church-Communion. And 'tis further enacted by
 † Can. Apost. 45. these Canons ||, That if a Bishop, Priest or Deacon did not use Flesh
 and Wine on Festival-Days, he should be depos'd as one having a fear'd
 Conscience, and as a Cause of Scandal. They that abstain'd from Wine
 and

and Flesh did it out of an Opinion, That the Creation was evil, and that the World was not made by the Father of *Jesus Christ*.

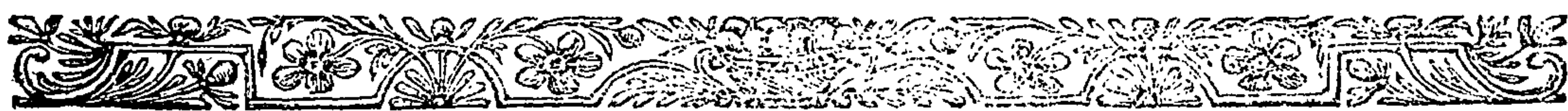
If a Clergyman shall absent himself from his Church on solemn Feast-Days (says the *Canon-Law*) viz. on our Lord's Nativity, on the *Epiphany*, *Easter-Day*, or *Whitsun-Day*, and had rather follow his Secular Gains than the Service of God, he shall be suspended from the Communion of the Church for three Years: And a Priest or Deacon shall in the like manner be liable to the same Censure, if he absents himself from his Church for three Weeks together*. Again, 'tis enjoyn'd by * 7. Q. 1. 29. the *Canon-Law*, That the Feast of *Pentecost*, or *Whitsun-Day*, shall not be observ'd with less Joy and Reverence than the Feast of *Easter* †: † 76 Dist. 9. For as we fast on the *Sabbath* (says the Law) and keep the *Vigils* of each Festival, so we ought to celebrate both the said Feasts with the like Mirth and Devotion. From what I have here said, it may be observ'd, that the ancient *Canon-Law* does not boast of the Antiquity of many Festivals in the Church, *Christ's Nativity*, *Epiphany*, *Easter-Day*, and *Pentecost* being all the ancient Feasts of the Church; and what have been introduc'd since (I fear) have been rather appointed for the Sake of Oblations and Offerings to the Priests than on any Religious Account, tho' some Good to Religion may flow from hence; and, therefore, I suppose our Church continues them: For I cannot find from any Reading of mine, that we can trace what we call the *Saint's-Days* higher than the eighth or ninth Century, if we follow good Authority.

But it has been a great Dispute among some Men, when a Feast or Holiday shall be said to commence. The *Canonists* say, that such a Day does not seem to be computed *de Vesperâ ad Vesperam* (as the Divines, and (especially) the *Spanish* Clergy maintain): Nor ought such a Custom or Usage of computing to be regarded, say the *Canonists*; because 'tis expressly said in the *Canon-Law*, that the Day shall commence from the middle of the Night, and shall end at the Midnight following; or (at least) that it shall begin in the Morning at Sun-rising, and end in the Evening at Sun-setting. But in the Council of *Terragona* ‡, where we find the first mention of any Monks in *Spain*, it was ‡ A. D. 516. decreed, That after the manner of the *Jewish* Sabbath, the Lord's-Day should begin on *Saturday* Evening; and hence it is, that among the *Spaniards*, the Custom of keeping of Holidays and Rejoycing on *Saturday* Nights still remains. But tho' the *Canon-Law* will have the Observance of the Lord's Day to be *a Vesperâ in Vesperam* ||, yet it says, || X. 2. 9. 1. that the beginning and ending of Holidays shall be govern'd according to the Importance of the Day, and the Custom of the Country where 'tis observ'd*. In Civil Affairs the Day (indeed) begins and ends at several Hours, according to different Respects; for in respect of Matters of Judicature it begins in the Morning and ends in the Evening, and 'tis the same Thing in Matters of servile Employment. But in the *Romish* Church, as to the Celebration of Divine Service, it begins in the Evening from their *Vespers*.

Tho' it be lawful even by the *Canon-Law* to work on Holidays in Cases of Necessity; yet by that Law it is not lawful to take an Oath on such Days, nor to hold Pleas in Causes of Blood †, nor ought Civil Causes † X. 2. 9. 1. to be heard and determin'd thereon; and whatever Process at Law or Sentence shall be given on such Days, it shall not be valid, tho' it be done with Consent of Parties ‡: And this holds good in respect of all ‡ X. 2. 9. 5. Causes whatsoever, unless Piety or Necessity be concern'd. But here I only speak of such Holidays as are enjoyn'd by the Authority of the

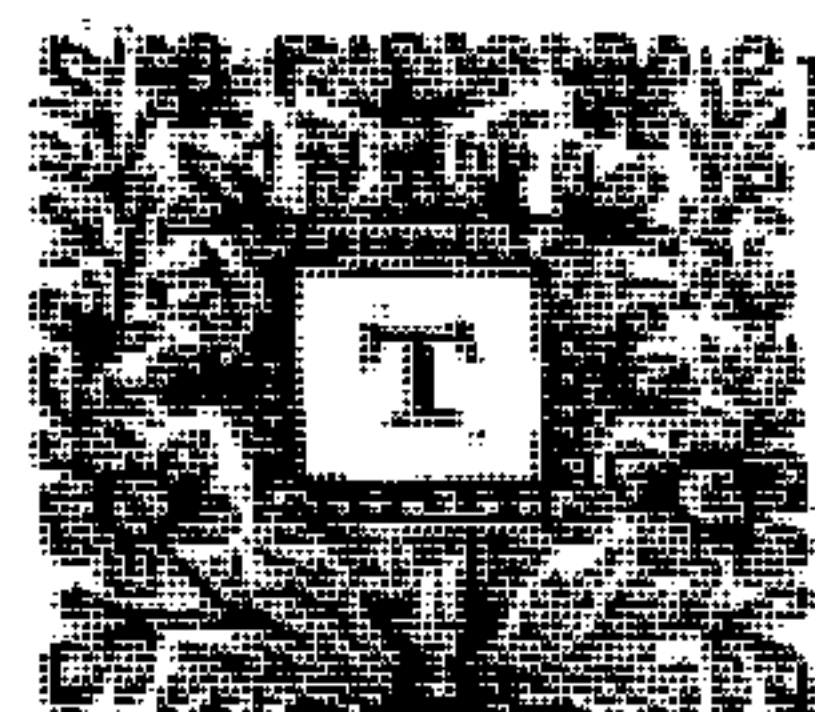
* Host. in
Sum. § Qua-
liter. x. 2. 9.

Church: For there are other solemn Festivals, which are introduc'd and commanded by Princes on the Account of some signal Victory over the Enemy, or the Birth of a Son, and the like, which are called *Feria repentina*; and for other Civil Matters to be done *. And the Reason the Law assigns for this, is, because such Holidays are not enjoin'd out of Reverence to God, but for some other Reasons of State: But if we would know the true Reason why the *Romish* Church depreciates these State Holidays, we may conclude it to be from hence, viz. because there are no Altar-Oblations on those Days for the Priests.



Of the Sacraments, and the Law concerning them.

* Con. 2 Dist.
32.
† Con. ut sup.



THE Words *Sacrament*, *Sacrifice* and *Mystery* do each of them bear a different Signification according to the *Canonists*. For a *Sacrament* is defin'd by them to be a visible Form of invisible Grace *: But a *Sacrifice* is a holy Rite, which (they say) is made by some mystical Prayer, and is a visible Thing †. And a *Mystery* is a visible Act apply'd

‡ Con. 1 Dist.
69.
|| 26. Q. 7. 1.
* Pen. 1 Dist.
† 30. Q. 2. 41.
‡ Con. 4. Dist.

* X. 5. 3. 9
& 42.

to a Sacrament, containing in itself a secret Dispensation. The Sacraments in the *Romish* Church are seven in Number, viz. *Baptism*, the *Body of Christ* ‡, which we call the Lord's-Supper, *Extream Unction* †, *Penance* *, *Matrimony* †, *Confirmation* ‡, and *Orders*. But we Protestants of the Reformed Religion acknowledge only two as generally necessary to Salvation, viz. *Baptism* and the *Lord's-Supper*, the last in other Terms called the *Eucharist* and the *Holy Communion*. And these Sacraments ought to be freely given to such as desire the same, without any Fee or Demand made by the Priest for the Administration of them *: But yet the *Canon-Law* says, that the Ordinary may compel the Laity to observe laudable Customs, which is the same Thing as to allow the Clergy to make a Demand in several Cases. I have already treated of *Baptism* in its proper Place; and, therefore, I shall only here speak of the *Eucharist* in a particular manner.

† Cap. 6. v. 10.
& 11.

‡ Cap. 6. v. 53.

Now this Sacrament of the *Eucharist* is typify'd out to us by the Prophet *Malachi* †; and 'tis plain, that Infants were in St. *Cyprian's* Time admitted hereunto, and did in his Country receive the holy *Eucharist*; which, indeed, was a just Consequence of interpreting St. *John's* Gospel, viz. *Except ye eat the Flesh of the Son of Man, and drink his Blood, ye have no Life in you* ‡; as respecting the holy *Eucharist*; since upon the Foot of that Principle Children could no more be depriv'd of the holy *Eucharist* than they could of *Baptism*. And as to the Preparations necessary hereunto, which are so much contended for by such as would be glad to have Confession of Sins made to them, the same Objections might lye against Infant-Baptism, as against Infant-Communion. But tho' this Practice obtain'd in St. *Cyprian's* Time; yet *Tertullian's* Silence herein, when he had a just Occasion of mentioning the same (on his giving Advice against Infant-Baptism) gives some Reason of suspecting, that it was not much practis'd before *Cyprian's* Time; and, therefore, not very general. Tho' after *Cyprian's* Time it continu'd in the

Western

Western Church very generally till the eleventh Century; when the absurd Doctrine and Belief of *Transubstantion* supplanted it. In ancient Times the Bishop's were wont at the Feast of *Easter*, which was the great Time of Receiving to send the *Eucharist* to other Bishops in the Name of *Eulogie*: But this idle Custom was at length forbidden in the Council of *Laodicea**. And from this Sending the Eucharist about to the Communicants the *Papists* now call it the Mass or *Missa* in the *Latin* Tongue.

* Can. 14.

The *Romish Church* distinguishes their Sacraments into *Necessary* and *Voluntary*; making *Orders* and *Matrimony* to be only *voluntary* Sacraments. *Baptism* they stile *Sacramentum intransientium*†. The *Eucharist* *Sacramentum progredientium*; and for that Reason it is also called a *Viaticum*‡. Penance they term *Sacramentum redeuntium*||. Extream *Unction* *Sacramentum exeuntium**. And Confirmation is with them *Sacramentum pugnantium*†. But as these are Distinctions little known to those who only maintain two Sacraments necessary to Salvation, I will dismiss this Enquiry, and proceed to speak of the Law touching the Sacrament of the Lord's Supper. And here,

† Con. 4 Dist. 142.

‡ 26 Q. 6. 7.

|| 26 Q. 7. 4.

* 26 Q. 7. 1.

† Con. 5. Dist. 2.

By a Provincial Constitution in *Lindwood*‡ all Laymen are to be admonish'd and put in Mind of receiving the *Eucharist* or holy Communion thrice in the Year, as by King *James's* Canons||, viz. at *Easter**, *Whitsontide*† and *Christmas*‡; and likewise according to the Direction of the *Canon-Law* it self. And before the said Feast they ought to prepare themselves for the Receiving hereof according to the said Constitution, by some Acts of Fasting or Abstinence, as the Parish-Priest shall advise||. Some Persons formerly were so superstitiously bent, that before *Christmas* (following his Advice) they would abstain from Flesh during the whole Time of *Advent*; and before *Easter* fasted the whole *Lent*, or (at least) the greatest Part thereof; and likewise before *Whitsontide* from the first Day of *Rogation-Week* till *Whitsunday*. And by this Constitution whoever shall not once in the Year (at least) viz. at *Easter**, receive the holy Communion, unless he be advis'd by his Priest to abstain from thence, shall in his Life-time be suspended *ab Ingressu Ecclesie*, and after his Death be depriv'd of Church-Burial. But this latter Part of the Constitution, which is Penal, has lost its Force. Again, tho' the Sacraments may be receiv'd and taken from wicked Ministers, as long as they are tolerated to administer them†; because such unclean Wretches cannot defile the Sacrament‡, and since 'tis the holy Spirit which gives Efficacy thereunto by whatever Ministers they are exhibited||: Yet they ought not knowingly, according to the *Canon-Law*, to be receiv'd from a Heretick*.

‡ Lib. Tit. 5.

16. c. 16.

|| Can. 21.

* X. 5. 38. 12.

† Con. 2. Dist. 19.

‡ Con. ut sup.

|| Lindw. ut sup.

* X. 5. 38. 12.

† 1. Q. 1. 36.

& 38.

‡ 1. Q. 1. 39.

|| 1. Q. 1. 38.

* 23. Q. 1. 34.

And by another Constitution in *Lindwood*†, no one ought to administer the holy Communion or the Sacrament of the Eucharist, to the Parishioner of another Curate, without the evident Leave of such Curate. And this is in Conformity to the *Canon-Law*, which says, That the Sacraments are only to be given to the Parishioners†. But yet this Constitution or Ordinance does not extend it self to Travellers and Pilgrims; nor ought it to be in Derogation of any Case of Necessity; for a Traveller is a Parishioner to every Church where he comes*. For as in Cases of Necessity every Presbyter may, according to that Law, hear the Confession of another's Parishioner‡; so in the like Case every Presbyter may administer the Eucharist||: But this Sacrament ought not to be exhibited by any Clerk inferiour to a Presbyter in the *Romish Church**; but 'tis otherwise with us, tho' a Deacon cannot consecrate the Elements of Bread and Wine.

† Lib. 3. Tit. 15. c. 2.

† 16 Q. 1. 10.

* Arg. D. 5.

1. 19.

‡ 26 Q. 6. 12.

|| 50 Dist. 53.

1. Q. 1. 70.

* Con. 4 Dist. 123.

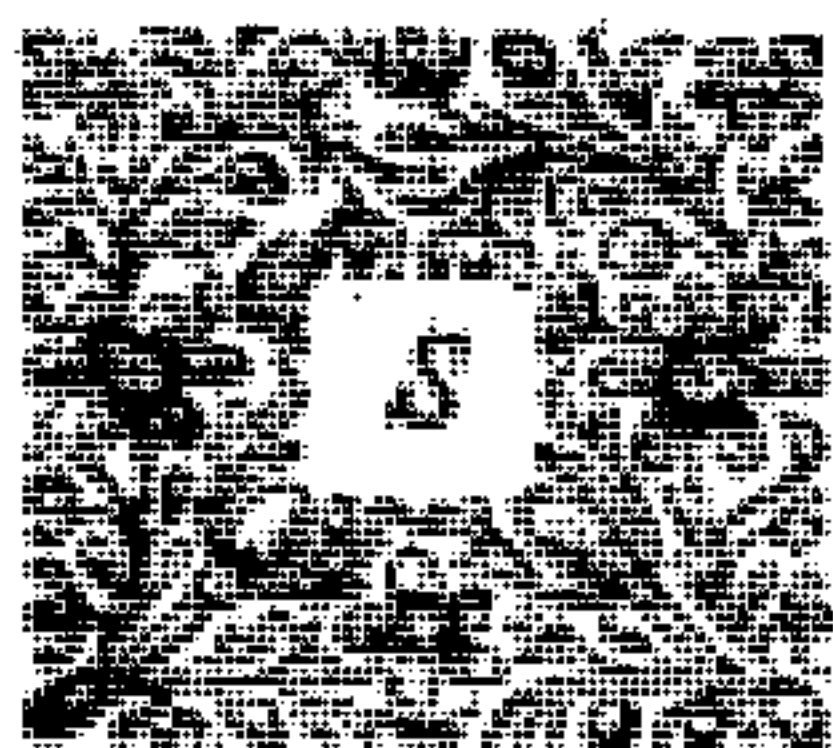
In the *Romish* Church at the Celebration of the Host or Eucharist a Bell ought to be rung, to the end that all such Persons as cannot every Day attend the Celebration of the Mass, may be on their bended Knees, wheresoever they are, either in the Fields, or in their own Houses, &c.

* 1 E. 6. c. 1. And in our Church, because there can be no Conversion to God, where the Sacraments of his Church are contemn'd and set at naught, it is enacted by a Statute of *Edward* the Sixth *, That no one shall speak or do any Thing in Contempt of the Holy Sacrament, under Pain of Imprisonment, and to make Fine and Ransom at the King's Pleasure. And three Justices of the Peace (one being in *Quorum*) have Power to take Information by the Oath of two lawful Witnesses or Persons (at least) touching the aforesaid Offence, and to bind over by Recognizance every Accuser and Witness in five Pounds each to appear the next Sessions to give Evidence against the Offenders, who are there to be enquir'd of before three or more Justices by the Oaths of twelve Men, and to be indicted, if the Matter alledg'd against them be found true. Three Justices or more have likewise Power to send out two Writs, viz. a *Capias* and an *Exigent*, and a *Capias ut-lagatum* against such Offenders in all Counties and Liberties; And upon their Appearance to determine the Contempts and Offences aforesaid, or to take Bail for their Appearance as aforesaid. And the Justices have also Power to direct a Writ in the King's Name to the Bishop of the Diocese where the Offence was committed, by which he shall be requir'd to be present himself, or (some for him sufficiently learned) at the Arraignment of the Offender, and to give Advice concerning the Offence committed.

† 18 Q. 2. 18. And as the Sacraments are not to be given to such as are not under the Cure of the Priest that administers them †; so they ought not to be given to harden'd and impenitent Sinners, nor to Schismatics, and the like ‡: For they require not only a good Disposition of Mind towards
 ‡ 26 Q. 7. fore per tot. Religion, but Repentance of a past wicked Life.



Of Sacrilege, the Species and Punishment of it.



SACRILEGE is a particular Crime, merely so nam'd at first by the Clergy, for before they baptiz'd it by this Name, it might as well have been called *Theft*, *Oppression* or *Extortion*: But now he is said to commit *Sacrilege* who steals or takes away any Thing, that is Sacred, from a sacred Place; as out of Temples, Churches, and the like; or to even break open such Places for this End and Purpose; or doth consent or attempt to commit such wicked Acts *. Prelates got this Crime under their Cognizance by virtue of that general Maxim, viz. *That all Wrong done to the Church must be judg'd by the Church*: And thus this Crime came to be punish'd in the Ecclesiastical Court. But the first time I can find that they challeng'd this Power here in *England*, was by *Egbert* Archbishop of *York* in the seventh Century; tho' since they have punish'd this Crime in the Spiritual Court, and (especially) when the Power of the Church ran high, as it did before the Reformation: For I meet with two adjudg'd Cases cited in *Fitz-berbert's*

* D. 48. 13.
4. 6 & 9.

herbert's Grand Abridgment of the Law, to this Purpose †, viz. If a Man takes Goods out of the Church-yard, he that has a Property therein may sue him in the Court Christian, and compel him to stand to the Judgment and Sentence of the Spiritual Court for this Offence.

† M. 4. 11. 5.
per For. 11.
Prohib. n. 25.

And again, *. If a Man takes Trees that are growing in the Church-yard, the Parson may sue for them in the Court Christian, and for Sacrilege also. But Lindwood speaking of Sacrilege says †, That it is not a Crime merely Ecclesiastical, because the Cognizance thereof may belong to a Temporal Judge (at least) touching the corporal Punishment of it, with whom the Justinian Code agrees in respect of the Civil Penalty thereof ‡: And this Hostiensis himself confesses in respect of a corporal Punishment; tho' 'tis otherwise in respect of Church Censures, which ought to be inflicted on such Persons as commit the same ||.

* 17. H. 3.
per L. 12. h. ut
sup.
† Lib. 5. Tit.
15. c. 1. v. Sa-
crilegio.

‡ C. 1. 3. 10.

|| Lindw. ut
supra.

Now Sacrilege in our Books is understood two ways, viz. *strictly* and *largely*, otherwise called *properly* and *improperly*. The Canon-Law defines it to be a Violation or Usurpation of a Thing sacred; and says, that it may be committed three several ways, viz. *First*, In respect of a Man's Person *; as when one wounds or strikes a Clergyman. *Secondly*, In respect of the Place; as when any one violates the Immunities of the Church or Church-yard †. And, *Thirdly*, in respect of a Thing; when any one usurps or steals a Thing consecrated or deputed to some sacred Use, whether the Thing be taken away from a sacred Place, or from a Place which is not sacred; or whether the Thing be not sacred, which is taken away from some sacred Place ‡. And a Man is said to be guilty of Sacrilege *strictly* and *properly*, when he steals a Thing sacred from some sacred Place, and this according to the *Civil-Law* ||: But by the *Canon-Law*, either is sufficient *. In a *large* and *improper* Sense of the Word, Sacrilege is extended to other Crimes: And, in pursuance hereof, a Man infringing the Liberties of the Church, or invading the Estate and Goods thereof, is called a sacrilegious Person: And the Persons that do invade and occupy such Estates as are appropriated unto Divine Uses, are excommunicated as sacrilegious Persons †, till they restore the same to the Church; and, moreover, by some Laws they are punished in *Quadruplum*, and by others in *Decuplum* ‡.

* 17. Q.
22 & 29.
Arch. ibi.
† 17. Q. 4. 21.

‡ ut supra.

|| D. 48. 19.
16. 4.
* 17. Q. 4. 21.

† 12. Q. 2. 3.
& 4.

‡ 12. Q. 2.
7. 9 & 10.

|| 17. Q. 4. 29.

* 17. Q. 4. 21.

† 25. 5. 17. 5.

‡ 17. Q. 4. 13.

|| X. 5. 17. 5.

Sacrilege is punish'd by the Common Law of the Church several ways. As, *First*, by an Excommunication pronounc'd, or (as we say) *ipso Jure* ||: And this is true, when 'tis committed against an Ecclesiastical Person, as by striking a Clergyman, and the like. *Secondly*, By an Excommunication to be pronounc'd. viz. when 'tis committed against the Estate and Goods of the Church *. And sometimes a Pecuniary Punishment or Fine is inflicted for Sacrilege committed †. And sometimes the Person was condemn'd to perpetual Infamy, and committed to Prison, or sentenc'd to a Banishment of perpetual Deportation ‡, by the *Civilians* called *Relegation*. And, *lastly*, if any one arrested or struck a Priest, or any Clerk in the lower Degrees of Orders, he was liable to a Canonical Pennance, and if he was Contumacious, he was coerced with an Excommunication. And in all Cases he was deny'd Church-Burial ||, unless in the Time of his Sicknes he receiv'd Pennance and Absolution from the Parish-Priest.

But, according to the *Civil-Law*, the Punishment of Sacrilege is more severe than by the Canons of the Church. For as the Punishment of Sacrilege among the *Greeks* was heretofore very grievous, as Burning, Drowning, and being thrown Headlong from some Precipice; so, by the *Roman Law*, a sacrilegious Person was condemn'd to fight for his Life

* D. 48. 13. 6. with Beasts, as Bears, Leopards, Lyons, &c. * And sometimes he was condemn'd to be burnt alive, sometimes to be hang'd on a Gibbet, sometimes he was condemn'd to the Mines; sometimes banish'd to an Island (in that Law called *Deportation*) and sometimes beheaded. But then this was only committed, when any Thing of a sacred Nature was stolen from a sacred Place, and not as by the *Canon-Law*, which makes it Sacrilege to steal any Thing from a private Man, if it be deposited in a sacred Place, on the Account of some Injury done to the Place as well as to the Thing: For, by the *Civil-Law*, if a Thing of a private Nature be deposited in a Church, and stolen from thence, an Action of Theft, and not of Sacrilege, lies against the Robber †. But then the *Canon-Law* makes Use of great Moderation in this Particular, when it is not committed against the Person of a Clerk by laying violent Hands on him, but only against the Goods of a private Man, or the like, decreeing, That such sacrilegious Persons must receive three Admonitions before their Excommunication ‡. So that from what has been said it appears, that the Clergy in former Times were more careful of their own Persons than they were of the Goods and Furniture of the Church. But tho' among the Heathens some Offences of this Nature were punish'd with Death, and the Offenders were not allow'd the common Humanity of Burial, and all their Goods confiscated: Yet it was not punish'd with Death by the *Canon-Law*, as already observ'd; nor was it so punish'd with us here in *England* anciently. For in King *Alfred's* Reign the Punishment was only Pecuniary; *viz.* The Offender was to restore the Value of the Thing taken, and was likewise to pay the Value of his Head, which was about forty Pounds: But it was an Aggravation of the Fact to commit Sacrilege on a *Sunday*; for in such a Case he was not only to pay the Value of his Head, but his Hand with which he committed the Fact was to be cut off; but this he might redeem at the same Price his Head was valu'd. And many Years afterwards the Punishment was by Excommunication in the Ecclesiastical Court, as being a Crime of a mix'd Nature; of which we have a remarkable Instance in *Henry* the Third's Reign ||, when the King himself standing with his Hand on his Breast, and the whole House of Peers with lighted Torches in their Hands, pronounc'd those Persons excommunicated, who maliciously depriv'd the Church of their Rights, &c. then they threw down their Torches extinguish'd and smoaking, and all of them pronounc'd these Words, *viz.* *So let all those who go against this Church be extinguish'd in Hell.* Our Ancestors were so confident, that a sacrilegious Person could not escape God's Judgment, that they deliver'd him over to Satan, or (as usually said) they curst him with *Bell, Book and Candle*, *viz.* after the Curse was pronounc'd, which was done four times in a Year, they said *Fiat*, and then they shut the Book, put out the Candle, and ringed the Bell. But now if there be no actual Force, and the Goods of the Church are taken from thence, the Churchwardens may in such a Case have an Action at Common Law against the Offender, and shall recover Damages; or else they may libel against them in the Spiritual Court *pro salute Animæ* *, which is the most proper Remedy; and there he may recover the Thing *in Specie*: But if there be Force offer'd, 'tis Burglary to break open the Church and enter it in the Night-time, with an Intent to steal †; because in this respect the Church is in the Construction of the Law the Mansion House of God.

* Siderf. Rep. p. 281.

† Dyer. Rep. p. 99.



Of the Sacrist, Ostiarius, and other Church-Officers.

TH O' no Ecclesiastical Benefice can be given, unless it be in respect of some Duty or other to be done for it; yet every Office in the Church has not an Ecclesiastical Benefice annex'd to it, nor has it a perpetual Cure of Souls going along with it: And, therefore, we distinguish Ecclesiastical Persons in another manner, than (as already remember'd) by the Stile of Bishops, Priests and Deacons, *viz.* in respect to an Ecclesiastical Office *simply* given them. For there is one kind of Office, which is given *Ecclesiasticks* in respect of Things Profane belonging to the Church, another in respect of Things Sacred, and a third in respect of Jurisdiction: *First*, Some may be said to have an Ecclesiastical Office in respect of Things Profane, or (in some Measure) Profane: And in this Sense, according to the Gloss *, the Keeper of the Gates, called *Ostiarius* by * In l. 6. C. 12. 1. the *Canonists*, the Keeper of the Meadows, the Steward or Treasurer of the Church, called *Oeconomus*, and the *Sacrist*, &c. may be said to have Ecclesiastical Offices. These Offices are known and distinguish'd from Church Benefices *ex Habitu administrationis*, *viz.* when any Persons have the Management and Administration of them without having the Honour and Prerogative of gaining any Stall in the Choir, or Voice in the Chapter, beyond others of their own Rank or Order. And 'tis the same Thing according to the Archdeacon ‡, if a Person has that un- ‡ Inc. l. x. l. 4. to which a Trust or Charge is annex'd without any Prerogative of Honour.

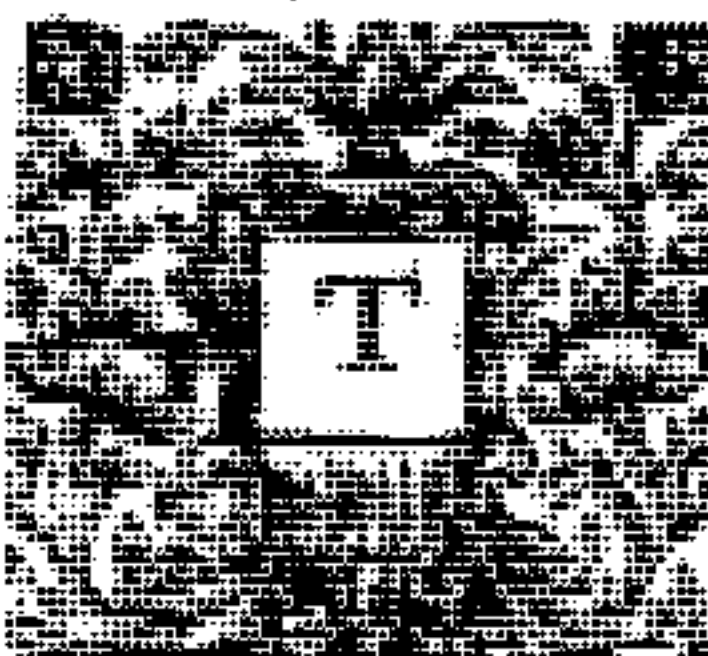
Now the *Sacrist* is said to be him unto whom the Archdeacon has committed the Care and Custody of the Sacred Vessels, the Ecclesiastical Vestments, Books, and the like, which are the Treasure of the Church ||; || X. l. 23. 3. and sometimes he has the Custody of such Things as are necessary towards the Lights of the Church, as Oyl, Wax, &c. according to a Decree of the Council of *Toledo* *: And he is so called from the Sacred * X. l. 26. l. Things which he has the keeping of; as the Place where such Things are kept is in *Latin* called *Sacrarium*, or with us the *Vestry*, tho' it be (*Ulpian* says †) a private Place. Sometimes this Place is in our Books called the *Treasury*, and the Person executing the Office is in *Latin* † In l. 9. D. 1. 8. term'd *Præfectus Thesaurarius* ‡. The *Sacrist* had a Minister or Servant ‡ 25. Dist. 1. under him, called *Custos Ecclesie*, whose Office it was to ring the Bells at Canonical Hours, to look after the Church-Furniture, and to take Care of the holy Fire that it does not go out, &c. There are three of these Churchmen in the Cathedral of *Winchester*; and they are something like unto Parish-Sextons.

As to the *Ostiarius* or Door-keeper, the *Jews* had in ancient Times several Persons in their Temples and Synagogues, whom we in *Latin* stile *Ostiares* or *Fanitores*, and in *English* Door-keepers or Porters; who were chosen in a particular manner to wait at the Gate or Entrance of the Tabernacle, and were set over the Chambers and Treasuries of the House of God; as we may read in the first Book of the *Chronicles* ||: And, according to *David's* Opinion, these Men ought to be || Cap. 9. v. 26.

Chron. cap. 22. be of the sacred Order. Wherefore, the *Romish* Church, which apes and follows the *Jewish* Synagogue (as near as possible) in all their Discipline and Ceremonies, will have their *Door-keeper* to be in Clerical Orders, tho' his Business and Duty in that Church as an Ecclesiastical Minister, is nothing else but to open and shut the inward and outward Doors, and to keep the Keys thereof; and likewise to admit Believers, and to keep out Unbelievers and excommunicated Persons from coming into the Church †: And the Symbol or Badge of the Order granted him is the Delivery of the Church-Keys made him by the Bishop ‡. It is also the Business of these Men, according to the Law and Discipline of that Church, to keep such Persons out of the Church during the whole Service-time, as are enjoin'd the Performance of publick Penance. Those Persons, who execute something the like Office and Duty in our Church, are in *English* stiled *Parish-Clerks*, and in *Latin* by the Name of *Ostiarii*, as may be seen in the *Latin* Version of King *James's* Canons ||.

† 25. Dist. 1.
‡ 23. Dist. 19.
|| 50. Dist. 64.
|| Can. 91.

Of Schism and Schismatics, &c.

HE Word *Schism*, which is deriv'd from the *Greek* Verb Σχιζω, denotes a Rent or Division in the Church; and, according to *Goffredus*, is a Recess or Departure from the Communion of the Church, either in Part or in the Whole: But because this Definition may as well serve Heresy or Apostacy as Schism, properly so called, I shall here define it in other Terms to be an *unlawful Dissent or Separation of Christians from the Unity and Communion of the National Church, occasion'd by their Disobedience to the Government and Discipline thereof*. And it differs in Principles and Fundamentals from Heresy; for Heresy carries along with it a perverse Opinion or *Dogma* in Point of Principle or Religious Fundamentals, which Schism does not *. But if *Schism* be permanent and lasting, it comes at length to be stiled *Heresy*, according to the *Canon-Law*; because a *Schismatick*, by persisting in his *Schism* (say the *Canonists*) supposes and believes, that he has made this Departure from the Church upon a right and solid Foundation of Truth, and is therefore by that Law deem'd a *Heretick* †. By the Laws of *England* a *Schismatick* is one that, divides and separates himself from the Establish'd Church of the Realm, not on Fundamentals of Faith, but on some Points of Religion relating to Church Discipline and external Worship: And thus Schism with us may be couched under the Definition above-given. In Unity there can be no Rent or Schism; and, therefore, (says the *Canon-Law* ‡) that such as communicate with Schismatics, do not communicate with the Unity of the Church. Unity, no doubt, is a divine Thing; and it is much to be wish'd, that all who call themselves Christians, were of one Mind and one Faith in Point of Religion: But if Persons contend more for Uniformity of Discipline in the Church, than for Unity of Faith among Christians, we can expect no good Effects from all our boasted Pretensions to Christianity it self. Peace, Love, and bearing with each others mistaken Notions

* 24. Q. 3. 26.
† 24. Q. 3. 26.
‡ 24. Q. 1. 34.

Notions about hidden Points of Religion, with Hopes of convincing the Erroneous by gentle Means, may (perhaps) by the Grace of God, produce Unity of Faith amongst us, which the Gallics and the Inquisition-Court can never effect.

If a Bishop, on the Examination of a Clerk presented to an Ecclesiastical Living, finds him to be an inveterate Schismatick, he cannot by the Laws of the Church admit him to such Living or Benefice * : But then the Bishop ought to shew, wherein he is a Schismatick, otherwise a *Quare Impedit* will lye against the Bishop as a Disturber of the Patron's Right of Presentation. In *Fitzherbert's* Abridgment we read, that the Earl of *Arundel* brought a *Quare Impedit* against a Bishop; and the Bishop shew'd the Earl's Presentee to be guilty of Perjury on several Accounts, for which Reason he was not capable of an Ecclesiastical Benefice, and so it ought to be in the Case of Schism. And *Dyer* in his Report says, that the Bishop ought to set down the Disability of the Clerk, and give Notice thereof to the Patron. In the ninth of Queen *Elizabeth*, a Bishop refus'd a Clerk, because he was a Haunter of Taverns and unlawful Games, &c. and for these and divers other Reasons he was held to be a criminous Person, and unfit to be admitted to a Living: And there the Plea was thought not good; because the Faults alledg'd were not evil in their own Nature, but only by a Prohibition of Law; and the Plea was also look'd upon as naught, because he did not shew what the other Faults were. And the Reason why the Ordinary ought to alledge in special or certain, what Faults the Presentee is guilty of, is, that the Patron may upon Knowledge thereof present another Clerk to the Ordinary; that is not stained with the like Faults: And how can the Patron tell that his Clerk is disabled for such a Fault, unless he certainly knows what the Fault is that he is charged with? On the contrary 'twas first said, That when a Clerk is presented to the Bishop, the Examination of him entirely belongs to the Bishop, as 'tis express'd in the Statute *de Articulis Cleri* * : And because the Cure of the Parson is the Cure of the Ordinary †, the Bishop need not shew, wherein he is a Schismatick; and the only Reason the Book-Case above quoted gives, why it ought to appear before what Judge and wherein a Man is perjur'd, is, because if it be not before some Judge, it is not Perjury in the Eye of the Law: But the Court said, that in the above-mentioned Case it was likewise shewn, wherein he was guilty of Perjury; and so in this Case it ought to appear, wherein a Person is guilty of Schism. But it was *Walsh's* Opinion in the Case of the twelfth of *Elizabeth*, That such Things as concern the Manners and Behaviour of a Clerk shall be try'd by the Temporal Court; but the Ordinary shall have the Cognizance of such Matters, as respect the Learning and Sufficiency of such a Person.

* X. 5. 8. 7.

* 9. E. 2. c. 13.

† 36. H. 6.

Schisms and Divisions were very ancient in the Christian Church, as we learn from St *Paul's* first Epistle to the *Corinthians*, from the tenth to the thirteenth Verse of the first Chapter: But then these Divisions were more about Faith than about Ceremonies; for as yet there was no settled Form of Discipline in the Church, but only this general Canon prescribed by the Apostle †, viz. *Let all Things be done decently and in Order*. But the Papal Canon-Law reckons Schism next of Kin unto Heresy itself; saying, There is no Schism which does not form unto itself some Heresy or other. And then it reckons up several Kinds of Schismaticks. *First*, In a large Sense of the Word. *Secondly*, In a more confin'd Sense thereof. And, *Thirdly*, in a strict Sense of it. In a large Sense all criminous Persons are deem'd Schismaticks ‡. In a more con-

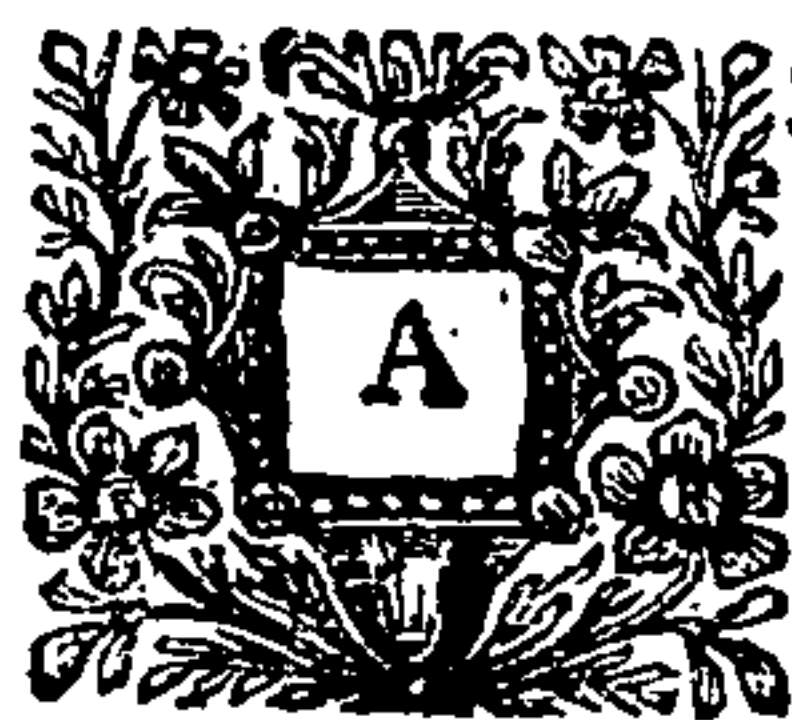
† 1. Cor. cap. 14. v. 40.

‡ 1. Q. 1. 112

- * 24. Q. 3. 8. fin'd Sense all excommunicated Persons are adjudg'd Schismaticks *, tho' some of these commit no Sin by remaining under an Excommunication. But in a strict Sense only those are called Schismaticks, who divide themselves from the Unity of the Church. *First*, By making Constitutions peculiar to themselves. *Secondly*, By ordaining their own Bishops and Presbyters: And, *Thirdly*, those are said to be Schismaticks in this Sense, who, in Contempt of the Ecclesiastical Constitutions, do make Combinations and Conspiracies against the Bishops and Prelates of the Church †;

Of Seals Authentick, and the Evidence thereof.

* Vid p. 444.



S I have already, under a former Title *, observ'd, that Proof is sometimes made by Letters under the Episcopal Seal, which is in Law stiled an *Authentick Seal*, I shall here say something of *Authentick Seals*, and the Evidence they give to an Act in Law. For 'tis a known Truth among us, that a Seal makes no Proof at all, unless it be an *Authentick Seal* †: And as a Prince's Seal is called an *Authentick Seal* ‡; so in the like manner is the Seal of a Bishop, or Dean and Chapter ||, and the like. According to the Notion of some Persons, such Seals as have no Impression of Writing upon them, do not obtain the Force of *Authentick Seals*; because they are then by this Means liable to Suspicion, as they may be more easily counterfeited or imitated: Moreover, that in these Impressions *Forma dat esse rei*. Tho' I am, in this respect of the Authentickness of such Seals, of a contrary Opinion, and think, that the Law rather refers itself to the Effect than to the Form. But we ought to give Credit to a Seal against the Person signing with it, if such Seal be not deny'd, tho' it be but the Seal of a private Person *: And this is true, unless there be some Statute or Custom to the contrary. For the subsignation or putting a Man's Mark or Signet, which is also called his Seal, is such an Evidence in Law against him, that he cannot elude the same, if he will acknowledge, that he sign'd and made this Impression under such a Writing; and thus this Impression of his Seal confirms the Authority of such Writing. And from hence we take Occasion to say, that there are two kind of Seals; the one called a *publick*, and the other a *private* Seal. I shall here first speak of a publick Seal, which is that which Princes, Magistrates, Judges, Actuaries, and the like, do use in all Publick Acts, and in Matters of Judicial Proceeding. And, *Secondly*, something in brief of a Private Seal. And,

Therefore, *First*, in respect of a Publick Seal, which is likewise called an *Authentick Seal*, 'tis a confirm'd Rule in Law, That full Credit ought to be given to such Letters of a Judge as are strengthened with his usual or common Seal of a Judge †, if he does by any Letters attest the Truth of such Things as do belong to his Office, and depend on his own Judgment and Discretion: And thus a Sentence of Excommunication ought to be strengthened and corroborated by the Judge's *Authentick*

† X. 2. 22. 2.

