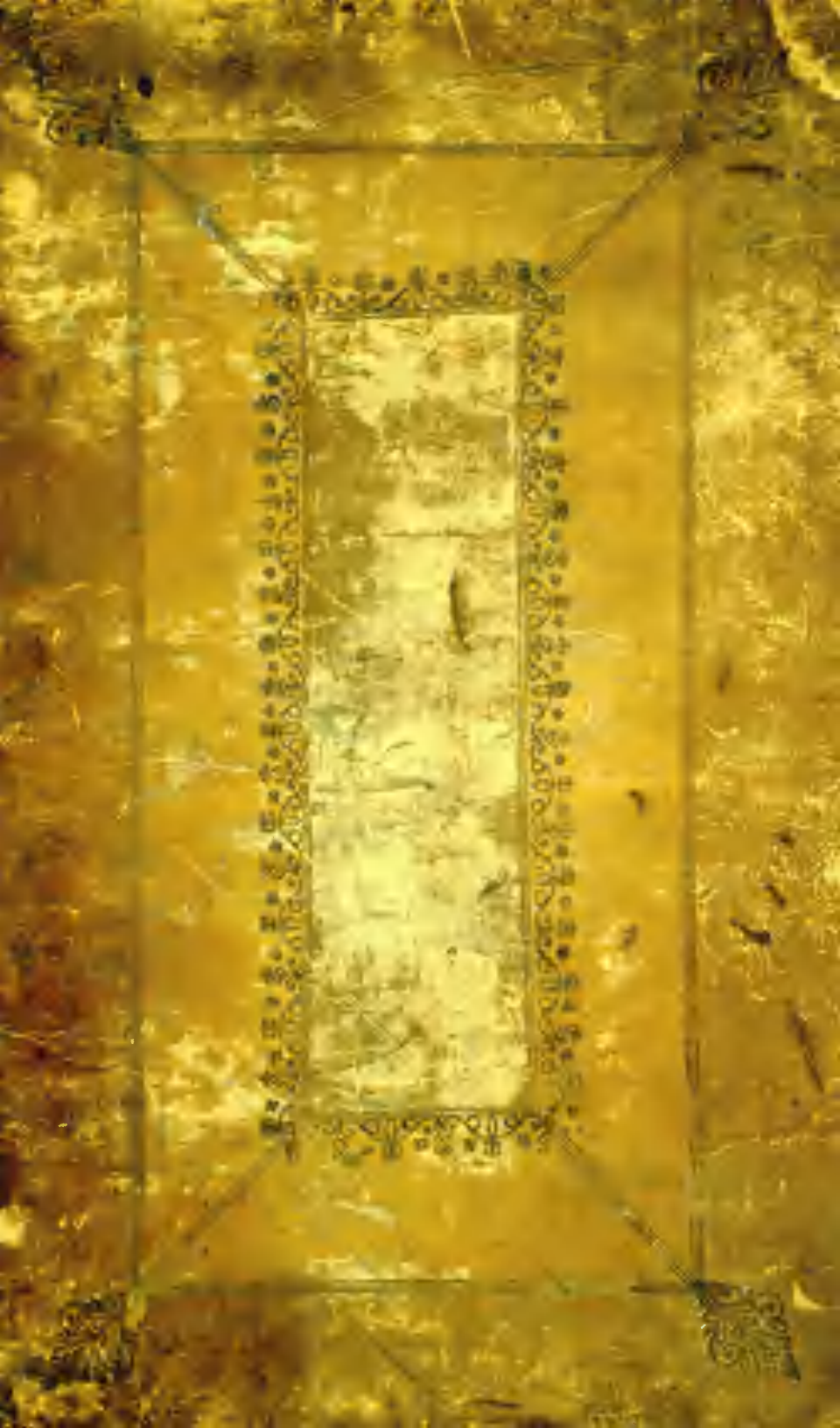

PARERGON
JURIS CANONICI ANGLICANI:
OR, A COMMENTARY,
By Way of
SUPPLEMENT
TO THE
Canons and Conſtitutions
OF THE
CHURCH of ENGLAND.

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.

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To the following

W O R K.

I HAVE 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 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*.

I 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 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 diſtinguiſh'd 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 *Bellarmine*, 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 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 acknowlege 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 administer'd. 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 Schismaticks, 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. 2*dly*, 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 rec[eiv]'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,

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* Vid. Pfandep. Can. † A. D. 325. ‡ A. D. 341. ** A. D. 493. †† 15 Dist. c. 3. 42 & 43.

Purity; from whence the *Papiſts* at this Day confirm their *Dogma's* 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 Dallee* in his *Pſeudepigraphe 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 *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 *Ger. 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 ſæc. 1. Diſ. 17. 18. 19. 20. ‡ lib. 3. cap. 1. ** lib. 1. cap. 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 over-weaning 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 *Thouloufe*, a pretty good *Civilian* and a *Canoniſt* of 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 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 in 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, diſtin-

* 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, through the great and raging Persecution thereof, the Church in General had but little Power of instructiong 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 impower'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 limitted 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.

Piettenberg, 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 Gonſalez*, 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-Cæſarea*, *Gangrena*, *Antioch*, and *Laodicea*: And theſe Canons were of Force among ſuch Biſhops, by whoſe Authority and Saffrages 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 hereunto. 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 ſtiled a *Corpus Juris*, or Body of Law, in the ſame manner as *Homer*'s Works are ſtiled *Corpus Homeri*, conſiſting of all the Books, and the ſeveral Parts thereof, belonging to that Poet: So likewiſe may this *Code* be called 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-Cæſaria*, 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. 2. cap. 26. ** Maſtricht. N. 27. Fran. Flor. par. 2. p. 253. †† Bet. de Mar. lib. 3: cap. 3. N. 4. *** Maſtricht. N. 56.

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-Cæſarea*, *Baſild*, Biſhop of *Cæſarea* in *Cappadocia*, *Gregory* the *Theologiſt*, *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

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* Pet. de Mar. de Conell. Can. cap. 2. † Can. 1. ** Nov. 131. cap. 1. †† A. D. 1610.
*** A. D. 1643. ††† A. D. 1661. **** Maſtricht. N. 96. †††† A. D. 419.
***** vid. Juſtell. Præf. ad Biblioth. Jur.

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*, *Laodicea*, *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*, *Hormiſda*, 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, thereof, in 300 Canons; omitting ſome whole Canons of Councils, and the Decrees of Popes. Tho' *Peter Pithou* 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* Hiſtories; 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 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 entreat 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 to 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

* 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 Pithou* 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-Cæſarea*, 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, ſtiles 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. Florens* aſcribes this Work to *Theodoret*, Biſhop of *Cyrus*, who liv'd 130 Years before *Scholaſticus*; yet *Chriſtoph. Juſtellus* has ſufficiently ſhewn from ancient Manuſcripts, That this was the Collection of *Johan 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. † Vict. Tun. Chron. p. 43. ** A. D. 1588. †† A. D. 1618.
*** Can. Lect. ant. Tom. 6. p. 413.

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 Bracarenſis*, 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 *Bibliotheque* of the ancient *Canon-Law*; the other called the *Modern* Edition, which (*Garſias 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-Cæſaria*, *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 go alſo by the Title of a *Nomo-Canon*. Theſe three *Epitomies* were

* Nov. 131. cap. 2. † Greg. Tur. Hiſt. Fran. lib. 5. 38. ** Appen. Tom. 1. f. 53. *** A. D. 1130. †† Maſtricht. N. 281. *** Par. Prolog. Sect. 20. ††† Maſtricht. N. 293.

were firſt publiſh'd from the Manuſcript Copies of the *French* King's Library, together with ſome other Collections of Canons of the ſame Kind in the *Bibliotheque* 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. Harmenopulus*, 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 *Freherus* 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 by 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 *Pretextatus*, Biſhop of *Rheims*; and *Gregory Turonenſis*, in his † Hiſtory, ſtiles 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 *Toledo*, and others. And the Council of *Bracara*, held *A. D.* 563. expreſly 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

* Præf. Biblioth. Jur. Canon. et. † Lib. 5. cap. 18. ** Dicta 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 *Penitentials* of *Halithgarius* 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 Pittavienſis*, *Peter de Flameſburgo*, 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 are 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

* Vid. du Freſne Pœnitentiale. † Edm. Martene de ant. Eccl. Diſc. cap. 17. ‡ Thomaſin. 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 Darkneſs, 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 Darkneſs. 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 their Clergy was rampant, and the Pope domineer'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 tho' Pope *Nicholas* the Firſt approv'd of theſe Decretals, yet ſome of the *Papiſts* themſelves have plainly rejected them as Spurious. *Anton. Poſſevine*, in his † *Apparatus*, ſays, That *Iſidore Hiſpalenſis*

* Nov. 131. † Vid. verb. Burchard.

