

Reliquia Spelmanniana.

THE
POSTHUMOUS WORKS
OF

Sir HENRY SPELMAN Kt.

Relating to the

LAWS and ANTIQUITIES

OF

ENGLAND.

Publsh'd from the ORIGINAL MANUSCRIPTS.

Sine dubio, domus Jurisconsulti est totius oraculum Civitatis. Cicero.



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Jan. 17. 1698.



T O T H E

Most Reverend Father in God

T H O M A S

L O R D A R C H - B I S H O P

O F

C A N T E R B U R Y,

PRIMATE of All ENGLAND

And METROPOLITAN,

And One of his Majesty's most Honourable Privy Council.

MY LORD,



I Beg leave to lay before your Grace these Posthumous Discourses of Sir *Henry Spelman*; promising them a favourable Reception, both for their own worth, and for the sake of their Author. He was a Person endow'd with those excellent Qualities, which never fail to recommend others to your Grace's good Opinion and Esteem: A Gentleman of great Learning, and a hearty Promoter and Encourager of it: In his Temper, Calm and Sedate; and in his Writings, Grave and Inoffensive: a true Lover of the Establish'd Church, and a zealous Maintainer of her Rights and Privileges. In which respect the Clergy of this Nation were more particularly oblig'd to him; because being a *Lay-man*, and, as such, not liable to the suspicion of Prejudice or Interest, all his Reasonings
in

The DEDICATION.

in behalf of their Rights, carry'd in them a greater weight and authority, than if they had come from one of their own Order.

I might add, as a farther justification of making this Address to your Grace, that He had the Honour to be particularly respected by two of your Grace's Predecessors; and some of his Posthumous Works, by a third. Archbishop *Abbot* and his immediate Successor were the chief Encouragers of the First Volume of his Councils: and after his death, the Second Part of his *Glossary* was publish'd by the procurement of Archbishop *Sheldon*. So that these Papers have a kind of hereditary Right to your Grace's Protection.

All the share that I have in this Work, is the handing it into the World: and to make the first Present to your Grace, would be no more than a decent regard to the Eminence of your Station; though I had no particular Obligation to do it. But in my Circumstances, I should think my self very ungrateful, if enjoying so much Happiness under your Grace's Patronage, I should omit any opportunity of expressing my Thankfulness for it; especially, since such Acknowledgments are the only Returns I can ever hope to make, for the Encouragement which you daily afford to

YOUR GRACE'S

most obliged and

most dutiful Servant,

T H E

P R E F A C E.



I Shall not make any Apologie for the publication of these Treatises: They appear'd to me to be very useful towards a right understanding of the Laws and Antiquities of England; and I hope they will appear so to others too: Nor need I endeavour to recommend them to the World, any otherwise than by shewing them to be the genuine Labours of Sir H. Spelman, whose Learning, Accuracy, and Integrity are sufficiently known.

The first of them, concerning Feuds and Tenures in England, was written in the Year 1639. and is printed from a fair Copy in the Bodleian Library, corrected with Sir Henry Spelman's own hand. The Occasion of writing it, was the Great Case of Defective Titles in Ireland; as may be gathered in some measure from the hints that our Author has given us; but is much more evident from the Case it self, printed afterwards by order of Thomas Viscount Wentworth, the then Lord Deputy. The Grounds thereof (with the Pleadings and Resolutions, so far as they concern the Original of Tenures) were, in short, thus: The several Manours and Estates within the Counties of Roscommon, Sligo, Mayo and Gallway, in the Kingdom of Ireland, being unsettled as to their Titles; King James I. by Commission under the Great Seal bearing date the 2^d Day of March, in the 4th Year of his Reign, did authorize certain Commissioners, by Letters Patents, to make Grants of the said Lands and Manours to the respective Owners. Whereupon, several Letters Patents to that effect, passed under his Majesty's Great Seal, by virtue of the said Commission, for the strengthening of such Titles as might otherwise seem defective. And afterwards, in the Reign of King Charles I. upon an Enquiry into his Majesties Title to the County of Mayo, there was an Act of State publish'd; commanding all those who held any Lands in that County by Letters Patents from the Crown, to produce them or the Enrollment thereof, before the Lord Deputy and Council, by a certain Day; to the end that they might be secur'd in the quiet Possession of their Estates, in case the said Letters were allow'd by that Board to be good and effectual in Law.

THE PREFACE.

In pursuance of this Order, several Letters Patents were produced, and particularly the Lord Viscount Dillon's; which last, upon the perusal and consideration thereof by his Majesty's Council, were thought to be void in Law. And therefore it was ordered by the Lord Deputy and Council, that the Doubt arising upon the Letters Patents should be drawn up into a Case, and that Case to be openly argued at the Council-Board. The Case was drawn up in these words: King James, by Commission under the Great Seal dated the second Day of March in the fourth Year of his Reign, did authorize certain Commissioners to grant the Manour of Dale, by Letters Patents under the Great Seal of this Kingdom, to A. and his Heirs, and there is no Direction given in the said Commission touching the Tenure to be reserved. There are Letters Patents by colour of the said Commission pass'd unto A. and his Heirs, to hold by Knights-Service, as of his Majesties Castle of Dublin.