‡ X. 2. 22. 9.

|| X. 2. 19. 3.

* 1. Q. 7. 21.

† X. 2. 19. 7.

tick Seal *. But if a Subscription of Witnesses be also added to such Letters, then it generally makes a just and full Proof of the Matters therein contain'd, against all Opposition†. And the Truth or Falshood of Privileges ought likewise to appear from the *Authentick Seals* of such Persons as granted the same ‡. As for Instance, when the University of *Oxford* would plead any Privilege, such Privilege ought to appear not only by the Seal of the University, but also under the Seal of the Prince that granted it.

* Innoc. 1. vi. 5.

† X. 2. 22.

‡ X. 2. 22.

The Seal of every Bishop, Prelate of a Collegiate Church, and of every Person exercising Ordinary Jurisdiction, either by Law or Custom, is an *Authentick Seal* *: But if a Bishop just elected, confirm'd or consecrated has not yet furnish'd himself with an Authentick Seal, he may in some Cases put his own private Signet or Coat-Armour to such Letters as are of *voluntary* Jurisdiction, provided the same be sufficiently known; because he may seal them with another's Seal if the same be known †. But in Matters of *Contentious* Jurisdiction, a Bishop's private Seal or Signet bearing his own Coat-Armour gives no Credit at all to an Instrument, or any other Matter; but he ought to put that Seal thereunto, which he generally uses in the Dispatch of all Church-Affairs, commonly called *the Seal of his Office*; and which is an *Authentick Seal* ‡. But 'tis to be noted, that when a Seal is put to give Authority to a Writing *principally* and not *secondarily*, then such Seal ought to be *Authentick*; but 'tis otherwise, if it be not *principally* put, but only *secondarily*.

* 11. Q. 3. 22. Dd. ibi.

† C. 6. 3. 12. Dd. ibi.

‡ Bern. in c. 2. X. 2. 22. v. *Sigillum Authentici*.

By a Provincial Constitution in *Lindwood* 'tis enacted ||, That no Dean of a Cathedral or Collegiate Church, or any Rural Dean, Archdeacon, or his or the Bishop's Official should set their Seal to any Proxy, unless the same be publickly requested in Court, or else before the Judge that has Cognizance of the Cause, by the Person that constitutes a Proctor; or else *Extrajudicially*, when the Person constituting such Proctor does in his own proper Person duly request the same. And if any Dean, Archdeacon, Official, &c. shall *ex certâ malitiâ* (for this Constitution was made to prevent Fraud and Deceit, as practis'd in those Times) act contrary hereunto, he shall *ipso facto* be suspended *ab Officio & Beneficio* for three Years: And, besides, if either of these Persons shall be convicted hereof, he shall be oblig'd to make Satisfaction and Amends to the Party injur'd. But as Deans and such Persons are now seldom apply'd to for their Seals, this Constitution seems to be grown obsolete, tho' still in Force. And likewise a Person that sets his Seal to any Certificate or other Act, knowing the Person that desires the same to have no concern in the Cause, and that he does this out of a fraudulent Purpose and Design, is guilty of Fraud and Malice; and shall be punish'd accordingly. To the end that a Seal may be called an *Authentick Seal*, it ought to have an Orbit and some Impression thereon to hinder Suspicion of Forgery *. And, therefore, it was enjoin'd by a *Legatine* Constitution in *Lindwood* †, That all Archbishops, Bishops, and their Officials; and all Abbots, Principal Priors, Deans, Archdeacons, and their Officials; and likewise all Chapters of Cathedral Churches; and other Colleges and Convents (which were all of them to have their *Authentick Seals*) should each of them respectively have the Name of his Dignity, Office or College engraven thereon in manifest Characters; and likewise the proper Name of such Persons as enjoy any perpetual Office or Dignity.

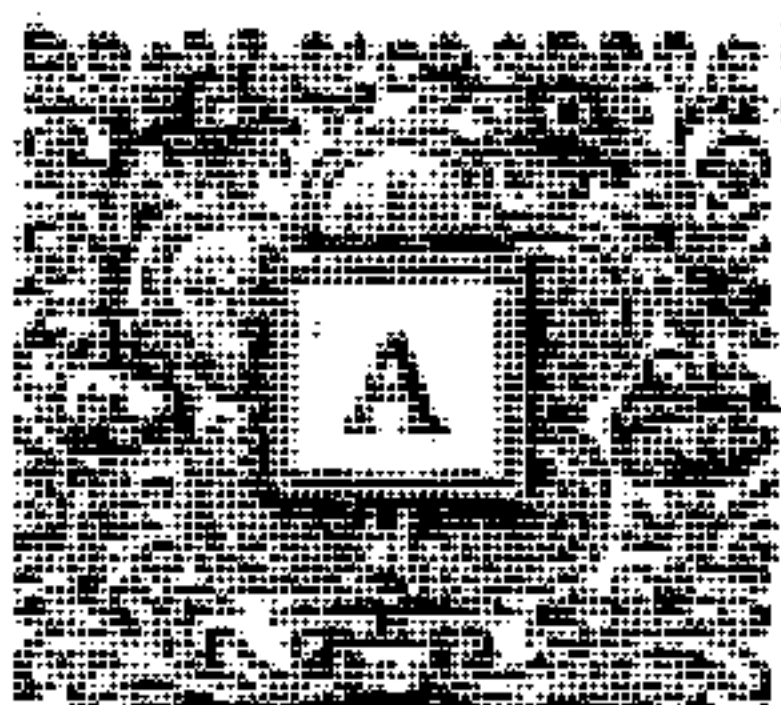
|| Lib. 1. Tit. 12. c. 1.

* D. 28. 1. 22. 5. Pen. 2. Dist. 65. v. *Quidam le-*

† Otho. Tit. 27.



Of Seats and Monuments in Churches.



* Hetley's
Rep.

† 3. H. 7. 12.
9. E. 4. 14.

‡ Vid. Hall's
Case.

There are several Controversies at Law, which happens about Seats and Monuments in Churches, I will here consider these Particulars, as they are of Ecclesiastical Cognizance, and do relate to the Spiritual Court: For in the Case of *Eaton* against *Ayliffe* it was said by *Hutton* *, That Seats in the Generality are in the Power of the Ordinary to dispose; and, consequently, all Disputes touching them do belong to the Church †: For tho', by the Common Law, the Church and Church-yard are (it seems) the Soil and Freehold of the Parson, yet the use of the Body of the Church is common to all the Parishioners: And tho' the Seats are fix'd to the Freehold, yet the Church it self is dedicated to God's Service; and the Seats are built there that the People may with more Convenience attend Divine Service. Therefore, the Law has thought fit to confer this Power of disposing of Seats generally on the Ordinary; and likewise intrusted him with the Cognizance of this Matter, whenever any Contention shall arise upon a Complaint made to him about a Seat in the Body of the Church: Because he, who has the general Cure of Souls within his Diocese, is presum'd to have a due Regard to the Qualities of the Contending Parties; and by a decisive Judgment to give Precedence to him, who ought to have it ‡. But where there is no Contention, and the Ordinary does not interpose, because there is no Complaint made to him: There (I say) in such a Case the Parson and Church-wardens have Power to place the Parishioners in Seats; and in some Places the Church-wardens alone have this Power by Custom, as in *London*.

Brabin, in order to have a Prohibition, surmiz'd, That in the Parish of *D.* a Custom was and is, that the Parishioners have Time out of Mind been used to chuse every Year Church-wardens, which have and are to repair the Seats of the Church, and to make new ones there as often as convenient; and also that these Church-wardens for the Time being with the Assent of twelve of the Parishioners may place and displace any of the Parishioners in their Seats at their Discretion, according to their Degrees and Qualities; and that they may erect a new Seat; and did with the Assent of twelve Parishioners place him the said *Brabin* there: And that the Bishop of *H.* made a Decree, whereby he remov'd *Brabin* from his said Seat, and gave the same to *Trediman* and his Heirs for ever; and likewise decreed, that if *Brabin* or any other should disturb *Trediman*, he should *eo ipso* be excommunicated. *Brabin* did disturb *Trediman*; and thereupon the Parson pronounced the Excommunication. *Brabin* appeal'd to the *Arches*, and after that to the Court of *Delegates*, where the first Sentence was affirm'd: And then he pray'd a Prohibition, and had it. *First*, Because the said Custom was and is Reasonable. *Secondly*, Because the Decree was, That *Trediman* should have the Seat to him and his Heirs, and that it was not so long as he or they should dwell in the said Parish, and that hereby if

he

he resides at *York*, he ought to have this Seat in *D.* Justice *Houghton* said; That if there had not been an immemorial Custom alledg'd for the Church-wardens to repair and make new Seats, no Prohibition could have been granted; for ancient Custom *ne potest vaer* as to new Seats. And 'twas mov'd, that because *Brabin* had appeal'd to the *Arches* on the first *Instance*, he came now too late to have a Prohibition: But the Plea was not allow'd*. For a Cause was cited between Dame *Layton* and *Hussey* the Term before, wherein a Prohibition was granted, notwithstanding the Appeal. *Rolls Rep. p. 24.

Again in a Prohibition the Case was this: The Defendant libelled in the Consistory Court of *London* for a Seat in the Church; and Sentence there passing against him, he appeal'd to the *Arches*. A Prohibition was pray'd, because the Title to the Pew or Seat was grounded on a Prescription: The Court answer'd, That as to the Title they were not to meddle with it, this being for a Seat in the Church. For (said *Houghton*) this Disposition of Pews in the Church belongs to the Order and Discretion of the Ordinary†; and to this Purpose is Sir *William Hall's* Case against *Ellis*. And tho' Justice *Dodderidge* was of Opinion, That an Action of Trespass would lye for a Disturbance therein, as in the Case of a Grave-stone and Coat-Armour; for taking down of which an Action of Trespass lies at the Common Law; yet the rest of the Judges did all of them say, That they would not meddle with the deciding of such Controversies about Seats in the Church, but would leave the same to whom it did more properly belong‡. And thus the Ecclesiastical Court has Jurisdiction and Power to dispose of Pews and Seats in the Body of the Church, notwithstanding the Church is the Parson's Freehold; if there be no Custom to the contrary. † S. H. 7. 3. § Bolstr. Rep. pt. 2d. May. v. Gilbert.

But if an Inhabitant and his Ancestors have used Time out of Mind to repair an Isle in the Church proper and peculiar to his House, and has been wont to sit there with his Domesticks, in order to hear Divine Service, and been likewise accustomed to bury therein, this makes this Isle so peculiar to himself and his Household, that he cannot be displac'd by the Ordinary himself†, much less can he be interrupted by the Parson or Church-wardens: But the constant sitting and burying there, without using to repair it, does not give him any peculiar Property or Preheminence therein. And if the Isle has been usually repair'd at the Charge of all the Parish in common, the Ordinary may then from Time to Time appoint whom he pleases to sit there, notwithstanding any Usage to the contrary. But in all Cases where the Ordinary grants a Faculty either for building new Seats, or disposing of the old ones, he ought to issue ought an Intimation or Notice to be given to the Parishioner, that none be thereby injur'd or molested in their ancient Right: For the Ordinary cannot remove Parishioners from their Seats, which they and their Ancestors have enjoy'd Time immemorial, or beyond a forty Years Prescription. When Seats in the Body of the Church are to be dispos'd of by the Parson or Church-wardens, it was formerly held that a Man could not prescribe for a Seat there*: But now the Law is settled as to this Matter, viz. That one Man may prescribe for a Seat in the Body of the Church; setting forth, that he is so seiz'd of an ancient House, &c. and he and all those whose Estate he hath therein, have, Time out of Mind, or for forty Years (at least) last past, used and had a Seat in the Church for themselves and their Families, as belonging to the said House, and that they repair'd the said Seat†. And the Reason why he must alledge that he repair'd it, is, because the Freehold being in the Parson, there must be * Noy. Rep. p. 78. Larch. Rep. p. 116. Palm. Rep. p. 424. † Cokes 12. Rep. fol. 105. Noy. Rep. 129. 130

* 1. Levinz.
Rep. p. 72.

† Crok. 2. Rep.
p. 604. Palm.
Rep. p. 46.

‡ Noy Rep.
p. 109.

|| Noy Rep.
p. 133.
* 3d Inst. p.
202. 9. Edw.
4. 14. a.

† 9. E. 4. 14. a.

some special Cause shewn for such a Prescription: But as to this Matter the Court distinguished between an Action on the Case brought against a Disturber, and a Suggestion for a Prohibition *. For in the first Case you need not alledge that you repair the Seat, because the Action is against a Wrong-doer: But, upon a Suggestion for a Prohibition it must be alledg'd that you repair it, because otherwise you shall not divest the Ordinary of that Right which properly belongs to him †.

If a Seat is built in the Body of the Church, without the Bishop's Consent, the Church-wardens may pull it down, because it was set up by a private Person, without the Licence of the Ordinary: But it was held (says Noy) that if in removing such Seat, they cut or break the Timber, an Action of Trespass lies against them ‡. This, like many other Cases reported by Noy, is not Law: For the Freehold of the Church being in the Parson, when the Person has fix'd a Seat to it, it then becomes Parcel of the Freehold; and, consequently, the Right is in him; so that the breaking the Timber could not be Prejudicial to the other, as having no legal Right to the Materials after they were fixed to the Freehold.

As to the Chancel the Ordinary has no Authority to place any one there; for that is the Rector's Freehold, and so is the Church: But as he repairs the one, and not the other, he shall have the Chancel to himself in a peculiar manner. And 'tis for this Reason, that an Impropriator has the chief Seat in the Chancel. Yet a Man cannot prescribe to have a Seat here, as belonging to an ancient Messuage ||.

As to *Monuments* in Churches, Coke tells us *, That 'tis the last Work of Charity which we can do to the Deceased, to build a Monument for him: And as 'tis subservient to several good Purposes, viz. to prove his Pedigree, to shew when and where he was bury'd, and to put us in Mind of Mortality, it is therefore called a *Monument*; because *Monet nos quod sumus Mortales*, &c, says the *Etymologist*. And tho' the Freehold of the Church or Churchyard where a Tomb or Monument is erected be in the Parson, yet those who build it, or their Executors, may have an Action on the Case against those who deface it †; or may sue in the Spiritual Court in *Causa violationis Sepulcri*. The Lady *Wyche* brought this Action against a Parson for taking down a Coat-Armour of her Husband in the Chapel where he was bury'd: And Judgment was given against the Parson, tho' he call'd it an Oblation, which it could not be, because not design'd by the Giver as such.



Of Sentences Diffinitive and Interlocutory.



* Abb. in Rub.
x. 2. 27.

† D. 8. 5. 63.

Sentence is a *Judicial* Declaration, which puts an end to a Suit or Controversy, according to the Nature, Quality and Appearance of the Thing indispute: Containing either a Condemnation or an Absolution of one of the Parties *Litigant* *. And 'tis called a Sentence a *Sentiendo*, because the Judge, on Examination of the Cause declares and pronounces, according to his Sentiments of the Matter in Suit or Controversy †. But this Definition agrees only with a *Diffinitive* Sentence

tence; as that puts an end to the Suit or Controversy. But an *Interlocutory* is describ'd after another manner, it being a Sentence or Declaration of the Judge pronounc'd betwixt the Beginning and End of a Cause touching some Incident or emergent Matter in the Proceeding; ‡: every Word and Decree of the Judge, that has a Relation to the Cause, being stiled an *Interlocutory*, according to *Baldus* ||.

‡ Gloss. in c. 1. Cl. 2. 6. v. Diffinitiva. || In l. 9. D. 2.

And herein, *First*, a Diffinitive Sentence differs from an *Interlocutory*, and is herein known; viz. For that the principal Matter in Question, and which is *principally* deduc'd in Judgment, is determin'd by a Diffinitive Sentence: And this either by Condemnation or Absolution *, as afore said. But an *Interlocutory* does not concern the principal Matter, but only determines some Exception or other, which arises in the Proceedings; and by this an End is not put to the *principal* Matter in Controversy †: For 'tis not called a Sentence without a final Condemnation or Absolution contain'd therein, or else without some Words Equivalent thereunto ‡. *Secondly*, It differs from an *Interlocutory*, because a Person condemn'd by a *diffinitive* Sentence, on the Account of any Crime is thereby render'd *infamous* not only by a Constitution in the Kingdom of *Sicily*, but also by the *Civil-Law* ||: But a Man so condemn'd is not thus affected by an *Interlocutory* *. *Thirdly*, It differs from an *Interlocutory*; because a Person condemn'd by a *diffinitive* Sentence may appeal from such Sentence, and the Appeal alone without the Inhibition of the Superiour Judge suspends the Force and Execution of such Sentence: But, according to the *Civil-Law*, it cannot be appeal'd from an *Interlocutory* †; unless the Grievance be of such a Nature that it cannot be redress'd by a *diffinitive* Sentence: And if it be appeal'd, the Execution of it is not suspended without an Inhibition ‡. *Fourthly*, It differs from an *Interlocutory*, because, by the Word *Sentence* simply used in a Statute or other Matter of Law, a diffinitive Sentence is always intended, and not an *Interlocutory* ||. *Fifthly*, It differs from an *Interlocutory*, because a *diffinitive* Sentence cannot be revers'd, after the Judge has pronounc'd the same, the Judge having hereby finish'd his Office *: But an *Interlocutory* may be revers'd at any time by the same Judge before a *diffinitive* Sentence be pronounc'd †: And in respect thereof it never passes in *Rem Judicatum*, the Judge having not as yet thereby discharg'd himself of his Office; because the Judge who has pronounc'd an unjust *Interlocutory* (as by not admitting what ought to be admitted, or by admitting what ought not to be admitted, &c.) may even at the Foot of a diffinitive Sentence consider thereof, and revoke the same by correcting what he has done amiss ‡. *Sixthly*, It differs from an *Interlocutory*, because a diffinitive Sentence may in the Cause of an Appeal be justify'd from the same, and from new Acts: But an *Interlocutory* cannot be revis'd from any other than the first Acts ||. *Seventhly*, It differs from an *Interlocutory*, because a diffinitive Sentence cannot be pronounc'd unless the Party be cited: But an *Interlocutory* may be pronounc'd without citing the Party; and the same shall be valid *. But then this ought only to be so understood, when an *Interlocutory* is of a light Importance and Consideration. But 'tis otherwise, if it be of any great Consequence to the Person; because then it is not valid without a Citation or Monition †. *Eighthly*, It differs from an *Interlocutory*, because a *diffinitive* Sentence is not valid, unless it be pronounc'd and given in Writing ‡: But this is otherwise of an *Interlocutory*, which may be pronounc'd without Writing, tho' it ought afterwards to be reduc'd into Writing, that it may appear from the Acts of Court †.

* C. 7. 45. 54 D. 42. 1. 11

† Angel. Conf. 114 & 115.

‡ Alex. in Rub. D. 42. 1.

|| D. 3. 2. 1. 4. D. 48. 1. 7.

* Alex. in l. 63. D. 42. 1.

† D. 49. 5. 2.

‡ VI. 2. 15 3.

|| Alex. in Rub. D. 42. 1. & in l. 14. D.

42. 1.

* D. 42. 1. 15

† D. 42. 1. 14

& ibi. Bart.

Alex. & Dd.

‡ Dec. Cent. 83.

|| Cl. 2. 12. 5

& ibi. Card.

& Bart. in l.

3. D. 49. 5.

* Gloss. in l. 9. D. 1. 10. 1.

† Bart. Pd. in l. 10. D.

39. 1.

‡ C. 7. 44. 5

|| Gloss. in c. 11. x. 2. 19.

Now

Now touching a *diffinitive* Sentence, three Things are requisite, *viz.* *First*, That it be made in Writing. *Secondly*, That it be recited or read *vivâ voce*. And, *Thirdly*, That it be pronounc'd by the Judge sitting on the Bench or Tribunal. I have said, That a *diffinitive* Sentence ought to be pronounc'd in Writing; but an *Interlocutory* may be pronounc'd *Ore tenus*, even without Writing, provided it be afterwards reduc'd into Writing by the Notary, and placed among the Acts of Court *. And hence 'tis, that if these opposite and proper Terms. *viz.* *In his scriptis pronunciamus* be not insert'd in a *diffinitive* Sentence, such Sentence is not valid; because these Words are requir'd *pro formâ*: But the ordaining Part of a Sentence may be pronounc'd by equipollant Terms, or such Words as these, *viz.* *Statuo ordino, præcipio*, and the like †. After the same manner if it be said in the Acts, That a Sentence was *data & lata, &c.* yet, unless the Word *lecta* be also there added, it is not valid: But it is sufficient if it be thus express'd, *viz.* *Sententia promulgata*. Bartolus says, that a Sentence may be pronounc'd without Writing by Consent of Parties. For, indeed, 'tis not necessary that any Acts should be in Writing, besides a Libel and a *diffinitive* Sentence, for the rest may be *Ore tenus*: But then they ought afterwards to be reduc'd into Writing by the Notary.

A Sentence is a Matter of *strict Law* ‖, and ought to be taken *properly*, and after a strict manner; that is to say, *simpliciter* and according to the Nature of the Words and the Sound thereof as they lye; and not to receive any Interpretation from the Libel; and no more ought to be inferr'd from thence than the Words do naturally import. So that the Words pronounc'd *ad unum effectum* ought not to operate beyond such Effect; nor ought a Sentence to operate beyond the Mind and Intention of the Judge. An ambiguous or doubtful Sentence may be interpreted by an Ordinary, but not by a delegated Judge *: But tho' an Ordinary Judge may regularly interpret his own Sentence, since he cannot be said to offer any Thing anew by such an Explanation and Confirmation of it, yet he cannot amend or supply any Defect in the same †, a Sentence being a Matter *stricti Juris*, as aforesaid. But according to some, a Sentence receives its Interpretation from the Libel, and Acts of Court; particularly, if they do expressly refer thereunto: And if a Sentence be obscure, it ought be so explain'd and interpreted as to render the same just and valid, if it be possible. For the Words of a Sentence ought to have some Operation, and to be adapted (if possible) to the Form of the Petition or Thing demanded in the Libel; and not to be render'd vain and *ludibrious*, or as a Matter of Sport; or to serve the Pleasure of the Wind, and the capricious Humours of Men. A Sentence, in a doubtful Case, ought always to be interpreted in Favour of the Defendant; and not to injure or prejudice him:

But to render a Sentence valid, it ought to be drawn in Pursuance and Conformity to the Libel ‡; and ought to be pronounc'd with an Invocation of the Name of God ‖: But it is sufficient alone to cite the Person whose Interest is principally concern'd. And where a Sentence is deficient in Point of Form, it is thereby render'd null and void, because Form gives an Essence to the Thing: And if the Process in a Cause be null and void, the Sentence pronounc'd thereon is likewise null and void. A Sentence pronounc'd thro' the Intercession of Money is null and void *ipso Jure* *: And so is a Sentence pronounc'd against a Contumacious Person before the Messenger or Apparitor has made his Certificate on the Return of the Citation. A Presumption always lies for the Justice of a Sentence †; and this is not a Presumption of Law and by

* Gloss. in c.
11. x. 2. 19.

‡ X. 2. 40. 15.

‖ Abb. in c.
15. x. 2. 26.
n. 3.

* D. 42. 1. 15.

† D. 48. 18. 1.
D. 4. 8. 19 &
22.

‡ Gail. lib. 1.
Obf. 66. n. 1.
‖ Abb. in c.
8. x. 2. 14. n.
11.

* Abb. in c.
10. x. 3. 1. n. 7.

† Abb. in c. 7.
x. 2. 27. n. 52.

by Law, but a Presumption of Law only, it being deriv'd from a *Judicial* Authority * : And 'tis said to be a Presumption of Law, because it admits of a legal Proof to the contrary. Nor is a Sentence presum'd to be unjust from hence, *viz.* because 'tis pronounc'd contrary to some Proofs, which are made in the Acts: Because in giving Sentence the Judge does not always apply himself to one *Species* or sort of Proof, for it depends on the Discretion of the Judge how much Faith and Credit he will give to Evidence produc'd. So that if the Judge prefers one sort of Evidence before another, as Proof made by Witnesses before Proof made by Instruments, he may read a just Sentence. When a Sentence appears to have been pronounc'd, all Things are presum'd to have been rightly and solemnly proceeded in †; and 'tis his Duty to prove the contrary, that avers the same. As a Declaratory Sentence is valid in a *Real*; so is it also valid in a *Personal* Action‡, and a Sentence *inter alios* shall not prejudice a third Person.

* Abb. in c. 20. x. 2. 26. n. 32.

† Menoch. Præsump. 68. lib. 2. n. 6. ‡ barrinl. 25. D. 4. 8. r. n. 1.

A Sentence pronounc'd by several Persons is valid in that Point, wherein they have all given their Consent. As for Instance, if one of the Judges or Arbitrators in such a Sentence or Arbitration condemns a Man in Fifteen Pounds, another condemns in Ten Pounds, and a third in Five Pounds: Now in this Case that Sentence or Arbitration is valid and prevails, which condemns him in Five Pounds; they all seeming to agree in Five Pounds: And this Law is grounded on this Maxim, *viz.* *Plus semper in se continet quod est minus.* And 'tis the same if I am by a Sentence acquitted from a Demand made of a whole Estate: For I am hereby acquitted from a Demand made of every Part thereof. 'Tis likewise the same Thing if I am acquitted from an universal Petition or Demand: As for Example, If I am acquitted from a Demand made of an Inheritance, or an Executorship. And an Exception *Rei Judicatae* hinders the Person claiming particular and individual Things, on the same Account; because that *Plus continet in se minus*: But this Rule does not always hold. A Sentence may be pronounc'd in Part for the Plaintiff and in Part for the Defendant upon the Self-same Article or Position in the Libel: And three conformable Sentences are esteem'd and held *pro Re Judicata*.

Now the Difference between a Sentence and what we call *Res Judicata* is this, *viz.* That that is strictly and properly called a Sentence, when the same is appealable, or the Party Sentenc'd has the Power of appealing: But when there is no *Retraëtative* Remedy by an Appeal, it is called *Res Judicata* ||. For that is called *Res Judicata* when an end is put to the Suit or Matter in Controversy either by the Judge's *Condemnatory* or *Absolatory* Sentence without the Prospect of an Appeal. For a Sentence (pending an Appeal) is not properly called *Res Judicata*; but if it be not appealed from such a Sentence, it then takes the Name of *Res Judicata* *: Yet in a large Sense a Sentence may be called *Res Judicata*, tho' it may be appeal'd from. The *Res Judicata* is one Thing, and the *Res Judicans* is another: For the *Res Judicans* is the very Sentence it self, or the Act of pronouncing Sentence; and this puts an end to the Controversy: But the *Res Judicata* is the Cause, which by the Sentence of the Judge receives an end of being controverted any further. And thus the Sentence is the *Res Judicans*; and the Cause is the *Res Judicata*: But sometimes the one is put for the other. And hence it is, that by the *Civil-Law* they are couch'd under different Titles by themselves, which they would not have been, unless they were different Things. A Sentence tacitly includes the Cause express'd in the Petition, and Acts of Court: And a Thing express'd, pre-suppos'd or

|| Abb. in Rubr. x. 2. 27. n. 3.

* Abb. in Rubr. x. 2. 27. n. 1.

necessarily understood, is the same Thing in a Sentence. The Province and Business of a Judge chiefly consists in giving Sentence : And, therefore, when it appears, that he has Jurisdiction both of the Cause and of the Persons *Litigant* from the Condition and Circumstances thereof, having fully instructed himself in the *Judicial* Proceedings ; and the Matter being so dispos'd either by the *Litigants* themselves, or their lawful Proctors, Advocates or Syndicks, and full Proof made of all the Matters before him in Judgment) he ought not to delay the pronouncing or giving of Sentence. If a Judge proceeds to give Sentence against an

* D. 49. 8. 1. absent Person not cited to appear *, unless it be in Matters notorious
3. D. 5. 1. 68. (for Things notorious do not require a Sentence † (at least) a solemn one).

† Abb. inc. 3 or against a Person not convict or not confessing his Crime †, such Sen-
x. 1. 7. n. 7. tence is null and void *ipso Jure* : And a Sentence which is null and
‡ Abb. inc. 10 void *ab initio*, cannot be called a Sentence. A Sentence pronounc'd
x. 1. 2. n. 11. against a Person deceas'd or against a Person under such a grievous

* C. 1. 18. 1. Infirmary *, as he cannot appear to hear the same read, is null and void :
D. 2. 11. 2. 3. But then such Death or Sicknefs of the Person must appear to the Judge

by the Means of a *Judicial* Allegation at the Time of pronouncing Sentence : For if he becomes acquainted with the Party's Death or Sicknefs only as a private Person, this does not hinder his pronouncing Sentence, if he pronounces a *diffinitive* Sentence without citing the Heir or Executor *de novo*. But if the Death of the Party be *Judicially* alledg'd after Publication of the Sentence, in the *Imperial* Chamber, a

|| Gail. lib. 1. Sentence passes against the Heirs or Executors by way of *Interlocutory* ||.
obf. 109. n. 5. If it appears from the Acts of Court, that the Cause wherein the

Judge is mov'd to pronounce Sentence, be false, such Sentence is thereby
* Papient. render'd null and void *. Sometimes the Falshood of the Cause consists
prax. Tit. 20. in some Fact and not in Law ; sometimes it consists in Fact and Law both ; and sometimes in Law only. In the first Case if the Falshood be notorious, then the Sentence is null and void : But if the Falshood be not notorious, then the Sentence is valid. If there be two Causes express'd in a Sentence, the one of which is true, and the other false in Law ; yet the Sentence shall be supported by that which is true, because the Law rather renders Things valid and subsisting than destroys the same. But if one Cause be express'd, and this being false cannot be supported by the other which appears from the Acts, the Sentence is null. A Sentence pronounc'd and given without expressing the Reason or the Cause thereof, is valid and binding.

A Sentence may be proved by Witnesses, tho' they do not depose touching the Causes which mov'd the Judge to pronounce such a Sen-
† X. 2. 27. 16. tence † : Nor are the Witnesses produc'd to prove, that such a Sentence was given, or that it was so declared in the Sentence, oblig'd to depose touching all the Words pronounc'd by the Judge ; but 'tis sufficient if they recite the Effect and Tenor thereof. A Sentence pray'd or moved for on the Principal Matter in Question ought to be certain ; but on Accessorial Matters it may be uncertain. Thus such a general and uncertain Sentence as this in respect of Expences of Suit, which are not the principal Thing in Question, but only an Accessory, may be always pronounc'd in this general and uncertain manner, *viz. Condemnamus I. S. Ricardo Bennet ad expensas, quas fecerit vel probatse fecisse* without

‡ Abb. inc. 5. any previous Taxation thereof ‡ : For such a Sentence is valid, tho' the
x. 2. 14. n. 8. Sum or Quantity of such Expences be not therein declared and set forth, because Expences are only Accessory to the principal Cause. Altho' a

|| Paul. de Sentence pronounc'd by an incompetent Judge be not valid, even tho'
Castr. in l. 1. the Parties should consent thereunto || ; yet a Sentence pronounc'd by a
C. 7. 48. n. 1. Judge

Judge, who may be recus'd by a lawful Exception, is valid, if such an Exception has not been made and propounded, or if such Sentence shall not be oppos'd: And so is a Sentence pronounc'd upon a Matter not prov'd, if it be not appeal'd from. But a Sentence read in favour of a Madman, or the like, appearing in Judgment without a Curator is not valid.

A Sentence pronounc'd on the Depositions of Persons guilty of Perjury may be revoked, tho' it does *ex post facto* appear, that they were guilty of such Perjury: For the Depositions of perjur'd Men ought not to have any Weight or Effect, if it does either before or after Sentence pronounc'd appear, that they were guilty of Perjury: For then the Sentence shall be revok'd, because it appears, that they on whose Depositions the Sentence was founded were guilty of Perjury; and this in the same manner as if the Sentence was pronounc'd thro' the Means of a reprobated Evidence. If a Sentence be pronounc'd on true and false Depositions, *viz.* Because there are two Witnesses that depose the Truth, and two depose that which is false; and the Judge is confounded by these Depositions or makes a mix'd Use of them. I say, in such a Case, that Sentence is valid, which is founded on the Authority of Truth.

A Sentence of Excommunication may be pronounc'd *sub Conditione extensiva*; and not only for an Offence or a *Judicial* Contumacy, but also *pro interesse proximi**: As when a Man will not make Satisfaction to him, unto whom he is bound to do it within such a Time. And to the end that such conditional Sentence of Excommunication may be valid at this Day *mera Culpa debet precedere aut offensa*. A Sentence of Excommunication, Suspension or Interdiction pronounc'd under some Condition is suspended by an Appeal, before the Event of such Condition be fulfilled. As for Example, A Judge pronounces Sentence in this manner, *viz.* unless *Titius* makes Satisfaction within twenty Days after *Michaelmas*, let him know himself suspended, excommunicated or interdicted: Now he, against whom such Sentence is pronounc'd, in the mean time appeals without making any Satisfaction at the Day prefix'd. And the Question being, whether he was excommunicated or not? It was answer'd, That this Appeal prevents and suspends the Force of the Sentence, because it was interpos'd before the Expiration of the aforesaid Term. A Sentence in Favour of an excommunicated Person, whether pronounc'd for him before or after his Excommunication, cannot be demanded to execution, before he has been absolv'd from his Excommunication. And thus an Exception of Excommunication shall be a bar to every Person moving for the execution of a Sentence. For an Exception may be objected to the Plaintiff tolerated in Judgment, and not repuls'd by the Aid of this Exception before a Sentence pronounc'd for him, even at the Time of demanding Sentence to Execution. But then he ought to pray for Absolution before this Sentence be demanded to Execution.

In a criminal Cause a Sentence may be pronounc'd without any Contestation of Suit: But in such a Cause a Sentence cannot be retracted. For by pronouncing the same the Judge has acquitted and discharg'd himself; and so he cannot again resume the same. For whenever a Judge pronounces a Sentence upon the whole Cause or Business before him, his Office ceases as to that Cause or Business: But 'tis otherwise, if it be only on Part thereof; Nor is a Sentence in Civil Causes to be revers'd on Pretence of *Instruments* newly discovered and found out †. But in a Criminal Cause, if new Proofs and Evidences are discovered the Person condemn'd may have Relief by the special Favour of the

* Abbinc. 40.
x. l. 2. c. 9. n. 8.

† Paul. de
Cath. in l. 4.
C. 2. 5. n. 1.

Prince

Prince alone : And this is true as well in an afflictive Punishment of the Body, as in a Punishment that deprives a Man of his Honour, and in all Pecuniary Punishments. Nor shall a Sentence of Divorce be revers'd or retracted ; because the Person, in whose Favour it was pronounc'd, does aver it to be unjust ; yet it does hereby induce a Presumption : And the Reason why such a Sentence ought not to be revers'd, is, because it was pronounc'd upon a Foundation of Reason, and according to the Rules of Law, that is to say, *Legitime & rationabiliter* ; which Words relate not to the Justice of the Sentence it self, but to the Order and Method of the Judicial Proceeding.

It is a good Caution to appeal from a Sentence, not only because it is unjust, but also because of its Nullity : And, in a Cause of Appeal, when a Sentence is pronounc'd *ex noviter deductis*, that is to say, on Matters newly deduc'd, and which were not set forth in the first Instance, such a Sentence ought to be pronounc'd *super Jure deducto principali*, as is neither Confirmatory, nor Infirmatory *. When a second Sentence does expressly confirm the first, the second Sentence ought to be demanded to Execution : But if it be only tacitly confirm'd by the second Sentence, as by a lapse of Instance, or by Reason of some Solemnity omitted, the first Sentence shall be demanded to execution. And if the second Sentence be *expressly* confirmatory of the first, then the second shall be demanded to Execution by the Judge of the Appeal : But if it be only *tacitly* confirmatory of the first Sentence, then the Judge *a Quo* shall demand the first Sentence to Execution. One Judge may by Letters of Request demand another Judge to execute his Sentence for him. Altho' a Sentence be pronounc'd upon divers Articles or Causes ; yet it may be still called one and the same Sentence.

* Abb. inc. 6.
x. 1. 9. n. 6.

When the Judge of an Appeal revokes the Sentence of an inferiour Judge, he is bound to shew the Reason of such his Revocation : But if he confirms the former Sentence by adjudging it *benè judicatum & male appellatum*, it is not necessary so to do. If the Judge of an Appeal will confirm a Sentence in some Parts thereof, and reprobate it in others, he ought to form his Sentence by separating every Head and Part thereof ; saying, *upon such a Head of a Sentence we pronounce it bene judicatum, and upon such a Head male judicatum* : And then there will be as many Sentences as there are different Heads or Parts thereof : But one and the same Head as connected to itself cannot be approv'd of in Part and reprobated in Part, because a Sentence is an individual Thing. A Sentence touching the Desertion of an Appeal is an *Interlocutory* ; and so is every Declaration made by the Judge after a *definitive Sentence* pronounc'd : But an *Interlocutory Sentence* is never meant or intended by the simple Name of *Sentence* without joining the Word *Interlocutory* to it. Altho' an *Interlocutory Sentence* may be revok'd at any Time, even in *Calculo diffinitivæ Sententiæ*, and by the Judge of an Appeal from a *diffinitive Sentence* ; yet an *Interlocutory Sentence* confirm'd by two other *Sentences* cannot be revok'd.

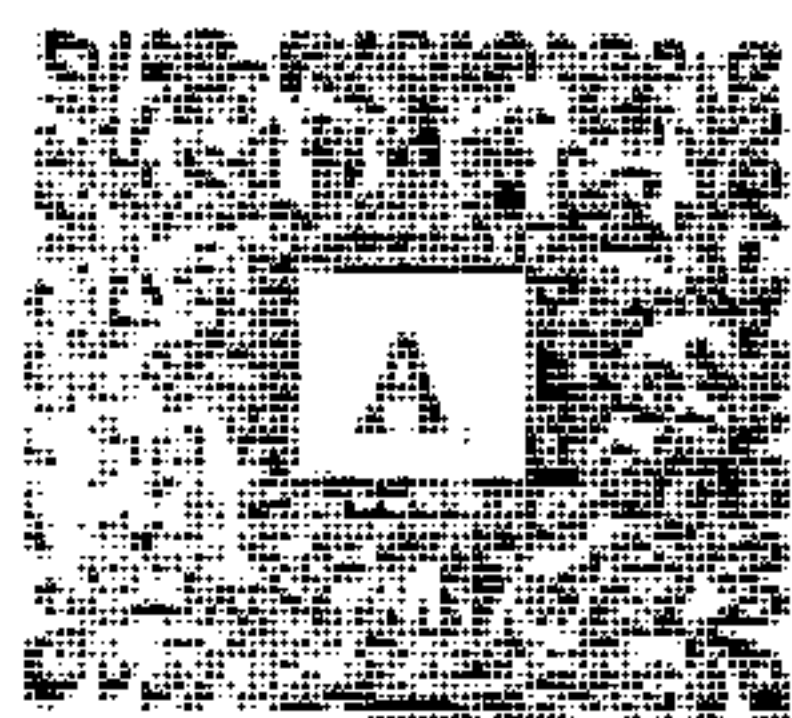
† Bald. in l. 1.
C. 7. 50.
‡ X. 2. 27. 7.

A Sentence never passes in *Rem Judicatam*, whenever there is a *Constat* by an Evidence of Fact touching the Iniquity of such Sentence † : Nor does a Sentence pronounc'd upon a presumptive Proof, or against Matrimony ‡, ever pass in *Rem Judicatam*, nor does a Sentence ever pass in *Rem Judicatam*, that is pronounc'd upon privileg'd Proofs. A Sentence pronounc'd under an intrinsic Condition, and which is coherent to the principal Matter in Question, is valid. As for Instance, *I condemn you unless you pay Twenty Pounds within such Term, or if the Plaintiff proves his Intention.*

tion: Or I *absolve the Defendant, if he shall swear, &c.* Because to pay, to prove, and to swear, do concern the principal Matter in Suit. Yea, a Sentence is also valid that is pronounced under an extrinsick Condition, tho' such Sentence be entirely remote from the principal Business in the Suit, and has nothing common with the Subject Matter thereof. As, *I absolve or condemn you, if such a Ship shall come from Asia*; and such a Sentence shall pass *in Rem Judicatum*, if it be not appeal'd from thence.



Of Sequestration, and the Species thereof.



Sequestration is the Separation of a Thing in Controversy; and, by the way of Pledge, committing it to the Custody of another; and this is done by an Interdiction impos'd on the Possession of the Thing under Sequestration. For whilst such a Suit or Controversy is depending, neither of the Parties claiming the Thing sequestred can have the Possession of it*: But, it being thus committed to Sequestration, it ought (during the Pendency of such Suit or Controversy) to remain *apud Sequestrum*, that is to say, in the Hands and Custody of him unto whom it is thus committed. But 'tis urged, That a Possessor (pending Suit) ought not to be remov'd from his Possession; nor become liable to a Sequestration†; yea, that no one ought to be depriv'd of his Possession, any otherwise than by a Sentence, unless (perchance) it be (as the Lawyers say) *Casualiter*; because all Sequestrations before a Sentence are odious in the Eye of the Law, and are all of them generally prohibited both by the *Civil* and *Canon-Law*‡. And thus a Sequestration permitted *Casualiter* may be caus'd or made, as in the ensuing particular Cases: Wherein I shall first observe, that a Sequestration is Three-fold, *viz. Casual, Necessary* and *Voluntary*.