lenſis 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 *Examplars*. *Luitprandus* in his ‡ *Chronicon*, touching this Author, ſays, That *Iſidor* Biſhop of *Xatica*, 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* Sirname. 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 *Maſcon*. The *Centuriators* of *Magdeburg* were the firſt among the Proteſtants that diſcover'd this grand Impoſture of the Papiſts; againſt whom the Jeſuit *Turrianus* had undertaken to defend this Collection: But *David Blondel*, a *Frenchman* of great Learning, has very fully detected this Fraud, who publiſhed the ſuppoſititious 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 *Ratblode'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 Law 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 20 Books or Titles. But in collecting this Work he has not ſhewn much Judgment, having inſerted ſeveral ſpurious and ſuppoſititious 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 Collecton, 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 *Pannomia*, by others called the *Pannormia*, which was divided into eight Parts. In which Books he chiefly

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* A. D. 675. † A. D. 681. ‡ A. D. 719. ** Baluz. Præf. ad Ant. Auguſtin. de Emend. Grat.
†† Cave ut ſupra. p. 415. ‡‡ Maſtricht. N. 254. *** Maſtricht. 261. 262. ††† Cave ut ſup. p. 437.

chiefly follows *Burchard*. But ſome aſcribe this *Pannomia* 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 *Quiſquillia* of *Pſeudo-Iſidorus*. *Gregory* the Prieſt alſo made a Collection of *Canons*, which is ſtiled *Policarpus*; 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 *Omnebonum*. 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 One 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

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* 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. ‡‡ Pancir. lib. 3. cap. 2. *** Car. Sigon. de Epiſc. 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 One 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 Cauſæ ſunt parte 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 *Examplars*. 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 *Per.* being added ††. In the third Part the Number of the

E *Chapter*

* Maſtricht. N. 320. Fran. Flor. Tract. de Authoric. Coll. & Gratian. † Ant. Aug. lib. 1. Dial. 15. p. 288. ‡ Maſtricht. N. 322. †† 63 Diſt. c. 22. ** 12 Q. 1. cap. 15. †† Pœn. 5. Diſt. cap. 6.

Chapter and the *Diſtinction* occurs, with the Word or Syllable *Con.* 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 they are 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 with

* Fr. Flor. de Auth. Collect. Grat. p. 307. † Ziegl. Diſſert. Prælim. Sect. 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 inferiour to the others in Number, Knowlege and Authority, but only in Point of Honeſty and fair Dealing with the Law itſelf. Among theſe Commentators of 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 *Teutonicus*, 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 Brixienſis* ††, 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 Gloſs, and in the two *Pithou's* Edition, are read in the Margin; but in the other Edition 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 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. 3. cap. 3. † Cap. 4. ‡ Cap. 5. ** Panc. lib. 2. cap. 6. †† Lib. 3. cap 7. ‡‡ Maſtricht. 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 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 thoſe *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 mde 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 of his Collection of ancient *Decretals*, in the Beginning of this Volume **. The ſecond Collection was made by *Joh. Valenſis*, and (as ſome ſay) by *Gilbert.* and *Alan.* but I rather think from the Compilements 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 privaae 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 *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 *Caronius* Chancellor of the Univerſity of *Thoulouſe*, lately publiſh'd it upon finding the ſame in the Library of *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 publiſh'd the four firſt Collections of the *Decretals*. The ſeventh

or

*** A. D. 494. * 15 Diſt. cap. 3. † Baluz. Præf. ad Ant. Aug. Dial. Sect. 2. Fr. Flor. de Meth. & Auth. Coll. Gr. Sect. 4. ** Maſtricht. N. 338. †† Maſtricht. N. 346. ‡‡ Maſtricht. N. 349. *** Maſtricht. N. 350. ††† Maſtricht. N. 358. ‡‡‡ Fr. 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 Compilements; 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*, sirnam'd *Modicipassus*, *Pet. Corbolus* otherwise called *Boliatus Hispanus*, *Bertrand. Damasius*, *Alan. Anglicus*, *Peter* Provost of *Pavia*, *Peter Galensis* of *Volterra*, *Bernard* of *Compostella*, *Laurent. Vincent*, *Castillion* of *Millain*, *Joh. Teutonicus* and *Tancredus*, who have also published 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*, *Ægidius* of *Bononia*, *Aretinus*, *Fran. Vercellensis*, *Boatinus* of *Mantua*, and the Archdeacon. There are also some Anonimous 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 Proveb, *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

*A.D. 1230. †Schot. Bibl. Hisp. Tom. 2. p. 186. ‡ Mat. Par. **352. ††Ziegler. Discurs. Præl. N. 515. ‡‡ Duar. Præf. Tract. de Sac. Min. *** A. D. 1298. ††† A. D. 124. ‡‡‡ A. D. 1272.

Pope Gregory the Ninth; being as it were a Supplement to thoſe Books and Titles *: And here in his 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 it is here 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 12*th* of the Calends of *April*, 1313 **. in a Publick Conſiſtory. And as he dy'd immediately afterwards, they were ſcarce tranſm tted 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, *vagantur 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 aforeſaid Pope for aggrandizing the Power of the See of *Rome*. This ſame Pope reviv'd the Rules of *Chancery* ***, and the Rights 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 Methord 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. Stero Ann. ad a. 1297. † Vid. Bull. Bon. 8. ‡ H. Stero. ad a. 1301. 1302. ** March 21. †† Aventin. Ann. Broir. lib. 7. 7. cap. 15. N. 18. ‡‡ Bern. Guid. vit. Joh. 22. p. 168. *** Vid. Gomeſ. ††† Gomeſ.

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 the 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 Gulcot*, *Oddo* Bailiff of *Narnicus*, and *Lean. Galganetto*, 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 theſe have been ſeveral Comments thereon written, as by *Jo. Doviat*, *Caſper Ziegler*, and lately by *Chriſtian Thomaſius* and others. *Ant. 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

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* A. D. 1580. † A. D. 1582. ‡ Bapt. Bartolinus & Anton. Timotheus. ** Baluz. Præf. ad Ant. Auguſt. Sect. 29. †† Ant. Aug. de emend. Gratian. ‡‡ Vid. Gregor. Bull. Corp. Jur. Canon. Præfix.

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 *Pithou* 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 Papal 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* upon 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 Council of *Florence* and *Trent*, relating to Faith, ſhould be inſerted or not, they adjudg'd them to be inſerted 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 inſerted 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 Purſes and Conſcience, ſince the Reformation of Religion has enlighten'd ſo great 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,

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* Maſtricht. N. 396. Introduct. ad Jus Can. † Vid. Cherub. Bull. Rom. 1588. ‡ Maſtricht. N. 407. ** 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 Examplar*) 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 deprav'd by ſome of the Papiſts themſelves, who, through a Senſe of Shame for ſuch an Impiety, do acknowlege, 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 *Spahi*, 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-

* 19 Diſt. cap. 6. † Duck. de Auth. Jur. Civ. lib. 1. cap. ‡ Pet. de Marca de Concord. Sacer. & 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 confirmd 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. Gœdenius*, *Jerome Schurf*, *Everard 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 *Catholick*, 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.

The

* Scard. de Auth. & Juriſd. Imp. Goldaſt. Collect. de Mon. Imp. lib. 1. cap. 7. † Dec. 10th, 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 Supineſs 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 Good

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 publickly 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 velle fieri 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 fore 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 Dioceſs, 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 Potion 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 tender

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, 1*st*, To the Archdeacon's Court. 2*dly*, From thence to the Bishop's Court.

* A.D. 648. † 15. Q. 3. 5. ‡ 3. Q. 5. 3. ** 45. Dist. c. 2.

3*dly*, 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 h ng'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 *Avitæ 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 *Savoy*, 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 *Miſeratione Divinâ* 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 Di-"ſtreſſes 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 Invective 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.

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

The Laws of *England* are the Municipal Laws of the Realm, which are built on these three Foundations, *viz. First*, On the general Customs of the whole Realm, of which sort are these, among many others, *viz.* That the Goods which are bequeathed on the Testator's Death, are not the Goods of the Heir, according to the *Civil-Law*, but of the Executor, whom the Testator deputed to execute his last Will and Testament; That the Wife cannot bequeath her Dower during her Husband's Life-Time, which she might do by the *Civil-Law*; That a Person born before Espousals is a spurious Issue, and cannot be an Heir, which he might be according to the *Canon-Law*, if Marriage afterwards ensu'd; and several Matters of this Kind. *Secondly*, On the Statute Law of the Realm, which is made by King, Lords and Commons. And, *lastly*, On such Foreign Laws as have been receiv'd in the Realm, and confirm'd by usage and length of Time. Therefore,

The ancient *Canon-Law* receiv'd in this Realm is the Law of the Kingdom in Ecclesiastical Cases, if it be not repugnant to the Royal Prerogative, or to the Customs, Laws and Statutes of the Realm *: For says the Statute of the 25 of *Henry* the Eighth, Chap. 19. "All Canons already enacted, and hereafter to be enacted, do and shall stand "in Force, provided they be not contrary to the Laws of the Realm of "*England*, meaning, the *Statute* and *Common-Law*; nor in Damage of "the King's Prerogative." And the *Canon-Law* is one and the same Law throughout the whole Church of *England*, and ought to be observ'd as such †. And it is said, that the Council of *Lateran* ordaining a Constitution in relation to Deprivation for a Plurality of Benefices, was a general Law receiv'd here in *England*. And this Constitution is of equal Force with an Act of Parliament, which concludes all Parties. *Stanley's* Case in the Exchequer ‡. And again, an Ecclesiastical Canon or Constitution is a general Sentence and Judgment, which binds stronger than the particular Sentence or Judgment of any Person whatsoever: And a Constitution made by an Archbishop in a Provincial Council legally assembled binds and obliges all Persons of that Province.