Here, it was agreed on all hands, that the Letters Patents were void as to the Tenure, and that the Commissioners had acted beyond their Commission, in reserving a mean Tenure, to the prejudice of the King; when they ought either to have reserved an express Tenure by Knight's Service in Capite, or have mentioned no Tenure at all, but have left the Law to imply a Tenure in Capite. The Question therefore was, Whether the Deficiency of the Tenure did so far affect the Grant, as wholly to destroy the Letters Patents? Or, Whether the Letters Patents might not be good as to the Land, and void only as to the Tenure?

The Case was argued several Days by Counsel on both sides; and was afterwards refer'd to the Judges, who were requir'd by the Lord Deputy and Council, to consider of it, and to return their Resolution. But they, upon private Conference, not agreeing in their Opinions, it was thought necessary for publick satisfaction to have it argued solemnly by them all: which was accordingly done. And when it came to be debated, whether the Reservation of a Tenure, so different from that intended and warranted by the Commission, could make void the whole Grant; this led them to a more general Enquiry, What the Reservation of a Tenure to the Grant? whether it be a part of the Grant, and the *modus concessionis*, or whether it be a distinct thing, and aliud than the Grant? For (as the printed Case represents their Opinion) If the Reservation of the Tenure and the Grant of the Land, be aliud & aliud, two distinct things, in the consideration of the whole Grant made, and the Authority given by the said Commission for the making thereof; then the Patent may be void as to the Tenure, and yet good for the Grant of the Land.

THE PREFACE.

“ if the Reservation of the Tenure be incident unto the Authority
“ and included within it, and the Reservation of the Tenure
“ and the Grant of the Land make up but one entire Grant, so
“ that the one is a part of the other, and the Reservation of the
“ Tenure be *Modus concessionis*; then the granting of the Land,
“ reserving a diverse or contrary Tenure to that which their
“ [made] Authority did warrant them to reserve, is a doing of
“ *Idem alio modo*; and so the whole Act is void.

They who pleaded for the Validity of the Letters Patents as to the Lands, and their being void only as to the Tenure; urged, among other Arguments, That Tenures in Capite were brought into England by the Conquest, but Grants were by the Common-Law; and therefore Grants being more ancient than Tenures, the Tenure must of necessity be aliud from the thing granted. And to prove that this Tenure came in with the Conqueror, they cited Mr. Selden in his *Spicileg. ad Radmerum*, p. 194. where he hath that out of Bracton de Acquir. Rerum Dominio. b. 2. Forinsecum servitium dicitur Regale servitium, quia spectat ad Dominum Regem & non ad alium, & secundum quod in Conquestu fuit adinventum.

But this Argument and the Authority were both over-rul'd; and it was affirm'd, that Tenures were not brought into England by the Conqueror, but were common among the Saxons. Their Answer to Mr. Selden's Opinion, with the Reasons upon which they grounded their Position, I will transcribe at large from the printed Case; the Book being very scarce, and this the only Point wherein Sir Henry Spelman is concern'd.

It was answered that Mr. Selden in that place does barely recite the Words of Bracton, not delivering an Opinion of his own.

For in that Book cited, pag. 170. and in his *Titles of Honour*, the last Edition, p. 612. We find that he was of another Opinion, and that this Tenure was in use in England in the Times of the Saxons.

What were those *Thani Majores*, or *Thani Regis* among the Saxons? but the Kings immediate Tenants of Lands, which they held by personal Service, as of the King's Person by Grand Serjeanty, or Knights-service in Capite.

The Land so held, was in those times called *Thain-land*, as Land holden in Socage was called *Reveland*, so frequently in *Dooms-day*: *Hæc terra fuit terra Regis Edwardi Thainland, sed postea conversa est in Reveland.* Cokes Instit. sect. 117.

THE PREFACE.

After some Years that followed the coming of the *Normans*, the Title of *Thane* grew out of use, and that of *Baron* and *Barony* succeeded for *Thane* and *Thain-land*.

Whereby we may understand the true and original Reason, of that which we have in the *Lord Cromwel's Case*, 2. *Coke* 81. That every *Barony* of ancient time was held by *Grand Serjeanty*; by that Tenure were the *Thain-lands* held in the time of the *Saxons*, and those *Thain-lands* were the same that were after called *Baronies*.

'Tis true, the Possessions of *Bishops* and *Abbots* were first made subject to *Knights-service in Capite* by *William* the Conquerour, in the fourth Year of his Reign: for their Lands were held in the times of the *Saxons*, *in pura & perpetua Elemosyna*, free, *ab omni servitio seculari*.