A *Casual* Sequestration is that which is permitted only in certain Cases immediately ensuing: But *Bartolus* takes no Notice of this *Casual* Sequestration; because it is not founded on any express Law, but only permitted by the Judge in some certain Cases. As, *First*, When 'tis fear'd from probable Suspicion, that the Possessor will waste and dilapidate the Goods (whether they be moveable or immoveable, touching which Goods there is a Suit or Controversy on foot) with the Fruits and Profits thereunto belonging, and from thence produc'd and growing: Because that the Person in Possession is not a Man of Frugality; but a meer Prodigal, Spendthrift, Gamester, and the like||. *Secondly*, When the Possessor is suspected of Flight or Running away. And he is said to be so suspected, when he has no immoveable Goods or Lands in that Jurisdiction where he is cited to appear; or about his House: Or if he has such, yet they are not equal or equivalent to the Goods in Suit and Controversy*. *Thirdly*, When any Suit or Question arises about Utensils and a moveable Estate; and the Person against whom Execution is awarded, does upon an Arrest appeal from such Execution. For in such a Case those Goods, becoming *litigious* or subject to the Suit, may

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be

* D. 1. 5. 4.

† C. 4. 4. 1. unic. & ibi. Gloss. in v. Sequest.

‡ C. 4. 4. 1. unic. 2. x. 2. 17. Gloss. in v. Sequest.

|| X. 2. 17. 2. D. 24. 3. 22. 7. D. 49. 1. 21. in fin. C. 7. 65. 5.

* D. 2. 8. 7. D. 1. 18. 16.

- * C. 7. 65. 5. be put under a Sequestration *. *Fourthly*, If the Husband shall by Gaming, ill Management, or by any other Misfortunes arising thro' his own Default or Neglect come to Want and Poverty ; then, in Favour of his Wife, his Goods and Estate shall be liable to a Sequestration for the Conservation of the Wife's Dowry or Jointure : Provided, sufficient be left for the Husband to live on †. And in the like manner may the Husband's Goods and Estate be sequestred in the Case of his Madnefs. *Fifthly*, When the Possessor is cited into Court ; and he either through Absence, or by hiding himself, contumaciously refuses to appear or put in Bail for his lawful Appearance either by himself or his Proctor : For in this Case his Estate may be sequestred, to compel him to his Duty of Obedience ‡. *Sixthly*, When the Wife deserts and goes away from her Husband by Reason of his insufferable Cruelty to her ; and she, having sufficiently experienced his Cruelty, without any Hopes of better Usage from him, cannot be perswaded by any Means to return to him again, but rather desires a Divorce. I say, in such a Case his Wife shall be sequestred and placed with her Parents or Friends. And this holds good in a more especial manner, when the Husband cannot provide and give sufficient Security for a more gentle Treatment of her ||. After the same manner a Woman, that is betroth'd or affianc'd unto a Man in Marriage, may be sequestred where there is any fear of her being stolen and carried away, or of her being deflower'd, and the like *. *Seventhly*, A Sequestration lies, when the Lord of any Fee or Fief will not acknowledge his Tenant for his Vassal ; or else has a Contest with him about the Fee or Fief it self : For then this Fee shall be subject to a Sequestration. *Eighthly*, A Sequestration lies, when the Party sequestred consents Conditionally thereunto ; as when he says, *If I shall not pay you, or make Satisfaction for the Debt I owe you, by such a Day prefix'd, then my Consent and Will is, that my Estate and Goods be sequestred.* *Ninthly*, When the Bailiff or Steward of a Mannor, or a Farmer, Husband, or other Usufructuaries, desire and endeavour to assume to themselves the very Property of the Farm or Mannor it self ; so that a Suit or Controversy arises on this Account : For in such a Case the Fruits and Profits of such an Estate shall be subject to a Sequestration. *Tenthly*, When Coheirs in Succession, or by way of Inheritance, or in *aliqua domo mortuaria*, cannot settle the Caution and ascertain the Security to be accepted on one side, and to be given on the other, the Goods of the Deceas'd in this Case may be put under a Sequestration. But if a Sequestration be made of Goods which are soon perishable, as Apples, Pears, and the like, or of Goods which cannot well be preserv'd by keeping, the Judge may then order the same to be sold, and decree the Money collected and arising from the Sale thereof to be brought into Court, or sequestred. *Eleventhly*, A Sequestration may be granted, when any Danger of Contention is dreaded between the Parties, *viz.* lest they should fall out and squabble on the Account of such Goods, and proceed to grievous Hatreds and Enmities thereupon ; or should come to Arms and Bloodshed †. For why should a *Prætor* or Judge (says *Julian*) suffer Men to proceed to Arms and Scolding, when he may restrain them by his Jurisdiction. But, according to the Stile and Practice of *France*, the Laws only suffer Sequestrations to be made of such Goods as have no certain Possessor ; and about whose Possession both Parties are at Law, and when both Parties are willing to collect the Profits of them. Nor do the Laws in *Casual Sequestrations* any wise regard the *Extra-judicial* Broils and Squabbings of Parties ‡ : For each Party may feign or counterfeit a Quarrel, &c.

† D. 24. 3. 22.
7. C. 5. 12. 30.

‡ D. 37. 6. 1. 10.

|| X. 2. 13. 13.

* X. 4. 1. 14.

† D. 7. 1. 13. 3.
Spec. Tit. Se-
quest. Verf.
sed nunquid.

‡ D. 7. 1. 13. 3.
D. 7. 1. 35.

Ec. to the end that by such a Figment he may put his Adversary out of Possession, and in a crafty manner deprive him of the Fruits and Emoluments of his Estate. But when one is in Possession, and the other is not, the Judge cannot then sequester that Possession, tho' he should have evident Demonstration, that the Parties would soon fall out and fight on that Account, or come to Arms*. There are several other Cases, wherein a Sequestration has been usually granted: As when the Plaintiff is put into the Possession of the Defendant or Debtor's Estate, to the end that the Debt or Thing in Demand may be preserved and kept in safe Custody; or that the Sum due may be more safe and secure. This is a Case of daily Use and Practice in *Curia Rotwilensi*, which is a Chamber of Justice at *Rotwil*, a small but free Imperial City of *Schwaben* in *Germany*, instituted for that whole Dutchy, where a Sequestration is decreed against a contumacious Debtor, whereby the Plaintiff is secur'd, that his Debtor's Goods shall not be wasted. *D. 7. 1. 13. 13

A Sequestration may be granted in Ecclesiastical Affairs on several Accounts: As, *First*, for Instance, when a *Spo'iation* is brought to try which of the Clerks presented is a right Parson of the Church, 'tis usual for the Judge at the Petition of either of them (setting forth that Opposition may be made in collecting the Profits) to decree that they shall be sequestred †, and to order the Church-wardens to collect them; and this must be publish'd in the Church, and they are to give Bond not only to collect, but to keep the same for the use of him who shall be found to have the Right, and to account to him ‡; and the Judge usually appoints some Minister to supply the Cure in the mean time, and appoints the Sequestrators to allow a certain Reward to that Minister as in a Sequestration on the Voidance of any Benefice. After the Suit is determin'd, the Sequestrators are to deliver the Profits, which they have collected, to him who has the Right; and this they must do either in *Specie*, or else according to the Value thereof, if they are sold: And if they refuse, they may be compelled hereunto by the Ecclesiastical Court; and if they delay to come to an Account, the Judge may assign the Bond to the Party aggriev'd, with a Letter of Attorney to sue for the Penalty. † 11. Q. 1. 50.

Secondly, A Sequestration may be made in the Spiritual Court for not repairing the Church, Chancel or Parsonage-House, as afore remember'd ||; and if the Impropiator or Incumbent shall, upon an Admonition, neglect to do it, then some of the Profits of his Living or Impropiation (as some say) may be sequester'd for that Purpose: But it has been a Question, Whether the Tithes of an Impropiation may be sequester'd towards the Repairs of the Chancel? 'Tis certain they might, whilst they were in the Possession of the Monasteries: But now they being made a Lay-Fee by a particular Act of Parliament, the Spiritual Court has no Jurisdiction (say our Common Lawyers) in that Matter; but the usual Course in such Cases is by Citation; and in case of Contumacy to proceed by Excommunication; and this is allow'd by our Common Lawyers, tho' (I think) the other way is not expressly or tacitly restrain'd by any Statute-Law. ‡ D. 16. 3. 1. 2.
D. 16. 3. 2 & 5.

Thirdly, A Benefice is sometimes sequestred by virtue of some Process out of the Courts at *Westminster*: And this is, where a Judgment is obtain'd against a Clergyman; and upon a *Scire* or *fieri facias* directed to the Sheriff to levy the Debt and Damages, he returns, That the Defendant is *Clericus Beneficiatus non habens laicum Feodum in Belliva mea* *: Whereupon another *Fieri facias* is directed to the Bishop to levy the same *de bonis Ecclesiasticis*; and by Virtue thereof the Tithes shall be sequestred †. But, *Fourthly*, The most common Occasion for sequestring a Benefice is on the Vacancy of the Living: For during that time || Pag. 458.

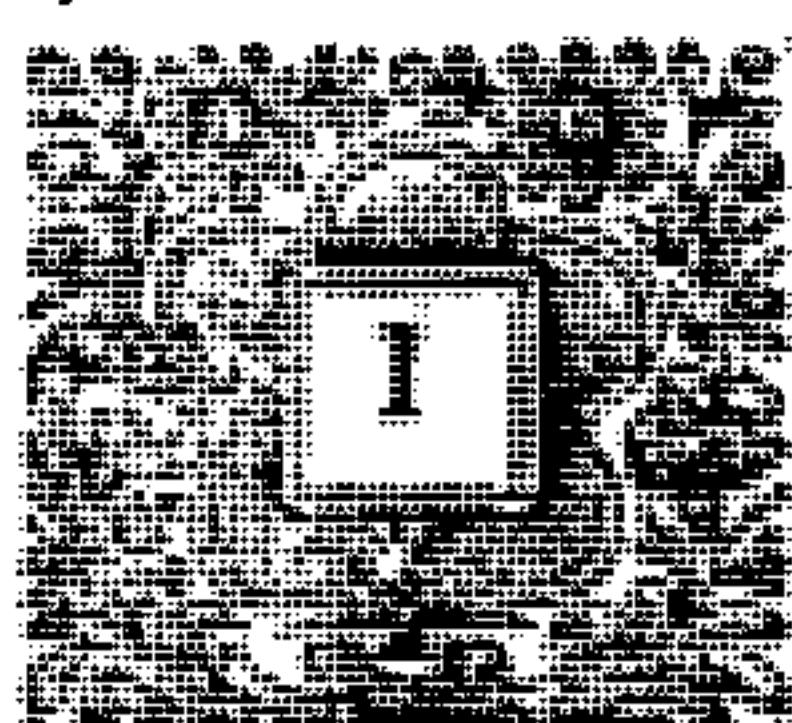
* F.N.B. 587.

† 2. Inst. in 2.
Westm. c. 18.

time the Profits of the Church are in Abeyance (as the Common Lawyers phrase it) and are therefore to be received by the Church-wardens by the Bishop's Appointment under the Seal of the Court ; and this is to provide for the Cure during the Vacancy ; and the Sequestrators are accountable, as aforesaid. But they cannot bring an Action in their own Name for the Tithes : Wherefore, the proper Remedy is to recover them by a Libel or Articles in the Spiritual Court.



Of Simony.



IN treating of *Simony*, which was Originally so called from *Simon Magus*, who was the first Author of this odious Crime, I shall discourse of it, *First*, according to its own Nature, and consider what it really is. *Secondly*, I shall relate the several Ways and Means, whereby it may be committed according to the present Notion of it. *Thirdly*, I shall shew how, and after what manner it is punish'd. *Fourthly*, Who may accuse a Person of *Simony* according to the *Canon-Law*. And, *lastly*, I shall solve some Doubts relating thereunto. Now *Simony*, according to the *Canonists*, is defin'd to be a deliberate Act, or a premeditated Will and Desire of Buying and Selling such Things as are Spiritual, or of any Thing annex'd unto Spirituals, by giving something of a Temporal Nature for the Purchase thereof ; or, in other Terms, 'tis defin'd to be a Commutation of a Thing Spiritual, or annex'd unto Spirituals, by giving something that is Temporal : But this was not the first Notion of *Simony*, as practis'd by *Simon Magus* ; for he endeavour'd to purchase the Gifts of the Holy Ghost by the Means of Money given to the Apostles to sell them again, which undoubtedly was an impious Attempt and Presumption upon the Holy Spirit. And, therefore, *Simony* as here defin'd must be a Matter invented and entirely founded on the *Canon-Law*. *First*, 'Tis called a *deliberate Act*, or a *premeditated Desire* (by the *Canonists*) in order to exclude all wilful Motions, which have not been fully debated in the Mind, but proceed from a blameable Ignorance : For I here speak of *Simony*, according to the Notion of the *Canonists*, which may be committed by the Will alone * ; and is, therefore, by them called *Mental Simony, quoad Forum Poli*. But in *foro fori* (as they phrase it) *Simony* is not committed by any Act of the Will alone, since a Judge cannot take Cognizance of *Mental Simony* ; the Church only pronouncing Judgment with Safety (they say) *super Occultis*. For no one can undergo a temporal or external Punishment for his Intentions alone †. But we know of no such Distinction among us as *Mental Simony* : And, therefore, *Simony* with us must consist in the very Act of *Buying and Selling* ; by which Words every Contract is signified and included, which is not *gratuitous*, whether it be a real *Bargain and Sale* or not, or *Permutation*, and the like. Again, 'tis said in this Definition, by *giving something that is Temporal*, or a Temporal Price : For if a Spiritual Thing be given for a Spiritual Thing, 'tis not *Simony* by the *Canon-Law*. Now a Price may be Threefold according to

* X. 5. 3. 34.

† D. 59. 19. 18.

to the *Canonists* *. The first is stiled *Pretium Muneris*, as Money, an * 11. Q. 1.3
Ox, Horse, or any Thing else that is wont to be sold. The second
they stile *Pretium Linguae*; as the Defence of an Advocate, a Re-
commendation to a great Man's Favour, and the like. And the third
they term *Pretium obsequii*, as any Ministerial Service in Temporal Af-
fairs. And, *lastly*, 'tis said to be given *for something Spiritual*, or *some-*
thing annex'd thereto †; as Orders, the Right of Patronage, the Per- † Abb. in c.
petuity of receiving the Fruits and Profits of the Church, and the like; 14. x. 5. 3.
because a Thing merely Temporal is not the Object or Subject of *Simony*.

The *Canonists* say, that no one can in sufficient Terms express their
Hatred and Detestation of this Crime, it being so odious and contrary
both to the Laws of God and Man, as they explain the Divine Law:
And hence it is, that several Popes * have reckon'd it among the greater * Paschal,
and more heinous Crimes. Among the Number of these pretended holy Lucius, &c.
Men, Pope *Innocent* the Third reckons all other Crimes as nothing in
Comparison of *Simony*; making it equal to the most grievous Sin of
Homicide. And some of the Fathers too have went such a Length in † X. 5. 34. 6.
Folly; that St. *Ambrose* holds this Crime of *Simony* to be worse than the ad fin.
Sin of Idolatry itself ‡. And *Gregory Nazienzen* calls it a Capital Crime ||.
And, therefore, 'tis no Wonder that *Baldus* *, *Roland a Valle* †, and ‡ Cap. citā
other Creatures of the Papacy, should make it equal to the Crime of Culpem.
High-Treason. || 11. Q. 1. 11.
Panormitan says, That the Pest of *Simony* in respect of * In l. 31. c.
its Magnitude, exceeds all other Distempers and Maladies of Vice what- 1. 5.
soever. † Conf. 31. n.
I will not here defend the Crime of *Simony*. as we usually de- 12. Vol. 3.
fine it; because it is against the Laws of the Land, which ought to be
maintain'd and preserv'd as Originally made for wise Reasons of State;
but, surely, it cannot be so great a Crime as the *Canonists* will have
it, barring the Oath taken in this Case ‡; because 'tis no where forbidden ‡ Lindw. lib.
by the Law of God: And as to the Law of Man, tho' it might be 2. Tit. 6. c. 1.
founded at first upon good Policy in the Church to exclude want of Me-
rit in such Persons as are ordain'd to sacred Orders; yet when it was at
first extended to Benefices, it was rather deem'd an Argument of Priest-
craft to acquire Livings in a *gratuitous* Manner; than of any great Good
to Religion itself. For if the Bishops only ordain'd fit Persons to the
Cure of Souls, some Present or Acknowledgment of Service to the
Patron could not be of such dangerous Consequence to the Christian
Church, as some Men pretend it to be with private Views to themselves.

The Twenty second Apostolical Canon ordains, That if any Bishop,
Priest or Deacon shall obtain his Dignity by Money, he and the Person
that ordain'd him shall be depos'd, and wholly cut off from the Com-
munion of the Church, as *Simon Magus* was by *Peter*. The *Papists* to
support the Pope's Supremacy, and some who would have those Canons to
be made by the Apostles themselves, say, *by me Peter*. But this Con-
stitution extended no further than to Holy Orders, and not to Benefices
(as aforesaid). So that tho' *Simony* crept very early into the Church in
respect of Orders; yet it went no further: For Men in those Days
were not so fond of the Cure of Souls, there being little Profit to be
made by it; inasmuch, as such as were ordain'd, or (at least) many of
them, were compell'd to take this Province on themselves. Afterwards
when Churches were well endow'd, he, that desired to be ordain'd, had a
greater Temptation to purchase Orders, than during the Primitive Times
of Persecution. But the Bishop that ordain'd, was more liable to be tempt-
ed with Money then on this Occasion, than at present, whilst Bishopricks
were very poor; which is the present Case of the *Greek Church*, where
Simony is said to reign very much: And, therefore, was this Apostoli-

cal Canon enacted. And the same Sanction of a Law was afterwards establish'd by the second Canon of the Council of *Chalcedon* against the like Kind of Simony. But after the Clergy became more desirous of Preferments rather for the sake of filthy Lucre, than out of a Desire of doing Service in the Church, the Papal Law christen'd the buying and selling of Benefices by the Name of *Simony*; and so it has continued to be called ever since. And thus Simony then became a Spiritual Traffick or Merchandize had for Ecclesiastical Benefices, making the House of God a House of Trade and Commerce: And then the *Canonists* distinguish'd it into *Mental* and *Conventional* Simony.

Conventional Simony is, when any Thing is either actually given; or when there is some Promise or Treaty intervening touching something to be given hereafter*. *Mental* Simony, is, when no Act has interven'd, but the deprav'd Intention of the Giver and Receiver occurs†, as aforesaid: And hence it is, that there are two *Species* of Simony. *Conventional* Simony may be committed by several Ways and Means according to the *Canon-Law*, as by not only actually receiving a Temporal for a Spiritual Thing‡; but even by receiving a Bond or Obligation for the Payment of some Temporality||: And by that Law it is also committed, not only when Money it self is given or received for a Thing Sacred, or when some *express* or *tacit* Covenant has been made about paying or receiving*; but even when the Patron requires some Office or Service from the Giver's Attendance, Tongue, and the like†. And so *vice versa* of a Person giving Spiritual Things. For a Person giving such ought to exempt himself from the Demand of all Service and Duty; and this he is understood to do, when he requires no Gratuity at all for the Spiritual Things given by him. Simony is also committed, when any Thing is given or promised for obtaining any one Voice in an Election to an Ecclesiastical Preferment*. And hence *Romanus* in his *Consilia* †, says, touching the Matter in Hand, that he incurs the Crime of *Simony* who has promis'd any Thing in order to obtain the Votes of any Patrons to Church-Livings or Dignities; and this is prov'd from the Books of the *Canon-Law*‡. Therefore in a Case where a Clergyman promises the Parishioners, who are Patrons of the Church, to refund or pay them one Moiety of the Revenues of the Church for four Years or the like, in order to gain their Votes or Intercession for him with the Bishop, he seems to incur the Crime of Simony. For tho' the Parishioners were not Patrons, nor had any Right in chusing a Minister; yet their Consent and Presentation of him to the Bishop by way of simple Petition or Recommendation is a Matter of great Weight, since a Bishop is always ready and accustomed to gratify their Request. Thus in the Court of *Rome* (as 'tis said) if any one receives a Gift or Present in order to procure a Benefice for the Person giving the same, he thereby commits Simony. But, I fear, that this is often practis'd there without this Censure.

I have before observ'd, that Simony may now be committed either in respect of Orders, or else in regard to a Benefice. And whoever has given any Money, or other Temporal Thing, either by himself or any other Person, either to the Person that ordains him to such Orders or Benefice, or to any other, so that he would not have been ordain'd or admitted to a Benefice without it, is guilty of Simony||: But 'tis otherwise, if he be not ordain'd or promoted to that Benefice; for then he is not a Simoniacal Person. Nor shall a Man be deem'd Simoniacal, if any other than the Person ordain'd shall give some Temporal Thing for such End and Purpose, without the Knowledge and Privity of the Persons thus ordained

* X. 2. 18. 2.
Abb. ibi.

† X. 5. 3. 46.
1. Q. 1. 9.

‡ X. 5. 3. 34.
|| X. 3. 19. 5.

* X. 5. 3. 1.
† X. 5. 3. 36.

* X. 2. 18. 2.
† Conf. 327.

‡ X. 1. 36. 9.

|| 1. Q. 1. 113.

ordain'd or promoted*. Simony is also committed by that Law, when not only a Right merely Spiritual is purchas'd by such Means, (as Election, Institution, &c. are Rights merely Spiritual) but also when a Right annex'd to Spirituals is thus purchas'd and obtain'd†: And such a Right is that of a Presentation, which the Patron of a Parochial Church makes to the Bishop; and thus Simony may, according to the *Canon-Law*‡, be committed in buying the Right of Patronage, tho' not by the Law of *England*. Simony by the Papal Law is not only induc'd by giving of Money, but even by Prayers and great Sollicitations, when they are made by a Person to be promoted to an Ecclesiastical Benefice or Dignity||; and such Sollicitations do vitiate such Preferments. But according to the Gloss this only happens, when such Sollicitations are made by an unworthy and disqualified Person: But if they are interpos'd by a fit and worthy Person, they do not induce Simony; because then the Person is not presum'd to be an ambitious Man, but only solicits on the Account of Necessity; but if he extends his Prayers to obtain some Prelacy in the Church, 'tis otherwise. Again, if Prayers and Sollicitations are made by any other than the Party preferr'd, they being made for an unworthy Person, they shall vitiate the Preferment: But if they are made for a worthy Person, and those Prayers are Spiritual, they do not then vitiate the Preferment. And if carnal Intreaties are made for a fit Person, they do not induce Simony, if they are not the principal Motive: But in a doubtful Case, they are presum'd to be carnal and unlawful, if they are made by a Parent; and therefore they vitiate the Preferment, unless it appears they are made for a very worthy Person. If they are interpos'd for an *Extraneous* Person, they are presum'd to be Spiritual, and rather made for a worthy than an unworthy Person.

* Abb. in c. 33. x. 5. 3. n. 1.

† X. 3. 3. 8. 16.

‡ X. 5. 3. 15.

|| Abb. in c. 10. x. 1. 14. n. 4.

Panormitan observes*, That in the Condemnation of Simony, it may be proceeded against *per signa sola*; and in Hatred thereof Presumptions are admitted as Evidence: And *Innocentius* before him declar'd the same Thing, saying, That in the Crime of Simony as well as Heresy lesser Proofs are sufficient. For in the Crime of Simony clear and manifest Proofs cannot always be had, Simony being a Contract of a dark and secret Nature; and, therefore, according to the *Canon-Law* Simoniackal Persons shall be incontinently remov'd from the Church, when any notable Signs and Tokens of Simony do appear against them†. And *Joh. Ananias* affirms, That tho' in other Crimes the Proofs ought to be clearer than the Light at Noon-day; yet in this of Simony Signs and Arguments are taken for full Proof. And *Lud. Gomez* proves the same Thing, saying, That since Simony is of such a private Nature, that it is usually committed in Secret, 'tis enough to prove the same by Presumptions. And *Joh. Ananias* seems to be of the same Opinion, declaring, That Simony in an Election may be prov'd by Conjectures; and there he subjoins after what manner such a Simoniackal Election may appear, *viz.* when the Electors do chuse the Person that has presented them with Money, and the like. But Note a particular Case, wherein an Election is not vitiated by Simony, *viz.* When Simony is committed in Fraud of him not expected to be chosen: And this Fraud may appear by Conjectures; as when he that opposes the Election, gave Money to be elected. But *Panormitan* says, That in Simony, when an Action is *civilly* brought or commenc'd therein, full Proof is necessarily requir'd‡: So that 'tis not enough (as he himself there subjoins) to prove the same by one Witness, even with a Presumption arising from the Averment of another Person to support his Evidence, who was a *Particeps Criminis*: For, in a Cause of Simony, an Accomplice of the Crime,

* Abb. in c. 6. x. 5. 3. n.

† X. 5. 3. 6.

‡ Abb. in c. 6. x. 5. 3.

Crime, and a Partaker of the Gift made, cannot so much as be a Witness touching such Matter of Simony. And as this is not a Cause of a light Nature, a suppletory Oath is not given in defect of other Proof: And this Gloss of the *Abbots, Alciatus* assures us, is approv'd of by the Doctors. So that in the Crime of Simony one Witness with a concurrent Fame, is not enough to condemn a Man thereof, tho' it be sufficient in a Civil Cause, because Proof is one Thing in a Civil, and another Thing in a Criminal Cause. Thus no one can be punish'd as a Heretick on a vehement Presumption of Herefy; because when the Process is grounded on Presumptions, we ought not easily to condemn a Man; nor does such a Sentence pass *in Rem Judicatam*, as already remember'd *. And that which we every where meet with in our Law-Books, is much in Aid of this latter Opinion, *viz. That in Crimes and Offences a Judge ought to have Proofs clearer than the Light at Noon-day.*

* Pag. 489.

† 22. Can. Apost.

Tho' Clergymen in the Primitive Church were only to be depos'd for common Immoralities; yet for Simony and not submitting to Ecclesiastical Censures, Persons were order'd to be cut off intirely from the Communion of the Church †, as already mention'd: But then Simony was not the same Thing as at present. Indeed it may be said in case of ancient Simony, that he who obtain'd Orders by this Means, had his Orders made null and void *ab initio*; and, consequently, there was no Punishment severe enough to be inflict'd on the Delinquent but Excommunication: For if he, that was depos'd from his Orders would not submit to that Censure, there was no Remedy left but a total Excommunication. This, therefore, was a Piece of Discipline absolutely necessary: Nor could the Delinquent justly complain or alledge, that he was punish'd twice for one Crime, because he was depos'd for Immorality, and excommunicated for his Obstinacy in not submitting to his former Punishment. *Lindwood* says, That a Simoniackal Person, and others

‡ lib. 1. Tit. 4 c. 2. v. *Simoniacos*.

§ X. 5. 3. 35.

† A.D. 1547.

‡ A.D. 1559.

mentioned in a Provincial Constitution ‡ are suspended from the Execution of their Orders, till such Time as they shall be lawfully dispens'd with; and the Pope may lawfully dispense with Simoniackal Persons in Orders, not only that they may administer in the Orders they have thus receiv'd, but that they may also rise to superiour Orders, and lawfully officiate therein ||: Yet sometimes the Pope has thought fit not to dispence with such Persons for certain Reasons mentioned by *Hostiensis*, and others, tho' he might have gain'd largely by it. By a Set of Injunctions publish'd by King *Edward* the Sixth †, and others by Queen *Elizabeth* ‡, it is thus enacted, *viz.* To avoid the detestable Sin of Simony; because buying and selling of Benefices is Execrable before God: Therefore, all such Persons as buy any Benefices, or come to them by Fraud and Deceit, shall be depriv'd thereof, and be made incapable at any time after to receive any Spiritual Preferment. And such as sell them, or by any Colour bestow them for their own Gain and Profit, shall lose the Right and Title of Patronage and Presentation for that Time; and the Gift thereof for that Turn shall go the King or Queen's Majesty. And by a Statute of the said Queen ||, he that is found guilty of Simony in obtaining a Benefice is for ever render'd incapable of obtaining that Benefice for which he contracted; and *Hobart* says *, That the Words of that Statute ought to be expounded in a large Sense: And he likewise tells you, that 'tis Simony to contract for the next

* Hob. Rep. p. 75.

† Hob. p. 165.

‡ p. 165, 166 167.

Presentation, whilst the Incumbent is sick and like to dye †. And tho' a Clerk presented by Simony should dye; yet the King's Turn is not thereby satisfied, as appears from *Winchcomb's Case* in the same Reports ‡. By the Words of the aforesaid Statute the Church unto which a Man is

pre

presented, instituted and inducted upon a Simoniacal Contract, is so entirely void, that it becomes so without Deprivation or Sentence Declaratory: And, therefore, an Incumbent presented by Simony cannot sue his Parishioner for Tithes, and the like *. But the *Canon-Law* says, That he, who confesses himself in Law to be guilty of Simony, or is a Simoniacal Person, ought to be depriv'd *ab Officio & Beneficio* †: For by the *Canon-Law* Simony is a Matter of which the Ecclesiastical Court has the sole Cognizance in *Popish* Countries‡. And the Reason which that Law gives why a Secular Judge cannot meddle herein, is, because this Crime had its Origin from the Prohibitions of the Church; and is in all Places, where the Papal Law prevails, regulated according to the Institutions and Laws thereof; and by the *Canonists* it is stiled no less than Heresy ||. *Wulfer* King of *Mercia* is tax'd by *Malmesbury* with the Scandal of Simony in selling to *Wina* the depriv'd Bishop of *Winchester* the Bishoprick of *London*; which, according to *Echard's* History†, if we may believe it, † Pt. I. p. 59. was the first time that Simony was known in *England*.

Tho' Simony arises from a Contract (as aforesaid) yet every Contract does not make it Simony; for in Simony we must consider the Nature of the Contract, whether it be *ex honestâ*, or *ex turpi Causâ*, and contrary to good Manners‡. A conditional Obligation to resign a Benefice upon a Request or Demand made is good in some Cases, and is no Simoniacal Condition, as it was affirm'd in a Judgment upon a Writ of *Error* in the Case of *Watson* against *Baker* ||: But it was said by the Court, upon Evidence given, that if a Patron presents one to his Advowson, having taken an Obligation of the Presentee, that he will resign his Benefice when the Obligee shall after three Months time give Warning, this is Simony within the Statute *. If a Patron makes a Simoniacal Contract with one Person, and presents another, this is not Simony within the Statute. Tho' the King pardons the Simony, yet the Presentation remains void, and the King may present †. If the Statute of Simony had only made the Presentation void, and not given it to the King, it would have return'd to the Patron, as in the Case of Institution by Simony.

* March. Rep. p. 84.

† X. 5. 3. 11.

‡ Abb. in c. 3. x. 2. n. 2. 20.

|| Abb. in c. 5. x. 5. 3.

† Pt. I. p. 59.

‡ Hob. Rep. p. 167.

|| Raym. Rep. p. 175.

* Noy Rep. p. 22.

† Hob. Rep. p. 167.



Of Suspension, and the several Distinctions thereof.



SUSPENSION taken in a proper Sense is an Ecclesiastical Censure, whereby a Spiritual Person is either interdicted the Exercise of his Ecclesiastical Function, or hindered from receiving the Profits of his Benefice: And Suspension may be either *ab Officio* or *Beneficio*; and sometimes 'tis both. Again, Suspension is either total or in Part; for ever, or for a Time only *: When 'tis for ever, it may be called *Deprivation*, or *Amotion*, as it often is in our Books; but when it is for a Time only, it is properly term'd *Suspension*. 'Tis called a Censure by way of *Genus*; for herein Suspension agrees with other Censures: And 'tis said to be an *Ecclesiastical* Censure to distinguish it from Civil Prohibitions; and to shew the efficient Cause of Suspension.

* Navar. c. 27. n. 15. Ugolin. tab. 4. c. 10.

* Navar. c.
27. n. 151.

sion. For a Suspension ought to be pronounc'd by an Ecclesiastical Person having Jurisdiction *in Foro externo*: Wherefore, in the *Romish* Church, when the Parish-Priest or Confessor commands the Penitent to abstain from the Function of his Order, he is not properly said to suspend him; because such Priest wants Jurisdiction *in Foro externo*; and, therefore, a Person violating the Prohibitions of such a Priest, does not incur the Pain of *Irregularity**. And 'tis said in this Definition, *whereby a Spiritual Person, &c.* to shew the Subject of this Censure: For properly speaking Laymen do not incur this Censure of Suspension, but only Ecclesiastics, who are hereby depriv'd of some Spiritual Benefice, or interdicted the Exercise of some Spiritual Office. But a Layman may be depriv'd of the Power of obtaining an Ecclesiastical Office or Benefice *in futurum*; and a Privation of this Power or Liberty is a Suspension. Thus Clerks alone are not the Subject of this Censure. But to this Objection I answer, by denying the minor Proposition: For the Deprivation of this Power or Liberty is a kind of Incapacity or Disability, and not a Suspension properly understood; since Suspension is an Impediment to the Use of that Power which any one has already acquir'd. And herein Suspension differs from Irregularity, which does not only toll the Use of that Power and Faculty, which a Man has, but it also hinders him the Affecution of such a Power or Faculty. And 'tis said in this Definition *in totum*, or *in part*; *for ever*, or *for a Time only*, to advertise us of the Latitude of Suspension: But, in strictness of Speech, he is said to be suspended, who is suspended from his Office or Benefice, or from both as it happens, for a Time only, and not for ever. And thus, according to the Opinion of some Lawyers, there is the like Difference between *Deprivation* and *Suspension* in the *Canon-Law*, as there is between *Deportation* which is perpetual, and *Relegation* which is only for a Time, in the *Civil-Law*.

† Sylvest. v.
Suspensio.
Quæst. 2.

Suspension is manifold, according to the aforesaid Definition: For, *First*, There is one kind of Suspension which is only *ab Officio*, whether it be an Office of Orders, or an Office of Jurisdiction it matters not. *Secondly*, There is another kind of Suspension which is only *a Beneficio*, whether the Benefice be a Dignity, Canonry, or a *simple* Benefice, &c. And a *third* kind of Suspension is that, which is *ab Officio & Beneficio simul*†. Again, there is one sort of Suspension *in totum*, whereby a Person is depriv'd of the whole Use and entire Exercise of his Office; and the other is a partial Suspension from his Office: And such is that, according to the Papal Law, whereby a Person is suspended from receiving Confessions, and the like; or from any particular Branch of his Office, according to our Law. There is also a *Penal* Suspension, and a *Medicinal* Suspension. The first is that, whereby some Offence is aveng'd and punish'd; and this is pronounc'd *in pœnam & vindictam delicti*: As happens, when any one is suspended for a Crime merely gone and past. But this Kind of Suspension is not pronounc'd by way of Censure, but by way of Punishment alone. The second is that, whereby the good and future Amendment of the Party suspended is intended; and this is properly a Censure‡. There is also a Suspension made by the Law, and a Suspension made by the Act of Man. The Doctors have introduc'd other Distinctions, as those of the *greater* and *lesser* Suspension; but this Division is not commonly received by them, because it has no sufficient Foundation in Law. But I call the *greater* Suspension that which suspends a Man *ab omnibus*, that is to say, from Office and Benefice both together: And I term that the *lesser* Suspension, which is only pronounc'd in regard to some particular Effect. Suspension *ab Officio & Beneficio* is sometimes

‡ Bonacin.
tom. i. p. 423.

times decreed *absolutely* and *simply*; and sometimes 'tis determin'd by that Time which is given for making Satisfaction or Restitution. Thus if a Person shall be suspended by the Judge's Sentence, till such Time as he shall make Satisfaction, he shall in this Case recover his Office and Benefice immediately after he has made proper Satisfaction. But a special Absolution from the Suspension is herein necessary after Satisfaction made; otherwise (perhaps) it might be said, that he had not made full and proper Satisfaction *. But herein we ought to distinguish, whether Suspension proceeds from the Act of Man, or from the Sentence of the Law †: For when a Suspension of this Nature proceeds from the Judge's Sentence an Absolution is entirely necessary; but not so, when it comes from the Judgment of the Law, because then there is no one who can deny or gainsay such full and proper Satisfaction ‡. Suspension sometimes is only *ab Officio*; and then it is sometimes decreed either *simply* and *absolutely*, or else sometimes only for a Year, and sometimes for three Years, &c. Suspension is also *a Beneficio* only; and then 'tis sometimes *simply* decreed, and sometimes 'tis limited to six Months; and sometimes to three Years, &c. This Suspension is also made *a Beneficio obtinendo*, as well as *a Beneficio adepto*, so that the Person thus suspended cannot obtain a Benefice during the Time of such Suspension.

* Othob.
Con. Tit. 6.
v. *Ultionem*
Canoniam.
† VI. 2. 14. 1. 3.
VI. 5. 11. 17. 1.

‡ Clem. 5. 8.
1. in fin.

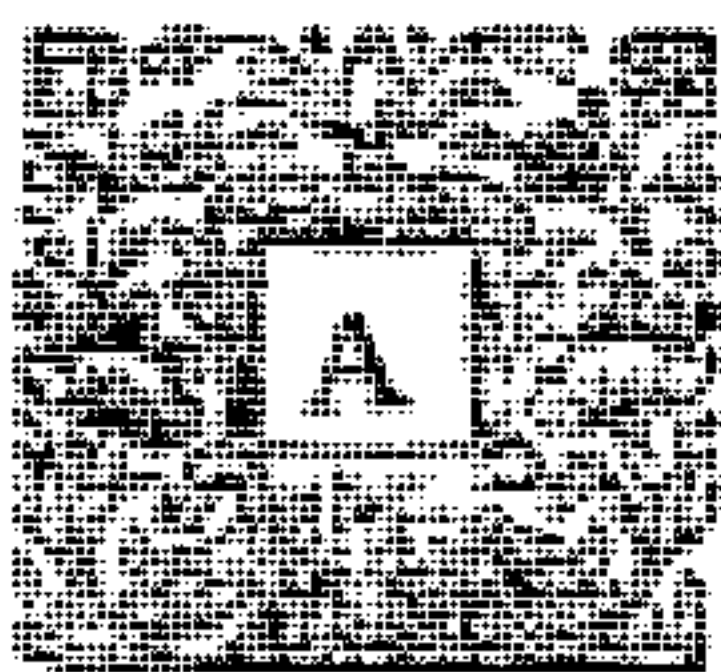
I have already hinted touching a Person suspended *ab Officio* only, that he may execute his Office in several Respects, if he be not totally suspended ||: Wherefore, it may become a Question from what Act or Acts a Man partially suspended is restrain'd. Now tho' such a Person cannot do those Things which relate to his Spiritual Office as a Pastor, as celebrating Divine Service, and the like; yet he is not hereby prevented doing those Things which are Matters of Jurisdiction: But a Person suspended *ab omni Officio* is suspended from all ordinary Power. A Person thus suspended can neither be an Elector, nor can he be elected *. Nor can he give Institution, Induction, Investiture, grant a Prebend †, and the like; nor excommunicate a Person, &c. And, according to some, 'tis the same Thing in a Person suspended *ab Officio* only. And this is true in respect of him that is suspended by a *declaratory* Sentence, or even by the Canon it self, if he be publicly denounced: But 'tis otherwise in a Person suspended by the Canon, and not publicly denounc'd, he being suffered to continue *in Statu quo*, till he is denounc'd; and then what he does is valid. That a Person suspended *ab Officio* only, cannot grant a Prebend, some contradict; for a Bishop suspended *ab Officio* only (say they) may collate to a Prebend, tho' a Canon of a Church cannot do it: And the Reason of this Difference is, because a Bishop has to do with some Matters relating to Orders, and some relating to Jurisdiction. Hence it is, that tho' a Person be suspended from one of these, *viz.* from giving Orders; yet he is not suspended from the other, *viz.* from exercising Jurisdiction: But Canons having no Jurisdiction, cannot collate to Benefices. Clergymen, who are *publick* Fornicators, are by the *Canon-Law* suspended *ipso facto*; and so are Hereticks and Schismatics: But then this Suspension being perpetual, is the same as Deprivation. But when Clergymen are suspended for applying themselves too greedily to the getting of filthy Lucre and sordid Gains (as they may be); or are suspended for Contumacy and Disobedience to the lawful Commands of their Superiours, this Suspension is only for a Time; and Absolution follows when they yield Obedience thereunto.

|| Othob. Con.
Tit. 2. v. *a*
Missarum so-
lemnis.

* X. 1. 4. 8.
† X 5. 27. 10.



Of Tithes, and the several Kinds of them, &c.



ACCORDING to the ancient Law of the *Jews*, the tenth Part of all Fruits was due from the People to the Tribe of *Levi*, or the *Levitical* Tribe, as sometimes called; and out of these Tenths the *Levites*, or the inferiour Degree of Ministers in the *Jewish* Dispensation, again paid Tithes to the Priests. There were other Tithes, which every one of the *Israelites* separated in their Barns, that they might eat the same when they went into the Temple at *Jerusalem*; inviting the Priests and *Levites* to this Entertainment which they made in the Porch of the Temple*. And there were also other Tithes, which they laid up out of their Stock to supply the Necessities of the Poor. But the *First-Fruits*, which they offered up out of the Fruits of the Earth, were not defined or stiled by any particular Name; nor were they ascertain'd to any special Use and Purpose, but were left to the Discretion of those that offer'd them up. And these *First-Fruits* were those Portions of Things, which first grew and were gather'd from the Fruits of the Earth; and being collected were dedicated and offer'd unto God, the Beneficent Giver of all Things, before they were appropriated to Human Use, that they might honour and worship God with the Acknowledgment of some first Gift. And not only those, who had a Knowledge of the true God, did thus offer their First-Fruits, but even the Heathens themselves did by the Law of Nature make these Oblations: For *Pliny* tells us*, That the old *Romans* would not taste of their Wines, or their new Fruits, before the Priests had offer'd up the First-Fruits as a Sacrifice to the Giver of them. But I shall here in the first Place speak of Tithes, being the chief Support of the Clergy; and with which I am more immediately concerned.]