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

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* Vaugh. Rep. p. 150. † 1 R. 3. 1. 5. F. 7. & 19. E. 3. ‡ Hetl. Rep. p. 101. Pasch. 1657.
** 25 H. 8. ch. 19. SS. 7. †† Cro. 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. *Elliot* 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 hereof from the Words of the Earl of *Clarendon* in his Hiſtory of the late Civil War ††, who there ſays as follows, *viz.*

"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 Bit-"terneſs 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 inveigh'd againſt?* All the Judges "of *England*, upon a mature Debate, in the Preſence of the King's "Coun-

* Vent. Rep. pt. 2d. p. 44. † Vent. Rep. pt. 2d. p. 43. ‡ 25 H. 8. ch. 19. ** A. D. 1640.
†† Pag. 204. & 205. 8vo. Edit. Vol. 1ſt. ‡‡ This Command was at the Inſtance of Archbiſhop *Laud*, 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 anciently questioned.* 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 overlook 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 Storm 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 Conjuncture 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 practised, 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 wholsome 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

* Can. 11. 13. & 14. vid. † These Words in the Text mark'd or printed in the *Italick* Letter are supposed to be an Oxford Interpolation. ‡ Vid. Can. 5. ** Can. 7. †† Can. 6. ‡‡ Can. 9.

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 *Melda* 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 Cogniſance; 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 Inſtructers 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 entire-

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* 11 Q. 1. 1. † Nov. 1. 31 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 certâ*, ought not to be extended *ad Personam repræsentatam*;

* Vid. Gloss. & Doct. in 19 Dist. cap. 4. verb. *Canones* & *Decretis*.

ſententiam; eſpecially if it be a Penal Canon or Conſtitution, as the greater Part of the Provincial Conſtitutions of Archbiſhop *Boniface* 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 Months 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 reſerved 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 *. 2*dly*, 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 †. 3*dly*, '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

* X. 1. 3. 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 *Emphiteuſis*, 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 Relicts, 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 Worſhips 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

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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 Knowlege 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 indè 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 Plantiff 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 Cognisance 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

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* Vid. Can. Jacob. 127. † Lib. 12. cap. 15. de Leg. Angliæ. ‡ Idem lib. 13. cap. 25.
** Ann. 24 Edw. 1. †† 25 H. 8. 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 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.* I. 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. 3 & 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. 

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. 3. 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 Judæis.* 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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PARERGON
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-

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 *Priors* are *Clauſtral*, others are *Conventual**, and a third Sort are *Secular*. *Clauſtral 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 expreſly 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 *Clauſtral Priory* is not †. Thoſe are term'd *ſecular Priors*, that have Priories, or (at leaſt)

*Clem. 1. 2. 2.

† 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 adminiſtred 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 the Cure of Souls to be granted to *Regulars* †. Therefore, the Perſon that is choſen and ſet over the ſame for the ſake of good Government, 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 Prior.

* Clem. 3. 10. 33. ff. *caterum.*

† X. 3. 37. 1.

‖ X. 3. 5. 32.

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 Religion 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*, 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 antient * common-Law of *England*, a Man could not alienate Lands, 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

* X. 3. 35. 6.

† X. 3. 35. 3.

* Glanvil. lib. 7. cap. 1. fol. 44.

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. Charta. 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 Seigniory 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 & Judæis*: 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 Cobler, 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*, 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* in *Briſtol*: for the Writ ſets forth, That the Abbot complain'd, that he 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 *puràe & perpetuâ Eleemoſyna, & non per Baroniam aut aliàs 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.

* 2 Inſt. 5.

† Prynn on Inſt. 555.

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 Treſpaſs; for by the Taking, the Property was diveſted. But this was

* 9 H. 6. 25.

(*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 Title of Lands at the Common-Law: as when Lands or Tenements are freely given to the uſes 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, *that* 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: whereas the Perſons 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* Bracton *writes at large. But* Britton *makes another Kind of this Land which is given in Alms, but not in pure Alms: becauſe the Tenants in this are oblig'd to certain Services to the Feoffor* *. *See* Britt. * Britt. ubi ſup. verb. Nat. Brev. *and the new Book of Entries, verb. Frank-Almoigne.*

† Britt. fol. 164.

‖ Britt. ubi ſup. n. 5.

remedy'd

remedy'd by the Statute of *Marlebridge*: by which it was provided, That the Succeſſor might declare, *Quare Bona & Catalla Domûs & Eccleſiæ 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 *Aſſize* 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. Eccleſ. 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* 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 be ing 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 *Imparsonee*; 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 ‖.

* 9 Rich. 2. chap. 4.
† 18 Q. 2. 17, 18, 28, 29, 30, 31.
‖ C. 1. 3, 4, & 47. Nov. 5. cap. 9. Nov. 123. cap. 34.
* X. 1. 16. 1. Clem. 1. 10. 1. 2.
‖ 11 H. 4. 68. b.
* 34 H. 6. 15.
† X. 3. 35. 5.
‖ X. 3. 37. 1.

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 Knowlege 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 Præscribendum*, 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.

* X. 3. 36. 9.
† X. 3. 31. 7.
‖ X. 1. 33. 10.

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

* X. 5. 31. 12.
† X. 1. 9. 15.

other Religious Order without the Pope's Licence or Diſpenſation *; nor can an *Abbot* do this, that is ſubject to a Biſhop †. *Ciſtertian* 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 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 *Religious* Order *. An *Abbot* is not put in by the Biſhop of the Dioceſs, 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 †. 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.

* X. 1. 4. 7.
† 18 Q. 2. 8.
‖ X. 5. 3. 43.
* X. 5. 31. 5.
† 18. Q. 23. 8, 9, 10, & 15.

Of Abjuration.

ABjuration, 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 Sacrilege, 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 *Elizabeth*, 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 Abjuration 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 Conviction,

* 1 Jac. 1. cap. 25. ff. 34.
† 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. l. 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 Dioceſs 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*. A ſecond Kind of Abſence is ſaid to be *neceſſary* and *voluntary*; as upon † D. 4. 6. 35. 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. 16. 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 & culpâ*, 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 *. A *neceſſary* Abſence is always pre- * Gloſs. in l. 13. C. 3. 1. judicial to baniſh'd or outlaw'd Perſons, and never helps them; becauſe † Conſ. 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. conſ. 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 * Conſ. 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 † In l. 8. D. 3. 3. Score of Religion, or (as *Caſtrenſis* † words it) in Favour of Religion. 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. conſ. 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. conſ. 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 *voluntarily* abſent, is ſaid to have a juſt Plea of Ignorance: And, therefore, † Conſ. 3. 313. n. 7. 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 which are done out of Neceſſity, as Elections and the like, a Nullity 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 *, as aforeſaid, becauſe abſent Perſons are not of Neceſſity to be ſummon'd 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* †, the abſent Perſons ought to be cited.

‖ Conſ. 259. n. 2.

* D. cont. n. 9.

† Conſ. 3. *an duæ Partes.*

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 ſufficient *Liquet* of the Cauſe, and Suit has been conteſted thereupon. For a Biſhop may, in order to extirpate Vice out of his Dioceſs, 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.

‖ Conſ. 65.

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 imports

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 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

*vi. 5. 10. 2.

† Pœn. 1. Diſt. 5. X. 1. 33. 16.

‖ D. 50. 17. D. 42. 1. 3.

* Fed. de ſen. conſ. 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.

† 2 Q. 1. 11.

* 25 H. 8. chap. 21.

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

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 publickly 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 publickly 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

* Othob. Tit. 28.

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

† 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.

* 2 Cor. 2. v. 10.

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 *a 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 Satiſ-

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 *Canonists*, even by a Layman *in articulo Mortis*: and this is true *in Foro Contentioso*, but not in *Foro Pœnitentiæ*; since in this last Case it only belongs to the Priest to absolve Excommunicated Persons ‖.

* X. 5. 39. 26.

† 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*.

† vi. de Reg. Jur. Reg. 42.

‖ Oldr. cons. 257. n. 16.

* D. 3. 5. 3. 1. Bart. & Jas. in l. 84. D. 30. 1. 10. in fin.

† Bart. in l. 13. D. 19. 1. 31.