But he then turned their Possessions into *Baronies*, and so made them *Barons* of the Kingdom by Tenure; so that as to them, this Tenure and Service may be said to be *in Conquestu adinventum*. But the *Thain-lands* were held by that Tenure before.

As the Kings *Thane* was a Tenant in *Capite*, so the *Thanus mediocris* or *middle Thane*, was only a Tenant by *Knights-service*, that either held of a mean Lord, and not immediately of the King, or at the least of the King, as of an *Honour* or *Manour*, and not in *Capite*.

What was that *Trinoda Neccessitas*, which so often occurs in the Grant of the *Saxon Kings*, under this Form: *Exceptis glis tribus Expeditione, Arcis & Pontis extractione?* (See it in a Charter of King *Eubelred* in the Preface to *Coke's 6. Report*, &c.) but that which was after expressed by *Salvo forinjeco*: *Bracton lib. 2. cap. 26. & 35. 12 Edw. I. Gard. 132. 26. Ass. 66. Selden Analect. Anglobrit. 78.*

And therefore it was said that Sir *Henry Spelman* was mistaken, who in his *Glossary*, *verbo Feudum*, refers the Original of *Feuds* in *England* to the *Norman Conquest*.

It is most manifest, that *Capite Tenures*, *Tenures by Knights-service*, *Tenures in Socage*, *Frank-almoigne*, &c. were frequent in the times of the *Saxons*.

And if we will believe what is cited out of an old *French Customary*, in a MS. *Treatise of the Antiquity of Tenures in England*, which is in many mens hands, all those Tenures were in use long before the *Saxons*, even in the times of the *Britains*: There it is said: The first *British King* divided *Britain* into four Parts.

THE PREFACE.

And gave one part to the *Arch-Flamines* to pray for him and his Posterity.

A second Part he gave to his Earls and Nobility to do him *Knights-service*.

A third he divided among Husbandmen, to hold of him in *Socage*.

The fourth Part he gave to Mechanical Persons, to hold in *Burgage*.

But that Testimony was wav'd, there being little Certainty or Truth in the *British Story* before the times of *Cesar*. Neither would they make use of that, which we are taught by *William Rouille of Alençon*, in his Preface to the *Grand Customier of Normandy*, that all those Customs (among which these *Tenures* are) were first brought into *Normandy* out of *England* by *Edward the Confessor*.

Besides that which hath been said, we find *Feuds*, both the Name and thing, in the Laws of those times, among the Laws of *Edward the Confessor*, *cap. 35*. where it is thus provided,

Debent enim universi Liberi homines, & secundum Feodum suum & secundum Tenementa sua, Arma habere, & illa semper prompta conservare, ad tuitionem Regni, & servitium Dominorum suorum, &c. *Lambard. Archaionom. 135.*

This Law was after confirmed by *William the Conqueror*. *Vide Coke's Instit. sect. 103.*

As these *Tenures* were common in those times, so were all the fruits of them, *Homage, Fealty, Escuage, Reliefs, Wardships*.

For *Reliefs*, we have full testimony in the *Reliefs* of their *Earls and Thanes*, for which see the Laws of *King Canutus*, *cap. 66. & 69.* The Laws of *Edward the Confessor*, *cap. de Heterochiis*, and what out of the *Book of Domesday* *Coke* hath in his *Instit. sect. 103.* *Camden* in *Barkshire*, *Selden* in *Eadmer*. *p. 154.*

That *Wardships* were then in use, and not brought in by the *Normans*, as *Camden* in his *Britt. 178.* nor by *Hen. III.* as *Randolph Higden* in his *Polychronicon*, and others (not understanding him) would persuade. *Vide Selden's Notes on Forrescue, 51.*

Among the *Privileges* granted by *Edward the Confessor* to the *Cinque-ports*, we meet with this, that their *Heirs* shall not be in *Ward*. *Lambard's Perambulat. of Kent, 101.*

And

THE PREFACE.

And in the Customs of *Kent*, which are in the *Magna Charta* of *Tottel's* Edition, and in *Lambard's Perambulation*, there is a Rule for the Wardship of the Heir in *Gavelkind*, and that he shall not be married by the Lord. And those Customs say of themselves, that they were *Devant le Conquest*, & *en le Conquest*.

For the Antiquity of Wardships in *England* and *Scotland*, see also *Hect. Boet. lib. II. Buchanan. rerum Scot. lib. 6.* and the Laws of *Malcolm II.* which prove the Antiquity of Wardships in *Scotland*, and therefore in *England*, before the *Norman Conquest*; for in those times it is probable the Laws of both Nations did not much differ: As for the times after, it appears they did not, by comparing their *Regiam Majestatem*, and our *Glanvil.* Neither is the bare Conjecture of *Sir Henry Spelman* sufficient, to take away the force of those Laws. *Vide Spelman. Glossar. verbo Feudum.*

Upon this (amongst other Reasons) they did conclude, That upon consideration of the Authority given, and Grant thereupon made, the Reservation of the Tenure cannot be said to be *Aliud*, i. e. a separate and distinct thing from the Authority of Granting the Land, but rather included within it. And that the Reservation of the Tenure, though it be not *Ipsa concessio*, the Grant itself, yet it is *Modus concessionis*, and a part of the Grant; and that therefore the Authority being not pursued in that, the whole Grant is void.