Now Tithe, as here to be consider'd, is a certain *Quota* or Portion of Moveable Goods lawfully acquir'd unto the Clergy for the Service of a Parochial Minister in the Church†: And, according to some Persons, this Right is not only founded on the Law of Man; but also on the Law of God‡. I say, a *Quota* or certain Portion; because Tithe is not in all Places the tenth Part, but various and uncertain, according to the Custom of Parishes. Therefore, whenever a Judge takes Cognizance of this *Quota*, he ought to consider the Custom of the Place†. Nor can any Certainty of this Portion (say the *Canonists*) be expressly declared; since a Custom is a Matter of Fact; and a Fact is deem'd various and uncertain‡. By the fifth Canon of the second Council of *Mascon* in *France*, the Payment of Tithes was insisted and commanded there||, and being founded on the Law of God, and the ancient Custom of the Church, which is thereby reinforced: *Unde Statuimus & decernimus, ut mos antiquus reparetur*. So that in this Canon there was only a renewing of an ancient Custom, which had obtained in the Church, but was now grown into Disuse. For this Council of *Mascon* was called on Purpose to restore what they found too much declining

* X. 3. 30. 1.

* lib. 18. c. 2.

† X. 3. 30. 13.

‡ 16. Q. 1. 47.

† X. 3. 30. 20. & 32.

|| D. 1. in l. 9. D. 12. 1.

* A. D. 585.

declining as to the State of the Church in *France*. So that there can be no Doubt of the Custom of paying 'Tithes in *France* from the Time of their receiving Christianity: And their Historians add, that this Custom declin'd as their Religion did. In the Council of *Nantz* † Tithes * An. 653. and Oblations are mentioned together †, as making up the Churches † Can. 10. Revenue, which was to be divided into four Parts, as already remem- ber'd ‡: The first was given to the Bishop, the second to his Clergy, ‡ Pag. 394. the third for Repairs, and the fourth to the Poor. But the main legal Support of the Parochial Clergy consisted in Tithes: And, therefore, I shall in the next Place consider upon what Foundation they stand in Law with us here in *England*, and how they had their Beginning.

And first as to the Foundation they stand upon in Point of Law, my Lord *Coke* not only says †, That the Parochial Right of Tithes is estab- lish'd by divers Acts of Parliament, but he also mentions the *Saxon* † 2. Inst. p. 642. Laws before the Conquest for the Payment of Tithes, viz. the Laws of *Edward* and *Guthrun*, *Athelstan*, *Edmund*, *Canutus* the *Dane*, and those of King *Edward* confirm'd by *William* the First. A modern Historian from *Simon* of *Durham* and *Malmesbury* informs us ‖, That ‖ Echard's Hist. Vol. 1st. p. 59. 'Tithes were first order'd to be paid in *England* at a Synod or a Council called by King *Osfa*, and held at *Calcuith* about the Year 777; where, among other Canons, the Payment of Tithes was decreed as one; and also declared to be by Divine Right. And so the *Canon-Law* declares, saying, That God commanded Tithes to be paid him as a Token of his being Lord and Proprietor of all Things *; and in his Stead (says that * X. 3. 30. 26. Law) he has deputed the Clergy to receive them for him, tho' this Commission (I think) is no where to be found in the New Testament, whatever it may be in the Old: And, therefore, by the *Canon-Law* Laymen cannot receive Tithes in respect of any Custom whatever, tho' it should be on a Custom founded on Prescription *. I shall not here * X. 2. 26. 7. enter into any Controversy about the Divine Right of Tithes due to the Clergy, but consider them as given to the Church by Human Laws for the Maintenance of such as serve at the Altar, the Labourer being worthy of his Hire ‡: But yet it must be observ'd, that if they were of ‡ 1. Tim. c. 5. v. 18. Divine Right, the Priesthood was depriv'd thereof by the Laity for some hundred Years after *Christ*. Indeed, the Law of God says thus, viz. *Thou shalt not delay to offer the first of thy ripe Fruits, &c.* †. And † Exod. c. 22. v. 29. again, *Concerning the Tithe of the Herd, of the Flock, even of what- soever passeth under the Rod; the Tenth shall be Holy unto the Lord* ‡. ‡ Lev. cap. 27. v. 32. But this was a Law unto the *Jeus* alone on the Account of Sacrifices and other Offerings, according to the Ceremonial Law, which was a- bolish'd, when Christianity came into World: But surely the Clergy have a Right to something according to St. *Paul*, who says, *If we have sown unto you Spiritual Things, is it a great Thing that we shall reap your Carnal Things* ‖? And again, *Who planteth a Vineyard, and* ‖ 1. Cor. cap. 9. v. 11. *eateth not of the Fruit thereof? Or who feedeth a Flock, and eateth not of the Milk of the Flock* *? But St. *Paul* speaks these Things as a * Ver. 7. cap. cod. Man; and does not the Law say the same Thing also †? So that tho' † Ver. 8. ibi. the Apostle does not pretend to speak these Things from God; yet he does it from the Law of Nature, or right Reason it self. *Hobart* tells us, That Tithes were Things of *Common Right* belonging to the Church before the Council of *Lateran*, tho' not to any Spiritual Person in certain till then ‡, that is to say, they are by right Reason and the ‡ Heb. Rep. p. 296. common Law of the Church, as founded thereon, given unto the Church; and since Parishes are erected, they are due to the Parson or Vicar of the Parish, except in some Spiritual Regular Cases as directed

* 3. Bull.
Rep. p. 242.

† Cok. 11.
Rep. fol. 8.

* Hob. Rep.
p. 44. 297.
298.

† X. 3.30.23.

‡ Lindw. lib.
1. Tit. 3. c. 2.
v. *Fruetus*.

† C. 3.32.22.

‡ D. 24.3.7.

|| D. 7.1.9.5.

* D. 24.3.7.

† Lind. lib. 1.
Tit. 3. c. 1.
Decimarum
Personalium.

‡ Vid. 2. E.
6. c. 13.

|| X. 3.30.22.

* X. 3.30.28.

† Dd. inc. 16.
x. 3.30.

by the Papal Law. *Dyer* says, that Tithes can never be extinguish'd, because they are due of *Common Right*; and the same is said by *Dodderidge* in the Case of *Fosse and Parker* *. But I suppose they only mean a Maintenance due to the Clergy from the Laity; for, doubtless, the Laws which gave them Tithes may give them any other Portion or Subsistence in lieu of Tithes. And in *Prieddle and Napper's Case*, Tithes are said to be an Ecclesiastical Inheritance Collateral to the Estate in Land; and of their own Nature due to an Ecclesiastical Person †: And that all Lands of *Common Right* are to pay Tithes; and, therefore, none can be discharged of the Right of Tithes, tho' they may be discharg'd of the actual Payment of them *. Of which by and by.

Now there are two, or (as others say) three general *Species* of Ecclesiastical Tithes, which are paid to Persons attending the Ministry of the Church, *viz.* *Predial*, *Personal* and *Mixt*. The first are those which accrue and grow *ex ipsis pradiis* from the Fruits and Profits of Lands themselves, as Corn, Hay, Wine, and the like; and which depend on the Fruits and Profits of such Lands, as from Wool, the Profits of Wind-Mills and Water-Mills †, &c. For under the Appellation of *Fruits*, in *Latin* stiled *Fruetus*, we may here reckon all those Things which relate to Tithes †. And, *Secondly*, under this Appellation we may also include such Things as concern the *Glebe* of the Church: And, in this last Sense, they are so stiled; whether they are Fruits acquir'd by Industry, or Fruits produc'd by Nature only †. 'Tis likewise to be observ'd in respect of Tithes, that under the Name of *Fruits* those Things are also contain'd, which are gather'd during the Vintage, as well as those which are gather'd during the Time of Harvest: And thus under this Term we may comprehend Corn, Hay, Herbs, and all Things of this Kind arising from a Man's landed Estate; also the Wool of Sheep, the Young of Cattle, and (by the *Canon-Law*) Pensions of Houses and Predial Estates, and (according to the *Canonists*) the Labour of Servants, and other Animals; and also all Mines of Gold, Silver, Stone, Iron, Chalk, and the like, if they produce a Yearly Increase ‡. In the same manner Revenues or Returns made by Fishing, Fowling and Hunting come under the Name of Fruits ||; and so do Trees or Coppice Wood, in *Latin* called *Sylva Cadua* *. But *personal* Tithes, which are the second *Species* of Tithes, and paid out of the clear Lucre and Profit acquir'd by the Industry of a Man's Person, or from Trade, Merchandize, and the like †, are not included under the Name of *Fruits*: because in Trade or Traffick, &c. there is no such Thing as Fruits. But in *England* we know no such Thing as Personal Tithes, which are deducted out of the Profits of a Man's Labour, Skill, and Employment, *viz.* from Warfare, Traffick, Handicraft Trades, &c. ‡ These Personal Tithes are by the *Canon-Law* paid to that Church wherein a Person receives the Sacraments of the Church ||, tho' this Lucre or Profit arises to him in some other Place. *Mixt* Tithes are those which are due partly from Things *predial*, and partly from the Profits of Human Industry: But this *Species* of Tithes (I think) is comprehended under the other two; and rather follows the Nature thereof. I have said that Personal Tithes are due from Trade and Traffick *, &c. and do rather respect the Person than the Thing itself; and that they ought to be paid to the Church where the Merchant, Tradesman, Soldier, and the like, do hear Divine Service, and receive the Sacraments. But the *Jews* are not oblig'd to pay this Sort of Tithes, because they are not Personally incorporated into the Church †; nor ought the Church to receive Tithes from them, lest it should seem to approve

approve of their Persons. But if the *Jews* inhabit Places where *Christians* have usually dwelt, and paid Personal Tithes and Oblations, such *Jews* shall in the like manner pay Personal Tithes, and render Oblations, lest such Churches as have been accusom'd to receive those Tithes and Oblations from the Inhabitants of such Places, should be prejudic'd by the *Jews* dwelling there: And thus the *Canon-Law* digests and gets over this Scruple of receiving Tithes from the *Jews*.

Tithes ought to be paid *integraliter*, (as the *Canon-Law* * as well as one of our own Provincial Constitutions † phrases it) that is to say, in an entire and perfect Manner, without the least Diminution; otherwise they are not said to be paid at all: For as a Man is not said to fast the forty Days of *Lent* (say the *Canonists*) unless he fasts every Day; so that he who pays less than the tenth Part is not said to pay his Tithes. The holy Scriptures (say they) commands us to pay Tithes of all Things which the Ground produces, and which are of a Yearly Increase ‡; therefore, Tithes ought to be paid to the full due thereof without any Deduction of Expences for the Tillage of the Earth †; so that by that Law a Custom is not valid, whereby less is paid than the Tenth of the Yearly Product. And St. *Austin*, a Champion for the *Romish* Church, says, That he, who would merit a Pardon for his Sins, must pay the Tenth to the Church; and give Alms out of the other nine Parts of his Estate *. And by a Provincial Constitution in *Lindwood* ‡, all such Persons as shall in any Popular Congregation endeavour to hinder and restrain the Devotion of the People in the Payment of their Tithes, or from making their Oblations, or shall unjustly convert the same to their own Use, are liable to the Sentence of the *greater* Excommunication, and shall not be absolved from thence till such Time as they have brought the People back from their Error, and have made Satisfaction to the Church; and this Absolution shall be only made by the Diocesan, except it be *in articulo Mortis*. And by the said Constitution, as well as another there recorded †, the same Punishment is inflicted on all such Persons as shall refuse to Ecclesiasticks, to whom the Perception of Tithes belong, or their Servants, free Ingress and Egress on their Estates from whence Tithes are due, for collecting or looking after such Tithes, and for carrying of them away when they please: But then their Pleasure ought to be governed according to the Laws in Force. And by a Constitution of *Rob. Winchelsey* it is enjoind ‡, That Tithes shall be uniformly paid all over the Province of *Canterbury*, of all Corn and Grain, without any Deduction of Expences for planting the same; and likewise of all Fruits of Trees, of Hay wheresoever growing within the Limits of the Parish, and of all Seeds and Garden Herbs there growing: But of Lambs and Milk according to a Rule or Standard therein mention'd. And, lastly, by this *Canon* Tithes shall be paid out of the Profits arising from Mills and Pastures. And such Persons as shall deny the Payment hereof, shall after three Admonitions stand excommunicated *: So that a Demand is necessary according to the Law, otherwise the Person not paying the same shall not be deemed *in mora* †. But tho' it be said in the foregoing Constitution, that Tithes shall be paid uniformly; yet in respect of the Payment of Tithes, there are divers Customs to be observ'd, which consist in a different way and manner of Tithing. For some pay their Tithes according to the Form of Corn, as it lies scatter'd up and down on the Lands, or thrown into the Furrows. Others pay according to the Shock as these Sheaves are collected and set up together in a Heap. Others do not set out their Tithes in the Field, but in their own Barns: And others carry the Tithes Home to the Parson's Barn †.

So

* X. 3. 30. 5.
† Lindw. lib. 3. Tit. 16. c. 5.

† X. 3. 30. 14.

‡ X. 3. 30. 7.

* 16. Q. 1. 66. in fin.
† Lib. 3. Tit. 16. c. 1.

‡ Lib. 3. Tit. 16. c. 2.

‡ Lindw. lib. 3. Tit. 16. c. 5.

* X. 3. 30. 5.

† Arg. X. 3. 30. 22.

‡ Lindw. ut sup. v. *Unguentis*.

So that in these and the like Cases there cannot be one uniform Demand of Tithes, or (at least) the same manner of rendring Tithes cannot be observ'd in all Places, tho' there be an Uniformity in this respect, viz. that the Tenth should be paid entire without any Diminution *.

* X. 3. 30. 4.
& 7.

But it has been a Question among the *Canonists*, Whether the Parson of a Parish can compound with his Parishioners in such a manner as (perhaps) to receive less than the Tenth in respect of Tithe? And it seems by the *Canon-Law* that he cannot. For tho' such a Composition among Clergymen is binding and well enough according to that Law †; yet

† X. 3. 30. 3.
X. 1. 36. 8.
‡ X. 1. 36. 2.

between a Layman and a Clergyman it is in no wise valid ‡, according to the Doctrine of some Men, without the Pope's Authority: But (I think) the Bishop's Consent is sufficient to establish such a Composition even by the *Canon-Law* itself ||; and *Hostiensis* agrees with me in this Opinion *.

|| Bern. in c.
2. x. 1. 36.
*. Hoff. in c.
2. x. 1. 36.

For by the Text of the Law quoted in the Margin it appears, that a Composition touching Tithes may intervene between a Layman and a Clergyman, viz. that something should be Yearly paid in lieu thereof,

† X. 2. 30. 7.

especially for small Tithes as *Job. Ananias* observes †. But tho' Laymen may lawfully compound for a past Substraction of Tithes: Yet for a Nonpayment of them hereafter a Composition made with Laymen is not valid without the Judge's Authority; nor does Custom, nor Prescription aid a Layman either to retain or to prescribe to the receiving of Tithes ‡.

‡ X. 2. 26. 7.

Our Provincial Constitution allows of a Composition; *nisi Parochiani competentem fecerint Redemptionem pro talibus decimis*, says the Text, without making any Distinction between great and small Tithes; nay (I think) it includes the greater Tithes under the Words *Talibus Decimis*, as may be seen from the Constitution itself ||. tho' the Gloss thereon is otherwise: But if a Parson would bind his Successor by such a Composition, he must then have the Patron and Bishop's Consent hereunto.

|| Lindw. lib.
3. Tit. 16. c. 5.

It has been already remember'd, that Custom sometimes obtains in the Payment of Tithes *: But a Custom for Non-payment, or for paying less than the Tenth is not valid, according to *Innocentius* and *Compostella* †. But this admits of a Distinction (say the *Canonists*). For tho' in real Tithes such a Custom of paying less does not avail; yet in Personal Tithes it is good enough: And thus Tithes are again divided into *Real* and *Personal* Tithes according to the *Canonists*. But (I think) this Distinction no wise differs from that of *Predial* and *Personal* Tithes: Therefore I shall here rather chuse to divide them into great and small Tithes, as they are commonly called with us.

* Dd. in c. 32.
x. 3. 30.

† In c. 32. x.
3. 30. 16. Q.
7. 7. 1. x. 3.
30. 7.

Hostiensis observes †, that in *England* small Tithes consist in Wool, Milk, Cheese, Lambs, &c. For these Tithes do even consist *in parte Animalium*, as Chicken, and the like are. The Tithes of the Fruits of Trees, Seeds and Garden-Herbs are reckoned among small Tithes, and so are Millet, Mint, Rue and Cummin, according to what is said in St. *Luke's* Gospel ‡, *Wo unto you Pharisees; for yee tithe Mint and Rue, and all manner of Herbs, &c.* Tithe of Honey and Wax are also reckon'd among small Tithes; and so are Eggs. But what is here said of paying Tithe of Cheese in its Season, is to be understood when the Milk, of which the Cheese is made, has not been already tithed; for otherwise it would follow from hence, that Tithe would be paid twice

‡ Cap. 11.
Ver. 22.

of the same Fruit, which ought not to be*: For if a Person shall first pay Tithe of Milk, and afterwards make Cheese of the other nine Parts, the Cheese shall not be tithed; but if he shall sell Cheese of this Kind, the Seller shall pay a Personal Tithe out of the Gain and Profit

* VI. de reg.
Jur. 83.

which he makes of such Cheese sold, where Personal Tithes are paid †.

† X. 3. 30. 28.

In Autumn and Winter, when Cheese is not usually made, Tithe shall be

be paid of the Milk of Cows, Sheep and Goats. Some Persons do not pay Tithes of Ducks and Chicken, because they pay Tithe of Eggs: But in some Places it is Customary to pay Tithes both of Eggs and Chicken.

Among Predial Tithes we may reckon Coppice-Wood, in *Latin* called *Sylva Cadua*, which ought to be demanded, after 'tis cut, of the Proprietor of the Coppice, and not of the Buyer or Purchaser thereof: For the Provincial Constitution † rather speaks of the Possessors of such Copices themselves, wherein such Wood or Fewel is cut down, than of the Possessors of such Wood or Fewel after 'tis cut. But if such Wood shall be consum'd in the House for the Maintenance of Husbandry, no Tithe shall be paid thereof; because the Parson has *uberiores decimas*. || *Furzes* pay a Predial Tithe, unless the Owner of the Soyl can be discharged by Custom, upon Payment of Tithe Milk, or Calves of such Cows which are depastur'd on that Ground where the Furzes grow. Tho' *Grass* pays Predial Tithe; yet, if 'tis cut and carry'd to feed the Owner's Plough-Cattle, before 'tis made into Hay, not having sufficient otherwise to keep them, no Tithe ought to be paid for it*; tho' the Gloss on the Provincial Constitution declares otherwise ‡. Where the Custom is not to the contrary, the Parishioner ought to make the Grass into Hay: But in many Places the Tenth Grass-cock is set out, and in such Case the Parson may, *de jure*, make it into Hay upon the Land where it grew, without alledging a Custom for it †. A Prescription to pay the Tenth Acre of Grass standing in lieu of all Tithe Hay, is good ||. Hay pays a Predial Tithe as well in Orchards as in Meadows; but no Tithes shall be paid for that which grows on Head-lands, where the Plough-Cattle can have only room to turn: But then there must a Custom be alledged to pay it, and the Party must aver, that the Head-land is only large enough to turn the Plough on it. ‡ And if once Tithes are paid for Hay, no Tithe shall be paid for the after-Pasture of the same Land, in the same Year.* As to the Manner of tithing it, the Custom of the Place is to be regarded: For, in most Places, the Tenth Cock is set out after 'tis made into Hay, but where there is no Custom, the Tenth Grass-cock may be set out †: And, therefore, tho' the Tithes of Grass ought, of Right, to be made into Hay; yet a whole Parish may prescribe to pay the Tithe in Grass-cocks before 'tis tedded, and this without any Consideration given to the Parson‡. But if 'tis suggested, that the Owners of the Land have, Time out of Mind, found Straw to thatch the Body of the Church, and have therefore been discharged of all Tithes of Hay, this is not good, for the Parson has no Benefit by it, because the Parishioners are to repair the Church.* If there is a *Modus* for the Tithe of Hay, and the Meadow is converted into Tillage, the Parson shall have the Tithe Corn; but when the Lands are again converted to Meadow, the *Modus* shall revive. † So in Consideration that the Parson and his Predecessors had, Time out of Mind, been seiz'd of a Meadow in the Parish, the People shall, in such a Case, be discharged of all Tithe Hay; for it shall be intended, that the Meadow was originally given to the Church, in discharge of the Tithes of the Parish ||: But 'tis not a good *Modus*, that in Consideration he had spent all his Hay in feeding Plough-cattle, that the Parishioner should be discharged of Tithe Hay*.

Hemp pays a Predial Tithe, and because there are various ways of tithing it, thereby by a late Act of Parliament †, a constant yearly Sum of five Shillings *per* Acre shall be paid for Hemp-land before 'tis carry'd off the Ground, and so in Proportion. *Hops* also pays a Predial Tithe;

[K k k k k k]

† Lindw. l. 3.
Tit. 16. c. 3.

|| Ventr. Rep.
pt. 1. p. 75.

* 1 Roll. Abr.
p. 645.
‡ Lindw. l. 3.
Tit. 16. c. 5.
v. *Exnis*.

† 1. Roll. Ab.
p. 643.
|| Ibid. p. 648.

‡ Ibid. 646.

* Ib. 640.

† Ibid. p. 644.

‡ Ib. 647.

* Crok. Eliz.
p. 2. 6.

† Godb. Rep.
p. 194.

|| Roll's pt.
1. p. 649.

* Ib. 650.

† 11th. and
12th. W. 3.

* Rep. p. 77.
Sid. Rep. 283.
† Abr. p. 144.

* Sid. Rep.
p. 443.

† Vent. Rep.
pt. 1. p. 61.

‡ Crok. 43e.
2. Crok. 575.
1. Roll. Rep.
62.

* 1 Roll. Abr.
p. 647.

† Lib. 3.
Tit. 6. c. 6.

‡ 11th. Nov.

Tithe; but the manner of tithing them is likewise various, according to the Custom of the Place: And of this Opinion was Judge *Twisden*, who lived in *Kenil*; and affirmed they might be tithed by the Hills, by the Pole, or by the Bushel; and if so, then the tenth Part may be set out before they are dried; and this agrees with the Case reported by *Hutton* *. But *Rolls* tells us, they ought not to be tithed before they are dried †; and this seems to be the better Opinion. But a Prescription cannot be suggested Time out of Time to pay a *Modus* for Tithe Hops, because they were not known in *England* till Queen *Elizabeth's* time, being then first brought out of *Holland*, tho' Beer is mention'd in a Statute of *Henry* the IVth; and therefore a Prohibition was granted to the Ecclesiastical Court to stay a Suit there commenc'd by a Vicar on a Suggestion *, *That they had paid for all Tithe-Hops, so much an Acre to the Parson Time out of Mind*; because there could be no such Composition Time out of Mind for the Reasons aforesaid. But the Court said, That perhaps the Vicaridge was Endow'd Time immemorial of small Tithes, of which Nature Hops are: And then a Prescription of paying a *Modus* to the Parson shall not take them from the Vicar; for it shall be taken to have commenced since the Endow-

ment †. I come in the next Place, to speak of Tithes in respect to Cattle: Now those which are bred for the Plough and Cart, pay no Tithe for their Pasture, because the Parson has the Benefit of the Labour of Plough-cattle by tilling the Ground; and Tithe-milk for such as are bred for the Pail: But in the first Case it cannot be alledged, that the Cattle were used to Manure the Ground in that very Parish ‡. If such Cattle are bred or bought to sell again, and accordingly are sold before they are used, Tithes shall be paid for them: But not if they are killed and spent in the House. If such Cattle are past their Labour, and the Cows are Barren, and afterwards fatted in order to sell, they shall pay Tithes during the time of their fattening; for the Reason of the Discharge ceaseth *. If a Man sows his Land to feed his Horses used for Tillage, there shall be no Tithe paid for such Pasture; but if he keeps Horses thereon to sell, and accordingly sells them, he shall pay Tithes. Cattle feeding on large Wastes, not known to be in any particular Parish, shall pay Tithes to the Parson of that Parish where the Owner lives; and if fed in several Parishes, they shall pay Tithes *pro Rata temporis*, so as they continue above a Month, or Thirty Days in each Parish. For there being heretofore, great Disputes between the Rectors of Parishes, about the Tithes and Agistment of Cattle, on Account of removing them to depasture in several Parishes at different Seasons of the Year; it was therefore Enacted by a Provincial Constitution in *Lindwood* †. That the Tithes of Sheep shall intirely belong to him, in whose Parish or Territory they shall feed, from Shearing-time to the Eleventh of *November*, being couchant there for the whole time; but shall be only due *pro Rata*, if they depasture there but part of the time. But if they are fed in one Parish, and are couchant or folded in another, then the Tithe (according to this Constitution) ought to be equally divided between the two Parsons. But the Tithes of other Animals shall be paid according to the Place and Time, where they fall and are bred. But if Sheep, after *St. Martin's Day* ‡, shall be drove to other Pastures, and be fed till Shearing-time in one, or in several Parishes, then the Pasturage of them shall be rated according to the Number of Sheep, and the Tithes shall be demanded of the Owners of them, according to the Rate of their Pasturage. Lambs, Calves, Colts,

Colts and the like, paying Tithe, shall be particularly, or in Proportion, tithed with a Respect had to the several Places, where they are engendred, do fall and are bred; and according to the time they continue therein. The Tenth Calf is due to the Parson when 'tis weaned*, and he is not bound to take it before; but if the Number of Calves does not come up to ten in one Year, the Parson cannot have Tithes in Kind for that Year, without a special Custom, but may take it so in the next Year†, accounting both Years together; or tithe *pro Rata*; if there be any Custom for it. But 'tis a good *Modus* to pay one Calf, if he has seven in one Year; and if under seven, then an Half-penny for every Calf for the Tithes of all Calves in that Year; and if he sells a Calf, then to pay a Tenth of the Value. Lambs pay a mixt Tithe, but that Payment is usually guided by Custom. If a Parishioner has six Lambs or under, he shall pay an Half-penny for every Lamb; and if he has above that Number, then to pay one Lamb is a good Custom when such Lamb is weaned‖. A Prescription to pay an Half-penny for every Lamb which he shall sell before *May-day*, without any other Tithe for them, and he sells them all before *May-day*, this is not good, because 'tis a meer Fraud*. They are called Lambs 'till they come to be one Year of Age†: But in this Respect, the Custom of every Place is to be considered; for in some Places they are deem'd as Sheep, when they come to be shorn‖. What I have said of Lambs, may likewise be understood of Kids, for they are also in *fructu Animalium**.

* Joh. An. in c. 7. x. 3. 30.

† Lindw. lib. 3. Tit. 16. c. 5. v. *Expectet*.

‖ Roll. Abr. p. 648.

* Lindw. lib. 3. Tit. 16. c. 5. v. *septimus Agnus*.

† Roll. Abr. p. 652.

‖ D. 32. 1. 60. in pin.

* D. 32. 1. 65. 7.

† I. 2. 1. 37

‖ Crok. Car. p. 339.

* Roll. Abr. p. 650.

‡ Lindw. lib. 3. Tit. 16. c. 7 v. *cicariorum* & *stagnorum*.

† Lindw. lib. 3. Tit. 3. 16. c. 5 v. *debito Alodo*.

* Dd. inc. 22. x. 3. 30.

‖ In c. 3. X. 2. 9. Gloss. Fin.

I proceed in the next Place, to discourse of Tithes for Fish: And here I shall consider the Method of paying thereof: And 'tis usually said, that Fish taken in the Sea are not titheable *de Jure*, because they are not only *feræ Naturæ*, but the Sea is not properly in any Parish†: But if that be a good Reason, then they should pay Tithes when caught in a River, because most Rivers are in some Parish, and yet Fish caught in a common River pay no Tithes‖. 'Tis true, the Court was divided upon this Point in the Ninth of King *Charles*; but yet they granted a Prohibition to try the Right. But Tithes may be paid by Custom for Fish taken in the Sea and in Rivers; and in some Places of *Cornwall*, they pay Tithes of Fish caught in the Sea to the Parson of that Parish wherein they are landed: And so at *Yarmouth*, they pay Tithes for Herrings, but not the tenth Fish, but so much Money; for this is a Personal Tithe, and therefore the Tenth shall be paid in *Specie*, unless it be by Custom*. If a Man suggests a Custom, that all the Fish in a Ship should be divided into Ten Doles, after the Owners Part is separated for the Use of his Ship, and that the Tenth Dole is then to be divided, one Moiety to the Parson, and the other to the Town of *Yarmouth*, this was held to be good. But if Fish are taken in a Pond, or other inclos'd Place within a certain Parish, they shall be paid to that Church then as a Predial Tithe:‡ But if the Place where Fish are taken be not enclosed, but is a Place where Fish may pass from one Parish to another, as in a publick River, they shall be paid as Tithe to that Church where the Fisher-man hears Divine Service, and receives the holy Sacraments†. And this is true, where a Foreign Parishioner has the Liberty of Fishing in such a River; but if he has not this Liberty there, but pays a certain Price or Portion of Fish thereunto, then the Tithe shall be paid out of such Price or Portion of Fish to that Church, within which Parish the Fish are taken*. But tho' these seem to be Personal Tithes, yet *Bernard*‖ seems to think, that the Tithes of Fishes taken in the Sea (for they are titheable by the *Canon Law*) are Predial Tithes.

Beasts and Birds which are *feræ Naturæ*, are not titheable of *common Right*, tho' they may become so by Custom*: But Rabbits in a Warren, and Pidgeons in a Dove-house are not properly *feræ Naturæ*, because they are kept under Custody, and by that Means are reduced to be the Property of particular Persons. Pidgeons and Rabbits ought to pay Tithes *de Jure* if they are sold, but not if they are spent in the Owner's House*: And the Reason is, because they are a Provision to support him in his Labour about other Affairs, for which the Parson may have Tithes†: But this seems to be a weak Reason, because in Tithing, the Nature of the Thing is to be consider'd, and not where it is spent. Now if the Place where Pidgeons or Rabbits are spent, would make them not titheable, when in their own Nature they ought to pay Tithes, then Corn, Pigs and Calves, &c. spent in the Owner's House, stand on the same Bottom, and no Tithes wou'd be paid for them, which would be of mischievous Consequence to the Clergy, if this Reason were allow'd to be Law. But if Partridges and Pheasants are kept in a Wood inclos'd, and their Wings are cut so as they cannot fly out, and they lay Eggs and hatch young ones, no Tithes shall be paid for them, because, tho' under a Restraint, yet they are *feræ Naturæ*, and are not reclaim'd; for if their Wings were not clipt, they wou'd fly out of the Inclosure. In respect of young Swans taken out of the Nest, I think, a Predial Tithe ought to be paid (for so 'tis termed) because they are hatcht in a certain Place, and are taken out from thence: But I should be of another Opinion, if Swans were taken flying from an uncertain Place, as has been already said of Fishes passing from one Place to another||. Domestick Fowl pay Tithe of Eggs or Chicken in their several Kinds; but where they pay Tithe of Eggs, there shall be no Tithes paid of Chicken: But in some Places 'tis customary to pay Tithes both of Eggs and Chicken (as aforesaid.)

Fruit of Trees, as Apples, Pears, Plums, &c. pay a Predial Tithe*, as soon as gather'd; and an Action will lie upon the Statute† for Subtracting such Tithes, or for not setting them out. *Mast* of Oak or Beech, in *Latin* call'd *Pannagium*, ought to be paid according to the Tenth of its Value, if the same be given to be eaten by Hogs; but if Sold, then the tenth Penny is due for Tithes||. *Flax* pays a Predial Tithe like Hemp, and 'tis reckon'd among small Tithes: And so does Saffron, which is also accounted among small Tithes. Therefore, tho' 'tis Enacted by the Statute of *Edward* the VIth. That Tithes shall be paid as usual for Forty Years last past before the making that Act; yet if Corn has been sown in a Field for Forty Years, and the Parson had the Tithes, and the Field should afterwards be sowed with Saffron, the Vicar shall in such a Case have the Tithes*. *Corn* pays a Predial Tithe, and ought of *Common Right*, to be cut down by the Owner, and prepar'd for the Parson to carry away; and it must be tithed by the Tenth Cock, Sheave or Shock; and if the Parishioner refuses to do it, the Parson may sue him in the Spiritual Court, but it must be specially for not setting it out in Cocks, &c. and not generally for not setting out the Tithes†. But the Parishioner is not bound to put the Parson's Sheaves into Shocks, unless it be by Custom. If he does not set out his Tithes, he is liable to be sued in an Action of Debt, upon the *Statute*|| for treble Damages; and if he sets them out and afterwards carries them away, the like Action may be brought against him, because the setting out, was with a fraudulent Design to cheat the Parson. But tho' 'tis clear that an Action of *Trespafs* lies against him; or else he may be sued in the Spiritual Court, as was always practis'd 'till this Statute: Yet if a Stranger takes them away, he must be su'd in an Action of *Trespafs* at the *Common-Law*.

A Prescription to pay the Parson the tenth Sheave, *as it falls out*, or tenth *Swarth* is not good *: But a Prescription to be discharged of Tithes in that Year wherein the Field was fallow, in Consideration he had set the Sheaves into Shocks, when the Field was sowed, is good and valid †. *Fallow Ground* pays no Tithes for the Pasture in that Year in which it lies fallow, unless it remains beyond the Course of Husbandry; for it makes the Land more fruitful the third Year ‡.

The *Canon-Law* says, that Tithes ought to be paid of the Profits of Wind-mills and Water-mills †: But as there are various Sorts of Mills, so the Tithes of them are different. As for Instance, the Tithe of Corn-mills are Predial; but the Tithe of Fulling or Paper-mills are Personal, even according to our Law ‖. For there are several Sorts of Mills, as *Copper, Corn, Fulling, Iron, Lead, Paper, Plate, Powder, Rape, Saw, Stamping* and *Tin* Mills: And of these only Corn Mills pay Tithes in Kind as Mills, which is the tenth Toll-dish, and Corn-Mills built before the Statute ‡ of *Edward* the Second are Tithe-free. Therefore, where a Suit is brought for Tithes of an ancient Mill, the Defendant must suggest that the Mill is very ancient, and has never paid Tithes; and he must make Oath of the Truth of this Suggestion: For all new Mills pay Tithes*. If a Corn Mill should be built on any Land discharged of Tithes by any *Modus*, the Mill shall likewise be discharged thereof †. But this Case seems to be unreasonable; and, therefore, 'tis not Law: For the Profits of Lands, and of some Mills are of different Natures, the one paying a Predial, and other a Personal Tithe; and so they are charged not in respect of their real Value as Lands are, but in respect to the Labour of Men. And therefore all Mills except Corn-Mills pay Tithes not as Mills, for they are only Engines of several Occupations, and the Persons using them pay Personal Tithes if they have been paid for forty Years next before the Act of *Edward* the Sixth ‡.) But Corn-Mills pay a Predial Tithe, as aforesaid. If a *Modus* of Six Shillings and Eight Pence is paid for the Tithe of an ancient Corn-Mill, and the Mill-stream should change its Course by Accident, and not by the Act of the Party, and the Owner pulls down his Mill, and rebuilds it to the Stream, the *Modus* shall still continue: But if he had diverted the Stream himself, and then rebuilt the Mill to it, he ought to pay as for a new Mill*.

Wood likewise pays a Predial Tithe, and sometimes 'tis reckon'd *inter minores decimas*: As for Instance, if a Vicaridge be endowed with small Tithes, and the Vicar always had the Tithe of Wood, in such a Case it shall be deem'd a small Tithe; but 'tis generally esteem'd to be a great Tithe. But 'tis not titheable, if spent in the Owner's House, tho' it may be so by Custom; for 'tis not discharg'd by the Law †. Yet if the Defendant suggests, that it was burnt in his Dwelling-House, by Reason whereof the Parson had *uberiores decimas*, this is good ‡. Nor ought Tithes to be paid for it, when 'tis used for Fencing of Corn or Hedging; nor when 'tis cut and burnt for making of Bricks to repair or enlarge the Owner's House. But then such Enlargement must be not only for his Pleasure, nor more than is necessary for the Habitation of his Family: For if 'tis not so alledg'd in the Suggestion, it will be difficult to get a Prohibition; because a general Suggestion that the Wood was burnt in making Bricks for the enlargement of his House would be so inconvenient, that it might deprive the Parson of his Tithes, since the Person might build a Palace ‖. If Wood-Grounds have likewise Timber-Trees growing on them; and consist for the most Part of such Trees, only some small Bushes and Underwoods intermixt, the Trees

shall privilege the whole : But if such Trees grow *Sparsim*, and the Underwood is the greatest Part, then it must pay Tithe for the whole.

* Lindw. lib.
3. Tit. 16.
c. 3.

'Tis to be observ'd, that Wood is only titheable by Custom or a Provincial Constitution * ; for till Archbishop *Stratford* made a Canon that it should pay Tithes, before it paid none : And as it was titheable by Custom, so it may be exempted from the Payment of Tithes : For Prescriptions are allow'd in *Non-decimando* for Wood in the *Weld* of *Kent* and *Sussex* ; but such a Prescription was never allow'd for Corn, because that pays Tithes *de Jure*. A Custom that the Parson has enjoy'd such a Wood Parcel of the Mannor, &c. in Satisfaction of all Tithe-Wood within that Parish, is good †. So a Prescription to pay the tenth Acre standing, is a good Prescription. *Lastly*, the manner of tithing Wood is by the Pole or Perch, or by the tenth Faggot or Billet, according to the Custom of the Place ; and all Underwood commonly in *Latin* called *Sylva Cadua*, which

† Roll. Rep
p. 555.

being under twenty Years Growth, and being cut renews from the same Stock or Root, pays a Predial Tithe, except, as before excepted. But *Rolls* says, that Tithe shall be paid of Beeches, Hazle, Willows, Holly, Alder, Maple and Birches, even after twenty Years ; because they are not Timber. But in some Countries where Timber is scarce Beech is used for Building ; and so we are told 'tis in *Buckinghamshire* : And in such Case, if above twenty Years Growth, 'tis privileged by the Statute of

‡ 45. E. 3. c. 3.

Edward the Third ‡. But 'tis Necessity, and not the Nature of the Tree which makes it Timber ; for wherever other Timber may be had there Beech is not used for Building, and so becomes titheable. Cherry-Trees in *Buckinghamshire* have also been adjudg'd Timber, and therefore Tithe-free. Tho' under the Appellation of the Word *Lignum*, in

§ D. 32. 1.
55. 2.

a general Sense, we may reckon all Trees cut and fell'd || ; yet properly speaking this Word does not denote Timber or Materials for Building or Repairs, but only such as is fit for Fuel or Burning : But touching this Matter, according to the Law just now quoted we ought to consider the Custom of the Country, *viz.* What is included under the Word *Lignum* in the Canon. *Bartolus* observes, that Trees bearing Fruits are not reckon'd among Coppice-Wood. It has been agreed, that if a Man cuts Trees for Houseboot, Hedgeboot, Cartboot, Ploughboot and Fireboot, Tithes shall not be paid of them. Lops of Trees above twenty Years Growth pay no Tithes ; for the Branch is privileg'd as well as the Body of the Tree * : And so 'tis if the Tree was not privileged at first lopping ; yet if 'tis afterwards lopp'd, no Tithe shall be paid †. And 'tis the same Thing if the Tree becomes rotten, and only fit for the Fire, because it was once privileged ‡ ; but *Croke*, who reports the same Case, says the Court was divided in their Opinion ||.

* Moor Rep.
762. 903.

† Brownl.
Rep. 33.

‡ Moor Rep.

|| Crok. Eliz.
p. 100.

Wool pays a Predial Tithe ; and in Proportion to the time the Sheep are in the Parish : As for Instance, if forty Sheep yield eighty Pounds of Wool, and are depastur'd in one Parish for a whole Year, the Parson shall have eight Pounds of Wool ; and consequently but four if fed there only for half a Year, and so two Pounds for three Months, and but the tenth of the twelfth Part of the Wool if they are fed there for one Month and no longer *. And 'tis to be observ'd, that the

* Lindw. 1. 3.
Tit. 16. c. 6.
v. *ratâ tem-
poris*.

Tithe-Wool ought to be paid on the Day of shearing the Sheep † : There are several Prescriptions relating to Tithe-Wool ; as when there are only six Fleeces of Wool, then the Parson shall have only a Half-penny for each Fleece according to *Lindwood* † ; but if there are seven, then he shall have the seventh Fleece, paying back the Half-pence ; or else wait for the seventh till another Year. Again, if a Man has under ten Fleeces, then to pay a Penny for each Fleece ; and if

† ut sup. v.
decima lane.

more

more then to pay the tenth Part *sine visa & tactu* of the Parson : But this seems to be an unreasonable Prescription. Nor is it a good *Modus* to pay the tenth Pound of Wool for Tithes, if he does not shew that he is to pay something for Tithe, if under ten Pound; because otherwise, as to what is under ten Pound, is a *Modus in non decimando* *. But 'tis * 1. Rolls Ab. p. 648. a good *Modus*, that in consideration he did wind the Wool into a Fleece, to be discharg'd of Neck-Wool shorn from the Neck of the Sheep a Fortnight before and after *Michaelmas* ; because 'tis plain such Shearing could not be for the Gain of the Wool alone, but to preserve the Sheep from Vermin †. So a Suggestion to pay the tenth Part of Wool of *all the Sheep* he had before *Lady-Day*, and which he sheared or fold, and that † 1. Rolls Ab. p. 649. it was to be in Satisfaction of *all the Wool* of such Sheep as should be brought into the Parish after *Lady-Day*, is good ‡. So 'tis a good *Modus* ‡ Ibid. that in Consideration that a Parishioner has Time out of Mind paid Tithe-Wool of all the Sheep at the Shearing, as well as those which *he bought* but two Days before the Shearing, as those that were kept all the Year in the Parish, he should be discharged of the Tithes of those he *should sell* but two Days before the Shearing ||. If Sheep dye of the Rot, || Ibid. 643. the Wool is not titheable but by Custom. So likewise if killed and spent in the Owner's House, the Skins are not titheable, but the Wool is : But if the Wool has not paid Tithe, Tithes ought to be paid of Wool-fells. Under the Word *Lana* in the Canon is comprehended the Down of Geese, the Fur of Hares and Rabbits, and the Shearings of Goats, as well as those of Sheep.