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

‖ 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.
† Conſ. 163. & 186.
‖ Conel. 14. & 15.
* Conſ. 191. n. 3.
† Conſ. 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 expreſly 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* is every enormous Crime committed either againſt Religion and the publick Laws of the Church, or elſe againſt the Peace and Tranquillity of the 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 Puniſhment; provided, ſuch Accuſer does obſerve the Order and Method preſcribed him by Law; and provided ſuch Crime be not manifeſt, becauſe Crimes that are manifeſt, do not ſtand in need of an *Accuſation* †: and of theſe Things publick Judicature conſiſts.

* D. 47. 15. 3 & 4. D. 48. 1. 1.

† 2 Q. 1. 1. 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 Puniſhment 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 with either of theſe in this Work; and, therefore, I ſhall here more properly 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 expreſly 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, Parricide, 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 appoint a Puniſhment according to the Nature and Quality of the Offence, and the Condition of the Perſon delinquent *: as Concuſſion, Burning of Houſes, Prevarication, the Crime of *Stellionatus*, and the like; touching which, the Reader may conſult the whole Title in the *Digeſts* quoted here in the Margin †.

‖ D. 48. 1. 2.

* X. 5. 1. 16. X. 1. 29. 4. 4.

† 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 Puniſhment ought to be inflicted on Perſons guilty of Calumny, by way of Vengeance* ‖. And as Pope *Calixtus* commanded, let the *Accuſer* offer his *Accuſation* to the Judge in Writing, in the Preſence of the Perſon whom he accuſes, and let him read his Letters of *Accuſation propriâ voce*, in his own proper Perſon *. And the Lawyer *Paulus* ſhews us, in the 48th Book of the *Digeſts* †, what the Form of an *Accuſation* is, and 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: quòd 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 ‖. There are ſeveral Things both according to the *Civil* and *Canon Law* to

‖ 2 Q. 8. 3.

* 2 Q. 8. 5.

† Tit. 2. l. 3.

‖ D. 48. 2. 3.

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
*D. 48. 2. 8. their Conditions, as *Libertines* againſt their Patrons*; and others thro'
†D. 48. 2. 9. a ſuſpicion of Calumny †, as having once already, by the Means of Subornation, given falſe Evidence; and, laſtly, others on the Account of
‖D. 48. 2. 10. 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 *Accuſa-*
*2 Q. 1. 14. *tion**. 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,
†3 Q. 5. 6. 7. & 8. the *Canon-Law* does the ſelf-ſame †; as Homicides, Thieves, Robbers, Sacrilegious and Inceſtuous Perſons, Adulterers, Raviſhers of Virgins,
‖2 Q. 8. 3. Perſons guilty of Perjury ‖, and all other criminous Perſons ſuſpected of
3 Q. 5. 6. 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
†2 Q. 7. 2. in a criminal Cauſe accuſe a Clerk or Clergyman †, nor can a Heretick,
‖2 Q. 7. 25. 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 Lieute-
D. 48. 2. 12. nant 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
†X. 3. 8. 4. coercive Laws †: but, according to the *Canon-Law*, the Emperor may be accuſed of Hereſy, Perjury, or Sacrilege; and the Pope may for the
‖40 Diſt. cap. 6. 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 Ca-
*23 Q. 5. 20. nonical or Eccleſiaſtical Crime, for which a Pecuniary Puniſhment is in-
†2 Q. 8. 3. flicted; becauſe he has no Property of his own †.
2 Q. 3. 3. X. 1. 38. 5. *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 commited: 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 endure

dure 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 raſed 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.* *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: 2*dly*, That which we term *Reproach* or *Reviling*: and 3*dly*, That which we call *Calumniation*, and is a Malicious and Falſe Repreſentation of an Enemy's Words or Actions to an offenſive Purpoſe. *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 Ἔγκλημα. 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, ‖ Prov. c. 18. v. 17. * *Plutarch* in vitâ *Publicol.* † Quintil lib. 12. c. 7.

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 Knowlege 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* ||.

* Lib. 5. Ethic.

† Ariſt. Topic. lib. 2.

|| Ch. 5. v. 43. & 44.

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.

* Cicer. pro Cæl.

† Lib. 2. Off.

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

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,

† Decianus.

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 †.

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

† 2 & 3 Phil. & Mar. chap. 17.

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.

* *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 ſupplicat.* ‖ 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 Assignation 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 *vivâ 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 Evidenceof 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.

* 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.

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*.

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 Quære:* 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.

* Gram. conf. 130. n. 1.

† Anch. conf. 451. n. 2.

‖ D. 42. 1. 15.

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

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 whersoever 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,

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 *Facts* than *Acts* 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. 3.

† Gemin. conſ. 87. col. 1.

|| Conſ. 93.

Of Adminiſtration, and the Poſſeſſion of Inteſtate Goods.

AN *Adminiſtrator*, in the *Civil* and *Canon-Law* ſtiled *Hæres 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: wherewith 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.

* J. 3. 1. 1.

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. † J. 3. 1. 13.

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 ‖. ‖ Cok. Rep. 5. fol. 83. * Dyer Rep. 23. Pl. 142. ‖ Crok. Rep. pr. 1.

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 Dioceſs, 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. * 8 Rep. 145. † 8 Rep. 135.

By

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 *Inteſtatos*. *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 remembred 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 *Confarreation* 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 *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 Behoof 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

† 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.

no Executors were*. But afterwards by a Statute, in the Reign of *Henry* VIII. the ſaid Adminiſtration was order'd to be granted to the Inteſtate'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 Statute in the 23d Year of King *Charles* II. chap. 10. directing whom 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 Eſtates, as that their Husbands may not have the Adminiſtration of their Perſonal Eſtates*: ſo that the Husband may have the Adminiſtration of the Perſonal Eſtate of the Wife dying Inteſtate by the *Statute-Law*, as well as by the *Civil-Law*.

* 31 E. 3. ch. 11.
† 21 H. 8. chap. 5.
‖ 23 Car. 2. chap. 10.
* 29 Car. 2. chap. 3.

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 Wife exclude and bar the Exchequer from ſuch a Succeſſion ‖: and, moreover, tho' the Lawyer *Azo* has made it a Doubt, whether a Corporation or Body Politick, of which the Husband was a Member in his Life-time, 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 deceas'd had acquired, through the Means and Occaſion of ſuch Corporation or Body Politick. But there is a Law in the *Novels* *, which introduces another Reaſon or Conſideration for the Wife to ſucceed to the 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.

† C. 8. 2. 3.
‖ C. 6. 18. 1.
* Nov. 117. cap. 5.

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 underſtanding of this Matter, I ſhall here Hiſtorically conſider the *Series* 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 Adminiſtrators

† Gal. c. 4. v. 7.

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 Orficianum*, 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. Tit. 2. L. 1. & 5. 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
‖ C. 6. 28. 4. 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. Tit. 45. 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. v. 8. 9. 10. 11. *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. Tit 14. Daughter, the Eſtate ſhall come to the Siſters, or next of Kin *. And the like Law is among the *Saxons* and the *Engliſh*.

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. 1. & 2. 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

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.

* C. 6. 57. 3.

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 Kindred to have the Letters of Adminiſtration committed to him, as one of 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 ||: and this is true as to the Diſtribution of the Eſtate, but not as to granting of Letters of Adminiſtration, according to the Statute. *Smith*'s Caſe.

† Fol. 74 & 75.

|| Mod. Rep. 209.

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 adminiſtred during the Coverture, though it had been granted to the Wife only *. *Brown* verſ. *Wood*.

* Select Caſ. p. 32.

Letters

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 threatned 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.

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 ‖.

† Hob. Rep. p. 250.

‖ Levin. Rep. Part 2. p. 240.

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 †.

* Lib. 5. Fol. 29.

† Dyer's Rep. p. 372.

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-

‖ Coke's 3. Rep. 37.

* Nov. 118. cap. 1. & 2.

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 *Jaſon*, 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.

* C. 6. 56. 2. I. 3. 3. 3.

† Alex. conſ. 150. vol. 2.

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*.

‖ Pag. 908.

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

† Rep. 8. 135.

‖ Levin. Rep. Pt. 1. p. 78.

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

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 †.

† Levin. Rep. p. 158.

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 aggriev'd a Man, is always preſum'd to be willing to aggrieve him* *. 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 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 *. 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.

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

† Coke Rep. 3. fol. 78.

‖ Term. del. ley.

* Coke 5 Rep. fol. 29, 30.

† Coke 3 Inſt. p. 148.

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. *Lovan*'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 *.

‖ Crok. Rep. Pt. 3.

*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-Friezeland*, 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

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* ‖.

By the *Canon-Law*, Admiſſion and Inſtitution unto Eccleſiaſtical Benefices, does not only belong to the Biſhop of the Dioceſs, 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*.

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

* Coke on Lit. fol. 344. a.

† Fol. 38. & Reg. Orig. fol. 33. a.

‖ Dd. in cap. 6. vi. 1. 3.

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

† X. 40. 2 & 4.

‖ X. 3. 8. 1, 2. & 13.

* X. 3. 7. 6.

† 15 H. 7. 8. a.

‖ Dyer. Rep. P. 292.