These were their Arguments for Tenures among the Saxons, as they are set down in the Case it self, drawn up and printed by Order of the Lord Deputy. And *Sir Henry Spelman* has severally consider'd both the Truth, and Force, of them; not strictly confining himself to their Reasons and Reflections, but taking occasion from thence to write a very elaborate Treatise of the Nature and Original of Feuds and Tenures.

The two Discourses, Of the ancient Government of *England*, and Of Parliaments, are both of them publish'd from the Original Manuscripts in the hands of *Mr. Charles Spelman* of *Congham* in *Norfolk*, Son of *Sir John Spelman*, and Grandson to *Sir Henry*.

The next, concerning the Original of the four Terms, was publish'd in the Year 1684. from a very uncorrect and imperfect Copy, which probably had been taken, when the Author first wrote the Discourse. The Original Manuscript (with very many Additions)

THE PREFACE.

ms and Corrections, which Sir Henry afterwards made in it) is preserv'd in the Bodleian Library; from whence the Work is now printed entire.

The Apology for Archbishop Abbot, by an unknown Author, and the Answer to it by Sir Henry Spelman, are in the possession of Mr. Henry Spelman, (Son to Mr. Clement Spelman, who was Sir Henry's youngest Son) and both written with our Author's own Hand. To this Answer he refers us in his Glossary, under the title *Muta Canum*.

The Letters relating to the same subject, are in a Collection of Original Papers and Records, deliver'd to Mr. Wharton by Archbishop Sancroft, and now in the hands of Mr. Chiswell.

The Treatise of the Original of Testaments and Wills, and his Icenia, or the Description of Norfolk; are both publish'd from the Author's own Copies, in the Bodleian Library. The latter of these is not so compleat, as he had intended to make it.

The Catalogue of the Earls Marshal of England, and the Dissertation de Milite, were evidently design'd for a part of his Glossary; as appears from the manner of the Composition, and from several Passages in them. But when the Papers were deliver'd to Sir William Dugdale, for the publication of the second Part of that Work, these two, it seems, had been mislaid. The Account of the Earls Marshal is, I fear, imperfect in some places; but will however be of good use towards a more accurate Catalogue of them.

The Succession of the Family of Sharnburn, is a piece of Antiquity that was much valu'd by Sir Henry Spelman; as appears both from his * Recommendation, and from the use that he has made of it in some part of his Works; and having met with a Copy in Mr. Ashmole's Museum at Oxford, I thought it might not be improper to publish it among his Remains.