According to *Speculator* the Person to whom Tithes are due, may forbid the Owner of the Estate either to collect or carry away the Fruits thereof till such time the Tithes are set out either in the Presence of the Person to whom they are due, or else in the Presence of his Agent or Servant, if he be afraid of being defrauded : And thus, according to *Aufreerius*, it has been adjudg'd in the Parliament of *Toulouse* in *France*. And *Hobart* tells us *, that a Custom for Parishioners to pay their Tithes * Hob. Rep. p. 107. without the View of the Parson is not good ; for no Man may be his own Judge and Divider : And, therefore, for a Parishioner who is in the Nature of an Adversary to the Parson in this Case, to set forth a Part for the Tenth (which he affirms to be just) is to give himself the meer Power of Tithing as he pleases. And a Prescription would be altogether as reasonable to say, that he might set out what Tithe he pleased. It is a weak Answer hereunto to say, that if it be not a just Tenth he may refuse it, and sue for his Due. For, *First*, he has no Means to be assur'd whether it be a just Tenth or not ; and so his Suit may be Causeless, and he may be sure it will be fruitless. But the Law was not provided to engender, but to prevent Suits ; and therefore provides that Things be done by indifferent Methods and Persons, that there be no Suspicion of indirect dealing. Touching this Matter we meet with two Edicts or Constitutions of *Francis* the First King of *France*, in the first † † A.D. 1545. ordaining, that no Owners or Occupiers of Lands do presume to gather or carry away the Fruits of such their Land out of the Fields, till they have paid their Tithes and First-Fruits according to ancient Custom : And hereby they are enjoyn'd to give Notice to all such Persons as have Right of Tithes, touching the time of setting them forth, before they carry them away, under the Pain of forfeiting all Fruits thus subtracted (the Tenths and First-Fruits being first deducted) unless they have first agreed with the Persons to whom they are due. And by the Second ‡, all Proprietors and Occupiers of Predial Estates, ‡ A.D. 1547. are forbid to cut or mow such Fruits as pay Tithes, 'till they have given

ven Notice in the Church of the Day and Time of cutting and mowing the same, that the Person who has the Right of Tithes may be appriz'd thereof, and be present (if he pleases) either by himself or Agent, at the setting them out, under the Pain aforesaid.

I have already observ'd, that no one can be discharg'd from Tithes, tho' he may be discharg'd from the actual Payment of them^{*}; therefore, if a Person will discharge himself from a just Demand of them, he ought to shew and satisfy the Court, touching the Grounds of such Discharge by some good Plea or other. Therefore, in considering the several Ways whereby Persons are exempted from the actual Payment of them, I shall first consider the Persons capable of them, and next the Means how they came to be so. Now the Persons or Bodies capable of receiving them, are *First*, such as are Spiritual: And, *Secondly*, By the Laws of *England* such as are Temporal. Indeed, by the *Canon* Law, Lay-men are not capable of receiving Tithes in respect of the Administration of Divine Worship, because Tithe is a Right meerly Spiritual by that Law: But, according to *Anchoranus* †, Lay-men may receive Tithes by Virtue of a Privilege, when they are paid (as the *Canonists* say) in *Signum Domini* to the Lord of the Mannor by way of Acknowledgment, or as a Quit-Rent, and these were stiled *Feudal Tithes*. And thus, tho' Lay-men were not capable of receiving Tithes in their own Right by the Laws of the Church †, yet they might receive them by the Pope's Grant: But Spiritual Persons do not only receive them in their own Right, but are also actually priviledg'd and discharged from the Payment of them †; as the *Cistercians*, *Templars* and *Hospitallers*, were not bound to pay Tithes out of their Estates, which they held in their own Hands, and Manur'd at their own proper Costs ‡. And here 'tis to be noted, that these priviledg'd Persons, as they were Spiritual, had four extraordinary Ways of being discharged from the Payment of Tithes, *viz.* *First*, By some Papal Bull. *Secondly*, By real Composition. *Thirdly*, By Prescription, and these were absolute. And, *Lastly*, By being of some religious Order, and that was Conditional, or limited so long as the Land continued in the Manurance of the Religious Persons themselves; and these Orders were the *Cistercians*, *Templars* and *Hospitallers* of *Jerusalem*, as aforesaid. But Unity of Possession of the Parsonage Appropriate, was antiently no Discharge of the Tithe; nor was it held so at the Common Law. But this Practice began (as we are told) in the *Norman* Times; the Separation of Tithes from Churches being not known in *England* till then: For the *Norman* Nobility took little Notice of the *Saxon* Laws about Tithes; but finding Tithes paid out of the Lands within their Mannors, they thought they did well enough, if they gave the whole Tithes, or such a Portion and Share of them as they thought fit, to some Monastery, either abroad or at home. *William* the First, gave several Churches with their Tithes to *Battle-Abbey*. *William Rufus* added more ||. In the like manner, *Henry* the First, gave to the Monastery of *Reading* several Churches; and *Henry* the Second gave more *. *Hugh*, Earl of *Chester*, gave the Tithes of several Mannors to the Monastery of *St. Werburgh*, in the time of *William* the First: And it were endless to give an Account of the Appropriations made by the *Normans*; for the *Monasticon* is full of them †. There is a Bull extant in the Collection of Pope *Innocent's* Epistles to exempt the *Premonstratenses* from the Tithes of *Lands in their own Hands*; but this was granted in the first Year of *Innocent* the Third, some time before the *Lateran* Council, and they might enjoy the same Privileges with the *Cistercians*, if it could be prov'd that they were generally receiv'd, which has not yet been done.

Of

* vid. p. 506.
Hob. Rep. p.
44. 297. 298.

† In c. 26. x.
3. 30.

† X. 5. 33. 3.

† X. 3. 30. 15.
& 17.

‡ X. 3. 30. 10.

|| Mon. Vol. I.
P. 31.

* P. 417.

P. 202.



Of Vicars, Vicaridges, their Beginning, &c.

THE Word *Vicar*, in *Latin*, *Vicarius*, is a general Term, and comprehends every Person, *qui vicem alterius gerit* *; and hence, in the *Civil* Law, even a Servant may be said to be a *Vicar* †: But I shall here use it in the common Acceptation of the *Canon* Law; and of these kind of Vicars there are four sorts in our Law-Books. *First*, There are some which are in *Latin* stiled *Vicarii mercenarii* *; and in this Sense the Rector's *Con-Vicars*, which he assumes and makes use of for a Time only, are called the Rector's *temporal Vicars*; because they are Conductitious Persons; and as they are only hired for a Season, and may be assum'd without the Bishop's Licence, the Rector may remove and part with them at pleasure, according to the *Canon* Law: And as such they may rightly administer the Sacraments, and perform all other divine Offices in the place and stead of the Rectors ||; for a good Rector, says that Law, ought to be attended with a Vicar; and these are called in *Lindwood* by the Name of *Stipendiary Priests* and *Capellani Parochiales*, as already remembred. Yea, a perpetual Vicar of this kind, hereafter mention'd, may have a Temporal *Con-Vicar* to aid and assist him in his Office *: And this without the Bishop's Licence, provided there be no Provincial or Synodal Constitution, which hinders and forbids the same. A Second sort of Vicars taken notice of in the *Canon* Law, are said to be those, which the Pope appoints for the Government of some certain Province; and these Vicars have as much Power as their Commissionall Letters do import, and no more †. A third sort of Vicars are those, which the Bishop does by a general Commission constitute and appoint in his Diocess for the dispatch of Matters Spiritual relating to his Office; and these are said to have their Power from the Law *: But how and in what manner these Vicars-general in Spirituals differ from principal Officials, who hold the same Consistory with the Bishop himself †; I have already related under the Title of *Chancellors*. But, in brief, the Principal Official has a general Cognizance of all Causes committed to him throughout the Diocess; tho' he has not the Power of Inquisition, Correction, Punishing of Excesses, or of Removing a Person from his Benefice, nor even of collating or giving Institution to Benefices, unless these Matters are specially granted to him by his Patent or Commission: But a Vicar-general in Spirituals may do all the aforesaid Acts by virtue of his Office, except collating or given Institution unto Benefices ||. A fourth sort of Vicars, are called *perpetual Vicars*; and as they are appointed for Parochial Churches and the Cure of Souls, they are install'd, instituted, and intituled hereunto *: And of these Perpetual Vicars is the Word, *Vicar*, in Propriety of Speech rightly predicated. And thus there are four sorts of Vicars, *viz.* *Perpetual* Vicars, which are constituted for Parochial Churches. *2dly*, *Temporal* Vicars, which are much the same with our Curates as we now call them; and these are constituted for some particular Acts and Seasons. And *3dly*, Some which are special, and not *ad curam Animarum*; and these are constituted for a certain Act, Place, or Article †. And, *lastly*,

* D. 50. 17.
† D. 15. 1. 4.

* Joh. de
Ath. in
Othon. conf.
Tit. 10. v.
Vicariorum.

|| 16 Q. 1.
19. Arg.
23. Dist. 29.

* 7 Q. 1.
15 & 16.

† 98 Dist. 3.
X. 5. 33. 8.

* vi. 1. 13. 3.
vi. 3. 4. 3.

† vi. 2. 15. 3.

|| vi. 1. 13.
2 & 3.

* X. 1128. 5.

† X. 1. 28. 3.

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There are some which are called *Vicars-general*, which are neither Perpetual, nor are they made *ad curam*, nor deputed to any certain Act or Article whatever, and such are Vicars in the Bishop's Courts. The first of these serve the Church *Nomine proprio*, in their own proper Name, and on their own Account. And the second are such as serve the Church *alieno Nomine*, in the Name and on the Account of some other Person; and have no Title or Institution into the Benefice, as the former have, but are Mercenary, Conductitious, and Removeable at Pleasure (as aforesaid) unless they have the Bishop's Licence, and the Parson will not serve the Church himself.

* Othobon.
Const. Tit.
22. X. 3. 5.
12 & 30.

Vicaridges, with Cure of Souls, had their first Rise chiefly from the Appropriation of Churches *: For the Rectory being annex'd to some Religious House, or Collegiate Church, the Cure was served from thence for a while by some Member thereof, with a competent Allowance to subsist on, till such Time as these Bodies of Men began to curtail their Chaplain's Maintenance, issuing out of the Revenues of the Benefice, and to apply it to their own luxurious way of Life; and then the poor Priest either begg'd for a Livelihood, or return'd to the greater Church or Monastery, and left his Flock to shift for themselves. But as an Affluence of Wealth and other temporal Goods often distracts and draws some great Churchmen from the Duty of their Office committed to them; so Poverty renders others very unhappy in the Circumstances of their Lives, and obliges them either to beg, or else to use mean Artifices to gain, perhaps, a bare Subsistence in the World: And, therefore, a new way was invented to support these Hirelings, who were only temporal Vicars at first, whilst the Monasteries and greater Churches swallow'd the Profits of the Parochial Benefices; and that was by Masses, Prayers for the dead, and the like. And as these poor Vicars had no Property in themselves, they entirely depended on the Alms and Good-will of others, and on their own Arts and Tricks of getting Money, to the great Dishonour of their Houses, and to the Disparagement of the Clergy themselves: And, therefore, a Law was introduced to make them perpetual by a Title and Institution had into the Church it self; and to give them an

† X. 1. 28. 3. Allowance out of the Revenues of the Parish Church †: and this was called the Vicar's Portion or Endowment; which was either settled at the time of founding the Vicaridge, or, at least, before the Vicar receiv'd

* X. 3. 5. 12. Institution into the Church itself *. And some observe; that, according to the antient Law, this Allocation or Assignment of an Income to the Vicar, ought to be first made by the Rector or Patron himself, and if he did not within six Months assign a competent or suitable Provision for the Vicar, the Bishop might then do it by his own Authority at the Time of granting Institution †. But *Hostiensis* assures us ||, that this Assignment of the Bishop at the Time of Institution was not practis'd in his

† X. 1. 10. 2.
|| In c. 12.
X. 3. 5. v.
assignatum.

* Cl. 5. 12.
1.

† Joh. de
Athon. in
Tit. 12.
Othon. v.
vel vicarias.

* A.D. 1222.

† Lib. 1.
Tit. 12.
cap. 2.
|| Ut sup.
v. ad vicarias.

Time, because if the Presentee be a fit Person, the Bishop is bound to admit him before the Term of six Months expires; but then he might, after the Determination of a convenient Term, by him limited for this end to the Rector or Patron of the Church, assign the Vicar a sufficient Portion, if such Patron or Rector refus'd or neglected to do it *. This Endowment at first, generally consisted either in small Tithes, or else in a certain Sum of Money to be paid out of the Profits of the Church †: And hence it is decreed * by an antient Constitution in *Lindwood* †, That a Revenue or Endowment of five Marks, at least, should be allotted to a Perpetual Vicar, unless, perchance, in those Parts of *Wales*, where Vicars are, by reason of the smallness of the Churches Income, content with a lesser Stipend. And hereupon *Lindwood* || very well observes, that though

a lesser Sum than this ought not to be assign'd the Vicar (unless as hereafter provided) : yet it was lawful, and expedient too, in many Cases to augment the same ; especially, according to the rise of Things in their Price and Value. And, therefore, *Simon Islip*, Archbishop of *Canterbury*, did afterwards * by another Provincial Constitution †, increase this Sum in respect of such as had the Cure of Souls, yea, tho' they were only Temporal Vicars, *viz.* Priests under Rectors or *Parochial Vicars*, as *Lindwood* calls them, who are the same with our present *Curates* ; and this Sum he extended to six Marks ||. But at length the Value of all Necessaries for human Subsistence growing dearer, under Archbishop *Sudbury* *, it was augmented even in respect of such Temporal Vicars unto eight Marks, or otherwise to four Marks *cum Cibariis* † ; And this appears from their several Constitutions. And *Lindwood* there remarks, that if we consider the Increase of Things in their Value in those respective Times, this Augmentation from five to eight Marks was but a just and wise Institution. But yet, says he, these Parochial Priests in several Places were not in his Time satisfy'd with such Salary, but desired to have the same advanced to ten Marks, at least. But if eight Marks in *Lindwood's* Days, which, according to the present Rate of Things, and Value of Money, is, as *Spelman* very well observes ||, something upwards of 60*l.* in these Times, was not then thought a sufficient Maintenance for a poor Vicar ; what will 20*l.* or 30*l.* be deem'd now, in respect of a poor Curate's Allowance, and but few Clergymen pay their Hirelings more than this last Sum ?

* A.D. 1362.
† Lindw.
lib. 3. Tit.
23. c. 10.

|| Lindw.
Lib. 1.
Tit. 12. c. 1.
v. *Quinq;*
Marcas.
* A.D. 1378.
† Lindw.
lib. 3. Tit.
23. c. 11.

|| Pag. 153.
of Tythes.

But it will be answer'd hereunto, That in settling the Vicar's Allowance, great regard was then had to the Incumbrances, which the Laws of the Church laid upon such Benefices ; and these were various and several, some of which are said to be Episcopal, and among these are reckon'd the *Synodaticum*, *Cathedraticum*, the Fourth of all Tithings and Mortuaries, when they are due by Custom ; and also Procurations, the Charge of entertaining the Pope's Messengers, and the *Subsidium Caritativum*, &c. A Beneficiary will say, perhaps, now, that these were heavy Duties upon the poor Vicar, which his Curate is not at present charg'd with. But is he not charg'd with Residence and other Acts of Duty ; and, in some measure, Hospitality is expected from him, if he would live well with his Parishioners ? But *Lindwood* further says, we ought not only to consider the Sufficiency of a Benefice in point of the Revenues and Incumbrances, which hang over the same ; but also the Competency thereof in respect to the Persons that serve it, as their Learning, Quality, and other Merits. But *Lindwood* puts this Matter out of all doubt, saying, That the Vicar's Portion ought to be five Marks *de claro*, after all Charges and Incumbrances are deducted ; *because his Allowance ought to be such*, says he, *as is sufficient to support himself and Family, not only in a narrow and penurious way of Living, but as it becomes him and his Family* : And with *Lindwood*, the Canon Law entirely agrees *, as well as the Interpreters thereon †. And *Lindwood* likewise concludes, that the Vicar's Portion ought to be so ample, as that he may maintain himself and one, at least, or more Parish Clerks, or *Clerks assistant*, according to the Quality and Extent of the Parish, both in Meat and Apparel ||.

* Arg. 31.
Dist. 11.
† Paul in
c. 1. Cl. 5.
12. v. *Con-*
gruam.
|| Lib. 1.
Tit. 12. c. 2.
v. *firmam.*
X. 3. 1. 3.

Sometimes the Endowment was express'd, as at the Founding or Appropriating of Churches ; and at other Times it was reserv'd in the Bishop's power to do it as he saw cause. But the Bishops were either so remiss in those Times, or the Monks so powerful at *Rome*, that the poor Vicars fared so hardly, that in *Henry* the II'd's Time, Pope *Alexander* the

* X. 3. 5.
12.

† Stilling.
Eccles. cas.
vol. 1. p. 201.
|| X. 3. 5. 10.

* X. 3. 5. 30.

† X. 3. 5. 12.

|| X. 1. 10. 2.

* Cl. 5. 12.
1.

† 31 H. 8.
cap. 13.

|| 2. Rolls.
p. 337.
9 Car. 1.

* 40 E. 3.
cas. 15. fol.
28.

the III^d. sent a Reprimand to the Bishops for favouring the Monks too much, and the secular Clergy too little *, (a strange Thing in a Pope to do!): And, therefore, requir'd the Bishops to take care that the Vicar had a competent Subsistence, so as to be able to bear the Burden of his Place, and to keep Hospitality. This *Decretal* was directed to the Bishop of *Worcester*; for it seems so long since the poor Vicars were hardly provided for. And yet there are several Forms of Appropriations made here by the Bishops after the Conquest, wherein there is a twofold *Salvo*; one for the Bishop's Right, and another for a sufficient Maintenance for the Curate, tho' the Church was appropriated *ad communem usum Monachorum*, as of *Wolstan*, *Roger*, and of *William* in *Henry* the II^d's Time, when *Alexander* the III^d. liv'd; and of *Walter de Grey*, *Sylvester*, &c. † But it seems where a competent Subsistence had been decreed, the Monks took the first opportunity to lessen it, which occasion'd another *Decretal* in the *Canon Law* ||, wherein any such Thing is forbidden without the Bishop's Consent. In other Places, they pleaded Custom for it: And from thence came another Decree of the *Lateran Council* *, to void all such Customs, by whomsoever introduc'd, where there was not a competent Subsistence for him that serv'd the Cure. The Monks were still refractory in this Matter; and because the Bishops had power to refuse any Person presented by the Monks, unless they consented to such a reasonable Allowance as the Bishop thought fit †; they, therefore, grew fullen, and would not present: In which Case, another *Decretal* || was made to give the Bishop power to present ||. And after all, Pope *Clement* the Vth reinforced the former *Decretals*, and enjoind the Diocesans in the strictest manner, not to admit any Person presented to a Cure, where the Church was appropriated, unless sufficient Allowance was made by the Bishop's Consent and Approbation, and all Customs and Privileges to the contrary are declar'd to be void *. But how far does this hold among us, since the Appropriations are become Lay-Fees, and the Bishops Power is not mention'd in the Statute of Dissolutions? To this I shall give a clear, tho' (perhaps) not a satisfactory Answer to all Persons concern'd: For as Necessity and Power, so some Mens Interest and Reason live very near each other.

First, The Statute of Dissolution leaves all Matters of Right as to Persons interested just as they were before: For by the surrender, the King was to have the Monasteries and Tithes in as ample a manner as the Abbots then had them in right of their Houses, and in the same State and Condition as they then were, or of Right ought to have been †: And so *Res transit cum suo onere*. But this is not all: For there is an express *Saving* of all Rights, Claims, Interests, &c. of all Persons and Bodies Politick. So that if by the Law of *England* there was an *Antecedent* Right in the Vicar to his Allowance, and in the Bishop to assign it, 'tis not taken away by this or any other Statute. *2dly*, By the Law of *England*, the Bishop had a Right to provide a competent Maintenance for supplying the Cure upon an Appropriation: And we are told by an undoubted Authority, in point of Law, that this Matter was brought before the *King's-Bench* in the Case of *Thornburgh* and *Hithcot* ||. The Vicar complain'd, that the Church was appropriated, and that he wanted a competent Maintenance: Whereupon a Prohibition was pray'd, but deny'd on this Reason, *viz.* *That the Vicar had Cause for his Suit*, and that the Ordinary might compel the Impropiator to make a greater Allowance; because in all Appropriations that Power was reserv'd to the Ordinary. And so in the Year-Books 'tis said *, *That the Ordinary may increase or diminish the Vicar's Portion*. *3dly*, The Law of *England*, as to a competent Subsistence for Vicars

Vicars or Curates in appropriated Churches, is founded on very good Reason: For the Tithes were originally given for the Service of the Parish Church †, and not for the Use of Monasteries. And, therefore, when Bishops grew negligent of the Parochial Clergy, and began to favour the Monks for private ends to themselves, there was a certain Portion of the Tithes set apart from the Monastery; and, being given *in perpetuum* to the Vicar for his Maintenance, this was called an Endowment *express'd*, which was usually made at the Time of appropriating any Church (as aforesaid). This was a hard Point for the Monks to get over, since the Tithes were given for the Maintenance of the Clergy; and so they ought to go: But as the Monks were none of the Clergy, how came they to have a right to the Tithes? 'Tis certain, that the State of the Clergy, and the Monastick State were different; and the Offices of the Clergy and of the Monks were inconsistent, if they held to their Rules: And, therefore, surely the Monks ought not to have that Maintenance, which belong'd to the secular Clergy for other Offices; since there is no Colour or Pretence for it, the Monks, by the Canons of the Church, being forbidden to meddle in Parochial Offices of *Preaching, Baptizing, Visiting the Sick, &c.* *. So that it might bear a Question in Law, whether a Monastery were capable of an Appropriation, since by the Ecclesiastical Law they are not an Ecclesiastical Body.

† X. 3. 30.
29. X. 3. 29.
5.

* 55 Dist. 1.
16 Q. 1. 4.
5. 6. 8. 10
& 11.

But the Remissness of the Bishops was so great and scandalous in respect of their Care of the poor Vicar upon Appropriations, that tho' there were some Endowments of Vicaridges by Tithes in case of Appropriations, even before the several Statutes for endowing the same; yet these Endowments were but very few, and scanty too, where the Endowment proceeded entirely from the Monastery: And, therefore, was the Statute of *Richard* the 1st made †, as I have before remembred under the Title of *Appropriations*. But one Statute was not enough, and, therefore, another was enacted in *Henry* the IVth's Reign ||: For they eluded the former by appointing Vicars out of their own Body, but the latter Statute requires, That the Vicar should be a secular Person, and made a spiritual Vicar; and have such an Endowment as the Ordinary should think fit, otherwise the Appropriation to be void. But these Statutes only regarded Perpetual Vicars; for as to Temporal Vicars (and many there were of them, even in those days, contrary to the Canon, *viz. That a Vicar cannot have a Vicar* †) these poor Wretches were left to the Goodwill and Discretion of the Bishop, and to the Bounty of the Parson of the Parish for their Wages, after the Price of Things came to encrease, and so they are still; which is the Reason, that several of them live such uncomfortable Lives (whilst the Rectors live in Idleness and Splendor) if they are not a Scandal to their Holy Profession: And, therefore, it is much to be wish'd, that some good Law was made to compel the Parson to allow them according to the Value of his Living, if he will not do the Duty himself; as he ought in Conscience to do.

† 15 R. 2.
c. 6.
|| 4 H. 4.
c. 12.

† X. 1. 28. 4.

By a Legatine Constitution in *Lindwood* *, no one could be admitted to a Vicaridge, unless he was at the Time of his Admission in Priests Orders, or (at least) in Deacons to be ordain'd a Priest at the next Ordination; or unless upon resigning his other Benefices, if he had any with Cure of Souls, he took an Oath to live thereon, and to observe a constant corporal Residence; and if he acted contrary hereunto, his Institution was deem'd null and void, and such Vicaridge was to be conferr'd on some other Person, and not on the same without another coming between. So that by this Constitution, a Vicar was not only sworn to continual Residence, but could not have more Livings than one †. Though

* Otho. Tir.
10.

† X. 1. 28. 2.

* In Tit. 10.
Othon. v.
Residentiam.

† Cl. 1. 7. 1.

Otho's Constitution obliges Vicars to personal Residence; yet it does not speak of Ministration: But *Joh. de Athon* thereupon observes*, that this Residence is not enjoind them on the account of a constant Attendance and Service in administering the Sacraments, and doing other Sacramentals only; but likewise on the score of maintaining Hospitality: for a personal Residence, implies a personal Duty of administering the Sacraments, and performing other Acts of Divine Worship in the Church. And hence 'tis, it seems, that a Vicar cannot assume to himself another Person for the Administration of the Sacraments, and other Sacramentals †.



Of Visitations Provincial, Episcopal, &c.

* Conf. 153.

|| Cl. 3. 10. 2.

* 10 Q. 1.
11.

† vi. 3. 20.

1. 1.

|| 10 Q. 1.
9 & 10.

THE Word *Visitatio*, in our Law-Books, sometimes signifies a Right of Power and Jurisdiction over Things and Persons; and sometimes it imports only a bare Right of Administration: But, according to *Baldus**, he, who has the Right of Administration, has also the Right and Power of Visitation. But with him I cannot agree; especially, if we consider the Term in the common Acceptation of it, as it denotes that Act or Office of the Bishop, or of some other Ordinary, going his Circuit throughout his Diocese or District, with a full Power of inquiring into such Matters as relate to the Government and Discipline of the Church, and sometimes of correcting Abuses, and punishing Excesses committed by his Subjects, &c. For though every Visitor is in this respect an Administrator; yet every Administrator, properly speaking, is not a Visitor, since Proctors, Syndicks, Stewards of Churches, are deem'd Administrators in Law, and so likewise are all such Persons as have any Office in the Church without a Jurisdiction annex'd to it. But a *Visitation*, as we would use the Word here, implies some Act of Jurisdiction and *coercive* Authority; and generally speaking has a Cognizance of Causes annex'd to it: But in all Visitations, the Visitor may summon || and enquire*, tho' sometimes he cannot correct and punish by hearing of Causes; as in the Case of some Archdeacons, and the like, who are only *simple Scrutators*, and must report the Matter presented to them unto the Bishop for his Cognizance. And hence 'tis, that the Law distinguishes Visitors into *general* and *simple* Visitors. The first are those, that have a full Visitation Power of inquiring into all Causes and Things that want Reformation and Amendment; and of punishing the Offenders if they see reason: And such a Power has an Archbishop all over his Province †; and a Bishop throughout his Diocese ||. But a *simple* Visitor has only a limited Jurisdiction, and can only enquire and take Cognizance *de levibus Delictis*; and that (perhaps) only within some certain Place of the Diocese: which of *Common Right*, Archdeacons could only do heretofore, tho' since, some of them have had a larger Power granted them from the Bishop; and are thus become Ordinary Visitors as well as the Bishop himself; and so are Deans of Churches, Abbots, and other Religious Prelates within their own Precincts and Jurisdictions. But a Vicar-General in Spirituals has not, by virtue of his general Office and Commission, the Power and Office of Visiting and Correcting, tho' he has the Cognizance of Causes transferr'd on him; and

and consequently cannot, in virtue of such Commission, deprive any one of his Benefice, because he has not thereby the Power and Office of visiting and correcting Offenders: But in a Case where the Power of correcting is given to a Visitor, the Power of depriving his Subjects of their Benefices, if their Crimes require it, is *eo intuitu*, included in his Commission, by way of Accessory; because, according to this Maxim in Law, *concesso uno videntur concedi omnia ad illud accessoria* *. And ^{* X. 1. 29. 21.} this is particularly true, if the Person delegating has the Power himself of depriving Persons of their Benefices: But otherwise not.

It has already been remark'd under another Title, that an Archbishop, who is willing to visit his Province, ought in the first place to visit his own proper Church, City or Diocese, and the Clergy and Laity thereof in a full and ample manner †: And after he has visited his ^{† vi. 3. 20. 1.} own proper Diocese, he may either in part, or in the whole, visit all the Cities and Dioceses of or within his Province, and exercise the Office of a Visitor, *Jure ordinario*, over his Suffragans and their Subjects ||; and visit the Chapters of Cathedrals, and other Churches, and ^{|| Innoc. in Nov.} all Monasteries, Churches, and Religious Houses, and Places of Charity and Piety. And if he cannot conveniently and without a great deal of Difficulty go to every Church and Diocese within his Province, he may call the Clergy and Laity together from their several respective Places, to some one convenient and agreeable Place *: And all our Bishops, taking the Hint from this Usage or Custom, have since drop'd their Parochial Visitations; and do now only summon their Clergy to meet them at some convenient Place within the Rural Deanery. And the Order, which Archbishops and the like ought to observe in their Visitations, is prescrib'd in *Boniface's* Decretals †, *viz.* First, They ought to preach ^{† vi. 3. 20. 1.} the Word of God, by giving the Congregation a Sermon. 2dly, They ^{5.} ought to enquire into the Lives and Conversations of such as minister in the Church, and into all other Things belonging to the Office of a Parish Priest, &c. and punish notorious Crimes and Offences. But in this respect, Religious Persons are to follow their own Customs and Institutions. And after an Archbishop has once visited all the Dioceses of his Province, he shall not repeat or renew his Visitation of the same without the Advice of his Suffragans: But if there are any Churches and the like, which he has not visited in his former Visitations, he may visit them afterwards even without the Consent of his Suffragans. A Bishop may visit his Diocese either in his own proper Person, or else by other grave and discreet Persons, if he be hindred by Sickness and the like from going himself ||: But every Visitor, before he begins his Visitation, ought to issue ^{|| 10 Q. 1. 10 & 11. * Cl. 3. 10. 2.} out a Premonition or Summons to call his Clergy and People together *, otherwise he cannot punish their Contempts in not appearing; and when they are assembled, the Bishop ought, by a Charge given, which is in *Latin* called *Allocutio* or *Admonitio Episcopi*, to inform them of their Duty, and to exhort them to perform it †; for in respect of the Clergy, ^{† Regin. Collect. Can. lib. 2. p. 205.} the two principal Parts of a Visitation was a Charge deliver'd, and an Enquiry made. The Enquiry was made according to certain Articles drawn out of the *Canons*, unto which the *Juratores Synodi*, or the *Testes Synodales* (as the *Canonists* call them ||) were to give in their ^{|| Regin. Collect. lib. 2. p. 204. 35 Q. 6. 7.} Answers upon Oath; which was therefore stiled *Juramentum Synodale*, the Bishop's Visitation being accounted an *Episcopal Synod*: For after the Bishop himself had in his Synod made a fit and proper Speech or Charge to his Clergy, he was wont to call out seven or more Persons among the People of his Diocese (as he thought fit) and to these, being all Men of mature Age, and eminent Honesty and Veracity, he

ad-

administred an Oath, called the *Synodal Oath* (as aforesaid) viz. *That they would, according to the best of their Knowledge, upon enquiry into the Crimes and Excesses committed by Persons within his Diocess, discover and present them to the Bishop for his Cognizance thereof: And their Detection was term'd a Presentment. These Persons are in our Law-Books called publick Witnesses; and, therefore, they might on the Account of Infamy be set aside from giving their Evidence, if they became infamous after they were admitted into their Office: but they could not be reprobated, if they only err'd (perhaps) in giving their Testimony, and corrected themselves immediately, and did not do this with an Intent of Deceiving; tho' 'tis otherwise, if they corrected themselves after some Interval of Time*. Church-Wardens with us are in the Place of these Synodal Witnesses.*

Visitors in their Visitations, ought not to behave themselves with Pride and Cruelty over their Subjects †, nor to be burdensome to them in point of Expences, but only to demand such as are moderate and reasonable ||: And a Bishop is oblig'd by the *Canon Law*, to visit his Diocess once every Year (at least)*; and in his Visitation he ought to make a more particular enquiry into the Lives and Behaviour of his Clergy, that they give no Offence to the Laity; and ought likewise to be very careful in his inquiry into the State and Condition of the Edifices belonging to the Church, and the Repairs thereof, if they are decay'd and want mending †. And Visitors how summary soever their Jurisdiction be (for they ought to proceed in a summary way) yea, though it be even *sine figurâ Judicii*; yet they ought to hear the Party, and to admit of all legal Defences ||. And this also proceeds in such as are Visitors of Religious Houses and Orders of Men: For a Monk, that is *de facto* despoil'd of his Place wherein he is a Professed, without being heard or admitted to his legal Defence, may sue for Restitution*. But there are some Religious Houses, which are exempt from the Bishop's Jurisdiction, and these are only visitable by the Pope's Legates or Commissioners †. Visitors deputed to visit in some certain Place, as a College and the like, cannot expedite their Visitation in any other Place, tho' they may hear private and particular Complaints elsewhere in order to ground a general Visitation thereon, and well enough do all Acts that are *preparatory* to a Visitation; but they cannot do any Acts, that are of the Substance of a Visitation (according to *Federicus de Senis* ||, and the rest of the Doctors) out of the Place deputed. See my *State of the University of Oxford* †.

* X. 2. 21. 7.

† 10 Q. 3. 7.

|| 10 Q. 3. 9.

* 10 Q. 1. 9 & 10.

† 10 Q. 1. 11.

|| Fed de Sen. conf. 55.

* Fed. de Sen. ut supr.

† Joh. de Ath. in Tit. 22. Orthob. Conf. v. Cistercienses.

|| Conf. ut supr. † Pt. 2d. cap. 3.



Of the Union, or Consolidation of Benefices, &c.

I shall next treat of the Union or Consolidation of Benefices; for Churches may be united, according to the *Canon Law*, upon several Accounts. As *First*, To the end that such Churches may be again united, which were before illegally divided. *2dly*, Benefices may be united by that Law on the score of Hospitality*, which is not permitted with us in *England*. *3dly*, On the Account of the Vicinity or Neighbourhood of Parishes †. *4thly*, Through a defect or want of Parishioners ||. And, *5thly*,

* 25 Q. 2. 21. 2.

† Arg. X. 3. 5. 8.

|| 10 Q. 3. 3.

5thly, They may sometimes be united on the score of their Poverty, or the Smallness of their Revenues*: which seems to be the best Reason given, if they lie contiguous or near each other. But this Union of Benefices, which was antiently introduced for good Ends and Purposes, was, in process of Time, made use of to palliate Pluralities and a scandalous Non-Residence. For Union of Benefices was first practis'd, either when a Church was destroy'd; or else when the Revenues were seiz'd upon by Usurpation, and very little remain'd to subsist the Curate thereon: in which last Case the Remainder, together with the Cure of Souls, was transferr'd to the next Church, and all made one Benefice. But the Industry of the Courtiers at *Rome* found out; that besides these Respects, there might be several other good Reasons for uniting Benefices; so that by a Collation thereof, much Advantage might accrue to that Court; and thus in favour of some Cardinal, or other great Personage, under a Pretence of Hospitality, thirty or forty Benefices were in divers Places of Christendom united together, as we may read in Father *Paul's* History of the Council of *Trent* †: But an Inconveniency arose, because the number of Benefices decreas'd, and the Favour done to one was afterwards done to many without any Demand of Merit at all, to the great Damage of that Court and its *Chancery*. And this was remedy'd with a subtle and witty Invention of uniting as many Benefices, as the Pope pleas'd, only during the life-time of him on whom they were conferr'd: By whose Death the Union was understood to be dissolv'd *ipso facto*, and the Benefices return'd to their first State. So they shew'd the World their excellent Inventions by conferring of Benefices, which were but one in Shew, but many in Fact and Deed: As one confess'd, that he had stolen a Bridle, concealing that it was upon a Horse's Head which he had stolen with it.

The Union of Churches may be made three several ways according to the *Canon Law*. *First*, When one and the same Person is set over two different Churches*, which gave the rise to Pluralities. *2dly*, When one Church is united to another upon the Account of its great Vicinity, Poverty, or want of a Congregation; the Parishioners being driven from their Habitations either by some hostile Incurfion, or else diminish'd thro' the Rage and Havock of some Disease and the like: in which Case, the Church, that is united, loses its Right, and makes use of the Right of that Church unto which it is united †; the Right of the Bishop still remaining untouched ‖. *3dly*, An Union may be made, when two Churches are united together without the one's being in subjection to the other; and then that, which is the better of the two, is retain'd and serv'd by the *Pluralist*: But (I think) this to be a very unwarrantable way of Union in point of Conscience, whatever it may be in respect of the *Canon Law*; since it implies an absolute Non Residence on one of the Livings. And to these three ways of Union, we may refer all those that are so largely enumerated by *Gothofred* and *Hostiensis*. Churches annex'd, generally speaking, are deem'd to be the same with them to which they are are annex'd: So that in the granting or obtaining of a Benefice, it matters not (according to the *Canonists* *) whether the Rights of Churches annex'd, be added or express'd in the Grant of such Benefice or not; provided, the Principal or Mother Church be express'd therein, and the true Value of the Church is annex'd †: For if an Union be founded on the Poverty of another Benefice, the true Value of each Living ought to be express'd in the Union thereof; and all Persons who have an Interest and Concern therein, ought to be summon'd to shew Cause why such Union should not be compleated; otherwise such Union shall not be valid. For a Bishop cannot unite Benefices without the

Consent of his Chapter, and the Patron of the Church unto whom the same belongs || : But the Pope may do it without the Consent of either; *propter Magnum Bonum Ecclesie*, as the Papal Law stiles it.

When an Union is only for the Life-time of the Person, the Benefice *revives* (as the Phrase is) after the Death of the Incumbent *, and returns to its antient State, and its own proper Nature ; because such Temporal Union is extinguish'd by Time. In the Court of *Rome*, these Temporal Unions were call'd Prerogative Unions *ad vitam*, which are very scandalous, and own'd by the best *Canonists* † to be destructive of all Order; and invented only to defeat the Canons against *Pluralities*. But the only Unions which our Law allows, are those where two distinct Benefices are made one for a competent Subsistence ; and then if the Union be reasonable, the Dispensation within due distance is so too; provided the Living be under such a Value : But (I think) our Law does not permit a perpetual Union, but only so long as the Bishop sees Cause, having the Patron's consent hereunto ; which is rather a Dispensation than an Union ; for with us the Rights continue distinct. This is by the Common Law of *England* ||, as well as by the *Canon* Law itself, called *a Consolidation of Benefices*, the Word being made use of by each Law, to signify the Uniting of two Benefices in one : And the Term is borrow'd from the *Civil* Law ; where the Word *Consolidatio*, properly signifies an uniting of the Possession or Profit with the Property it self*. As for Example, if a Man by way of Legacy has the *Usufruct*, and he afterwards buys the Property or Fee-simple thereof of the Heir ; in this Case there is said to be a *Consolidation* of the *Usufruct* and the *Property*†, which in our common Books is called an Unity of Possession.

And as Benefices cannot be united without the Bishop's Act, and the Patron's Consent, according to the *Canon* Law ; so neither can they be divided without such a Concurrence: For a Bishop may, *ex causâ probatâ*, divide a Prebend, Church or Dignity ||. He may divide, change or diminish the same, where Benefices of this kind are endow'd by the Bishop and Chapter only * : But if they are endow'd by other Persons, tho' by Laymen, they may not then be divided, changed or diminish'd by the Bishop without their Consent† ; tho', by the Papal Law, 'tis otherwise in such a Division as his Holiness is pleased to make thereof ; for in such a Case, the Opposition given hereunto by a secular Person availeth nothing *propter Magnum Bonum Ecclesie* ; because the Pope, who is *Lex animata in terris* (according to the *Canonists*) has determin'd to have it so. But in a Division or Union of this kind, 'tis not necessary that the Church should be void, or that the surviving Rector's Consent should be had ; tho', heretofore, the Doctors doubted about this Matter. But to the end that such a Division should be binding, four Things are necessary. *First*, The Consent of those to whom the Church belongs ||. *2dly*, That they do intend to increase the Number and Benefices *. *3dly*, That there be a reasonable Cause for such Division †. And *4thly*, That it be a fat Benefice, and sufficient to maintain two or more Clergymen from the Income thereof ||. By a *Legatine* Constitution in *Lindwood* *, there ought to be but one Priest or Rector in one and the same Church, who ought to be in full Orders, of a holy Life, perfect in Learning, and of sound Doctrine : And therefore, this Canon forbids a Church to be divided into several Rectories or Vicaridges without the Bishop's Consent had thereunto, and a suitable Allowance settled on each Parson who was to have the Cure of Souls annex'd to his Portion ; and to reside on his Living. But in those Days (I think) Laws against splitting of Benefices were needless, unless it were to restrain Patrons as this was made ; for scarce any one Living was large enough for the Avarice of one Man at that Time.

Of the Voidance, or Vacancy of Church-Benefices, &c.