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

* 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.

of the *Welch* 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 *England*, who does not underſtand the *Engliſh* Tongue, the Biſhop may refuſe to admit him for ſuch Incapacity †: But if he underſtands our Language, though he be an *Alien* born, yet he is not to be refuſed. See Statute the 7*th H.* 4. Chap. 12. and the 14*th H.* 6. Chap. 6. Tho' by the Statute of the 13*th* of *Rich.* 2. and the firſt of *Henry* the 5*th*, 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 the King will preſent a *Frenchman* or *Spaniard*, they ſhall not hold the Benefice within this Realm *. And *Coke* ſays alſo generally, That if an *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.

* Leon. Rep. pt. 1. p. 31.
† Hob. Rep. p. 147.
‖ Rolls Abr. 2. p. 348.
* Godb. Rep.

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 *Croke*'s Reports ‖. But there are other good Cauſes for the Biſhop to deny 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, Drunkenneſs, Simony, Outlawry, Irreligion, and the like: All which the Reader may ſee more at large under the Title of *Deprivation*. As a Clerk preſented may be refuſed Admiſſion, if he has been guilty of Perjury before a lawful Judge in a Court of Judicature *; ſo he may likewiſe be refuſed Admiſſion, if it appears by his own Confeſſion that he is guilty thereof, tho' there be no Conviction of it †. For it is ſaid, that the Ordinary may refuſe a Clerk upon his own Knowledge of an Offence committed by 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 Games, yet the Biſhop may not refuſe him Admiſſion, unleſs he has been guilty of frequent and ſcandalous Acts of Drunkenneſs; 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 15*th* Year of *Charles* the Firſt, this Caſe was denied to be Law after much 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, the *Canon* Law in this Caſe does not obtain in the Church of *England*. *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

‖ Paſch. 26 Eliz. p. 27.
* Paſch. 6 Eliz.
† 15 H. 7. 20.
‖ 7 H. 6.
* 38 E. 3. f. 2.
† Dyer. Rep. 293. b.
‖ 38 E. 3. 2. b.
* Dyer Rep. 154.
† X. 1. 17. 5. & 4.

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

† Noy. Rep. p. 91.

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*.

† Caſes adj. in Parl.

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.

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

† Bern. in c. 20. X. 1. 3.

* D. 1. 17. 6. 1.

Of Adultery, and the ſeveral Puniſhments thereof.

THE *Julian* Law touching Adultery, which was made by *Auguſtus Cæſar* ||, 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

|| D. 48. 5. 1.

* D. 48. 5. 12. & 38.

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 *Coemption*; 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 Thori 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 *Twofold* 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 Thori 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 Thori*. 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
* D. 48. 5. 15. 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
† D. 48. 5. 30. C. 49. 6. & 14. ubi Dd. 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
‖ D. 48. 5. 3. 4. 14. 30. Woman might do it ‖, and all other extraneous Perſons were admitted to do the like; but extraneous Perſons were oblig'd to inſcribe themſelves ac-
* D. 48. 5. 14. 2. cording 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 Di-
† D. 48. 5. 29. 5. vorce, 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
‖ D. 48. 5. 31. 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
* D. 48. 5. 18. acquitted by Colluſion *. All Perſons may be accuſed of Adultery, of
D. 48. 5. 19. what Condition or Dignity ſoever they were †, provided they knew the
† D. 48. 5. 38. 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*.
‖ D. 48. 5. 11. 1. 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
* C. 9. 10. 30. ſacrilegious Perſons *. But *Joh. de Ananias* ſays, That Adultery is only of Eccleſiaſtical Cognizance, when the Proceſs is *ad ſeparationem*
† vi. 2. 2. *Thori* †.

Adultery is very hard and difficult to be prov'd, and ſo likewiſe is Fornication, being both of them Acts of Darkneſs 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 frigid or impotent on ſome Account or other; or even the Woman her ſelf may be *nimis arcta*, ſo that he could not

enter

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 *exactibus 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 Damſel, 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.

‖ 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. Cir. C. 178. n. 14.

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-*

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

bœus affirms, there is no greater Sin or Evil among Men than Adultery. *Sybilla Erythræa*, 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.

* Lib. 8. cap. 5.
† Lib. 10. cap. 34.
‖ Lib. 10. cap. 3.
* Lib. 15.

The Puniſhment of Adultery, according to the *Roman Civil* Law, was ſometimes made by capital Puniſhments, ſometimes by a Thoral 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, was Deportation ‖ or Relegation*. But the *Juſtinian Code* and the *Novels* 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

† D. 24. 2. 8.
‖ D. 48. 18. 5.
* C. 9. 9. 30. 1.
† Lib. 5. cap. 18.

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

‖ 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 *; 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 †: But this Pennance is often bought and redeem'd by Money. For though, 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

* 27 Q. 1. 6.

† 82 Diſt. cap. 5.

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* †.

* 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.

The ſecond Puniſhment of Adultery above-mention'd, is a Thoral 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: And he that marries the Woman thus put away, 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,

‖ C. 2. 3. 29.

* 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* †, *Melanction* ‖, *Ameſius* *, *Ritterhuſius* †, and *Buchanan*, hold the affirmative Side of the Queſtion: and *Luther*, *Woſembeck* ‖, and *Carpzovius* **, three eminent and learned *Germans*, are of the ſame Opinion with *Beza*, and the others juſt now quoted.

† De Divor.
‖ In Mat. ch. 5.
* De Caſ. conſ. lib. 5. cap. 38.
† De Diff. Jur. l. 2. cap. 9.
‖ Parat. D. de Diver. N. 11.
** Praſt. crim. Q. 63. N. 40.

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 Adulterous. 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.

† Sanch. de Matrim. ‖ 32 Q. 1. 4 & 5.
* Nov. 134. cap. 10.
† 32 Q. 1. 1. 48. 5. 29. C. 9. 9. 9.

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, 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 venereal 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 *venereal 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. conſ. 33. N. 16. vol. 2.

‖ Bart. in l. 13. D. 48. 5. 31. 4.

* Roman. conſ. 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 *Abſolutory* 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 Adultereſs 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 Pennance *. 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 *Conteſtes*, 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 prov'd

* Conſ. 6. Lib. 5.
† Conſ. 34. N. 25.
‖ Jacob. de Belv. Prax. Crim. Tit. de Len. N. 45. & 46.
* Dict. Belv. eod. Tit. n. 48.
† C. 9. 9. 34.
† Hipp. Marſ. in l. 5. D. 48. 18.
‖ Decii conſ. D. 77. N. 12. Hipp. conſ. 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 conſ. 11. vol. 1. Crav. conſ. 73. N. 3.
* Abb. in c. 7. X. 2. 21. In cap. 7. X. 2. 23.
† In cap. 7. X. 2. 21.

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.

* C.5.17.8.3

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.

* Seld. in cad. 185.1.37.

† Selden. Jan. 35.

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 Turns, tho' I find no ſtruggling between theſe Courts as long as the Offence was Capital, but only ſince *Commutation* came in Play.

|| Spelm. Gloſs. v. *Lairmite.*

* Spelm. ut ſupra.

Of

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*, a Perſon of the *Long Robe*. For tho' *Proctors* are Aſſiſtants to Cauſes 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 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.

* C. 2. 7. 6. & 14.

† C. 2. 7. 11.

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. 8. 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 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. 57.

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 publickly 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 *Curiis Pedaneis & Inferioribus*, where Cauſes of Weight and

* Lib. 1. Tit. 17. cap. 2.

† 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 Knowlege 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 express 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.

* D. 50. 4. per tot.

† Lib. 1. Tit. 17. c. 1.

* D. 3. 1. 1, 2.

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 †.

‖ D. 3. 1. 1.

* 23 Q. 8. 30.

† D. 3. 1. 1.

* D. 3. 1. 1. 5 & 6.

† D. 50. 13. 1. 12.

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

* D. 3. 1. 1. 4.

† C. 2. 6. 7.

‖ Dd. in l. 150. D. 50. 17.

tion to the Import of the Cauſe; *3dly*, According to the Eſtate and Circumſtances of the Client; and, laſtly, According to the Stile and Practice
†D.50. 13. 1. 10. 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 practiſed 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
*C. 2. 6 6. 2. C. 2. 6. 5. 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 Stipula-
† C. 2. 6. 6. 2. tion, 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 *Eng-*
‖ Weſtm. 1. 3. E. 1. 28. 20. E. 3. ch. 4. 7. R 2. ch. 15. 32. H. 8. 9. *land*, 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 *thus 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
* 57 Diſt. 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
† D. 3. 3. 8. 1. Will to be a *Proctor* to any one †, yet the Judge may oblige every exercent *Advocate* to give his Patronage and Aſſiſtance unto a Litigant in
‖ D. 3. 1. 1. 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
* Dd. in l. 156. D. 50. 17. the Penalty of being depriv'd of his Office by the Judge of the Court *: And

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 expresly 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.

* Mynsinger. cent. 4. obs. 32.

† C. 2. 7. 7.