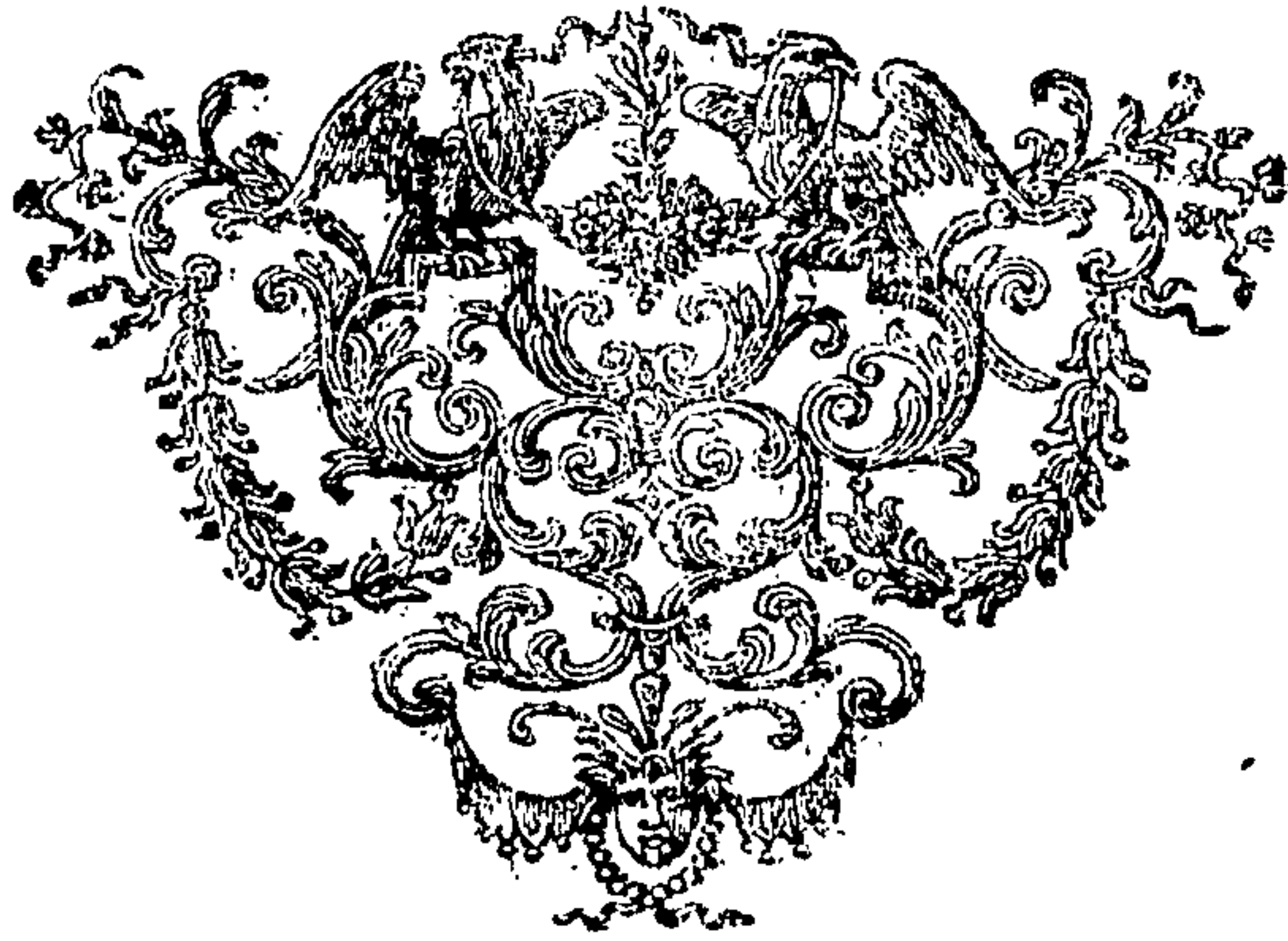
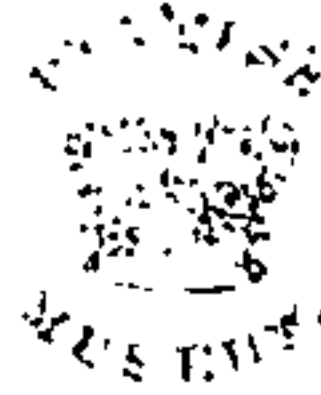
The Dialogue concerning the Coin of the Kingdom, and the Catalogue of the Places of the Arch-bishops and Bishops of this Realm; are in the possession of Mr. Charles Spelman. The first is written in a Hand not unlike Sir Henry Spelman's, only somewhat less; which (if it was really his) may have been occasion'd by his writing it, while he was young: For it † appears to have been

THE PREFACE.

compos'd in the 36. of Elizabeth; when Sir Henry was but about thirty three Years of age. The Catalogue was drawn up * in the time of King James I. for the use of the then Archbishop of Canterbury; as I gather from those Words in the Beginning, written in a different Hand, Pro Domino Archiepiscopo Cantuar. I dare not positively affirm, that either of these is Sir Henry Spelman's; but my finding them among his other Papers, and the accurate Knowledge of our English Affairs which appears in both, inclin'd me to believe that he was really the Author of them; and for that reason, they are printed upon this occasion.

This is all I have to say concerning the Posthumous Works of Sir Henry Spelman; which I was willing to make publick, as well for the Author's reputation, as the service of my Country.

* Pag. 212. Durham-house.

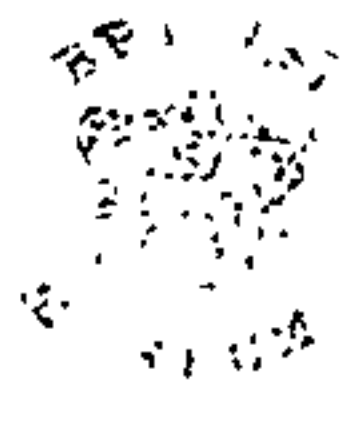


T H E

C O N T E N T S

O F T H E

S E C O N D P A R T.



THE Original, Growth, Propagation and Condition of Feuds and Tenures by Knight-service, in England. pag. 1.

CHAP. I. *The Occasion of this Discourse, and what a Feud is,* p. 1.

CHAP. II. *The Original, Growth, and Propagation of Feuds: first in general, then in England,* p. 2.

CHAP. III. *That none of our Feodal Words, nor Words of Tenure, are found in any Law or ancient Charter of the Saxons,* p. 7.

CHAP. IV. *Of Tenures in Capite, more particularly,* p. 10.

CHAP. V. *What Degrees and Distinctions of Persons were among the Saxons, and of what condition their Lands were,* p. 11.

CHAP. VI. *Of Earls among our Saxons,* p. 13.

CHAP. VII. *Of Ceorls; and that they were ordinarily but as Tenants at will; or having Lands, held not by Knight-service,* p. 14.

CHAP. VIII. *Of Thanes, and their several kinds,* p. 16.