HAVING under the foregoing Title discours'd of the Union and Division of Benefices, I shall here say something of the Voidance of Benefices; lest a Beneficiary should falsely usurp to himself a Title without any Foundation in Law. Now the Voidance of a Benefice, is, when the same becomes destitute of the Clerk that held it by way of Title, or *in Commendam*; or, in other Terms, it is a separation of such Clerk from his Benefice: And, in this Sense, the Lawyer *Martianus**, calls a Widow by the Name of *Vacans mulier*. Benefices are said to be void or vacant several Ways, according to *Andreas* on the *Canon Law* †, *viz.* By Death, Resignation, Deprivation, Translation and Permutation: But for a fuller Account hereof, in respect of Translation and Permutation, the Reader may consult the Archdeacon's Comment on the Law, quoted in the Margin ||; for, according to him, Benefices are always said to be void whenever they want their proper Ministers*. And a Church is also void (says *Compostella*) that has an Heretical Pastor or Teacher belonging to it †: But (I think) such Benefice is only Voidable, and not void *ipso Jure*, as some of the *Canonists* would have it; for a declaratory Sentence is necessary hereunto. And lastly, a Benefice is said to be void by the Affecution of a second Benefice which is incompatible with the first ||; and this our Common Lawyers call *Cession*.

* D. 48. 6.
5. 2.

† vi. 1. 3.
10. v. *vacabunt.*

|| v. *vacabunt.*

* Arch. in
c. 4. vi. 1. 6.
v. *vacant.*

† Bern. in
c. 1. X. 5.
13. v. *firmi-*
tate.

|| X. 3. 5. 28.

But for the clearer understanding of this Matter, 'tis to be observ'd, That Benefices are said to be void either, 1st, *Ipsò Façto tantùm*; or, 2^{dly}, *Ipsò Jure*; or, 3^{dly}, By a Sentence; or, lastly, *Ipsò Façto & Jure simul*. A Benefice is void *ipso Façto tantùm*, (as we say) and not *ipso Jure*, when any one shall quit a Benefice, being driven thereunto either thro' Force or Fear, or else is disturb'd in the Possession thereof: For such a Benefice is not really and truly vacant*. Also when a Benefice is collated on or given to an absent Person, who does not accept of such Benefice †: For, according to *Boerius**, such a Benefice is only void *de façto* and not *de jure*. A Benefice is said to be lost and void *ipso jure*, when any one is, *eo ipso*, depriv'd thereof by a Constitution of Law, for that he has done something which he ought not to have done; and when he forfeits the same without any Sentence of Deprivation on the Account of the Fact itself committed ||. And 'tis the same Thing, when any does not do that which he is oblig'd to do, if the Law makes it void by its own Declaration: And then such Benefice may be collated to either by the Bishop, or conferr'd by any other Person that has a Right of disposing of the same, tho' the Person who is, *ipso jure*, depriv'd, may be *de façto* in possession of such Benefice, but he cannot be depriv'd of the real Detention without a Summons*, as in the Case of Non-Residence. For a Benefice is void *ipso jure*, either *ex delicto*, or else *ex quasi delicto Titularii*. And first, 'tis void *ex quasi delicto*, when any one that has a Benefice with the Cure of Souls obtains a second Benefice without a Dispensation, having also the Cure of Souls annex'd to it; for in such a Case, the first Benefice shall be void *ipso jure*, not only by the *Canon Law* without any regard

* X. 1. 40.
3 & 4.

† vi. 3. 4. 17.

* Decis. 2.
N. 41.

|| Dd. in c.
10. X. 2. 24.
Gloss. in
c. 35. vi. 1.
6. v. *justo*
impedimento.

* vi. 3. 4.
28.

† vi. 3. 4.
32. X. 3. 5.
28. X. 3. 8.
6.
* 21 H. 8.
c. 13.
|| X. 1. 6. 54.

regard had to the Value of either Benefice †, but even by a Statute of this Realm, if such Benefice be of the yearly Value of eight Pounds or upwards *: But 'tis otherwise by both Laws if he has a Dispensation ||. 2dly, After the same manner a Benefice becomes void, according to the Canon Law, if the Person, who obtains the same, be not promoted to Priests Orders within a Year after he has had quiet possession thereof, unless he be hindred by some lawful Impediment; for by that Law, after the Year is expir'd, the Benefice is void *ipso jure*, and it may be granted to another †. By the Law of *England*, a Person promoted to an Ecclesiastical Benefice ought to be in Priests Orders at the time of his Institution*; and so the Canon Law does not take place in this Particular with us. 3dly, If a Person elected to a Benefice does not consent to such Election tendred him within a Month, or within a Term prefix'd him for that end, such Election is void *ipso jure* †. Or, 4thly, If he shall not within three Months, after such Consent given, sue for Confirmation of his Election ||; and within three Months after Confirmation sue for Consecration †. In the *Romish* Church, Marriage of the Priest, or entring into a Religious Order, vacates a Benefice; and so does several other Things, too tedious here to enumerate. The second Point I have handled under the Title of *Deprivation*.

† vi. 1. 6. 14.
& 35.

* 13 & 14
Car. 2. c. 4.
§. 41.

† vi. 1. 6. 6.
extra. 1. de
elect. c. 2.

|| vi. 1. 6. 6.

† X. 1. 6. 7.

|| X. 1. 9. 4.

* X. 1. 7. 2.
& Dd. ibi.

Again, 'tis to be observ'd, that a Benefice is sometimes said to be void *de facto* & *jure*, as by Death and by all other ways of voiding the same, when the Title thereunto ceases, and, as the *Canonists* phrase it, *ubi non est dare personam incumbentem possessioni ejusdem*, when 'tis not possible for a Person to be incumbent on the Possession thereof: But where a Person is *de facto*, incumbent on the Possession of a Benefice, without any good Title thereunto, it is then said to be void *de jure*, and not *de facto*. But it is said to be void *de facto*, and not *de jure*, when the Possession is lost, but the Property is retain'd; as in the Case of a Resignation made, but not admitted by him into whose Hands such Resignation is made; so that tho' the Person resigning the same be not incumbent on the Possession, yet he has a Right thereunto, till the Ordinary accepts of his Resignation ||. A Benefice is also void *de facto*, and not *de jure*, when Rector or Parson thereof becomes unfit to serve the Cure, or attend the same *. If a Person having a Prebend or Dignity, be admitted to another Prebend or Dignity, either in the same or any other Church, the first Prebend or Dignity is void according to the Canon Law, even tho' the same should be confirm'd unto him by his Superior: But this Law is not observ'd among our Dignitaries here in *England*.

† Othon.
con. Tit. 11.

By a *Legatine* Constitution in *Lindwood*, to prevent any Injustice done to an absent Person, 'tis decreed, that no Person having the Right of Presentation, shall presume to present any one to a Church †, without a just and probable Knowledge of the Voidance of such Church; nor shall any Bishop grant Institution to a Person presented by the Patron, before he is certify'd of the Death or Cession of the last Incumbent, either by Letters under an *authentick* Seal, or else by the Oath of proper Witnesses; or, lastly, by the Presence of the Person voiding such Benefice by Cession. And if any one shall intrude or receive Institution contrary hereunto, he shall not only be depriv'd of such Benefice, but be for ever render'd incapable of obtaining the same. And if there be a plain and open *Constat*, that the Incumbent is living, both the Person granting Institution, and the Clerk instituted, shall make good the Damages and Expences to the Person thus extruded; and the Person granting Institution, shall be suspended *ab Officio* & *Beneficio*, as well as the Person instituted punish'd, who suffers Deprivation hereby.

Of Usury, Perjury, and Idolatry; and the Punishments thereof.

IT appears by the Authority of divers Parliaments, that *Usury*, as well as *Perjury* and *Idolatry*, are punishable in the Ecclesiastical Courts: But because these Crimes are seldom impleaded and punish'd there, (the two former especially, being of a mix'd Jurisdiction) I shall not allow them distinct places in this Work; but throwing them together under this Title of *Usury*, treat of them afunder in the Order I have above rang'd them. And first of *Usury*, 'tis said, *That the King and his Temporal Courts shall have the Cognizance of Usurers, when dead; and the Ordinaries of holy Church shall have the Cognizance of Usurers, when alive, as to them it appertains to make Compulsion by the Censures of holy Church for the Sin of Usury, and to make Restitution of Usuries taken, against the Laws of holy Church* *. But this Act is repeal'd. And by another later Act made against Usury, *There are reserv'd to the spiritual Jurisdiction their lawful Punishments in every Cause of Usury* †. This Act is also repealed. And so 'tis also mention'd in the Statute *de Excommunicato Capiendo* ||. But the Jurisdiction of the Ecclesiastical Court is since restrain'd in some respects, because Usury cannot now be punish'd or corrected thereby, except it reaches above the Rate of ten Pounds in the Hundred *per Ann.* according to a Statute in Queen *Elizabeth's* Time *; or rather five *per Cent.* by a Statute made in Queen *Ann's* Reign.

* 15 E. 3.
c. 5.

† 11 H. 7.
c. 8.

|| 5 Eliz.
c. 23.

* 13 Eliz.
c. 8.

But, according to the general Definition or Notion of Usury given in the Books of the *Civil* and *Canon* Law, it is said to be that Sum of Money, or whatever else, the Borrower pays unto the Lender beyond the principal Sum lent him, upon the account of such Loan ||: And 'tis called *Usury* in respect of the *Use* of such Loan, and among the more correct and polite Authors in the *Latin* Tongue, 'tis called *Usus ipse*, or Use it self, as being often taken for that Advantage which a Man receives from the Use of Money lent. For, according to the common Opinion of the Doctors, Interest or Usury does not properly accrue, unless it be on the account of some Loan made, and this has respect to the Form of the Contract, which, by the *Civil* Law, makes Usury either Criminal or not so. And thus Usury is sometimes by the *Civilians* stiled *Lucrum sine damno*, and *Lucrum non sine damno*, in respect of that Damage which the Lender sustains from the Use which another Person reaps from the Loan of his Money. The *Canonists*, who distinguish Usury into what they call *lucratory* and *mental* Usury, (for in respect of a deprav'd Intention, any Profit or Lucre conceiv'd in the Mind, they deem *mental* Usury) stile this *lucratory* Interest; and this first kind of *lucratory* Interest is forbidden both by the *Civil* † and *Canon* || Law, as it was also heretofore by the Law of God given unto the *Jews* by *Moses* *. But by the *Civil* Law, Interest or Usury is sometimes given *in Panam*, by way of Penalty; because one Man retains another's Goods or Money contrary to the Will of the Proprietor: For if the Borrower shall delay Payment, or defer making Restitution of the Money borrow'd, he may be sued in an Action, as well to make good the *Lucrum Cessans*, as to repair the *emergent Damage*. And from hence I infer,

|| D. 2. 14. 17.
in prin. D.
12. 1. 11. 1.
X. 5. 19. 1
&c 2.

† Bart. post.
Gloss. in
l. 1. c. 1. 1.
n. 5. Jaf. ibi.
n. 47.
|| X. 5. 19.
10. X. 5. 19.
3. 4. 14.
* Exod. c.
12. Lev. c.
15. Ezech.
c. 18.

P p p p p

that

† X. 3. 22. 2.
Gloss. in c. 8.
X. 5. 19. v.
de Feudo.

|| Luke c. 6.

* X. 3. 19. 2.

† 13 Edw. 1.

|| 5 Eliz.
c. 23.

* 5 Eliz. c. 9.

† Pag. 215.

|| M. 2. H. 4.
15. Dr. &
Stud. lib. 2.
c. 24.

that there are two *Species*, or different Kinds of *Usury*, according to the *Civil* Law. The first relates to that, which is odious in the Eye of the Law, and is prohibited (as aforesaid) upon the account of Humanity : And as to the second, it is permitted even by the *Canon* Law†; for *Panormitan* says, that something may be demanded, even by the *Canon* Law, beyond the Principal, not only in respect of the Damage that happens, but also from the Profit which ceases to arise from the Principal; and so Damage in this Case is not deem'd as *Usury*, but as an Amend or Satisfaction made for the *Lucrum Cessans*, or the *emergent Damage*: which seems to me to be a very nice Distinction to palliate the grossest *Usury*, where the Interest is not limited by some Law, as it is not by the *Canon* Law. For by this Law, a Person, who says, that the Crime of *Usury* is lawful, is an Enemy to the Law of God; and asserts two Contradictories to be true at one and the same time, contrary to the Rules of good *Logic*, viz. A Crime, and a Thing lawful. And, according to that Law, he, who believes it to be lawful, is deem'd a Heretick, because he is guilty of an Error (say the *Canonists*) in a certain Article of Faith, as not believing the Gospel||, nor the Scripture of the *Old Testament*. Manifest Usurers by the *Canon* Law, ought not to be admitted to the Communion of the Altar, nor to make any Oblation thereunto; nor shall they receive Church-Burial; and such of the Clergy as shall admit them thereunto, or give them such Burial, shall stand suspended from the Execution of their Office till they make Satisfaction for their Offence *ad arbitrium Episcopi* *. But because this is a Crime of a *mix'd* Jurisdiction, viz. In some respects of a Temporal, and in others, of Ecclesiastical Cognizance, 'tis probable that frequent Prohibitions would come to the Spiritual Courts, if they should pretend to determine what are *usurious* Contracts: And therefore, Suits are seldom or never in these Days commenc'd there for *Usury*.

Secondly, In respect of *Perjury* or the *Breach of an Oath*, by the *Canonists* sometimes in *Latin* called *lesio Fidei*, 'tis affirm'd by several Laws, that the Ecclesiastical Court has also Cognizance of this Matter. For in the Statute of *circumspecte agatis* † (amongst divers other Matters) the Breach of an Oath is mention'd as one: and in the end of the Statute it is thus added, viz. *In all Cases before rehears'd, the Spiritual Judge shall have Power to take Cognizance, notwithstanding the King's Prohibition*. And by the aforesaid Statute of *Elizabeth*, *De excommunicato Capiendo* || (among fundry other Crimes and Offences) *Perjury in the Ecclesiastical Court is reckon'd to be of Ecclesiastical Jurisdiction*. And so 'tis by a *Proviso* in the Statute against *Perjury* made in the same Reign *. By the Books of the Common Law, I find two Cases to be determin'd by the Temporal and not by the Spiritual Court, wherein the Breach of an Oath is called *lesio Fidei*, such Oath being taken voluntarily either before an Ecclesiastical Judge (as was much used in those Days) or else in a private manner: As the Vicar of *Saltash's* Case (already remembred) † wherein a Prohibition went forth, and no Consultation could be obtain'd; because a Man shall not be sued before the Ordinary for *Perjury*, unless it be where the principal Matter whereon the *Perjury* grew be a Spiritual Matter, or the Oath taken in the Spiritual Court and the like: And the Reason there alledg'd was ||, because if he should there be found guilty of *Perjury*, the Spiritual Court would immediately award or compel him to perform the Oath whereon such *Perjury* grew, and whereof he is attainted; and so, though it were to pay Debts, yet he would be there compelled to pay them, and thus oust the Temporal Courts of their Jurisdiction, and Lay-

Con-

Contracts would be there determin'd contrary to the Laws of the Realm. And it would be the same Thing in the Case of a *Feoffment*, as it once was ||, if Persons were allow'd to sue generally in the Spiritual Court *pro læsione Fidei*. For we read, that a Person having sworn or taken an Oath to make a *Feoffment* of his Land, was sued in the Court Christian for Perjury, in not performing his Oath ; and because the Suit was in order to compel him to perform a Thing which did concern Land and Inheritance, it was adjudg'd in such a manner, as if he had sued there for the Principal ; and a Prohibition went out accordingly. So if a Man and his Wife do alienate the Wife's Right, the Wife being sworn that she will not sue the *cui in vitâ* ; and yet after her Husband's Death brings this Writ, and the other sues her in the Court *Christian* for Breach of her Oath, she shall have a Prohibition *. In pursuance hereof we have a Judgment given long since, *viz.* When one sued another in the Spiritual Court *pro læsione Fidei* ; the Oath arising on a temporal Contract or Cause : And *Bracton*, who wrote at that Time, says †, *In placito quod pertinet ad coronam & dignitatem regis, etsi fides fuerit apposita in contractu, non propter hoc pertinebit cognitio super Principali ad iudicium Ecclesiasticum.* And in another place of the same Book he assigns a Reason for it ; because, says he, *Jurisdictionem regiam non mutat fidei interpositio, Sacramentum præstitum, nec spontanea renunciatio partium* ||. But when Faith is made touching a matter Spiritual, then the Breach thereof shall be punish'd in the Spiritual Court : As when one swears to pay me his Tithes truly, or a Woman swears to marry with me †. And thus we are told by a Treatise of the *Common Law*, printed in *Henry the VIIIth's* Time against the Bishop of Rome's Supremacy here, by the Laws of the Realm * ; " That in most Cases of Perjury, the King and his Courts have had the Punishment, and in some Cases, the Clergy and their Courts have had the Punishment by the Custom of the Realm only, *viz.* Such as has arose on Spiritual Causes." Now Perjury, according to *Julius Clarus*, is defin'd to be a Lye confirm'd by the Force of an Oath : And as to the Punishment thereof, according to the *Civil* and *Canon Law*, the guilty Person is first render'd *infamous* ; tho', by the *Civil Law*, a perjurd Man is not made infamous *ipso Jure*, unless it be in the Case mention'd in the Law here quoted †. But according to the common Opinion of the Doctors, a perjurd Man is not render'd infamous by an *Infamy of Law*, as *Felinus* observes in his Treatise of Witnesses. But to the end that any one should incur *Infamy* on the score of Perjury, 'tis necessary he should contravene his Oath and Promise ; for if he only contravenes his Oath, he is not render'd infamous by the Gloss on the *Civil Law* ||. See *Cagnol* in Lib. 21. Cap. 2. 4. And, therefore, whenever any one asserts a Thing *de præterito* or *de præsentî* with an Oath, and that thing is false, he becomes infamous by such Perjury committed on the score of that *assertory* Oath : But if he shall by an Oath promise any thing *de futuro*, and shall not do it, then by such Perjury committed on a *promissory* Oath, he shall become infamous immediately, according to the Doctors ; and thus the aforesaid Gloss distinguishes in favour of the *Canon Law* *. Though a Clerk may be depriv'd of a Benefice, which he has obtain'd, on the score of Perjury ; yet, according to the more receiv'd Opinion of the Lawyers †, he shall not be depriv'd *ipso Jure* : for *Felinus* and *Ripa* do both agree, that he ought to be decreed *privandum fore*. See *Sylva*, de Beneficiis ||, and *Rebuffus*, de pacific. Possess. *. But if a Clerk guilty of Perjury be afterwards instituted into a Benefice, such Institution is void *ipso Jure*, according to *Lambert*, de Jure Patron. † ; and this is the common Opinion of all the Doctors : But then this ought not to be understood,

|| T. 11. H. 4. fol. 241. secund. unam impress & 88. ver. 85. sec. aliam.

* Firzh. Tit. Pron. 12. ex Reg.

† Lib. 5. c. 2.

|| Lib. 5. c. 91

† M. 20. E. 4. 10.

* Cap. 1.

† C. 2. 4. 41.

|| D. 3. 2. 21. v. debet autem.

* X. 2. 19. 11.

† Gomes. in §. 37. J. 4. 6.

|| Fol. 137. n. 7 & 8.

* Fol. 37.

† Part 1.

lib. 2. Q. Art. 15.

† Lindw.
lib. 1. Tit.
11. c. 1. v.
Perjurio.

derstood, says *Lambert*, when he is become infamous for Perjury. *Sed Quære.* Perjury may be committed three ways, according to the *Canonists* †, viz. *First*, By taking an Oath against a Man's Conscience; and such an Oath God will surely avenge hereafter. *2dly*, By taking an unlawful Oath. And *3dly*, By acting against, or contrary to the Oath a Man has taken. And as a perjur'd Man is both by the *Civil* and *Canon* Law set aside from bringing his Action, or of being Plaintiff in a Cause; so, according to the Commentators, he is repelled from giving Evidence, and being a Witness in a Court of Judicature.

† 5 Eliz.
c. 23.

Lastly, In respect of Idolatry it appears by the Statute *de excommunicato capiendo* † before quoted, that the same is punishable in the Ecclesiastical Court: But as we have no such hardened Persons in their Ignorance and Superstition, but the *Papists*, among us, whom we can charge with Idolatry, and those too, as they say, do only profess a relative Worship of Images; I shall not here insist upon this Branch of my Division of this Title.



Of Last Wills and Testaments, Codicils, &c.

* J. 1. 10. 1.
in prin.

† Lib. 6.
Eleg. c. 36.
‖ Lib. 6.
c. 12.

* In l. 35.
D. 39. 6.

† Oldenb.
lex.

‖ In l. 1.
D. 29. 3.

* J. 2. 12.
1, 2, 3, &c.

† Ut supr.

THERE are two sorts of Succession to the Estates of Men deceased, viz. Succession by Last Will and Testament, and that which the *Civilians* call *Intestate Succession*. I have already treated of the latter; and, therefore, I shall only here speak of that which is made by a Last Will or Testament duly made and executed. Now a Testament is so called, according to *Justinian*, from these two *Latin* Words, viz. *Testatio Mentis* *, because the Person making the same, does thereby declare and testify his Mind touching what he would have done with his Estate after his decease. But *Valla* † rejects this Etymology on the Authority of *Aulus Gellius* ‖, saying, that *Ornamentum*, *Vestimentum*, *Calceamentum*, and other Words of the like kind, may as well be deriv'd from the Word *Mens*, as that of Testament: But this cannot be, for several Reasons. But the word Testament, according to *Viglius* *, is deriv'd from *Testatio* only, as *Donation* is from the Verb *Dono*; and the Addition is for Declaration sake: Tho' *Theophilus* thinks this Word to be compounded of *Testatio* and *Mens* for *Emphasis* sake, in order to shew a greater Manifestation of the Mind: But this *Emphasis* not appearing in the word *Velamentum*, *Calceamentum*, *Vestimentum*, &c. these are therefore Primitives †. From what has been said,

A Testament, according to *Ulpian* ‖, is defin'd to be a just Sentence or Declaration of a Man's Mind or Will, touching that which he would have done with his Estate after his death. The Word *Sentence* in this Definition, is a generical Term, including every kind of Will; and the Words *Voluntatis nostræ*, which *Ulpian* makes use of in his Definition, are there added to exclude Bondmen, Children in the power of the Father, Persons not arriv'd at Puberty, Madmen, Prodigals, and the like *; because these Persons have not the free Power and Government of their own Will: Wherefore, their Sentence or Declaration is not deem'd to be a Will in Law †. I here call it a *Testament*; because, according to the Doctors,

Doctors, a Testament, in Propriety of Speech, differs from a Last Will ; since only that is properly call'd a *Testament*, when 'tis made with all the Solemnities necessary thereunto, and not otherwise : But it may be stiled a *Last Will*, though it be not perfect and consummate in every respect * ; and in this Sense, a Donation *mortis causâ* may be term'd a *Last Will*, but not a *Testament* † ; and so may a *Codicil*, according to *Ancheranus*, be taken for a Last Will ; for as *Bartolus* observes ‖, an imperfect Testament proves the Will of the deceas'd. And consequently whenever any Solemnity is wanting, which the Law requires, it may from hence be stiled a *Last Will*, tho' there be a *Constat* of the Disposition of Lands and Goods made in a defective Manner, if such Disposition be afterwards chang'd. But Last Wills and Testaments may be understood either *conjunctively* or *disjunctively* : Conjunctively, for one and the same Thing ; because the Testator's Last Will being sometimes superadded by way of *Codicil* to the Testament first made, the same is proved together with a perfect Testament without changing the Testament. So that this Monosyllable (*et* or *and*) whose Property it is to conjoin, sometimes stands *disjunctively*, and makes a Last Will and Testament sometimes to be the same, and sometimes to be different Things in our Law-Books : And thus it often happens, whereas otherwise a Disposition of Law would be repugnant unto itself *. Therefore, that we may know, when the Conjunctive (*and*) is put disjunctively, we must consider ; That a Copulative is sometimes placed between two Contraries, and Things incompatible ; and then 'tis resolv'd into a Disjunctive †. Sometimes 'tis put between such Things as are in some respect the same ; and then if one Thing be necessarily inherent to the other, the *Copula* is thrown away and resolv'd into an *Adjective*, as *Placitum & Consensus* for *Placitus Consensus* : And thus these two Words, *Testament* and *Will*, may be here taken for a Testamentary Will. A Testament is a solemn Last Will ; and a Last Will is an unsolemn Testament : Therefore, I shall in the next place consider, what it is that makes a solemn Will ; and the Validity thereof. And,

To the Validity of a solemn Will these following Things are required, according to the *Civil Law*, viz. *First*, That it should be written either by the Testator himself, or by some other Person through his Order, in Letters and Words at Length * ; and that an Heir, whom we call an Executor, be appointed in express Terms. † *2dly*, That it should be subscrib'd or sign'd by the Testator himself, or by some other Person in his Name, and on his Account ; and this in the Testator's Presence, and before seven Witnesses that are *Roman* Citizens, being particularly requested hereunto in regard to the Solemnity thereof *. And *3dly*, 'Tis necessary that these Witnesses should either subscribe themselves in their own Persons † (if they can write) or else one Witness may subscribe for another, if there shall be found so many Persons that can write ‖. And moreover these Witnesses ought to sign the Will either with their own Seals ; or with the Seals of other Men, if they have none of their own *. If any other Person than the Testator wrote the Will, then the Testator was to subscribe it himself † : But if he himself wrote it with his own Hand, and therein declares the same ; then it was not necessary, that the Testator should subscribe his Name * ; and if the Testator had so little Learning that he could not write, then an eighth Witness subscrib'd in his Name †. And so careful were the antient *Romans* to prevent the Forgery of Last Wills and Testaments, that (besides these seven Witnesses) they had the Faith of a Notary Publick to attest the solemn Ordination of them ‖. But tho', regularly speaking, all Wills ought to have the Attestation of seven Witnesses and a Notary : Yet a less Number of Witnesses was

* In l. 51.

D. 40. 5. in

l. 2. C. 6. 42.

† D. 39. 6.

‖ In l. 51.

D. 40. 5.

* D. 50. 16.

53.

† D. 33. 2.

10.

* D. 28. 1.

21. 1.

† C. 6. 23.

19. & l. 21.

* C. 6. 23.

19.

† C. 6. 23.

21.

‖ C. 6. 23.

31.

* D. 28. 1.

22. 2.

C. 6. 23.

12.

† C. 6. 23.

29.

* C. 6. 23.

18.

† C. 6. 23.

21.

‖ C. 6. 23.

21.

sufficient in some Cases; for a Will made by a Father *inter Liberos*, does not require the Solemnities of the *Civil* Law, but only those of the Law of Nations*; and by the Law of Nations, two Witnesses are sufficient. So likewise by the Law of Nations, a Woman may be a Witness unto a Will, which she cannot be by the *Civil* Law†: Nor is it necessary by the Law of Nations, that Witnesses should be ask'd. And in the same manner a lesser number of Witnesses are sufficient, if the Will be registred or engross'd as the Act of Court||, though it be done in a private manner*; and 'tis the same Thing, if such Will be made in the Time of War, or of any Pestilence and the like†. And by the *Canon* Law, in respect of Wills made *ad pias Causas*, a less number of Witnesses are sufficient||. But in foreign Countries, govern'd by the *Civil* Law, two Witnesses, with the Credit of a publick Notary, are enough at this Day; and in *England* two Witnesses without a Notary Publick (unless it be in the Case of Lands devis'd, where three are required*), are sufficient; because all our Wills are military Testaments.

A Testator made his Last Will and Testament in a Country, where it was sufficient to make the same in the Presence of a Notary Publick and two Witnesses, as in *Holland*; *Quære*, Whether such a Will shall be deem'd valid even in those Places and Countries, where seven Witnesses, and the greatest Solemnity is required, as in *Zealand*, where they follow the Rules of the *Roman Civil* Law herein? The Commentators on the first Law of the Code *de Trinitate*† do in common affirm the Validity of such a Will: And according to this Opinion, it has been often adjudg'd*; yet some are of a contrary Mind, thinking we ought to distinguish on the Question propos'd in this manner, *viz.* That this common Opinion ought to be admitted as Law in respect of Debts and Things moveable. But in respect of things immoveable and fix'd to the Soil, we ought to consider the Law of the Place where they are situated. For things moveable, because they may be carry'd to any place whatever as depending on the Will and Pleasure of the Owner, ought to follow the Owner's Person, and not the Laws of any certain Place: But Things immoveable, whose Situation is certain and perpetual, ought to be govern'd according to the *local* Constitutions of the Country where the Possession lies†. Tho' the Last Will of a Testator ought to be observ'd, regularly speaking, as a Law; yet this does not proceed and take Place, if he orders and disposes of any thing contrary to Law and Equity, for a Testator cannot Decree and Ordain, That the Laws should not take place in his Testament*. For all Precepts inserted in a Last Will and Testament in fraud of the Law, are invalid: For the Precepts of a Testator are to be understood to have been founded upon Justice, and not upon Injustice. A publick Will made by the Hand of a Notary with seven Witnesses is fully prov'd, tho' the Witnesses be all of them dead.

There were heretofore among the *Romans* three sorts of Wills in use, one of which was made in the general Diet or Assembly of the People in Times of Peace; another was made *in Procinctu* (as the saying was) *viz.* when Men were summon'd to go into Wars; and a third sort was made *per Emancipationem-familie* by the Means of the *Æs* and *Libra*†. But upon abolishing of these three Kinds of Wills, there succeeded in the place thereof, a twofold kind, *viz.* a *solemn* and a *nuncupative* Will, which are still in use among some People. A *solemn* Will is, when the Testator reduces the last Order and Disposition of his Will into Writing, by observing some due Solemnities of Law (as aforesaid) and then offers the same to be corroborated by the Evidence of Witnesses||. But a *nuncupative* Will, according to the *Civil* Law, is when the Testator declares his Mind or Will in the Presence of seven Witnesses, without reducing the same

* C. 6. 23.
21. 1.

† J. 2. 10. 6.

|| C. 6. 23.

19.
* C. 6. 23.

21.
† Alex. conf.

70 & 177.
vol. 2.

|| X. 3. 26. 10.

* 29 Car. 2.
c. 3.

† C. 1. 1. 1.

* Guid. Pap.
Dec. 262.
Mynf. 5.
Obs. 19 &
20. Gail. 2.
Obs. 123.

† X. 3. 26.
16.

* X. 3. 26.
15.

† J. 2. 10. 1.

|| J. 2. 10. 4.

same into writing* ; and this is so called by that Law, whether the same be afterwards committed to writing or not. Tho' with us here in *England*, by the Statute for avoiding of Frauds and Perjuries ||, 'No nuncupative Will shall be valid, where the Estate bequeath'd exceeds 30 Pounds, which is not prov'd by the Oaths of three Witnesses then and there present at the making thereof, nor unless the Testator bids them or some of them to bear Witness, That such is his Will: nor unless it were made in the last Sickness of the deceas'd, or in his Dwelling-House, or where he had been resident ten Days or more, except where he was surpriz'd from his own Home, and died before his Return. And after six Months passed from the time of speaking the pretended Testamentary Words, no Testimony shall be received of such *nuncupative* Will, unless the said Testimony was committed to Writing within six Days after making the said Will.' For the *Romans* finding a *solemn* and *perfect* Will to be a matter of some Difficulty at some certain Seasons, and in some Cases, they, therefore introduced what they call'd a *nuncupative* Will* ; and this kind of Will has been in frequent use among Men; especially, when they fear that a *solemn* Will made as such, wherein some of the Solemnities required by Law being omitted, will not be deem'd as valid; nor reckon'd as a *solemn* Will, because that is not done which ought to be done; nor will it be taken for a Will *Jure Codicillorum*, because that was not intended by it. In this last kind of Testament the Testator reveals his Will; and in the other he conceals it in writing: And this for two special Reasons. *First*, Lest such Persons as hope to gain something from the Will, should be provoked to an unwarrantable Hatred of the Testator, in Case they find themselves disappointed. And, *2dly*, Lest such as are named Executors, or have Legacies left them, should contrive and procure the Testator's Death, either to hinder him from altering his Will, or to come at their Legacies and Expectations so much the sooner. But, From what I have just now hinted it appears, that there is another Division of Wills or Testaments, *viz.* into what we call a *perfect* and an *imperfect* Will or *Codicil*: And this Division may be tolerated without any absurdity; especially, for the sake of Instruction, the Law not rejecting the same as disagreeable. That is called a *perfect* Will, which has an Executor named and appointed therein by express Terms†: For without the Appointment of an Executor it is no Will at all properly speaking*, but only a legal Disposition; so that the Appointment of an Executor is the chief Foundation and Support of a Will or Testament strictly so called: And such a perfect Will may either be a solemn or unsolemn Will; and in writing or without writing, as a *nuncupative* Will is. *Plato*, in the second Book of his Laws, enacts and establishes this as one, *viz.* That he who makes a Testament ought in the first place to institute and appoint one of his Children, whom he shall think fit, to be his Heir or Executor, as we say: And the *Civil* Law approves of the same Thing. For by this Law it becomes the Cause of a Person's dying *Intestate*, if a Testator does, *de facto*, pass by his Son or Child: And, according to *Papinian*, a Testament is of no Weight or Moment; when the Son, who was in the Father's power, is passed by‡. And the Lawyer *Caius* thereupon observes; that, among other Things which are necessarily requir'd to the ordaining of a Will, the principal Thing is the Testator's Power, either in appointing his Children to be his Heirs, or else in Disinheriting them||: For if the Son, who is in the Father's power, be passed by in Silence, the Testament is of no Use or Advantage to the Testator's Design of making it a Testament. We have likewise a Proof of this Law in the *Justinian* Code, where 'tis said, That if a Father shall in silence pass

* J. 2. 10. 14.

|| 29 Car. 2. c. 3.

* J. 2. 10.

14.

† C. 6. 23.

29.

* J. 2. 20. 34.

† D. 38. 3. 1.

|| D. 28. 2. 30.

pass by his Son in making his Will, no Advantage shall accrue to him from thence : So that if the Son dies during the Father's Life-time, the Father can have no Heir existing from that Will ; because it was not a legal Will *ab initio*. And, hence it appears what this passing by of an Heir means, *viz.* 'Tis the Testator's Silence in respect of the Person not expressly appointed, or by Name not dis-inherited : For a Son, by the *Civil Law*, ought either to be expressly made an Heir by Name, or else to be expressly disinherited.

Having thus far spoken of a *perfect* Testament, I shall next consider what we call an *imperfect* one ; or in other Terms, a *Codicil*, from the *Latin Word Codex*, which signifies any hasty or sudden Epistle, according to *Serv. Sulpitius* on *Cicero's* familiar Epistles* : And here shew the Difference between a *Codicil* and a *Testament*, which is manifold. As *first*, because an Heir or Executor must be instituted and appointed in a Testament, as aforesaid : But in a Codicil, an Heir is neither appointed, nor revoked † ; unless some one has a Privilege granted him of making an Executor by a Codicil (for so I shall stile an Heir in this Place) as this Privilege is granted to Soldiers by the *Civil Law* ‖. For Soldiers have many Privileges in making Wills according to *Jul. Clarus*, who says, that these Privileges are extended even to such as are found in an Enemy's Quarters, and in the Camp, tho' they do not fight there. *2dly*, There are several more Things required to the making of a Testament than to the making of a Codicil : For in the first, seven Witnesses of fourteen Years of Age (at least) are necessary, and these must be Males, and ask'd to give Testimony thereunto (as already hinted;) but in a Codicil four Witnesses are enough, and it matters not whether they are Males or Females*, or ask'd or not. And, therefore, a *Codicil* is defin'd to be a Last Will, vested with fewer Solemnities than a Testament, whereby a Person orders and disposes of that which he would have done after his Death, it being publish'd and declar'd in the Presence of five Witnesses subscribing the same. Besides, in a Testament, the Subscription of all the Witnesses in Writing, and likewise all their Seals thereunto, are held necessary : But in Codicils, the Subscriptions of the Witnesses alone without their Seals are sufficient †. Again, there is another Difference, *viz.* That a Person may die with several Codicils by him, provided they do not contradict each other : But he cannot die with more Testaments than one by him ; because the latter destroys and revokes the former. Lastly, If a Person dies after he has made his Testament, he is said to die *Testate*, tho' he has made no Codicils : But he, who dies after he has made Codicils, and without making a Testament, is said to die *Intestate* ; and, consequently, his *intestate* Heirs, whom we call *Administrators*, do succeed to his Estate ; and must fulfil what he has ordain'd and dispos'd of by these Codicils. And thus a Codicil is not properly a Testament.

Now only those Persons can make Codicils, who have the Power of making Testaments ‖ ; because the same Power seems necessary for the one as for the other : And the necessary Form and Solemnity of a Codicil, according to the *Civil Law*, is, that it should be made by the Application of five Witnesses (as aforesaid) thereunto ; but by our Law two Witnesses are sufficient. Yea, when a Codicil is not made by *Nuncupation*, but solemnly and in writing, which is called a *close Codicil*, or a *Codicil*, the Subscription of these five Witnesses is absolutely required thereunto*. But this is not necessary in *military* Codicils ; for these only require the same Solemnity as *military* Testaments ; a greater Solemnity not being demanded in a Codicil than in a Testament. *2dly*, This Exception holds

good

* In Lib. 4.
cap. 12 &
lib. 6. c. 18.

† 1 J. 25. 2.

‖ D. 29. 1.
5.

* C. 6. 36. 8.

† C. 6. 36. 8.

‖ D. 29. 7.
2. 3. D. 29.
7. 6. 3. C. 6.
36. 5.

* C. 6. 36. 8.

good in Codicils relating to Children: For in such Codicils as these, two Witnesses are enough even by the *Civil* Law, as two Witnesses are sufficient in a Testament relating to Children *. The third Exception is in respect of blind Men making of Codicils; and in respect of these only, the same Solemnity is required as is necessary in making of Testaments: And, consequently by the *Civil* Law, seven Witnesses and a Notary are necessary † hereunto; or else some other Person, that supplies the Place of a Notary. † C. 3. 36. 26. † C. 6. 23. 21.

Codicils may be made four several ways, and at several Times. *First*, Before a Testament; when the Testator has made Codicils in the first Place, and afterwards thinks fit to make a Testament: And these Codicils do not fall to the Ground on the Account of a subsequent Last Will and Testament; unless they be therein expressly revoked ‖. *2dly*, A Codicil may be in the Testament itself, as when any one makes a Testament, wherein he adds a Codicillary Clause, in order to be the more certain of the Validity of his Disposition: As that, *if the Testament be not valid as a Testament, it should be valid as a Codicil*; or, *omni meliori Modo, &c.* For tho' a Testament of this kind wants the Solemnity necessary unto a Testament, yet 'tis supported by a Codicil; provided, it has the Qualities requisite to a Codicil: And, consequently, Legacies contain'd in such a Codicil are valid *. And this I affirm, in opposition to the Gloss on the third Law of the Digests, as quoted in the Margin †: where it is said, 'That if a Testament does not subsist as a *Principal*, a Codicil does not subsist as an *Accessory*.' But this is a very weak Reason given by the Gloss; because a Codicil is not supported as an Accessory, but as some principal Thing by virtue of the Codicillary Clause. But this ought yet to be understood in a limited Sense, *viz.* Provided, The Testament be not invalid through a Defect of a Will in the Testator; or invalid on the Account of Fraud, Fear, or the like; but only on the Account of some Defect in point of Solemnity. For a Defect of Will cannot be assisted or salved by any Remedy of Law, since the Power of a Last Will and Testament entirely depends on the Will of the Testator. *3dly*, A Codicil may be made after a Testament: For he that has forgot to dispose of any Thing in a Testament, may, after a Testament is made, dispose of that Thing in a Codicil ‖. *4thly*, A Codicil may be made without any Testament either antecedent or subsequent to such Codicil: And then the Person deceased, charges the Heir *ab Intestato* or Administrator without any Testament to do that which he in such Codicil orders to be done; as the Payment of the Legacies, and the restoring the Inheritance to Persons expressly nam'd in such Codicil *. From whence we may infer by the bye: † That tho' a Person cannot be directly appointed Heir in a Codicil †; yet he may be indirectly so appointed, by commanding the Heir, *ab intestato*, or the Administrator to restore the Inheritance to another. But though such Heir or Administrator so named in the Codicil or Will annex'd, shall be oblig'd to restore the Inheritance to that Person; yet such Heir or Administrator may retain the fourth part of the Inheritance to himself, which we call the *Pars Trebellianica*; unless in the Codicil or Will annex'd, he shall be prohibited so to do: For the *Pars Trebellianica* may be deducted; provided, it be not particularly forbidden ‖. † J. 2. 25. 1. * Mantic. lib. 3. Tit. 14. N. 11. † In l. 3. D. 28. 2. ‖ D. 29. 7. 8. * D. 29. 7. 8. † J. 2. 25. 2.

An imperfect Testament in Writing among Children is valid, if the Father shall with his own Hand, in clear and undoubted Letters, write down the Names of his Children, and the Number of Ounces or Parts (for the *Romans* divided the Inheritance into twelve Parts) that he designs to give them, and shall distinctly point out their Dividend and the Legacies bequeath'd to them *: But this is otherwise, if it be done by Signs and Characters. And such a Will first made by the Testator, shall not

‖ Molin. Disp. 124. Col. 3. Oinotom. in Inst. 2. 25. 1. N. 26.

* C. 6. 23. 21.

be destroy'd, unless the Testator shall afterwards, in the Presence of seven Witnesses, expressly declare, that such Will is not valid; and makes a second Will that is perfect, or makes an unwritten perfect Will.