‖ D. 2. 14. 53.

* C. 2. 7. 6. 1.

† D. 32. 1. 78. 6.

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 Pa'trons, 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.'

‖ 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*.

* D. 34. 1. 6.

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 leaſtblameable †. And, therefore, if the Wife, who did by her Default wilfully leave her Husband, ſhall afterwards on Repentance ſubmit herſelf

† 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. ced. v. *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 exori nocet*, according to *Barboſa*, in his Comment on the *Digeſts*, Tit. *De 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* ‖.

‖ Clarſ. in c. 4. §. 4. 19.

* Ferrer. conſ. 34. N. 1.

† D. 25. 3. 7.

‖ Sanch. Tom. 2. l. 7. Diſp. 9. N. 22.

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 †.

* C. 5. 12. 20.

† Barboſ. in D. Tit. 3. lib. 24. n. 71.

‖ D. 49. 1. 14.

* D. 25. 3. 7.

† Mor. Rep. 874.

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 Alimoniæ*, 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

‖ Rolls Rep. pt. 1. p. 110. Crok. Rep. pt. 3. p. 220.

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 Sævitiam*, 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 vicariâ 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. *Provenius.*

† Crok. Rep. pt. 1st. p. 578.

Now touching this *Altarage*, there is an antient Record in King *Henry* the IIId'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 præsens scriptum inspecturi vel audituri,*

turi, quod cum inter Dominum Edmundum *Dei gratiâ* † Cantuarienſem *Archiepiſcopum totius* Angliæ *Primatem, Magiſtrum* S. de Langeton ex una 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, quòd Archidiaconus quando viſitationis exercet officium in Eccleſiis eorum ſicut in aliis Eccleſiis Dioceſis* Cantuarienſis *recipiat Procurationem conſuetam, exceptis, &c. In capellis verò* de Menſtre, *ſcil. Sanct.* P. & Johannis *& Laurentii præſentabunt domino Archiepiſcopo idoneos Capellanos ad* Altaragia, *ità tamen quod ſingula* Altaragia *valeant decem Marcas, qui hâc portione tantum erunt contenti ſub pœnâ amiſſionis dictæ portionis, ſi coram Judice quocunq; ex certâ plus aliquando petierint, præſertim cum vicarius Matricis Eccleſiæ de* Menſtre, *&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 Chauntry-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 ſtiles 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, Goſſins, 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 Nomo-Lexic.

‖ Vid. Nomo-Lex. ut ſupr. v. *Altaragium*.

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

† Note, *Such was the Pride of Biſhops and Archbiſhops in theſe 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.*

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 meerly 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 & apprimè 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.

† Tit. 4. v. *Proventus.*

‖ Can. 42.

In Cardinal *Otho*'s Days this Revenue of *Altarage* was ſo groſly 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 Simoniacal Extortion, far exceeding the allow'd and accuſtom'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 Simoniacal 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.

* Tit. 4.

* Tit. 7.

† Tit. 7. v. *Eccleſias.*

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,

‖ Hetl. Rep. p. 135.

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-wool to the Vicar *. * Winch. Rep. Brot. 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 *Primitiæ* 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 feminum 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: Si quis dare diſtulerit, eas Epiſcopo undecies præſtato, ac regi Ducenos & viginti ſolidos perſolvito* ‖. 'Tis ſuppos'd, that *Boniface* Archbiſhop of *Canterbury*, in King *Edward* the IIId'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 rep. Ing.

† 26 H. 8. ch. 3.

‖ Vid. Lamb. Leg. Sax.

* 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 Dioceſs 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 there-
†A.D. 1538. of 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 Dioceſs was always one) were appointed to eſtimate their Annual Revenues, that ſo their *Firſt-Fruits* and *Tenths* might be proportion'd accordingly.

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.

Gammarus the *Canoniſt* ‖, in Favour of the Apoſtolick See, aſſerts, That *Annats* were very juſtly required by the Pope *pro conſervando decenni 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 relinquiſh'd his demand, and the *Firſt-Fruits* were for two Years, by that Parliament, given to the King.

Of

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. 1. obs. 79. n. 10.

† Gail. lib. 1. obs. 79. n. 5.

‡ C. 2. 59. 2. 2. Gloss. ibi in v. *existimat.*

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

* D. 11. 1. 11. 7.

† Gail. lib. 1. 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. & 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 †. 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 anſwer 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. 2. 37. Bald. in l. 7. C. 9. 2. n. 15.

‡ vi. 1. 4. 1.

* Bart. in 82. C. 59. 2.

† Specul. de poſ. Sect. 7.

‡ 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 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 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 præſenti* is contracted by ſuch Words as theſe, tho' the Words do import a Habit, and not an Act of the Future Tenſe;

‡ Covar. Reſ. lib. 1. c. 2. n. 5.

* C. 7. 65. 2.

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. Pap. Q. 554. Inst. tit.

† 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 aforegoing 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. 34. 5.

† C. 1. 1. 5.

miſſion, but ſuch an exorbitant Execution thereof ought to be puniſh'd
*Groenew. de Leg. abrog. C. 7. 65. 5. by the Court *, as in *Holland* and other Places.

There was heretofore among the *Romans* a College or Body Politick of thoſe Men commonly called *Executors*, over which there preſided a Dean
‡ C. 3. 2. 1. 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*
† I. 4. 6 24. were anciently in *Latin* term'd *Viatores* †, *Lictores*, *Accenſi*, and alſo
* C. 3. 2. 2. *Stratores*: But in Proceſs of Time they were ſtiled *Executors* * and *Of-*
‡ C. 9. 2. 7. *ficials* ‡; and might be remov'd at the Pleaſure and Diſcretion of the Judge. And having different Titles and Appellations according to the
* C. 3. 2. 3. reſpective Magiſtrate, unto whom they gave Attendance: They were
C. 9. 49. 9. in this manner called *Cæſariani*, *Catholici*, *Præfectiani* *, *Præfectorii*, *Magiſteriani*, *Auguſtani*, *Præſidiales*, *Rationales*, and the like. But in latter Ages they have been in *Latin* term'd *Bajuli*, *Maſſarii*, *Bedelli*
† X. 1. 29. 21. *Biruarii*, *Oſtuarii*, *Nuncii* †, *Servientes*, and the like; their Office being
X. 2. 28. 19. 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 138*th* 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.

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
‡ Lib. 3. Tit. 22. Cap. 3. 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,
* VI. 1. 16. 6. 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
† X. 1. 29. 43. 3. 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 Burthenſome 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 Parties. 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 Dioceſs, and that Archdeacons in their Archdeaconries ſhall not have ſo much as one riding *Apparitor*, but only a Foot-Meſſenger; ſo 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 Juriſdictions than either they or their Predeceſſors had or were accuſtom'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 ſeveral 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. 5. Tit. 22. Ca.

‡ 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 inferr'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 Burthensome 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 Tenths 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 Tenths, is not Peremptory but Traversable; and that the Demand of the Tenths must be made at the Incumbent's House, and the Refusal must be there ‡.

† Mor. Rep. p. 341.

‡ Mor. Rep. p. 1229.

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. 1ſt. p. 95. Cook. 5. Rep. 91.

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, leaſt the Temporal Courts ſhould impeach their Proceedings.

Apparitors are ſo called, *quia faciunt Reos apparere in conſpectu Judicum*: 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. 5. 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.

IN 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 Eviction, 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

† Bart. 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. in c. 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 interposed 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 interposed 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 *.

* D. 49. 1. 2. X. 1. 30. 2.

† Fald. in l. 6. C. 7. 62. n. 8. Abb.

‡ 2 Q. 4. 3. vi. 1. 6. 4.

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

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.

† D. 49. 1. 4. 2.

† 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. Cleflan C. 19. n. 1. 24.

† Abb. in cap. ut fequa. n. 1.

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 *juis 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 †.

* Abb. in c. 6. x. 2. 28. n. 1

† Abb. ut ſup.

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.

* 24 H. 8. c. 12.

† D. 4. 4. 17.

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. in c. 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-Laws*, or within fifteen, according to our *Statute-Laws* ‡, 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.

* C. 2. 7. 31.

‡ C. 7. 62. 6. vel. Simil. † ut supra

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 *Appellate* 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.

* D. 49. 1. 1a.

† 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.

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 tollerated 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*

† D. 49. 1. 21. v. 2. 28. 61.

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
† X. 2. 28. 3. 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
* Gail. lib. 1. obſ. 1. n. 28. in Criminal Cauſes *, by a particular Ordinance, tho' 'tis of *Common*
† C. 7. 62. 29. *Right* †.

Tho' this Clauſe of *Appellatione remotâ* takes away every Appeal which is not expreſly indulg'd: Yet if a Perſon be unjuſtly aggriev'd,
‡ Abb. in cap. 53. x. 2. 28. 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 Querelæ*: But I think the other Explanation and Underſtanding is more agreeable to the Text. Both by the *Civil* and *Canon-Law* this Clauſe of *Appellatione remotâ* may be inferted 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 *Fruſtatory* 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* Sen-
‡ X. 2. 20. 34. x. 2. 24. 19. tence ‡. But 'tis otherwiſe, if it be *ſimply* provided by a Statute, That

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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. 1. 1.