CHAP. IX. *Charters of Thane-lands granted by Saxon Kings, not only without mention of Tenure or Feodal-service, but with all Immunity, except Expedition, &c.* p. 19.

CHAP. X. *Observations upon the precedent Charters, shewing that the Thane-lands, or Expedition, were not Feodal, or did lye in Tenure,* p. 21.

CHAP. XI. *More touching the Freedom of Thane-land, out of Doomsday,* p. 23.

CHAP. XII. *The Fruits of Feodal Tenures; and that they were not found among the Saxons, or not after our manner,* p. 24.

CHAP. XIII. *No Profit of Land by Wardship in the Saxons time,* p. 25.

CHAP. XIV. *No Wardship in England amongst the Saxons: Objections answer'd,* *ibid.*

CHAP. XV. *No Marriage of Wards,* p. 29.

CHAP. XVI. *No Livery; no Primer-seisin,* p. 30.

CHAP. XVII. *That Reliefs (whereon the Report most relyeth) were not in use among the Saxons, nor like their Heriots,* p. 31.

CHAP. XVIII. *Difference between Heriots and Reliefs,* p. 32.

CHAP. XIX. *No Fines for Licence of Alienation,* p. 33.

CHAP. XX. *No Feodal Homage among the Saxons,* p. 34.

CHAP. XXI. *What manner of Wealth among the Saxons,* p. 35.

CHAP. XXII. *No Escuage among the Saxons: What in the Empire,* p. 36.

CHAP. XXIII. *No Feodal Escheate of hereditary Lands among the Saxons,* p. 37.

CHAP. XXIV. *Thaneland and Reveland what. No Marks of Tenure, but Distinctions of Land-holders,* p. 38.

CHAP. XXV. *How the Saxons held their Lands; and what obliged them to so many kinds of Services,* p. 40.

The CONTENTS.

CHAP. XXVI. <i>The Charter whereby Oswald Bishop of Worcester disposed divers Lands of his Church after the Feodal manner of that time, entituled, Induculo Libertatis de Oswalds-Laws-Hundred,</i>	Indiculu
CHAP. XXVII. <i>Inducements to the Conclusion,</i>	p. 4
CHAP. XXVIII. <i>The Conclusion,</i>	p. 4
II. <i>Of the Ancient Government of England,</i>	
III. <i>Of Parliaments,</i>	
IV. <i>The Original of the four Terms of the Year,</i>	
<i>The Occasion of this Discourse,</i>	p. 6
SECT. I. <i>Of the Terms in general,</i>	p. 6
SECT. II. <i>Of the Names of Terms,</i>	p. 7
SECT. III. <i>Of the Original of Terms or Law-days,</i>	ibid
SECT. IV. <i>Of the Times assigned to Law-matters, called the Terms,</i>	p. 7
CHAP. I. <i>Of Law-days among the Ancients,</i>	ibid
CHAP. II. <i>Of Law-days amongst the Romans, using choice-days,</i>	p. 7
CHAP. III. <i>Of Law-days among the first Christians, using all Times alike,</i>	p. 7
CHAP. IV. <i>How Sunday came to be exempted,</i>	ibid
CHAP. V. <i>How other Festival and Vacation-days were exempted,</i>	p. 7
CHAP. VI. <i>That our Terms took their Original from the Canon-law,</i>	ibid
CHAP. VII. <i>The Constitution of our Saxon Kings in this matter,</i>	p. 77
CHAP. VIII. <i>The Constitution of Canutus more particular,</i>	ibid
CHAP. IX. <i>The Constitution of Edward the Confessor, most material,</i>	p. 78
CHAP. X. <i>The Constitution of William the Conqueror,</i>	p. 79
CHAP. XI. <i>What done by Will. Rufus, Henry I. K. Stephen, and Hen. II.</i>	p. 80
CHAP. XII. <i>The Terms laid out according to these ancient Laws,</i>	p. 81
CHAP. XIII. <i>Easter-term,</i>	p. 82
CHAP. XIV. <i>Trinity-term,</i>	p. 83
CHAP. XV. <i>Of Michaelmas-term, according to the ancient Constitutions,</i>	p. 84
CHAP. XVI. <i>The later Constitutions of the Terms,</i>	p. 85
CHAP. XVII. <i>How Trinity-term was altered and shorten'd,</i>	p. 87
CHAP. XVIII. [<i>How Michaelmas-term was abbreviated by Act of Parliament, 16. Car. I. cap. 6.</i>]	p. 88
SECT. V. <i>Other Considerations concerning Term-time,</i>	ibid
CHAP. I. <i>Why the High-Courts sit not in the Afternoons,</i>	p. 89
CHAP. II. <i>Why they sit not at all some Days,</i>	p. 90
CHAP. III. <i>Why some Law-business may be done on Days exempted,</i>	p. 93
CHAP. IV. <i>Why the End of Michaelmas-term is sometimes holden in Advent, and of Hilary in Septuagesima. &c.</i>	p. 94
CHAP. V. <i>Why Assizes be holden in Lent,</i>	ibid
CHAP. VI. <i>Of the Returns,</i>	p. 96
CHAP. VII. <i>Of the Quarta dies post,</i>	p. 97
CHAP. VIII. <i>Why there is so much Canon and Foreign Law us'd in this Discourse, with an Excursion into the Original of our Laws,</i>	p. 98
APPENDIX, p. 103	
V. <i>An Apologie for Arch-bishop Abbot, touching the Death of Peter Hawkins the Keeper, wounded in the Park at Bramsil, July 24. 1625.</i>	p. 107
VI. <i>An Answer to the said Apology,</i>	p. 111
VII. <i>Letters and Instruments relating to the killing of Hawkins by the Arch-bishop,</i>	p. 121
VIII. <i>Of</i>	p. 121