Though among other Things which are necessarily required in making Last Wills and Testaments, the Witnesses ought to be ask'd to give their Testimony * as aforesaid; yet it is not necessary to ask them to be present at the Will as Witnesses, but 'tis enough to ask them to be present as Witnesses in general. The Number of Witnesses, according to *Baldus* †, does not constitute the Form, but only the Solemnity of a Will: And the same Person says again, that the Substantial Form of a Will does not consist in the Number of the Witnesses, but only the accidental Form thereof, which the said *Baldus* calls the extrinick Solemnity of a Will. For the Number of seven Witnesses cannot be the Substantial Form of a Will, because the Substantial Form thereof cannot be chang'd in any wise either by Law or Custom. But no one doubts but that the Number of Witnesses to a Will may be increas'd or diminish'd both by Law and Custom: Therefore the Number of Witnesses cannot be understood to be of the Substantial Form of a Will. Nor is the Law in the Code any Objection hereunto, since it proves the contrary, by saying, That the Number of Witnesses appertains to the Solemnity of a Will ‖. But it may be urg'd, That a Will is defective, if one of the seven Witnesses is wanting, because it cannot be legally prov'd *. For it must be admitted, that the Substantial Form of a Will is a Matter introduced by *Civil* Law, which may be also chang'd and remov'd by another *Civil* Law: the Substantial Form of a Will being in no wise founded on the Law of Nations, which is perpetual and immutable. But the Question here is, Whether the Witnesses made use of in a Will may be presum'd to have been ask'd, if this be not express'd in the Will? To which I answer in the Negative, because this is an extrinick Solemnity which cannot be presum'd ‡. All the *Italian* Doctors do agree, that it is enough, if such Witnesses have been ask'd by any extraneous Person: But then this ought to be done in the Presence of the Testator, suffering and permitting the same; because the Testator himself is then understood to order and command the same. For Witnesses ought to be ask'd either by the Testator himself, or else by some other Person that represents him herein, according to *Alexander* in his *Consilia*; and other Doctors are of same Opinion. If a Notary shall *simply* say in Writing, that the Will was made in the Presence of the Witnesses within-written, such Witnesses, according to *Speculator*, are not presum'd to have been ask'd.

A Testament and a Last Will are not the same Thing, because a Last Will is of a larger Extent and Signification than a Testament. Yea, a Last Will is at were a *Genus*, containing under it a Testament as a *Species*. For the Doctors reckon up several *Species* of a Last Will. The *first* is a Testament. The *second* is a Codicil. The *third* is an Epistle, wherein a *Fidei-Commissum* is left to any one *. The *fourth* is a Legacy. The *fifth* is a *Capio, mortis Causâ* ‖; and some reckon a Donation *mortis Causâ*. Every one may make a Last Will and Testament, unless the Law prohibits him so to do; provided, he has a sufficient Use of his Reason, and a free Administration of his Goods and Estate: Because every one may dispose of his own as he pleases; provided, he be not hindered and forbidden by some Law. Now several Persons are prohibited from making a Last Will and Testament. As *first*, an Idiot and a Madman, that has not his lucid Intervals †: Yea, these Idiots and Madmen are not only hindered from making a Will to *profane*, but even to *pious* Uses. For the Act of making a Will is a human Act, which ought to be executed *humano modo*:

But

* C. 6. 23. 21.

† Inl. 21. C. 6. 23.

‖ C. 6. 23. 21.

* C. 6. 23. 32.

‡ Mantie. ut sup. cap. 11.

* C. 3. 36. 26.

‖ D. 39. 6. 18 & 31.

‡ C. 6. 22. 9.

But a human Act cannot be executed by him, that has not a sufficient Judgment, and Will to make a Testament : Wherefore a Person that has begun to make a Will, and falls into a Frenzy or Madness before he has perfectly finish'd the same, makes an invalid Will ; and so 'tis decreed in the Law above-quoted in the Margin * : For he that has not the Use of Reason, and a sound Understanding, cannot exercise a human Act. If it be a Doubt, whether a Person has the use of Reason sufficient to make a Will, we must have recourse to Witnesses and other Circumstances ; there being no better Rule laid down and assign'd to distinguish herein. But if this cannot be discern'd or known by Witnesses or by Circumstances ; and 'tis still doubtful, whether he that appear'd to be an Idiot or Madman, has his lucid Intervals sufficient to make a Will, it ought to be presum'd, that he has not ; because there is a *Constat* of his Ideocy or Madness, but none of a Return to his Senses again †. But if it cannot be collected from Circumstances that the Will was made in the time whilst he was in his right Senses, I think, we ought to judge thereof according to the Form of the Disposition of the Will. For if the Form of the Disposition was prudently made, the Will or Testament is presum'd to be made during the time that he was in his right Senses : And the Person averring it to be in the time of his Madness or Lunacy, ought to prove the same ; because there is a *Constat* of an Act prudently done and manag'd ||. *Secondly*, A Person that is together Deaf and Dumb from the Time of his Birth, cannot make a Last Will and Testament to *profane* Uses * ; except it be such a Person as is render'd capable of making a Will by the Grant of the Prince ; for such a Person's Will is valid, if he can sufficiently express his Mind by Signs and Tokens †. And a second Exception hereunto is in the Case of a Soldier, whose Will is valid by reason of the Privilege granted to Soldiers, if he has clearly express'd the same by Signs ||. I say *Deaf* or *Dumb*, because if he is only thick of Hearing, or slow of Speech, his Will is good, and shall not be irritated by Law. But if a Person be not Deaf and Dumb at the same time, he may make a valid Will ; because 'tis enough if he can point out the Heir or Executor, and declare what he would have become of his Goods after his Death *. And such Person must be Deaf and Dumb together from the time of Birth, or naturally so ; because if a Person be only so by Accident, he may make a good Will if he knows how to write † : For a Person, that is only Deaf by Accident, can express the Sentiments of his Mind, which a Person Deaf by Nature cannot do. But if such Will of a Deaf and Dumb Man be made to *pious* Uses, it is valid for the Good of the Church ; since the Solemnity of the *Civil* Law is not necessary in a Disposition *ad Causas pias* ||. Persons that are Blind ; or under the Age of Puberty ; or Servants to Punishment ; as Persons condemn'd to Death, or to suffer Banishment, and the like, cannot make their Wills *.

The Interpretation of a Last Will and Testament belongs to the Judge, before whom it was prov'd, or to some other lawful Judge ; and to him we must have recourse for the Construction thereof : But the Judge ought to observe this Order and Method in expounding the same. *First*, He ought to consider the Testator's Mind and Intention, if possible. But if this does not plainly appear, then he ought, *2dly*, To consider what is most likely, and probable to be th Testator's Meaning ; which Probability is inferr'd from many Circumstances. But if this Probability does not appear, he ought then, *3dly*, to have Recourse to the proper Signification of the Words ; and if the Words bear several Acceptations, *viz.* One a *proper*, and the other an *improper* Sense, he ought to adhere to the proper Signification thereof †. There is no Conclusion more commonly known

* C. 6. 22. 9.

† Tusch.
Tom. 8.
Concl. 104.

|| Mant. de
Conj. ult.
Vol. Tit. 5.
Mascard. de
Probat.
* Concl. 825.
N. 13. C. 6.
22. 10.
† C. 6. 22.
10.
|| J. 2. 11. 2.
C. 6. 22. 10.

* C. 22. 13.
2.

† C. 6. 22.
10.

|| Tusch.
Tom. 8.
Concl. 120.
N. 13.
* J. 2. 12.
1, 2, 3, 4,
&c.

† D. 6. 3. 1.
Gloss. ibi.

* Bart. in
l. 57. D. 36.
§. 1.

known in our Law-Books than this, *viz.* That the Wills of all Testators ought to be understood and taken according to the Disposition of the Laws; and that every Person is presum'd to have willed that which the Law itself ordains and directs *: And as a Testator is only suppos'd to conceive and think of that which the Law appoints; so a Judge in the Interpretation of a Will ought to have a great Regard to the Laws, and not to his own Fancy and Pleasure. And that Interpretation, whereby the Common Law is preserv'd, is in every Disposition deem'd a favourable Interpretation; and, therefore, it ought to be embrac'd and follow'd: And every Disposition, which is express and *simply* pronounc'd, is cloath'd by the Common Law; and ought to be restrain'd and extended according to the Rules of the said Law; and all doubtful Words ought to be referr'd to the Meaning and Sense thereof. In Last Wills and Testaments, Words of a doubtful Signification may be explain'd and declar'd in Codicils: But where Words are clear of themselves, there is no room for Interpretation. But to proceed:

There are some derogatory Words inserted in a Last Will and Testament; and, therefore, I shall consider them in the next Place. Now derogatory Words herein inserted may be of a threefold kind: For there are some Words which are derogatory to the Act of making a Testament; some which are derogatory to the Solemnity of a Testament; And some, which are derogatory unto the Mind and Will of the Testator himself. For *First*, If a Man says in his first Will, *That he will not make any other Last Will and Testament*, these Words are derogatory to the Act of making another Will: or, *2dly*, If he shall say thus, *viz.* *If any other contrary Will appears, his Will is that the same shall not be valid*: And these Words are also derogatory to the Act of making another Will. But if he should say, *That if any other contrary Will should appear, he would not have the same to be valid, unless it had such and such Words literally express'd therein, as a PATER NOSTER, and an AVE MARIA*, and the like (which are usual among the *Papists*): These Words (I say) are only derogatory to the Solemnity of the Will. But if he has already declar'd in his Will, *That if he should make another Will or Testament contrary to the present, he would have this not valid, nor to be look'd upon as a Will made by him*: The Words are derogatory to the Will itself.

A Notary, where Notaries are made use of in Last Wills and Testaments, may be compell'd to publish the first Will or Testament of a Person deceas'd, tho' the Testator has revok'd the same by his Last Will: for it may be the Interest of a Person to have that Will also produced; because (perhaps) he has a mind to impeach it of Forgery, or of a Nullity and the like. And such Notary ought not to tear it even at the Request of the Testator himself: For the Office of the Notary is such, that tho' the Testator should cancel the same, yet the Notary is still oblig'd to keep a Copy of it. If a Testament should appear to be cancell'd by Interlineations, yet I may desire to have the same publish'd; and the Notary ought to publish it with the Interlineations and Rasures, and to make mention of them too. A Confession made in a Last Will and Testament in the Presence of the Party, who accepts thereof, is irrevocable, tho' such Testament be afterwards render'd null and void, or be even revok'd by the Testator: I mean such a Confession, whereby any Person acquires a Right, and which is made in the Presence of the Party that acquires this Right; or in the Presence of another that acts for him. But if such a Confession made in a Testament be not accepted before a Revocation of the Testament, the Confession shall afterwards be revocable. And such a

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Confession made of a Debt by the Testator in his Will, shall induce a sufficient Proof of such Debt, if it was made in the Presence of the Party, or some one accepting of such Confession in his Behalf. 'Tis presum'd by a Tradition or Rule of Law, that a Last Will and Testament, which is found cancell'd in the Custody and Possession of the Testator, was cancell'd either by the Testator himself, or else by the Means of his own Order *. Though a Will shall not be revoked by doubtful Words; yet it might be revoked by sufficient Words, and without Writing too, before the Statute of *Frauds* and *Perjuries* †: And before that Statute, it might be revoked by a subsequent Will, which was void in itself; for it was good to revoke a former Will. But a subsequent Will which does not appear, shall not be a Revocation of any Will in Writing which does appear: But a subsequent Will, tho' not made in pursuance of the Statute of *Frauds* and *Perjuries*, &c. shall be a Revocation of a former Will, if it appears; yet a Will shall not be revoked by a subsequent Writing, unless such Writing be also a good Will in its Circumstances. A second Will does not toll and revoke the first, according to some Men's Opinions, unless some special mention be made of a Clause inserted in the first Will: For the first Will is valid and binding when two Wills are existing, though it be, in some respects, derogatory unto the second, unless in renewing of the said Will some special mention be made thereof.

* Jaf. &c. in l. 12. c. 6. 23.

† 29 Car. 2. c. 3.

The Effect and Consequence of a Last Will and Testament is, That a Sentence ought to be pronounc'd in pursuance thereof; which is call'd the Probate or Approbation of such Will; and a Man ought to abide entirely by it if it be just; for this is only a Sentence of *common Form*, unless the Will be controverted in point of its Validity; and then such Sentence is only demanded to Execution, *quousq; &c.* For some Testaments are said to be unlawful or invalid in respect of the Will and Mind of the Testator himself, as because his Will is irrational or contrary to good Manners, or because the Testator was not of a sound and perfect Mind or Memory at the time of making his Will*: For 'tis not by Law sufficient, that the Testator be of Memory (when he makes his Will) to answer to usual and ordinary Questions, but he ought to have a disposing Memory, so as that he is able to make a Disposition of his Estate with Reason and Understanding, and this is such a Memory as is call'd a *sound and perfect Memory*; and if he has not such a Memory, his Will ought not to be prov'd by a solemn Sentence, or demanded to Execution. For if the Ecclesiastical Court shall proceed to the Probate of such a Will, where Lands are concern'd therein, a Prohibition lies at the Common Law, generally to stay all the Proceedings in the Spiritual Court, as to the Probate of the Will, &c. till this Suggestion be try'd at the Common Law ‖. Some Wills are also unlawful in respect of some Solemnity not observ'd therein: But such Wills ought, notwithstanding, to be demanded to Execution *. The *Canon Law* says, Those of *common right*, are stiled *lawful Wills*, which a Man makes touching his own proper Goods and Estate, *viz.* Such as he has not acquired in Contemplation of the Church †, tho' it be otherwise by special Custom: For by Custom, a beneficed Clerk may make a Will, and thereby dispose of the Goods and Estate he has acquir'd even in Contemplation of the Church; which, by that Law he cannot otherwise do ‖. If a Testator dying shall have Goods in divers Diocesses or Jurisdictions, and his Executor shall have prov'd his Will before an Ecclesiastical Judge of one of those Diocesses or Jurisdictions, 'tis sufficient as to the Probate thereof, according to the *Canon Law*, if it has been once prov'd before a competent Judge; especially, if it has been prov'd before the Ordinary of the Place where the Testator died *. Nor is it needful that

* X. 3. 27. 3. Lindw. Lib. 3. Tit. 13. c. 1. v. *Legitima testamenta.*

‖ Cok. 5. Rep. fol. 23.

* Anton. de Butrio in c. 19. X. 3. 26. in fin. † X. 3. 26. l. 7. & 9.

‖ Lindw. Lib. 1. Tit. 3. c. 2. v. *Legata.*

* Othob. Con. Tit. 14.

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such

* X. 3. 26.
17 & 19.

† Lindw.
Lib. 3. Tit.
13. c. 5. v.
Laicis.

such Will should be proved again. But though, in respect of granting Letters of Administration of Goods, and of Auditing and Passing an Account, &c. every Ordinary of a Place, where the Goods are found, may intromit him by the *Canon Law* * : yet at this Day, in *England*, the Archbishop of *Canterbury*, in his Province, has the dispatch of all these Matters, as well in respect of the Probates and Registering of Wills of this Kind, as in granting of Letters of Administration, and in Auditing and Passing Accounts, where the Persons have *Bona Notabilia* in several Diocesses of his Province † ; and a Person is so said to have *Bona Notabilia*, who has Effects in different Diocesses to the Value of 100 Shillings and upward in each Diocess. For, according to the Laws and Constitutions of several Popes, and other Persons, publish'd on this Account, those Things are not stiled *Bona Notabilia*, whereby a Person still remains a *Pauper*, tho' he has acquired the same : And in regard of the Canon or Constitution quoted in the Margin, who is not worth of his own Money or Goods a hundred Shillings Sterling, or more.

|| X. 3. 26.
17 & 19.

† In l. 21.
D. 28. 1.

* X. 3. 26. 10.

† D. 28. 1.
20. 6.

|| Covar.
Tom. 1.
fol. 23.

Tho' the Probate of Wills does of *common Right* belong to Bishops, according to the *Canon Law* || ; yet, according to *John de Athon*, on a *Legatine* Constitution, this Power may accrue to inferior Ordinaries, and hence 'tis, that Archdeacons, Deans of Churches, and Abbots, sometimes have the Probate of Wills, &c. and now Lords of Mannors with us in Right of the Abbots. This Probate, according to *Bartolus* †, may be made by an Instrument in a *Nuncupative* Will, and so likewise it may in a Testament that is not *Nuncupative* (at least) as to proving the Solemnity, tho' not as to the Proving of the Will itself. For a Will may be proved *per Testes*, when two Witnesses of Integrity are produc'd thereon, and do clearly depose touching the same*. For 'tis enough in respect of a Canonical Equity, that a *Constat* be made of the Will of the deceas'd by two Witnesses of Integrity being Superior to every Exception, to the end that the same should be demanded to Execution, whether it be made to *pious* Uses or not. It has been already said, that a Woman cannot be a Witness to a Last Will and Testament, though a Person of never so honourable a Condition and Reputation for Integrity † : yet *Panormitan* says; that, according to the *Canon Law*, both Men and Women may become good Witnesses thereunto, in the common Opinion of all the Doctors : For the *Canon Law* reduces the Solemnity of a Will to the Law of Nations, which does not distinguish between the Testimony of a Man, and that of a Woman. But *Alexander*, *Albert. Brunus* and *Tirraquel* declare ; That the Testimony of a Woman in respect of some Wills is barr'd and excluded even by the *Canon Law* ||. But the *Canon Law*, besides the Solemnity of the Law of Nations, requires the Presence of the Parish-Priest at the Attesting of Wills ; and if the Parish-Priest, or some other Priest (at least) cannot be had, then four Witnesses are requisite unto a Last Will and Testament. This seems to be an Invention of the Church to get the Clergy admitted to Persons in their last Hours, in order to procure Legacies, and the like, to be left to the Church, or to the Parish-Priest himself, who is their Confessor and Ghostly Father that must remit their Sins, if he pleases so to do ; or else they are sent to Hell by a Curse of the Church, as is commonly practis'd in the *Roman* Communion.

The Insinuation or Registering of Wills is the Publication of Wills at the Acts of Court * ; and, according to the Custom of *England*, this belongs to the Ecclesiastical Courts, that is to say, to the Bishops and their Officials ; and by the like Custom, so does the Approbation of them too † : Tho', by the *Civil Law*, a Lay Judge is a competent Judge in his own Jurisdiction, to grant the

* C. 6. 23. 2.

† Otoben.
Con. Tit. 14.

the Probate of a Will*. *Hostiensis* observes, That in Ecclesiastical Estates, such Approbation and Insinuations belong to Ecclesiastical Judges; but in Temporal Estates, the Matter appertains to the Temporal Judge†. But this Distinction is not regarded with us. And such Approbation and Insinuation may be made by a Person that is not an Ordinary Judge, but even by a Commissary, and a delegated Judge, provided he has a special Mandate or Commission for this End and Purpose; for a general Commission is not sufficient. But then, according to *Hostiensis*, when the Estate of the deceas'd is both Ecclesiastical and Temporal, it ought to be done by both Judges, viz. First, By the Ecclesiastical, and then by the Temporal Judge. In *England*, Wills relating to Lands in Freehold are prov'd in the Court of *Chancery*, and all other Wills in Ecclesiastical Courts.

* C. 6. 23.
18. & 23.
C. 1. 3. 41.
† In c. 16.
X. 2. 22.

By the *Civil*|| and *Canon* Law †, the space of a Year is allow'd and prescrib'd for the Execution of Last Wills and Testaments; and this time runs from the Day that the Judge decrees his Monition or Order touching the same: But by the *Novels* only six Months are allow'd for the Execution thereof*; and this Time commences and is current from the Day that such Last Will and Testament was prov'd, registred and engross'd. But by another *Novel* Constitution, five Years are indulged and appointed for this Purpose. Now, for the better understanding of this Head, I shall propound some Axioms. As, First, The Testator's Will ought to be demanded to Execution within the Time prescrib'd and limited by the said Will; and this is current from the Day of the Executor's taking on himself the Executorship. 2dly, If the Testator has fix'd no Time for the Execution of his Will, the Law appoints the Heir or Testamentary Executor one whole Year for the Payment of all Legacies whatsoever, which are not bequeath'd to Pious Uses; and likewise to execute the Will in all other Respects†. And after the Lapse of a Year, the Right of executing Wills is transferr'd, and devolves itself to the Bishop of the Diocess||; unless the Testator shall, in case of such Negligence, have substituted another Executor; and this space of a Year, runs from the day of the Monition made by the Judge, as aforesaid.

|| C. 1. 3. 28.
† X. 3. 26. 3.

* Nov. 99.

† C. 1. 3. 28.

|| X. 3. 26.

19.



Of Witnesses, and their Depositions.

AMONG all the several Species of Proof, that is deem'd most effectual which is made by Witnesses, whose Credit and Evidence is invoked for the Confirmation of some doubtful Matter*. Now those Persons are called Witnesses, whose Depositions the Plaintiff or Defendant makes use of, to procure Proof and Evidence to some doubtful Matter, and to render the same Credible†. Thus a Witness is a Person cited or called into a Court of Judicature to declare to the Judge what he knows touching some Matter of Fact, which is under the present Examination of the Court||: And his Declaration is stiled his Testimony or Deposition. If fit and proper Witnesses are not produced, the whole Cause or Business of the Suit drops and comes to nothing: And the Judge may in virtue of his Office repel and set aside unfit and improper Witnesses. Among Witnesses, Conspirators are deem'd the same as capital Enemies; and, therefore,

* X. 2. 22.
10.

† Socin.
Conf. 34.
N. 10. Vol. 1.

|| X. 2. 21. 1.

* X. 2. 27.
22.

fore, ought to be set aside, and their Testimony to be disallow'd of *. But yet in some Cases they may be admitted; because Witnesses that are *minus idonei*, are admitted, where other Witnesses cannot be had. The adverse Party ought to be cited to see the Witnesses produced and sworn: And regularly this is indistinctly true in all Cases except three, *viz.* First, Where the Fact is notorious, and the Judge only admits Witnesses for his own Information. 2dly, Where the Dispute or Controversy is *de informatione Personæ*, *viz.* Whether he be fitly qualify'd for a Dignity or not. And 3dly, When the Process is by way of *Inquisition*. But the Abbot thinks this last way not to be legal, for the Laws do not distinguish between Inquisition and other Methods of Process in relation to the Admission of Witnesses. But the Party need not be cited to appear *ad audiendum testes*, since they ought to give their Depositions in secret, according to the *Civil* and *Canon* Law. For the Meaning of *ad audiendum testes* in a Citation, is, First, that the Party *Litigant* should come and hear them sworn. And 2dly, That after Publication he should come and hear the Depositions read, or else receive Copies thereof. He that will produce Witnesses that come a great Distance, ought to tender and allow them their Expences: But the Person against whom these Witnesses are produced, is not bound to bear any part of these Expences †, tho' the Witnesses ought to give their Testimony for both sides, as far as is consistent with Truth; and ought likewise to give an Answer to the *Ministrants* Interrogatories. And these Expences ought to be tendered and administered to them, before they depart from the Place of their Abode or Habitation, without any regard had to what such Witnesses might have spent in their own Houses: But it ought to be consider'd, what their Journey and Travelling Expences may stand them in. And if such Witness shall receive Expences for ten Days, and shall be dispatch'd in five, he shall be oblig'd to restore the Overplus or Residue to the citing Parry.

† C. 4. 20.
11.

|| D. 22. 5.
3. 5.

* X. 2. 20.
54. D. 22. 5.
3. 5.

† C. 1. 5. 21.
X. 2. 20. 21.

|| C. 4. 20. 11.

That Witnesses be accounted *Idoneous*, they ought first of all to be Persons of a free Condition, and not Bondmen or Servants. 2dly, The Sex of the Witness ought to be consider'd, *viz.* Whether such Witness be a Man or a Woman. 3dly, We ought to regard the Age of the Witness: For if he deposes in a Civil Cause, he ought to be above fourteen Years of Age ||; and full twenty Years of Age, if he deposes in a Criminal Cause, unless in a Cause of Treason. 4thly, He ought to examine and enquire into the Fame and Reputation of a Witness, *viz.* That he be not an infamous Person, and the like *. 5thly, The Fortune and Circumstances of a living Witness ought to be consider'd, whether he be a *Pauper*, and an indigent Person or not. 6thly, We ought to regard the Religion of a Witness, *viz.* Whether he be a Pagan, Infidel, Heretick, Christian, or the like †. 7thly, No Credit ought to be given to Witnesses that may reap any Advantages to themselves from their own Depositions: For where the Consequence of the Evidence may redound to the Benefit and Advantage of the Witness, such Witness shall always be rejected. 8thly, Accomplices in any Crimes, in *Latin* called *Participes criminis*, cannot be Witnesses in the same Crime ||, unless it be in some particular Cases. As for Example, if there be four Persons that have been Accomplices together in the Commission of some particular Crime or Mis-demeanor; and, upon enquiry made thereinto, three of them should be willing to excuse the fourth by saying, that he was not guilty: In this Case (I say) no Credit shall be given to his Depositions. So on the contrary, if they should say, that only the fourth was guilty, and neither of them, no Credit ought to be given to such Evidence. If one Man commits one Homicide, and another commits another, they shall not be Witnesses for each other; because they seem,

seem, in some measure, to be Accomplices in the same specifick Crime : But the Gloss holds the contrary Opinion, because the Text speaks of one and the same Crime *Identically* : But 'tis otherwise in different Crimes; especially when one of the Parties accus'd is acquitted, and not render'd *Infamous*. But this Law does not hold in the Case of a Conspiracy, which is acted in Secret, and cannot be prov'd but by one of the Accomplices or Partakers in such Crime.

As a Judge ought not to admit any Position or Article, that is not pertinent to the Matter in Suit : so neither ought he to suffer any Witness or Person to be interrogated on such an impertinent Article or Position; nor ought he to suffer Witnesses to be examined or interrogated on any other Articles or Positions, than those on which they are produc'd *. And as a Judge ought not to suffer the Party, that is willing to prove any Thing *extra Causam*, to proceed thereon: So neither ought he to suffer Witnesses to depose *extra Articulum* †. Now in order to examine Witnesses, three Things are frequently required, *viz.* a *Citation*, *Admission*, and a *Judicial Compulsion*. For this is a general Maxim, *viz.* *That all Persons, that are not particularly forbidden to give Evidence, and whom some Law or other does not excuse from giving their Testimony, ought to be cited, admitted and compelled* ||. But there are some Persons, tho' they are nam'd by the Party in Court as Witnesses, yet for some Reason or other are not admitted: And if they are admitted, yet they are not cited: And if they are cited, yet sometimes they are not compelled to give their Testimony. Touching the first of these, we read these Verses in *Hostiensis* *, *viz.*

*Conditio, Sexus, Aetas, Discretio, Fama,
Et Fortuna, Fides, in testibus ista requires.*

In order prove the Defendant's Innocency in a Criminal Cause, Witnesses may be examin'd after a Conclusion in the Cause, and immediately before Sentence on Articles exhibited not directly contrary to former Articles. The Examination of Witnesses is valid, tho' they be not examin'd on Interrogatories †.

An Exception against the Person of Witnesses ought to be made touching the *principal* Matter in Suit, or (at least) it ought to have an oblique Respect and View to such *principal* Matter: And all Exceptions or Protestations against Witnesses ought to be made *ante Aperturam attestationum*, *viz.* before the Publication of their Depositions. All Persons, by the *Civil* Law, of what Sex soever may be Witnesses, whether Men or Women ||; provided, no Exception be made against them. But Women, regularly speaking, according to the *Canon* Law, ought not to be produced as Witnesses in Criminal Causes by reason of their Modesty, the Imbecillity of their Sex and Judgment; unless it be in such Cases wherein other Witnesses cannot be had; or where the Greatness and Importance of the Cause requires it *: And this proceeds in all other Cases. In *England*, by the Common Law, the Wife cannot be admitted to give Evidence against her Husband in any Case, unless it be in Treason; nor the Husband against the Wife. Tho' by the *Julian* Law a Pupil cannot be a Witness; yet when he is out of his Non-age, he may give his Testimony touching those Things, which he knew and saw in his Minority, or during his Pupillary Age †: But this only proceeds touching such Things as he knew and saw, when he came to the Age of Puberty. And the Reason why a Person cannot be a Witness of such Things as he knew and saw in his *Infancy*, is, because such Age of Infancy, generally speaking, has neither Knowledge or Understanding sufficient to judge of Things. The Testi-

T t t t t

* Gloss. in
l. 7. D. 5. 3.
Barr. tract.
test. §. qua-
liter. N. 3.
† Gloss &
Dd. in c. 29.
X. 2. 20. &
in l. 7. D. 5.
3.

|| X. 2. 21.
1. & 3.
D. 22. 5. 1.

* §. quis
possit, eod. tit.

† C. 4. 20. 4.
Dd. ibi.

|| D. 22. 5. 1.

* 15 Q. 3. 1.

† D. 22. 5.
3.

mony

* D. 22. 5.
3.
† X. 5. 40.
10.

mony of a Person not yet arriv'd at the Years of Puberty, is (therefore) null and void *, tho' nothing be objected to or against his Person: And the same thing may be said of a Bondman or Vassal †. All Persons are presum'd to be *idoneous* Witnesses, unless it be such as are found to be prohibited by some Law or Statute: For there is a *permissory* Edict, whereby every one is allow'd to give his Testimony; unless it be shewn, that the Law does particularly provide against such Evidence.

* D. 22. 5. 3.

† Q. 2. 7. 39.

* X. 2. 20.
23.

¶ X. 2. 20.
13.

Now Witnesses are reprobated and disallow'd of in Law, on the Account of a twofold Defect, *viz.* either on the Account of some Fault or Defect which arises from their Depositions: As for Example, because their Depositions are *contrary, obscure, impossible*, or the like, of which more hereafter: or else on the Account of some Fault or Defect, which arises from their Persons. *First*, then, Witnesses are reprobated on the Account of some Defect arising from their Persons: as because they are *infamous* Persons *, and the like. For, without doubt, Infamy of Law repels and sets aside the Persons so stigmatiz'd, not only in Criminal, but even in Civil Causes †; since a good Name and Reputation for Credit and Integrity is the Foundation of all Testimony *. But an *infamous* Person stands in need of such a good Name and Reputation, the good estate thereof being diminish'd on the score of his Crimes, which render him infamous: And he is declar'd to be so *ipso Facto*, or by way of Sentence. For this Reason, Persons guilty of Forgery, Incest, Adultery, Keeping of Concubines, and Persons condemn'd of any Crime against the Publick ¶, are set aside, and not admitted to give Evidence or Testimony in any Cause. Nay, the Law has such a Detestation to Infamy, that an infamous Person, tho' join'd with another credible Witness, does not make full Proof or Evidence in a Cause. Nor is Credit given to a Witness, who in his last exit or extremity of Life, has said, That he has born false Witness in any Matter: But a Witness may be examin'd and interrogated as a Witness even in the last extremity of his Life, and his Evidence shall be valid, if he be a Person of an honest Reputation. For tho' he that can make a Last Will and Testament at the point of Death, may also be examin'd as a Witness at that Article of Time; yet his Deposition may be reprobated for certain Reasons, because every dying Person is not presum'd to be a St. *John* the Evangelist.

† X. 2. 25. 1.

* D. 22. 5. 3.

† X. 2. 25. 1.

* 2 Q. 7. 39.

† X. 2. 25. 1.

¶ Q. 7. 39.

Tho' a Witness convicted of any Crime objected to him, or otherwise confessing the same, may be set aside from giving his Evidence: yet he shall not be punish'd for such a Crime on such a Conviction, unless it concerns the principal Matter in Suit †; such Crime being objected by way of Exception only, and not by way of Action or Accusation. And such Crime ought to be prov'd, before it be determin'd by a Sentence: For Witnesses ought to be free from all Infamy and Defamation of Infamy *, as aforesaid: Nay, they ought to be free from the least Suspicion thereof, and to be without any manifest Stain or Blemish in their Reputation, in order to render their Testimony effectual †. But Witnesses cannot be set aside as criminous Persons after a Sentence or Conclusion in the Cause: For a Sentence is a Term that excludes and bars the Proof of an Exception afterwards objected against the Persons of Witnesses. From what has been already observ'd, it therefore appears, that to the end a Witness may be said to be of an entire Fame and good Integrity, he ought to be entirely free from four Things, *viz.* *First*, From any Crime itself *. *2dly*, From the Infamy and Defamation of any Crime †. *3dly*, From the Suspicion of any Crime or Enmity to the Person against whom he is produc'd. And, *Lastly*, He ought to be free from every manifest Stain and Blemish in his Life and Conversation ¶. Now this last may be understood in a twofold

Sense

Sense and Meaning, *viz. De Maculâ animæ*, which ought to be more regarded than any Defect and Imperfection, because the Soul is of greater Price and Value than the Body: For if there be any Spot or Blemish therein, it differs not from a Crime.

The Judge may, by Virtue of his Office, assign a Term-Probatory common to the Parties in Suit for the Production of their Witnesses: and moreover 'tis to be observ'd, That a Witness ought not, of his own accord, to offer himself, but ought rather to expect the Citation of the Judge, or the Request of the Party litigant: For without such a Request, or judicial Compulsion, such Witness is deem'd as a Person suspected*. If a Witness refuses to come and give Evidence, either on the Party's Request made to him, or on the Judge's Citation, the Judge may compel him hereunto *indictâ multa*, that is to say, by laying a Mulct or Fine on him||: yet this is otherwise in some certain Persons, as aforesaid, who cannot be compell'd hereunto contrary to their Wills†. The adverse Party ought also to be cited or admonish'd (if present in Court) to appear and see the Witnesses themselves produced and sworn||, and ought likewise (if he thinks it his Interest) to exhibit and administer such Interrogatories to them, as he conceives to be proper; otherwise the Examination is null and void*: I say *sworn*, because it is provided both by the *Civil* and *Canon* Law, That all Witnesses should be sworn before they give their Depositions, in what Rank or Station of Honour soever they appear||: Because, tho' in respect of God there is no difference between an Oath and a *simple* Declaration, yet in respect of a Court of Law, there is this difference, *viz.* That he is punish'd more severely that acts contrary to an Oath, than he who acts contrary to a simple Declaration or Affirmation of a Thing. The Party that produces Witnesses, ought to tender them their necessary Expences, and the Charges of their Journey†. And this the Judge ought to take care of and see perform'd. Note, 'Tis one Thing to be produced and sworn *sub Capitulis*, and another to be produced and sworn on the Merits of the whole Cause. The Admission of Witnesses made against a Person not cited to see them produced, is null and void: And a Witness is said to be admitted as soon as he is sworn.

* D. 3. 3. 25.
C. 4. 20.
19.

|| X. 2. 21.
10. X. 2. 21.
2.
† Vide
Specular.
|| X. 2. 20. 2.

* X. 2. 20.
2. 3. 2. 9. 2.

|| X. 2. 20.
51.

† Cyn. in
l. 11. C. 4.
20.

In Civil Causes, a Judge cannot regularly proceed to the Examination of Witnesses *ex officio*, that is to say, unless it be at the Instance and Request of the Party *producent**: But 'tis otherwise in Criminal Causes, wherein he may proceed *ex officio*, in virtue of an Inquisition; for therein he takes on himself the Person and Office of a Party, and may proceed of himself without the Request or Instance of any Party†. By the *Canon* Law every Person, who gives his Testimony, ought to do it Fast- ing||: But this is not practis'd here in *England*.

* Bart. in
l. 4. D. 39.
2. S. & in
l. 68. D. 5. 1.
† D. 48. 18.
1. 27.

|| X. 2. 20. 1.

When both Parties are together, and ready at the same time to produce Witnesses, the Plaintiff ought to have the Precedency, if he pleases: But if the Defendant desires Dispatch, he shall always have the Precedency in point of Production, if he pleases; because the Time for Production of Witnesses is common to both Parties. And Witnesses produced, ought to depose in common, for the Benefit of both Parties, according to the Truth and the best of their Knowledge*; and not for the *Producent* only, as it too often happens: For hereunto they are oblig'd by Oath. He that produces a Witness, is presum'd to approve of the Person of such Witness from the very Production of him: And tho' a Witness deposing *de Credulitate*, be no Evidence against the Person of him, against whom he is produced; yet the Deposition of such a Witness is good Evidence against the *Producent*. Nay, one Witness proves a Thing

* 14. Q. 5.
15.

Thing against the Party *Producent* : Therefore, let every one be careful what Witnesses he produces. If I produce a Witness against my Adversary, and he be also produced against me, I cannot reprobate such Witness, though he should appear to be an *infamous* Person, or one guilty of Perjury : And his Evidence shall be deem'd good against me. For, says *Justinian*, if any one shall make use of Witnesses, and the same Witnesses shall afterwards be produced against him in another Suit or Cause, it shall not be lawful for him to except against the Persons of such Witnesses; unless he shews, that there have since arose great Enmities between him and them. And these Enmities ought to be such for which the Laws do command Witnesses to be set aside. Or unless they must have committed some Fact or Crime, since he made use of them, for which the Law repels them as Witnesses. If the adverse Party produces Witnesses on one Head; and afterwards the other Party desires, that they may be examin'd on the rest of the Heads or Articles of any Matter exhibited in Judgment, he thereby seems to approve of them in such a manner, as that he cannot then disallow of them *; but if the Party neither approves nor reprobates Witnesses produced against him, he may reprobate and disallow of such Witnesses produced against him in another Cause, since he is not from hence presum'd to approve of them, because he has not reprobated them. Therefore, tho' he has renouuc'd the Power of reprobating them in one Cause; yet he does not from hence seem to have renouuc'd this Power in another Cause. If the adverse Party, against whom a Witness is produced, shall protest against the Person of such Witness as an improper Witness, and this Witness shall afterwards depose in Favour of the Person thus Protesting, in such a Case (I say) his Evidence shall not be taken in favour of the Person Protesting, if the Party *Producent* accepts of such Protestation †: But it is otherwise, if the *Producent* shall not accept of and ratify such Protestation, which yet is to be understood with some Ampliation, *viz.* if such Protestation be made against the Person and Validity of such Witness: But 'tis otherwise, if it be only made against the undue Admission of him.

* Bart.
Traët. de
Testib.

† Farinac.
Traët. de
Testibus.

* 14 Q. 5.
15.

† 3 Q. 9. 15
& 16. Innoc.
in cap. 37.
X. 2. 20.
|| X. 2. 20.

29.
* 3 Q. 9. 15
& 16. Gloss
& Inn. in
c. 37. X. 2.
20.

It has been said, that Witnesses are introduced to this End and Purpose, *viz.* To give a full, true, and faithful Evidence for both of the Parties in Suit, according to the best of their Knowledge *: And this Testimony or Evidence ought first of all to be given and founded on some principal Corporeal Sense of their own, according to the Nature and Quality of the Fact, as on their Sight, Hearing, Touching, Tasting, or Smelling; and not on the Corporeal Sense of another Person †. So that the Reason, which such a Witness gives for his Deposition, ought to conclude *rightly* to the Purpose of the Party *Producent*; because more Regard is shewn to the Reason given by such Witness, than to his simple Saying or Deposition ||: And thus Witnesses ought to depose appositely *de proprio suo sensu*, and not *de sensu alieno* *. If a Witness says, That he has heard an Instrument read, yet he is not hereby said to have understood the same : For this does not necessarily conclude and follow, because to hear and understand are different Acts and Things; for a Person may only hear the nude and simple Sound of the Words, and not understand the Import and Efficacy of them. But, according to *Baldus*, if a Witness should say, *I know it because I was present*, such would be good Evidence; the Word *Present* including a Sense and Understanding thereof.

Tho' Witnesses may be compell'd to give their Evidence, yet a Witness is not bound to give an answer to a Position or Interrogatory which is of a criminous Nature in respect of himself †; nor ought a Witness to be ask'd

† Abb. in
c. 37. X. 2.
20. N. 13.

ask'd or interrogated about any Matters, unless they are such as are pertinent to the Articles on which he is examin'd *: And those Things are said to be pertinent, which either respect a Declaration or an Interpretation of such Articles as the Person is examin'd on; or else relate to such Things as are connected and incident to them. And 'tis the same Thing, if they be their Appendages, and do any wise whatever belong to them, no matter how lightly and slenderly; because they administer some adminicular Proof. But it has been a Question, Whether such a Declaration may be admitted after a Publication of Witnesses? And 'tis held, that it may; provided, such Declaration be probable and likely to be true. After the Publication of Depositions, regularly speaking, other Witnesses ought not to be produced in Civil Causes thro' fear of Subornation of them, and also because the Parties do, by way of Conclusion, renounce all further Production of Witnesses †: But in Criminal Causes, other Witnesses may be produced in Favour and Defence of Innocence, notwithstanding such a Publication of the Depositions of Witnesses ||. For, in Criminal Causes on the Defendant's part, the Cause is never said to be concluded till after Sentence: And, therefore, he may prove his Intention at any Time whenever he pleases; yea, even till a Definitive Sentence *exclusively*. But Witnesses may, in some special Cases, be produced a second Time, even after a Publication of their Depositions: For a Judge may, for his own Information, *ex officio* *, require Witnesses that have not been rightly and duly examin'd, yet he is not oblig'd to do it.

* Spec. de interrogationibus. §. 3.

† X. 2. 20. 18.

|| Abb. in c. 17. X. 2. 20. N. 4.

* X. 2. 20. 53.

In such Matters as are usually committed and done, Witnesses are admitted that are otherwise *inhabiles ad testimonium perhibendum*: And Credit is likewise given to a *Non-idoneous* Witness, if he has a *Contestis* or Fellow-Witness with him in point of Evidence. One Witness proves a Thing against the Party *Producent*; and Credit is given to one Witness deposing touching his own Fact, if there be any concurrent Indications or Conjectures contributing thereunto. In a Matter of Antiquity, more Credit is given to Witnesses advanc'd in Years, than to others; and the older the Witnesses are, the more Regard and Preference is given to them, being more likely to know the Truth thereof than others that are younger than themselves. Witnesses cannot prove a Negative touching a Deed; but they may have sufficient Notice and Knowledge of an Affirmative. On the Plaintiff's Contumacy, and at the Defendant's Instance and Petition, Witnesses may be examin'd, and a Sentence pronounc'd thereupon; yea, according to some, tho' Suit be not contested: But this, in my Opinion is wrong Practice. Tho' regularly, single Witnesses make no Proof according to the *Civil* and *Canon* Law †, nor yet so much as half Proof by these Laws; unless such single Witness's Deposition be given upon the principal Fact or Matter in Controversy: yet this Rule does not proceed in the Proof of Jurisdiction, or in the Proof of Servitude, which may both be prov'd by one Witness. And, moreover, this Rule ought to be limited and restrain'd in respect of a Nobleman's Evidence; the Opinion of his Integrity being so great among all Men, that it induces the Judge to a Belief of his Testimony.