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 expreſly 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*.

† X. 1. 29. 28. Sect. *prater.*

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 commited 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
*C. 7.62.24. 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 gi-
†C. 7. 62.15. ven 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 præſenti* 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 præſenti* 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 præſenti* 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
‡C. 7. 62.24. Neceſſity of Law ‡; and ſometimes out of his own Urbanity †. But it is
†D. 4. 4. 39. 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
*X. 2. 28. not ſo bind up the Judge *a Quo*, but that he may proceed *ad ulteriora* *.
10. 2. 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
†C. 7. 62.21. 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 ac-
‡X. 2. 28.31. cording 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 Sil-
*C. 7. 65. 5. ver, or be render'd infamous *: But by the *Canon-Law* he ſhall be re-
C. 7. 62.19. mitted 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
†X. 2. 28.26. 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,

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. 3.

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 *. 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 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. obs. 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 incurr'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 inter- * Prax. Pap. Tit. 21. Gloss. 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 copulativè 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 præſtando & parendo Juri & Mandatis Curiæ* 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 Interminſion *.

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 *Appellant*

* C. 1. 62. 6. Sect. *ſed hodie.*
† X. 2. 27. 15.
‡ 24 H. 8. c. 12.
* X. 2. 27. 15. C. 7. 62. 6. Sect. *ſed hodie.*
* Gail. lib. 1. obſ. 139. n. 13.

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 præsentandum*‡. 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. 3.

† X. 2. 28. 10.

‡ Lod. 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 *Rem Judicatam* 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 interposing the Appeal, by the Party *Appellate*; because the *Appellant* does from that Time begin to retard and delay the Process. Therefore, upon the Desertion of an Appeal, he ought to be entirely condemn'd in Expences as a contumacious Person, according to an express 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 Intervallo* 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, whenever 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 Sententiæ* 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 Resort 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. * C. 7. 63. 2. ‡ X. 2. 28. 8.

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 versâ* †.

* Joh. And. in c. 1. in 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 *vivâ 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 an unjust Sentence in Point of Law become a just one.

* X. 2. 28. 43.

‡ VI. 2. 12. 5.

* X. 2. 28. 59.

† X. 2. 28. 16.

‖ C. 7. 62. 4.

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

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, Proceſs, Sentences, and the like, ſhall incur a *Præmunire* 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.

* 16 Rich. 2. ch. 5

An excommunicated Perſon (pending the Cognizance of an Appeal) may be abſolv'd from his Excommunication *ad Cautelam:* 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 Pennance, 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.

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

† X. 1. 32. 2 & 5. 2 Q. 7. 25.

‡ X. 5. 9. 1.

Apostates in Point of Faith, are, according to the *Civil-Law*, subject unto all Punishments ordain'd against Hereticks, they lose all Priviledges 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 *Manichæans* †, they were exterminated and driven out of the very Borders of the *Roman* Empire. And herein *Apostates* were

* C. 1. 7. 1.

† C. 1. 5. 4.

dealt with more Severity than Hereticks, becauſe their Crime according to the *Civil-Law* was not pardon'd and aboliſh'd by Pennance *, 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 Pennance 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 *.

* C. 1. 7. 3.

† C. 1. 7. 4.
‡ C. 1. 7. 2.

* C. 1. 7. 5.

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 †.

† Abb. in c. 1. X. 5. 9.

Of Appropriations and Impropriations.

THOSE 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 *Approprier*, 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 expreſly 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 pres'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.

* Othob. Tit. 22.

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

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.

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

†Plowd. ut supra.

‡ Pag. 453. Fitch. N. B. Fol. 35. Cok. 7. Rep.

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

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 *Suſſex*, 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 Amortiſation 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 Dioceſs: 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 aforeſad *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 in

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 *Eadmeon*, 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 expretly provided in the *Canon-Law*, 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 expres'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 passed 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.

* 16 Q. 1. c. 4.

† 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 *Wolphgang. 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 Metropolitical Right is that which accrues unto Archbishops †.

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 Dioceses very necessary and convenient for the Government of the Church: But this Division or Distinction did not always continue; for the Will of Princes

* 80 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.

Princes and the Course of Time have now changed the Form of Provinces *. *Budæus* 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 *Incolæ* were deriv'd and translated to some other Place †: And thus a *Metropolis* or Metropolitical 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 πολις. 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 *Save* 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 *Metropolitical* Cities; which as Mothers do take care of their Children, so do these Cities, or the Bishop 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. antiqu. Imp.

† Rud. 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 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 *Congé 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. 10.

‡ 66 Dist. c. 1.

* Sigism. Lib. Baron. comment. 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 Con-

† X. 1. 6. 38. & 44.

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 †.

‡ Gloss. in c. 4. & 28. x. 1. 6.

* 100 Dist. c. 1. & 6. Gloss. ib.

† 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 Dioceses without the Metropolitan's Privity 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 Diocese 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 Dioceses 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. 30. 1.

X. 2. 26. 16.

* 11 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 Dioceses 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 Metropolitical 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 Dioceſs 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 Dioceſs, 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. 15. Car. B. R. ‡ X. 1. 9. 9. * 191 Diſt. cap. 1.

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

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 Providentia*, whereas other Biſhops only uſe *Divinâ Permiſſione*, for the Kingly Stile of *Dei Gratiâ* is now thro' great Modeſty omitted.

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

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.

† Heylin's Help to Hiſt. v. *Canterbury.*

‡ Cok. Inſt. 4. cap. 74.

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

* A. D. 622.

created the Bishop of St. *Andrews* Archbishop and Metropolitan of all *Scotland* *. The Archbishop of *York* stiles 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.

* Hoylin in Engl. Eccl.

† 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 stiles 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. 1. 23. 7.

† X. 1. 23. 1.

‡ X. 1. 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. in c. 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 Dioceſs, 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 of 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. 1.

† 93 Diſt. c. 24.

‡ 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 himſef, 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 Cenſor 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 Dioceſs. For the Biſhop ought to viſit his Dioceſs 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 (not-

‡ Abb. in c. 7. X. 1. 23.

(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 Scrutinii*, 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. 6

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 enjoin'd, 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* abovementioned, 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
*60 Diſt. c. 3. 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 ano-
† X. 1. 23. 4. ther 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
‡ Inſt. pt. 3d. ch. 71. Cure of Souls ‡: But even ſome of our common Lawyers have put a *Quære* 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 21*ſt* of *H.* 8. *ch.* 13. againſt Pluralities, tho' the *Proviſo* had been omitted: For
* 13 Eliz. c. 12. 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 limitted by the 13*th* 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, accord-
† 7 H. 6. 27. ing to the Senſe of the Common Law: For by a Dignity †, we underſtand that Promotion or Preferment, to which any Juriſdiction is annex'd.
‡ 5 Ed. 3. 9. 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 *:
* Pag. 236. And, therefore, an Archdeaconry is not incompatible with a Benefice having the Cure of Souls. For if any Perſon having a Benefice with
† Dav. Rep. 68. 1. Leon. Rep. p. 316. 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
* 60 Diſt. 1. & 2. 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
‡ 60 Diſt. c. 2. 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
* 14 Car. 2. c. 4. 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

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 an 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 found 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 Deanary 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* induct 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 †.

* Conf. 119. & 206.

† Conf. 126. per tot.

‡ Alex. Conf. 89. lib. 1. n. 6.

* Tusch. Conc. 376.

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.

† Conf. 158. n. 19.

‡ VI. 2. 15. 7.

* C. 3. 39. 4.

† Gail. lib. 1. Obs. 146. n. 3.

‡ VI. 2. 8. 1.

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 *.

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

Of

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.

† 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.

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 *Whitſun-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 *Lyndwood*'s Provincial *, a Perſon contracting Matrimony without Publication of theſe ſolema *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.

* Tit. 14. v. *clandeſtina.*

Of Baptiſm, and the Effects thereof, &c.

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.

† Ch. 3. v. 5.

‖ Ch. 28. v. 19.

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 *extrinſecally* 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.* 1*ſt*, The Intention of the Perſon baptizing, whether ſuch Intention be general or ſpecial only.

2*dly*,

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 Suscription 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 Conciliorum* *. 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.

* Can. 4. Dist. 4. 14.

† Can. 4. Dist. 4. 75.

‖ Can. 3. Dist. 4. 82.

* 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 Clothes, 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.

† Con. 4. 1.

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.

‖ Con. Diſt. cap. 1.
* Con. Diſt. 4. cap. 6.
† Con. Diſt. cap. 4 & 9.
‖ Con. Diſt. 4. cap. 131. & 143.

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.

* Con. Diſt. 4. cap. 19.
† Con. 4. 19.
‖ 93. Diſt. cap. 16.
93. Diſt. c. 18. Dd. in c. 13.
* Pœn. Diſt. 1. cap. 88.
† Dd. in cap. 1. X. 1. 1. 4.