The CONTENTS.

- VIII. Of the Original of Testaments and Wills, and of their Probate, to whom it anciently belong'd, p. 127.
- IX. *Icenia, sive Norfolkiae Descriptio Topographica,* p. 133.
- X. *Catalogus Comitum Marefcallorum Angliae,* p. 165.
- XI. *Difsertatio de Milite,* p. 172.
De etate Militari, p. 174.
De evocatis ad Militiam fufcipiendam, p. 175.
De modo creandi Militem honoratum; & primo de Cingulo militari, p. 176.
Qui olim fiebant Milites, p. 179.
Qui poffint militem facere, p. 180.
Judices etiam fub appellatione Militum cenferi; fcil. Equites effe Palatinos, p. 182.
De loco & tempore creationis, p. 183.
De cenfu militari, p. 184.
Modus Exuitorandi Militem, quod Degradate nuncupatur, ibid.
- XII. *Historia Familiae de Sharnburn,* p. 187.
- XIII. *Familiae Extraneorum (sive Leftrange) accurata Defcriptio,* p. 200.
- XIV. A Dialogue concerning the Coin of the Kingdom; particularly, what great Treasures were exhausted from *England*, by the ufurp'd Supremacy of *Rome*. p. 203.
- XV. A Catalogue of the Places and Dwellings of the Archbifhops and Bifhops of this Realm (now or of former times) in which their feveral Owners have Ordinary Jurifdiction, as if Parcel of their Diocefe, tho' they be fuate within the Precinct of another Bifhop's Diocefe, p. 211.

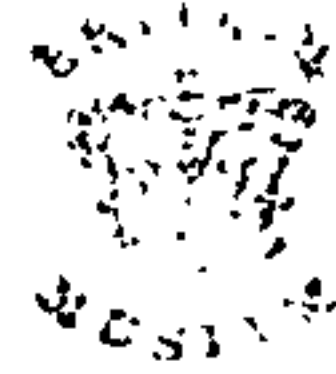
To which are now added,

- Two Difcourfes, XVI. Of the Admiral Jurifdiction, and the Officers thereof, p. 217.
Of the Etymologie of the Name of Admiral, and the Beginning thereof in England, ibid.
A little Digreffion to the Beginning and Antiquity of Courts, thereby to bring us to the Office and Courts of Admiralty, p. 219.
Who had the Rights and Jurifdiction of the Seas, before it was affigned to the Admiral, p. 220.
Of the Beginning of the Admiral-Jurifdiction now in ufe, p. 222.
Of the Perfons whom it concerneth, and firft of Proprietaries, p. 223.
Of the Officers of the Admiralty, and firft of the High-Admiral of England, p. 224.
Of the Conſervator of Truce, to whom Admiral Authority, ibid.
Of the Vice-Admiral, ibid.
Of the Register, p. 225.
Of the Places fubject to the Admiralty, p. 226.
Of the Place where the Admiralty confifteth, ibid.
Of the Shore and Soyle of the Sea, p. 229.
Of Rivers, p. 230.
Of the Place accidentally fubject to the Admiralty, p. 231.
The Fees which are taken in the Admirall Courte at London, p. 232.

XVII. OF

The CONTENTS.

XVII. Of antient Deeds and Charters,	
<i>Of Deeds in general ; and then of Saxon Deeds,</i>	P. 233.
CHAP. I. <i>Of the Direction,</i>	ibid.
CHAP. II. <i>Of the Parties,</i>	P. 237.
CHAP. III. <i>Of the Consideration,</i>	P. 238.
CHAP. IV. <i>Of the Words of Grant or Donation,</i>	P. 243.
CHAP. V. <i>Of the Thing granted,</i>	P. 244.
CHAP. VI. <i>Of the Estate of the Granter,</i>	P. 245.
CHAP. VII. <i>Of the Habendum, or Estate granted,</i>	ibid.
CHAP. VIII. <i>Of the Use whereto the Estate was granted.</i>	P. 246.
CHAP. IX. <i>Of the Reservation,</i>	P. 248.
CHAP. X. <i>Of the Tenure,</i>	P. 250.
CHAP. XI. <i>Of the Warranty,</i>	ibid.
CHAP. XII. <i>Of the Sealing and Delivery,</i>	P. 252.
CHAP. XIII. <i>Of the Date,</i>	P. 253.
CHAP. XIV. <i>Of the Witnesses,</i>	P. 254.
	P. 256.