† X. 1. 6. 32.

'Tis an Objection against a Witness, that he was heretofore, and at present is an Enemy to the Person, against whom he is produc'd *; and that he will now revenge himself: or, that he cohabits with Enemies and the like. Which is a good Exception, if such Person be a Capital Enemy, or a Conspirator against the Party *Excipient*; for then he shall never be admitted †: But 'tis otherwise, if he be only an Enemy on the Account of some Criminal Suit or Prosecution commenc'd against him; yet in this Case, he shall not be admitted till the end of such Suit; and at the time

* D. 22. 5. 5.

† X. 2. 28. 22. X. 5. 3. 35.

* Nov. 90.
c. 7. X. 5.
3. 31.

† C. 4. 20.
6.

¶ D. 22. 5. 9.

¶ Gloss in
l. 4. D. 22. 5.

of *Informations* it shall be discuss'd, whether he ought to be credited or not. Therefore, a Witness that is an Enemy by an outrageous Enmity, shall be repell'd and set aside *: But 'tis otherwise, if his Enmity be light and Moderate. And as an Enemy cannot be a Witness; so neither can a Friend, if such Friendship be very great and obliging: But else he may. For a Friend is not repelled, unless it be on the score of such Friendship and Affection, as is between Parents and Children, Husband and Wife, and the like Relations †. For 'tis an Objection to a Witness to alledge, that he is the Parent or Father of the Person producing him, who cannot give Evidence either for or against his Son, nor the Son either for or against the Father or Parent, tho' both are willing it should be so ¶. And the same is understood of the Mother compriz'd under the Appellation of a *Parent*; and also of the Daughter. And, according to the *Civil Law*, this is true of Ascendants and Descendants *in infinitum*, whether they be under the Power of the Father, or have receiv'd *Emancipation*. Note, The Grandfather, by the Mother-side as well as the Mother, is also stiled a Parent: But Collaterals and Kindred in a remote degree, may be reciprocally Witnesses for and against each other, if they please; but not against others in Behalf of themselves. The Father, Mother, and Children, are neither admitted to be Witnesses in Behalf of each other, nor against one another ¶. For the Voice of the Father and of the Son is the same Thing, representing, as it were, one and the same Person. But this is otherwise in the following Cases. For, *First*, A Father may be a Witness to the Last Will and Testament of his Son or Daughter. *Secondly*, A Mother may be a Witness, if a Question arises touching the Age, Stock, or Lineage of her Children. *Thirdly*, 'Tis otherwise in Matrimonial Causes, *viz.* When the Question is, Whether Matrimony may be had and contracted with them or not, by Reason of their Consanguinity or Affinity: But if the Question be, Whether Matrimony be contracted or not, the Bride affirming it to be contracted, and the Bridegroom denying the same, the Father and Mother in this Case are not admitted as Witnesses, if the Bride or Bridegroom be either of them Persons of greater Riches, Honour, Power or Nobility than the other: But if they be equal or inferior in either or all these Respects, they shall be admitted in favour of Matrimony. Yet some say, that if they are equal in these Points, the Father and Mother seem to be suspected Persons in point of Evidence. But if the Husband and Wife are in this respect unequal to each other, as Things exceeding, and Things exceeded, that is to say, if the Husband be richer, and the Wife a Person of greater Power, Honour, and Nobility, in such a Case, a good Judge ought to estimate how great the Husband's Riches are, and consider, whether the Wife be of higher Honour and Nobility, and the Husband only of mean Extraction; so that it is not likely for the Witnesses to be prevail'd on by the Riches of the one, or the Nobility of the other: and according to this it shall be interpreted, whether their Testimony shall be suspected or not.

A Witness that has an Interest in a Cause, is not a fit and proper Witness therein *, no one being an *idoneous* Witness in his own proper Cause: For when any Credit is given to a Witness, he ought to be superior to every lawful Exception. And for this Reason, the Judge *à Quo*, cannot be Witness before the Judge *ad Quem*, because he has a kind of Interest or Concern in the Cause of Appeal. Now he is said to be an *idoneous* Witness, and superior to every Exception, against whom no legal Exception can be objected. Thus the Testimony of a Brother or Sister, is, in Law, stiled *testimonium inutile*; because their Persons are liable

liable to Exceptions. Witnesses ought not to be hired for a Price to give their Evidence; for such Witnesses as are hired cannot be said to be faithful and idoneous Witnesses in giving their Testimony †. But a Person induced to give his Evidence at the Request of the Party, is not said to be hired or corrupted; and therefore 'tis said, that Prayers and kind Intreaties may intervene, tho' no Price or Reward ought. For a Witness may sooner be corrupted with a Price than with Prayers and Intreaties, considering the Avarice of Men: And, therefore, the Parties *litigant*, may use Prayers and Intreaties to induce a Witness to come and give his Evidence, provided no Corruption ensues thereupon. Nay, the Parties producing Witnesses, may not only ask and intreat them to give their Evidence for the Discovery of the Truth, but are obliged so to do before they can have a Citation*: wherefore a Witness produced by a *Litigant*, without a Request or Citation, may be recus'd (as aforesaid) as a suspected Person, or as one that intrudes and thrusts himself into the Business of giving Evidence †. No Credit ought to be given to a Witness deposing *ad sui exonerationem*; nor to Witnesses, that have been instructed by the Party *Producent*, or his Advocate, Proctor, and the like, how and in what manner they ought to Depose in point of Evidence; unless they be only instructed in such Matters as are Matters of Law: As that they ought to give a conclusive Reason for their Sayings or Depositions; or unless they are only simply admonish'd by the Party to speak the Truth. Nor is a Person said to be a proper Witness, when either Praise or Dispraise may be ascrib'd to him from his Depositions. By the Common Law of *England*, a Counsel, Attorney, or Solicitor ought not to be examin'd as a Witness against his Client; because he is bound to keep his Secrets: And this holds good, when they, or either of them, discovers a Fact done after they are retain'd*. By the *Canon* Law, a Bishop or Presbyter cannot be produced, or (at least) compelled to be a Witness, unless it be in a Cause which cannot be otherwise known and discover'd; because the Priesthood (says that Law) is hereby dishonour'd †: But a Bishop or Presbyter, who thus gives his Evidence by way of Necessity, ought not, according to that Law, to swear, as other Persons do, on the Bible, but need only see the same. And by this Law, a Bishop or Presbyter may, in the place of an Oath, give Evidence by his Consecration, and on the Word of a Priest‡: But this is not good Law here in *England*.

† D. 22. 5. 3.

* C. 4. 20.
18. Nov. 90.
c. 2.

† Arg. D. 3.
3. 25. Dd. in
l. 19. c. 4.
20. & in
c. 22. X. 2.
20.

‡ 4 Q. 3. 1.

* Vent. Rep.
pt. 1. p. 147.

† 11 Q. 1. 9.

‡ 2 Q. 5. 4
& 5.

* X. 2. 20.
21.

† X. 2. 20.
21.

‡ 3 Q. 8.
16.

* X. 5. 20.

By the *Canon* Law, a Layman cannot be a Witness against a Clergyman in a Criminal Cause*; not only (says the Law) because Laymen are usually Enemies to Clergymen, as envious of their Privileges; but also on the account of that Reverence which is due to them: and forasmuch as a Layman is not, in the Eye of that Law, of equal Dignity with a Clergyman, nor of equal Conversation. Under such artful and self-interested Pretences did the Clergy, in antient Times, fortify themselves against the Justice of the Laity; and commit various Crimes without being question'd for them: a Doctrine some of them would like well enough even in these Days. By the same Law, a Heretick may be a Witness for a Christian against a Heretick, but not against a Christian †.

A Witness that gives false Evidence, ought to be punish'd with much Sharpness and Severity‡, because he offends against three Persons: For, *First*, He renders himself obnoxious to God, whom he contemns. *2dly*, He becomes obnoxious to the Judge, whom he deceives. And *3dly*, He grows obnoxious to the innocent Person, whom he injures by his Depositions*. Witnesses that say a Man has been in daily Possession of a Thing, are not deem'd false Witnesses, tho' there should have been Days

Days or Intervals of Time, wherein he was not in Possession, &c. And it is the same Thing, if they depose touching a Man's daily Residence on such a Benefice, or in such a Place: for this Evidence is not vitiated, if there be some small Intervals of Time, wherein he has not thus resided: For such Words ought to be understood in a civil Acceptation. And 'tis the same Thing of these Words, *viz. omni tempore, assidue, jugiter, indefinenter, &c.* Nor are Men render'd false Witnesses, that say they *all did so and so*, and one of them is excepted: If a Witness, shall upon one Article give false Evidence, and on another speak the Truth, his whole Evidence shall be naught and vicious; because he is guilty of Perjury*: and, consequently, his Evidence ought to be set aside.

Time immemorial ought to be prov'd by Witnesses, which ought to be old Men, deposing, *That they have thus and thus seen it themselves, and have so receiv'd it from their Parents and Ancestors of old Times; and that ever since their Remembrance it was thus done and observ'd, and never otherwise to their knowledge*: For as often as any Matter of Antiquity or antient Fact comes in question to be prov'd, recourse ought always to be had to Men of Age and Seniority. Thus old Men in the Neighbourhood are presum'd to have Knowledge of the Bounds and Limits of Lands: And, therefore, they are deem'd to be good Witnesses touching the same†: For they are presum'd to be better acquainted with the same, who are (as it were) always present. *Baldus* says||, that in proving the Boundaries of Lands or Districts, we ought to abide by the Credit and Depositions of old Men that live in the Country, and are produced as Witnesses: And hereunto he subjoins, that in Matters of this kind, the Evidence of Fame prevails much, if nothing has been heard of contrary thereunto*.

When 'tis said in our Books, that more Credit is given to two Witnesses affirming a Thing to be so and so, than to a hundred denying it||, this ought not to have Place in a *Negative* Evidence well coarcted with Circumstances, but only in a *Negative* Evidence founded on Credulity or Purgation. For whenever a *Negative* falls under the Corporeal Sense of a Witness as an *Affirmative*, such a *Negative* may be directly prov'd. As for Example, if I see you not to have a Cap or Hat on your Head, I may give my Deposition thereof in a direct Manner, as if I would prove an *Affirmative*: For I do as directly perceive that you have no Cap or Hat on, as if I saw you had, in Case you had a Cap or Hat on your Head.

In the Cause of a Corporation, *extraneous* Witnesses are required; and not such Persons as are of the Corporation or Body Politick†: nor ought the Names of Persons belonging to a Corporation to be used and set down in a Deed or Instrument as Witnesses thereunto, if such Deed or Instrument concerns the Corporation; because they ought not to be Parties and Witnesses to the Tenor and Authority of such Deed or Instrument: And by a Parity of Reason, the same may be said of other Acts sped and executed by a Corporation.

Testimony is not only *verbal* and by Word of Mouth, but 'tis also a *real* Thing, it being made by Evidence of Fact*: And herein two or three Witnesses are sufficient for the Proof of any Fact, unless it be in some particular Cases, wherein a greater number of Witnesses are necessary†. Witnesses that are concordant and agreeing in the principal Business, do make full Proof, tho' they vary in Accessaries. 'Tis the receiv'd Opinion of the Doctors, that in Criminal Cases two Male Witnesses of good Fame and Integrity, and superior to every legal Exception, giving their Evidence touching those Things which they have heard or seen, do make full and sufficient Proof: it being said, That in the Mouth of

* X. 2. 20. 9.

† X. 2. 23. 8.

|| Conf. 154.

* D. 22. 3. 28.

|| Gloss. in l. 27. D. 4. 8. 3.

† Papiens. aurea prax. Tit. 12. Gloss. 11. N. 4.

* 28. Dist. 4. 82. Dist. 2.

† X. 2. 20. 23.

of two Witnesses, every Word shall be establish'd ||. But no one in such Causes shall be condemn'd on the bare Testimony of a single Witness*. Note, By the *Canon Law*, more Credit is given to Male than Female Witnesses, for the Reason abovemention'd. Again, in Criminal Causes, the pure and free Confession of the Party himself is full and sufficient Evidence: For there can be no firmer Proof of a Thing, than the Confession of a Man's own Mouth. For the Fact being confess'd, there can be no Question made of such Evidence: But then it ought to be a *judicial* and free Confession made out of Prison, and without any just Fear of Danger †. But because Credit is not always given to him that confesses an Offence; (for sometimes a Man makes his Confession for some End or Reason respecting himself alone;) therefore every Confession of the Party in Criminal Causes is not sufficient for Condemnation; unless the same be free, spontaneous, constant, and the like. For a Confession made by Constraint, and on the account of Necessity, is no Proof ||: And it is a wicked Injustice for a Judge, to pronounce a Sentence founded on such an extorted Confession.

|| 2 Cor. c. 13. v. 1.
* Deut. c. 19. v. 15.
† X. 2. 18. 2.

|| X. 1. 29. 16.

Regularly, the doubtful and ambiguous Deposition of a Witness, ought to be construed and interpreted against the Party *Producent*, so that it shall make no Proof for him*, because it does not relieve him. And hence it follows, that the Deposition of Witnesses ought not to be literally concordant with the Averment of the Party *Producent*, unless such Concord and Agreement be probable and likely, and that they have been examin'd on the Interrogation of the Party *Producent*: For as an Answer ought to be made and understood, according to the Interrogation and Question put; so ought also the Depositions and Testimonies of Witnesses to be understood, according to the Articles produc'd and exhibited by the Party. The Depositions of Witnesses are not valid, if a due Course of *judicial* Proceedings has not been previously observ'd: But the Examination of Witnesses is valid, tho' they be not examin'd to Interrogatories. The Use of Depositions is infinite according to the infinite Multitude and Variety of Events, which may become necessary to prove a Fact, whether it be in Civil or Criminal Matters.

* Gail. lib. 1. obs. 82. N. 5.

It has been said, that regularly, every Person is admitted to be a Witness; unless he be expressly reprobated by Law †. Now to *reprobate* in Law, is to propound some Exceptions either against Facts, Persons, or Things, *viz.* to alledge such Deeds or Instruments not to have been duly and lawfully executed; or that they are such Persons as ought not to be heard. For, as I have already shewn, Witnesses produced may be set aside on the score of Infamy, Crimes committed by them, Affection to the Party *Producent*; and on the Account of any private Advantage accruing to themselves. Or, lastly, they are such Things as ought not to be admitted ||. Therefore, *Reprobation* is threefold. *First*, In respect of Deeds or Instruments. *2dly*, In respect of Persons. And, *3dly*, In respect of Things. Others divide *Reprobation* in this Manner. *First*, In respect of Productions reprobated. *2dly*, In respect of Witnesses. And, *3dly*, In respect of Titles and Letters produced against themselves. And all these Things are reprobated two several ways, *viz.* either by *Reprobations* of Law, or by *Reprobations* of Facts: which in other Terms are stiled Contradictions of Law, and Contradictions of Fact. In all *Reprobations*, a general Protestation ought to be made, and particularly before the Examination of Witnesses; lest the Person against whom they are produced should seem to approve of their Persons and Depositions †: And if such a Protestation be not then made, the Person protesting, shall not afterwards be heard; unless he makes Oath, that he

† vi. 2. 10. 2.

|| Papiens. aur. prax. Tit. 10. Glofs. 9.

† X. 2. 20. 5.

X x x x x

was,

* vi. 2. 10. 2. was, at that Time, ignorant of their Defects *. For the Person of a Witness being once approv'd of either *tacitly* or *expresly*, he cannot be afterwards reprobated by him that has thus approv'd of him, whether such Approbation be made by the Party *Producent*, or by him, against whom such Witness was produced †; or whether produced in the same or in another Cause, unless some new Cause of Reprobation supervenes ||. Nay, if the Witnesses produced have been reprobated by the Judge as vicious Persons, and then another Person produces them against me in another Cause, I cannot even then reprobate them; because I have once approved of them: which Approbation has its Effect and Operation in another Cause, as well as between other Persons †. Reprobations of Witnesses do not hinder their Examination, unless the Causes of such Reprobations are to be prov'd by Persons that are infirm, and of great Age, or else by such as are about to be absent, &c. whereby great Danger may accrue to such Persons as reprobate such Witnesses *. But if there be no Delay, then the Examination of the Witnesses produced on the principal Cause, shall not be delay'd and put off: Because a Reprobation or Contradiction is presum'd to be made *animo litem protelandi* †. But after the Witnesses have been examin'd and publish'd on the principal Cause, the Crimes and Defects of the Witnesses shall then be prov'd, if any such have been objected against their Persons or Depositions *.

† C. 4. 20.
17.
|| Cyn. in
l. 17. C. 4.
20. Inn. in
c. 14. X. 2.
25.

† Cyn. in
l. 17. C. 4.
20.

* X. 2. 6. 5.

† D. 2. 12. 1.

* Gail. Prax.
lib. 1. obs.
105.

† X. 2. 19. 9.

|| D. 48. 2. 9.
& 12. 2. 33.

* Willh. in
c. 2. Cl. 2. 8.
v. *subornatio*.

† X. 2. 19. 9.

|| Gloss. in
c. 2. Cl. 2. 8.

* Cl. 2. 8. 2.

† Abh. in
c. 3. X. 2.
18. N. 22.

* X. 2. 21. 7.
Dd. ibi. X. 2.
20. 53. & ibi
Notata.

A Person suborn'd and corrupted shall be reprobated, and not allow'd to give any Evidence in a Cause †. Now *Subornation* is a *latent* and *secret* seducing of Witnesses from discovering the Truth in a Cause, by instructing them in Falshood: For the Verb *suborno*, in *Latin*, signifies the same as *falsum aliquem instruo, semotis arbitris*, being always used in an ill Sense. You have an Instance or two of this in the *Digests* ||. Thus *Subornation* is said to be, when any one applies himself *secretly* to a Witness, either to express and declare something that is false, or to conceal something that is true, in the giving of his Evidence *. For they are said to suborn a Witness, that do in a *secret* manner instruct such a Witness, what he ought to give in Evidence by his Depositions, as well as they who bribe and corrupt him to depose that which is false †. *Subornare* (says a certain Author) is *quasi subtrus in aure alicujus ipsum male ornare* ||.

Though a Witness may *incontinently* correct himself and amend his Depositions before the Judge or Notary has perfected the Examination of him, and before he leaves the Presence of the Judge; yet such Witnesses cannot correct himself *ex intervallo*, or after any Distance of Time, and a Publication made of his Depositions; and this through a Fear of Subornation *. But a Witness may correct himself not only before the Notary has reduced the Answer of such Witness into Writing, which he afterwards corrects; but even after the Notary has taken the said Answer down in Writing; provided he does it before he the said Witness has subscribed himself to the Examination; because then such Correction and Amendment is said to be made *incontinently* and not *ex intervallo* †. Nay, a Witness may correct himself after his Examination is ended and finish'd; provided it be done before he has had any Discourse and Conversation with the Party in Suit *: But 'tis otherwise, if he has since had Discourse with the said Party, because this might induce Subornation. Wherefore, if a Witness be always kept in Prison in such a secret manner, that he cannot have any Discourse with the Party, he may correct himself at any Time whatsoever; tho' *Bossius* seems to be of a different Opinion in this Matter, by reason of the easy way of Corrupting Jaylors in this point.



A CATALOGUE of the Monasteries and Religious Houses in *England*, dissolv'd by a Statute in King *Henry* the VIIIth's Time, explaining the Lands of such Houses as were discharg'd from the Payment of Tithes in virtue of their several Orders; as *Knights Templars*, *Hospitallers*, and the *Cistercians* were in their Times. Those mark'd with an Asterisk * were Mitred Abbots called to Parliament, and exempt from Episcopal Jurisdiction.

The Names of Monasteries, and Priories.	In what Counties.	When Founded, Ann.	Of what Order.	Of what Value per Ann.		
				l.	s.	d.
* A Bington, Ab.	Berks.	821	Benedictines	187	00	00
Abbotsbury.	Dorset	1016	Benedictines	390	19	02
* St. Albans, Ab.	Hertford.	793	Benedictines	413	14	11
Ambresburg, A.	Wilts	1177	Benedictines	494	15	02
St. Andrews, Pr.	Northam.	1067	Cluni	263	07	01
Ashrugg, Coll.	Bucks	Edw. 1.	Can. St. Aust.	416	16	04
Barndney, Ab.	Lincoln	712	Benedictines	366	06	01
Barnewelt, Pr.	Kent	Hen. 1.	Can. St. Aust.	256	11	10
Bartholomew.	Smithfield	1102	Can. St. Aust.	653	15	00
Bath, Abbey.	Somerset	Hen. 3.	Benedictines	617	02	08
Berking, Ab.	Essex	680	Benedictines	862	12	02
Bellavalla, Pr.	Nottingh.	16 E. 3.	Carthusians	227	08	00
Belland, Ab.	York	1134	Cistercians	238	09	04
Bermondsey, Ab.	Surry	7 Hen. 1.	Can. St. Aust.	474	14	04
Birlington.	York	Hen. 1.	Can. St. Aust.	547	06	11
Bodmin, Priory.	Cornwall	936	Can. St. Aust.	270	00	11
Bolton in Craven.	York	Hen. 1.	Can. St. Aust.	212	13	04
Bordesly, Ab.	Worcester	1138	Cistercians	388	09	10
Boxley, Ab.	Kent	1114	Cistercians	204	04	11
Bradstock, Pr.	Wilts	T. Conq.	Can. St. Aust.	212	19	03
Brewton, Ab.	Somerset	T. Conq.	Can. St. Aust.	439	06	08
Bristol, Ab.	Gloucester	Hen. 1.	Can. St. Aust.	670	13	11
Buckland, Pr.	Somerset	Edw. 1.	Cistercians	223	07	04
Buckfast, Ab.	Devon	Hen. 2.	Cistercians	466	11	02
Burton on Trent, Ab.	Stafford	K. Edw.	Benedictines	267	14	03
Buslesham, Ab.	Berks	13 E. 3.	Can. St. Aust.	285	00	00
Butley, Ab.	Suffolk	1171	Can. St. Aust.	318	17	02
Carlisle, Pr.	Cumberl.	W. Ruf.	Can. St. Aust.	418	03	04
Castle Ave, Ab.	Norfolk	1092	Cluni	306	11	04
Cerne, Ab.	Dorset	K. Edg.	Benedictines	515	17	10
Charter-House.		1372	Carthusians	726	02	07
Chertsey, Ab.	Surry	666	Benedictines	659	10	08

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<i>The Names of Monasteries, and Priors.</i>	<i>In what Counties.</i>	<i>When Founded, Ann.</i>	<i>Of what Order.</i>	<i>Of what Value per Ann.</i>		
				<i>l.</i>	<i>s.</i>	<i>d.</i>
Chickland, Pr.	Bedford	Wm. 2.	White Canons	212	03	05
* Cirencester, Ab.	Gloucester	Hen. 1.	Can. St. Aust.	1051	07	01
St. Clare.	Wt. Algate	1292.		1418	08	02
Clerkenwell, Pr.	Essex	K. Step.	Benedictines	262	19	00
Colchester, Ab.	Warwick	Hen. 1.	Can. St. Aust.	523	17	00
Comb, Ab.	Cheshire	K. Step.	Cistercians	371	15	01
Combermere, Ab.	Stafford	1134.	Cistercians	225	09	07
St. Cross, Ab.	Lincoln	1153	Cistercians	227	05	00
* Croyland, Ab.	Leicester	716	Benedictines	1803	15	01
Croxden, Ab.	Stafford	R. 1.	Præmonstr.	385	00	10
Croxden, Ab.	Durham		Cistercians			
St. Cuthbert, Ab.	Derbysh.	842	Benedictines	523	17	00
Darby, Abby.	Kent	Hen. 2.	Can. St. Aust.	258	14	05
Dartford, Ab.	Devon	43 E. 3.	Can. St. Aust.	380	00	00
Dinkswell, Ab.	Oxon	1201	Cistercians	294	18	06
Dorchester, Ab.	Bedford	635	Can. St. Aust.	219	12	00
Dunstable, Ab.	Wilts	Hen. 1.	Can. St. Aust.	344	13	03
Edington, Pr.	Suffolk	1352	Can. St. Aust.	442	09	07
* Edmondsbury, Ab.	Oxon	1020	Benedictines	1659	13	11
Einsham, Ab.	Bedford	K. Eth.	Benedictines	441	12	02
Elmeston, Ab.	Lincoln	Wm. 1.	Benedictines	284	12	11
Epworth.	Hampsh.	W. R. 2.	Carth. Monks	237	15	02
Fair-place, Ab.	Wilts	1204	Cistercians	326	13	02
Farley.	Kent	1125	Cluni	217	00	04
Feverham, Ab.	Devon	1147	Cluni	286	12	06
Ford, Abby.	York	1133	Cistercians	374	10	06
Fountain, Ab.	Lincoln	1132	Cistercians	998	06	08
Furnes, Ab.	Cornwall	1127	Cistercians	805	16	05
St. Germans, Ab.	Somerset	Atbelst.	Can. St. Aust.	243	08	00
* Glasfenburg.	Gloucester	300	Benedictines	3311	07	04
* Gloucester, Ab.	York	680	Benedictines	1946	00	00
Gisborn, Ab.	Oxon	K. Step.	Can. St. Aust.	628	03	04
Godstow, Ab.	Gloucester	K. Step.	Benedictines	294	05	10
Hales, Abby.	Worcester	1246	Cistercians	257	07	08
Hales-Owen, Ab.	Salop	K. John	Præmonstr.	282	13	04
Hales-Owen, Ab.	Salop	K. John	Præmonstr.	337	15	06
Haghmond, Ab.	Devon	1100	Can. St. Aust.	259	13	07
Hertland, Ab.	Hampsh.	Hen. 2.	Cistercians	294	18	06
* Hide, Abby.	Somerset	K. Alfr.	Benedictines	865	18	00
Hinton, Pr.	Cumberl.	Hen. 3.	Carthusians	248	19	02
Holmeoltron, Ab.	Lond. &c.	1135	Cistercians	427	19	03
Holynell.	Norfolk	1318	Black Monks	347	15	06
Hulme, Abby.	York	K. Can.	Benedictines	583	17	00
Jervall, Ab.	York	K. Step.	Cistercians	234	18	05
John of Jerusalem.	Suffolk	Hen. 1.		2385	12	08
Ixworth, Pr.	Somerset	T. Conq.	Can. St. Aust.	280	09	05
Keynsham, Ab.	Warwick	Hen. 1.	Can. St. Aust.	419	14	03
Kennelworth, Ab.	Gloucester	Hen. 1.	Can. St. Aust.	538	19	00
Kingswood.	York	680	Benedictines	244	11	02
Kirkham, Ab.	York	Hen. 1.	Can. St. Aust.	239	09	04
Kirkstall, Ab.	Lincoln	Hen. 1.	Cistercians	329	02	11
Kirksted, Ab.		1139	Cistercians	286	02	07

The

and Religious Houses in England.

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The Names of Monasteries, and Priories.	In what Counties.	When Founded, Ann.	Of what Order.	Of what Value per Ann.		
				l.	s.	d.
Lacock, Ab.	Wilts	1232	Can. St. Aust.	203	12	05
Lanthony, Pr.	Gloucester	1136	Can. St. Aust.	649	19	11
Landa, Ab.	Leicester	W. Ruf.	Can. St. Aust.	399	03	03
Launceston, Ab.	Cornwall	W. I.	Can. St. Aust.	354	00	11
Ledis, Priory.	Kent	1119	Can. St. Aust.	362	07	07
Lenton, Priory.	Nottingh.	Hen. 1.	Cluni	329	05	10
Leicester, Abbey.	Leicester	1143	Can. St. Aust.	951	14	05
Lillyshall, Ab.	Salop	Adelfled K. of Mercia.		229	03	01
Lincoln, Priory.		Hen. 2.		202	05	00
London Minors		Edw. 1.	Benedictines	318	08	05
London House		Edw. 3.	Carthusians	642	00	04
* Malmesbury, Ab.	Wilts	670	Benedictines	803	17	07
Malvern, Ab.	Worcester	1083	Benedictines	308	01	05
St. Mary Bish. Pr.		1187		478	06	06
St. Mary Ov. Ab.		7 Hen. 1.	Can. St. Aust.	624	06	06
* St. Mary York, Ab.	York	W. Ruf.	Benedictines	1550	07	00
Mauling, Ab.	Kent	K. Edm.	Benedictines	218	04	02
Maulton, Ab.	York	K. Step.		237	07	00
Melfam, Ab.	York	1136	Cistercians	299	06	04
Merrival, Ab.	Warwick	1148	Cistercians	254	01	08
Merton, Priory.	Surry	1121	Can. St. Aust.	957	19	05
St. Mich. Hull.	York	1377	Carthusians	231	17	03
Midleton, Ab.	Dorset	Ethel.	Benedictines	578	17	11
Michelney, Ab.	Somerset	740	Benedictines	447	04	11
Missenden, Ab.	Bucks	1293	Benedictines	261	14	06
M. Burton, Ab.	York	1186	Cluni	239	03	06
Mountgrace, Ab.	York	1396	Carthusians	323	02	10
Neots, Abby.	Hunting.	Hen. 1.	Benedictines	241	11	04
Newark, Pr.	Surry			258	11	11
Newham, Ab.	Devon	1246	Cistercians	227	07	08
Newburg, Pr.	York	1145	Can. St. Aust.	367	08	03
Newnham, Pr.	Bedford	Hen. 1.	Can. St. Aust.	293	05	11
Newsted, Pr.	Nottingh.	Edw. 3.	Can. St. Aust.	219	18	08
Noteley, Ab.	Bucks	Hen. 1.	Can. St. Aust.	437	06	08
Nostel, Ab.	York	Hen. 1.	Can. St. Aust.	492	18	02
Nuneaton, Mon.	Warwick	Hen. 2.	Benedictines	258	14	05
Osney, Priory.	Oxon	Hen. 1.	Can. St. Aust.	654	10	02
Oswick, Ab.	Essex	1120	Can. St. Aust.	677	01	02
Oxford, Pr.	Oxon	Ant. Conq.		224	04	08
* Peterborough, Ab.	Northam.		Benedictines	1721	14	00
Perthore, Ab.	Worcester	1138	Cistercians	643	04	03
Pipewell, Ab.	Northam.	1143	Cistercians	286	11	08
Plimpton, Ab.	Devon	Edw. 1.	Cistercians	241	17	09
Pomfret, Ab.	York	T. Conq.	Cluni	337	14	08
* Ramsey, Ab.	Hunting.	968	Benedictines	1716	12	04
* Reading, Ab.	Berkf.	Hen. 1.	Benedictines	1988	14	03
Reverly, Ab.	Lincoln	1142	Can. St. Aust.	287	02	04
Rival, Ab.	York	1132	Cistercians	278	10	02
Rithal.	York			351	14	06
Rocheſter, Ab.	Kent	600	Benedictines	486	11	05
Rock, Ab.	York	1147	Cistercians	224	02	05
Rumſey, Ab.	Hampſh.	907	Benedictines	293	10	10

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				<i>l.</i>	<i>s.</i>	<i>d.</i>
Selby, Ab.	York	<i>T. Conq.</i>	Benedictines	729	12	10
Sempringham, Ab.	Lincoln	1048	Gilbertines	317	04	01
Shafton, Ab.	Dorset	941	Benedictines	1166	08	09
Shene, Pr.	Surrey	1414	Carthusians	777	12	00
Sherborne, Ab.	Dorset	370	Benedictines	682	14	07
* Shrewsbury, Ab.	Salop	1081	Can. St. Aust.	615	04	03
Sibeton, Ab.	Suffolk	1150	Cistercians	250	15	07
Sion, Ab.	L. & M.	<i>Hen. 5.</i>	Can. St. Aust.	1731	08	04
Smithfield E. Ab.		34 <i>E. 3.</i>	Cistercians	602	11	10
Southwick, Pr.	Hampsh.	<i>Hen. 1.</i>	Can. St. Aust.	257	04	04
Spalling, Ab.	Lincoln	1052	Benedictines	761	08	11
Stratford, Ab.	Essex	511	Cistercians	511	16	03
Sulby, Ab.	Northam.	<i>K. Step.</i>	Præmonstr.	258	08	05
Strata Florida.	Cardigan	<i>T. Conq.</i>		1226	06	00
St. Swithin's.	Winchest.	634	Benedictines	1507	17	02
Tarrent, Ab.	Dorset	<i>Hen. 3.</i>	Cistercians	214	07	09
* Tavistock, Ab.	Devon	961	Benedictines	902	05	07
Taunton, Pr.	Somerset	<i>Hen. 1.</i>	Can. St. Aust.	386	08	10
Thame, Ab.	Oxon	<i>Hen. 1.</i>	Cistercians	256	13	11
* Tewksbury, Ab.	Gloucester	715	Benedictines	1598	01	03
Thetford, Ab.	Norfolk	1103	Cluni	312	14	04
* Thornley, Ab.	Kent	972	Benedictines	411	12	11
Thornton, Ab.	Lincoln	1139	Can. St. Aust.	594	07	10
Thurgarton, Pr.	Nottingh.	<i>Hen. 1.</i>	Can. St. Aust.	259	09	04
Titchfield, Ab.	Hampsh.	<i>Hen. 3.</i>	Præmonstr.	242	16	01
Tinmouth, Pr.	Durham			397	11	05
Tinmouth.	Northum.	A Cell	to St. Albans.	511	04	01
Torre, Ab.	Devon	<i>Rich. 1.</i>	Præmonstr.	369	11	00
Twineham, Pr.	Hampsh.	1042	Can. St. Aust.	326	13	02
Vale of Holy Cross.	Denbys.	<i>Edw. 1.</i>	Cistercians	214	03	05
Walton, Ab.	York	<i>K. Step.</i>	Gilbertines	360	16	10
* Waltham, Ab.	Essex	1060	Can. St. Aust.	904	04	03
Walden, Ab.	Essex	1136	Benedictines	372	18	01
Walsingham, Ab.	Norfolk	<i>K. Step.</i>	Can. St. Aust.	391	11	07
Walter, Priory.	York	<i>Hen. 1.</i>	Can. St. Aust.	221	03	10
Warden, Ab.	Bedfordsh.	4 <i>Step.</i>	Cistercians	389	16	06
Warson, Pr.	Nottingh.		Can. St. Aust.	239	10	05
Welbeck, Ab.	Nottingh.	<i>K. Step.</i>	Can. St. Aust.	249	06	08
Wenlock, Pr.	Salop	1181	Cluni	401	07	00
St. Wereburg.	Cheshire	1095		1103	05	11
West Deerham.	Norfolk	<i>Hen. 2.</i>	Præmonstr.	228	00	00
* Westminster.		<i>K. Edg.</i>	Benedictines	3471	00	02
Westacre, Ab.	Norfolk	<i>W. Ruf.</i>	Cluni	260	13	07
Whale, Ab.	Lancast.	1172	Cistercians	331	09	01
Whitby, Ab.	York	<i>T. Conq.</i>	Benedictines	437	02	09
Whorwill, Ab.	Hampsh.	<i>K. Edg.</i>	Benedictines	339	08	07
Wigmore, Ab.	Salop	1172	Can. St. Aust.	267	02	10
Wilton, Ab.	Wiltshire	<i>K. Eth.</i>	Benedictines	601	01	01
* Winchcomb, Ab.	Gloucester	787	Benedictines	391	18	02
Witham, Pr.	Somerset	<i>Hen. 2.</i>	Carthusians	215	15	00
Wooburn, Ab.	Bedford	<i>K. John</i>	Cistercians	391	18	02
Wymundham, Ab.	Norfolk	1139	Benedictines	211	16	06

A T A B L E

Of the F E E S belonging to the Officers of the
Ecclesiastical Courts. At first set forth by the
Most Reverend Father in GOD, *JOHN*
WHITGIFT, Lord Archbishop of *Canterbury*,
M.D.XCVII.

Fees due to the Judge.

	s.	d.
 Iteræ Testimoniales	05	00
Commissio	10	00
Exemplificatio	10	00
Significavit	10	00
Quietus est	10	00
Administratio cujuslibet de- functi cujus bona extendunt ultra 40 l.	10	00
Literæ ad colligenda bona	06	08
Sequestratio fructuum	06	08
Commissio Tutelæ	06	08
Licentia Solemnizandi Matri- monium absque Bannis	06	08
Sententia	06	00
Examinatio processus	03	04
Decretum interlocutorium	03	04
Examinatio cujuslibet Computi	03	04
Admissio Resignationis	03	04
Licentia prædicandi, deserviendi & docendi	02	00
Inhibitio in causa Matrimoniali	01	08
Suspensio	00	08
Absolutio ejusdem	00	09
Excommunicatio	00	08
Absolutio ejusdem	00	09
Certificatorium de absolutione	00	08
Citatio	00	05
Decretum	00	10
Productio partis principalis	00	09
Productio primi testis	00	09
Productio cujuslibet reli- quorum	ob.	00 04
Pro die ad exhibendum Invento- rium	01	00
Pro parte purgata	00	09
Pro primo Compurgatore	00	09
Pro quolibet reliquorum	ob.	00 04

	s.	d.
Literæ intimatoriæ five procla- matoriæ	01	00
Admissio cujuslibet exhibiti	00	04
Caveat pro Testamentis & Ad- ministrationibus	00	06
Caveat pro Institutione five Matrimonio	01	00
Dimissio cujuslibet causæ incon- tinentiæ & instantiæ post litis Contestationem	00	05
Pro interrogatoriis ministratis	00	09
Licentia Solemnizandi Matri- monium tempore prohibitio- nis de Bannis edendis	02	00
Pro exhibitione cujuslibet pro- curatorii pro qualibet causa	02	00
Literæ Interdictoriæ	02	00
Commissio ad absolvendum quempiam	02	00
Testamenta & Administrationes prout in statuto 21 Hen. 8. c. 5.	00	00
Transmissio processus & sigillo	06	00
Licentia sectandi extra Juris- dictionem	05	00

Fees due to the Register.

L Iteræ Testimoniales	06	08
Institutio cum Mandato	06	08
Commissio	06	08
Exemplificatio præter scriptio- nem materiæ exemplificatæ	06	08
Significavit	06	08
Quietus est	06	08
Literæ ad Colligendum bona	03	04
Pro scriptione Computi	06	08
Sequestratio fructuum	03	04
Sententia	06	00
Licentia Solemnizandi Matri- monium absque Bannis	03	04

Licentia

	s.	d.		s.	d.
Licentia deservendi vel docendi	01	04	Pro exhibitione cujuslibet billæ	00	04
Inhibitio in causa Matrimoniali	01	08	detectionis eodem tempore	01	04
Suspensio	00	08	Literæ Interdictoriæ	01	04
Absolutio ejusdem	00	09	Licentia non residendi	01	04
Excommunicatio	00	08	Commissio pro Absolutione ali-	01	04
Absolutio ejusdem	00	09	cujus		
Schedula Excommunicationis ex	00	06	Testamenta & Administrationes	00	00
Officio			prout in statuto prædicto		
Certificatorium de Absolutione	00	08	Pro exhibitione cujuslibet pro-	01	04
Citatio	00	05	curatorii pro Testamentis		
Decretum	00	10	Administratio cujuslibet de-	06	04
Productio partis principalis	00	09	functi cujus bona extendunt		
Productio primi testis	00	09	ultra 40 l.		
Productio cujuslibet reli-	00	04	Pro exhibitione cujuslibet pro-	01	04
quorum	ob.		curatorii		
Pro parte purgata	00	09	Admissio Resignationis	02	06
Pro primo Compurgatore	00	09	Transmissio processus quantum	00	00
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Literæ intimatoriæ sive procla-	01	00	Scrutinium factum in Registro	01	00
matoriæ			<i>Fees due to the Procurator.</i>		
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Caveat pro Testamentis & Ad-	00	06	Pro schedula excommunicationis	00	06
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Caveat pro Institutione vel Ma-	01	08	Pro feodo ad probandum Testa-	01	00
trimonio			mentum		
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Dimissio cujuslibet causæ incon-	00	05	Pro qualibet materia	03	04
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Contestationem	00	09	Pro Conceptione Computi	03	04
Pro interrogatoriis ministratis			Pro Conceptione Sententiæ	03	04
Licentia Solemnizandi Matri-	01	04	Pro Conceptione cujuslibet re-	02	06
monium tempore prohibitio-			sponsionis personalis		
nis de Bannis edendis	00	04	<i>Fees due to the Apparitor.</i>		
Pro quolibet actu			F O R execution of every		
Licentia sectandi extra Juris-	05	00	Citation of Instance, Ex-	00	02
ditionem			communication and Decree		
Pro qualibet Obligatione	01	00	per Mile		
Pro copia cujuslibet materiæ ex-	00	00	For every Detection	00	04
hibitæ secundum quantitatem			For every intimation upon pur-	00	02
Pro literis Diaconatus ordinis	03	04	gation per Mile		
Pro literis Presbyteratus ordinis	03	04	For every Suspension, Excom-	00	02
Pro licentia prædicandi, deser-	01	04	munication & viis & modis		
viendi & docendi			ex officio per Mile		
Pro exhibitione literarum Dia-	00	04	For every Testament or Admi-	00	06
conatus ordinis tempore Vi-			stration above 5 l.		
sitationis			For every Sentence	01	04
Pro exhibitione literarum Pres-	00	04	For every Interdiction per Mile	00	02
byteratus eodem tempore			For dimission of every Cause of	00	03
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Pro exhibitione cujuslibet Dis-	01	00	Seal.		
penfationis			T O the Judge's Man for	00	04
Pro exhibitione cujuslibet pro-	02	00	Wax to seal every thing.		
curatorii tempore Visitationis			A N		



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THE END.