S O M E
LETTERS and INSTRUMENTS

Concerning

The killing of *Hawkins* by Archbishop *Abbot*.

A LETTER written by his Majesty to the Lord Keeper, the Bishops of *London*, *Winton*, *Rocheſter*, *St. Davids*, and *Exeter*, Sir *Henry Hobart* Kt. Chief Juſtice of the Common-Pleas, Mr. Juſtice *Dodderidge*, Sir *Henry Martin*, and Mr. Doctor *Steward*, or any ſix of them, whereof the Lord Keeper, the Bishops of *London*, *Winton*, and *St. Davids* to be four.

It is not unknown unto you what happened this laſt Summer unfortunate-ly to our Right Truſty and our Right Well-beloved Counſellor the Lord Archbiſhop of Canterbury; who ſhooting at a Deer with a Croſs-bow in Beaulieu-park, did with that Shoot caſually give the Keeper a Wound, whereof he died. Which Accident, tho' it might have happened to any other Man, yet becauſe his eminent Rank and Function in the Church, hath (as we are informed) miniſtred occaſion of ſome Doubts, as making the Caſe doubtful in his Perſon, in reſpect of the Scandal (as is ſuppoſed:) We therefore being deſirous (as it is fit We ſhould) to be ſatisfied therein, and having eſpecial Truſt in your Learning and Judgment; have made choice of you to inform Us concerning the Nature of this Caſe: And do therefore require you to take it preſently into your conſideration, and the Scandal that may have riſen thereupon: And to certify Us, what in your Judgment the ſame may amount unto, either to an Irregularity or otherwiſe. And laſtly, what means may be found to redreſs the ſame (if need be.) To which Points we ſhall expect to hear your Reports with what diligence and expedition you poſſibly may. Dated at Theobalds 3. Oct. 1621.

A Letter from the Lord Keeper to Archbiſhop *Abbot*, intimating the Reception of his Majesty's Letter.

May it pleaſe your Grace,

My Lord of Wincheſter, my Lord Hobart, Sir John Dodderidge, Dr Martin, and my ſelf, having met this Afternoon about a Letter ſent unto us (together with ſome others) under his Majesty's Signet; and finding the Contents thereof to require from us ſome Information of the nature of an Inſolent Act, which doth refer unto your Grace: We thought our ſelves bound in all Juſtice and Reſpect, to ſend your Grace (as I do here incloſed) a Copy of his Majesty's Letter: And to let your Grace underſtand, that we are ready to receive from your Grace (in Writing) all the qualifying Circumſtances of the Fact (if any ſuch there be) omitted in this Letter; that

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we

we may be better grounded to deliver our Opinions (as is desired) concerning the nature of this unlucky Accident. And we have appointed Two of the Clock in the Afternoon upon Saturday next, to be the Time; and this College of Westminster to be the Place of our Meeting, to receive what Information of the Fact your Grace shall be pleas'd to communicate unto us. And ceasing to be further troublesome, I shall ever rest

Westminst. Coll.
this 5th of Octob.
1621.

Your Grace's poor Friend
and Servant,
Jo. Linc. & C. S.

The Archbishop's Answer.

My very good Lords,

I Thank you for sending me the Copy of his Majesty's Letter, which concerneth the unhappy Accident that befel me in Hampshire. I have enclosed send unto your Lordships a Copy of the Verdict given up by the Jurors unto the Coroner; as also a Relation of some Circumstances of this Fact which are not expressed in that Verdict. For the first, being already upon Oath, it needeth not (as I conceive, under your Lordship's favour) any further Verification: And for the other, such of the Particulars as are not included in the Verdict, there are in readiness those who will testify the same. And for the better expedition of the whole business, if your Lordships shall once resolve, what are the special Points in Law to be insisted upon; I will, with all convenient speed, cause my Council to be ready to attend you; by whom I desire to give your Lordships satisfaction. And so commending my Love and Service to your Lordships, and forbearing to be further troublesome, I rest

Your Lordships very loving Friend,

Lambeth, Oct. 13. 1621.

G. Cant.

A Note of my Lord Keeper's at the bottom of the Letter.

*" To this Letter we answered, that we had no Warrant to bear Council;
" cil; nor could we in justice bear any, unless the Credit of the Church
" and Honour of the King had their Council likewise on the other side.*

Jo. Linc. & C. S.

The Opinion of the Bishops and others, to whom the Consideration of Archbishop Abbot's Case was referred; in a Letter to his Majesty.

May it please your Majesty,

W Hereas we receiv'd a Command from your Majesty under your Royal Signet, to deliver our Opinions unto your Majesty, whether any Irregularity or Scandal might arise by this unfortunate Act, which God