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

‖ Epiſt. 1.
* Calvin. Inſt. ch. 15.

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 *Whitsuntide* 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 *Whitsuntide*, 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 Fœderal 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. 30.

‖ Lib. 3. Tit. 24. c. 1.

* Con. 4. 105.

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 Sickneſs happens, or any other danger of Death, they ought to be baptized without delay.

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

‖ Lindw. ut ſupra.

* Can. Reg. Jac. 79.

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 unmarry'd; 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 unmarry'd; 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*. † 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 *Nothi* ‖; 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.

* D. 1. 5. 23.

† Vid. Hoſt.

‖ Nov. 89. c. 13.

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.

* C. 5. 27. 11.
† C. 5. 27. 11. Nov. 117. cap. 2.
|| Nov. 89. c. 9.
* C. 5. 27. 9.
† 28 H. 8. cap. 7.
1 Mar. 1. Parl. cap. 1.
|| X. 4. 17. 6.
† 20 H. 3.

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 *Incidently*, 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 *incidently* 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 agnoſcere de Baſtardid*, 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.

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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 *.

* Clanv. 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 Contradicter 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 *Incidently*, 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. Inſtit. fol. 33.

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

*9 H. 6. ch. 11.

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 continentiæ 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 *Tryal 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. Intrat. fol. 35.

Of

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

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.

* Dd. in c. 27. X. 1. 3. v. *Beneficium.*

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-Fruct* 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 Eccleſiaſtical Promotions, as to *Deaneries*, *Archdeaconries*, *Prebends*, &c. ||

† Duaren de Ben. lib. 2. cap. 4.

|| Inſt. pt. 3d. cap. 71.

But my Lord *Coke* affirms *, that it appears, in the Books of the Common Law †, That *Deaneries*, *Archdeaconries*, *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-

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

|| Reg. fol. 58.

* 11 H. 4. 60.

† 1 Q. 3. 7.

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. 1.

† Alex. 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. 3. X. 3. 5. 8.

* 21 Dift. c. 1. 3.

† Gloſſ. in c. 2. Clem. 3. 7. 3. Panormitan. ‖ ib. 3. 4. 32.

* In d. cap.

† Extra. 3. 4.

‖ Dd. in c. 4. X. 1. 23.

*X. 3. 7. 4.

†X. 3. 5. 30. ib. 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

‖ ib. 3. 4. 1.

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.

* Rot. deciſ. 32.

† X. 2. 26. 4. X. 2. 12. 3.

‖ vi. 1. 6. 15.

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.

* Gloſs. in c. 6. X. 1. 14.

† Gloſs. ut ſupra.

‖ 60 Diſt. c. 1.

* 14 Car. 2. ch. 4.

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

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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; 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 Aſſecution 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 Patrimonal 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

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* Alb. Conſ. 38.

† X. 3. 5. 28.

‖ X. 3. 7. 1.

* 21 H. 8. ch. 13. Sect. 8, 9, & 10.

† Cloſſ. in c. 2. X. 1. 3.

‖ vi. de Reg. Jur. c. 1.

* Boer deciſ. 202. n. 2.

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
† X. 3.3.3. 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 Reform'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
‖ X. 1.10.3. 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 ensu-
* X. 3.8.2. ing, 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
† X. 3.7.7. 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
‖ X. 3.5.29. 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
* X. 1.6.7. 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 Sollicitation, and the impious Desires of getting other Mens Prefer-
† X. 3.9.2.3. & 13. ments, 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
‖ C. 2.3.30. C.8. 34.4. Succession ‖; so the *Canon* Law excommunicates and depose all such Persons as do procure the Presentation or Collation to Ecclesiastical Benefices during the Life-time of the present Incumbent or Possessor there-
† X. 3.8.1. 2.Q.1.7. of †, 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.

*Dd in c.10. vi. 1. 3. V. *vacabunt.* For according to the *Canonists* *, Benefices are said to become vacant several ways, *viz.* by Death, Resignation, Deprivation, Deposition, Translation,

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*.

† In c. 4. 7. 1. 6. 1. 2. *Calumn.*

* X. 3. 3. 13. *extra* 5. 2.
‡ X. 5. 7. 9. vi. 5. 2. 19.
‖ vi. 5. 4. 18.
* vi. 1. 6. 1.
† X. 5. 31. 4.
‖ vi. 5. 4. 1.
* X. 5. 20. 7.
† vi. 5. 3. 3.

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.

‖ X. 3. 8. 2.
* vi. 3. 19. c. unic.
† vi. c. ut sup.

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 *pariade valere*, to hold the first with the second Benefice; this is not a good Licence, tho' confirm'd according

‖ 25 H. 8. ch. 21.

to the Statute, to take away the Patron's Presentation, tho' his Church
* X. 3. 5. 18. 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
† Vaugh. Rep. pa. 21. 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.

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
‖ Acts. ch. 20. v. 18. watch for their Souls ‖, and in the Behalf of his Flock, to preserve it from
* Dist. 21. c. 1. the Incursions 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 *Eutychean* Heresy; which was condemned by all the Bishops there present at that Council, together
† C. 1. 3. 23. 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
‖ C. 1. 3. 31. & 42. 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
* C. 1. 3. 48. 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
† Nov. 6. c. 1. Nov. 123. c. 1. Nov. 137. c. 2. 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
‖ C. 1. 3. 31. 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 Ho-
* C. 1. 3. 14. nour and Degree, which he had thus shamefully lost *. Besides, that 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 anciently 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 *Covarrucias*, 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. q. 10. n. 3.

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 duly 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 would argue *a Minori ad Majus*, these

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

† X. 1. 6. 7.

‖ X. 1. 14. 15 X. 1. 6. 7.

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 preferr'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.

‖ X. 1. 6. 7.

* Ch. 3. v. 4.

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 *Bertachinus*, 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 *Popish* 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 Infirmity 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 *Popish* 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.

* Pag. 788.

† Pag. 300.

‖ 7 Q. 1. 1.

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

* C. 1. 3. 35.

*C. 1. 3. 43. Nov. 6. l. 3. Nov. 123. 2. 10. Dioceſs on the Summons and Command of their Superior *, unleſs they were retain'd in the Prince's Service beyond the Year; for by the Prince's Command, Biſhops, and other Prelates of the Church, might at the 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- *Seſs. 22. c. 1. de Reform. mand *. By the 11th Canon of the Council of *Sardis*, no Biſhop was to abſent himſelf from his Church without evident Neceſſity above three Weeks: But as this was only a Provincial Synod, it did not extend to the whole Church, but only ſhews the Senſe of thoſe Fathers in reſpect of Epiſcopal 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* relents it †, that he was ordain'd Biſhop 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. c. 12. that both *Valerius* and *Auſtin* were *Titular* Biſhops; and, therefore, one 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. Tract. 1. *ordinario*. And on this Account, that ſubtle Caſuiſt *Ockham* * diſtinguiſhes, 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 Ariſtocratical Form of Government; (which in the primitive State of the Church was the true and original Form thereof:) for the Neceſſity and Advantage of the Church (ſays he) renders thoſe Things lawful, which otherwiſe 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 Dioceſs; 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- † X. 1. 7. 1 & 4. ſation for accepting thereof †, under Pain of being deprived of the Biſhoprick 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-* ‖ Can. 11. vid. Can. Ap. 11. Can. Nic. 15. Can. Ant. 21. *dis* ‖, Tranſlation of Biſhops from one City or Biſhoprick to another was abſolutely forbidden, in order to prevent Avarice and Ambition in Men of that conſpicuous Dignity and Office: For we cannot find any one, that is willing to paſs and be tranſlated from a better to a worſe Biſhoprick in point of Power and Revenues. But you ſee the *Canon* Law makes a cunning Diſtinction here, in order to gratify the Pope's Treaſury, ſaying, That this cannot be done by his own proper Authority, without the 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 Dioceſs, 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 Dioceſs, 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 Dioceſs, 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 converso*. 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 præest*. 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.

* 11 Q. 3. 11.

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.

† 2 Q. 1. 9.

‖ Specul. Tit. de Prob.

* Inn. in c. 36. X. 1. 6.

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 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 Dioceſs, ought to be depos'd; and no Co-adjutor aſſign'd him *; nor ſhall he be reſtor'd again thereunto.

*3 Q. 6. 5 & 6.

† 67 Diſt. c. 2.

*7 Q. 1. 39.

‖ Mat. ch. 19. v. 6.

*15 Q. 6. 3.

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 Dioceſs, 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 invocate 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.

‖ X. 1. 32. 2.

† 6 Q. 1. 9.

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. * 6 Q. 1.

'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 *Oſius* 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 *Oſius*) 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. ‖ 71 Diſt. per totum. † 15 Q. 6. 1. — 3 & 4. ‖ 74 Diſt. c. 1. 2 & 3. * 92 Diſt. c. 4. 5 & 6.

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 Eccleſiæ*, he cannot make a Will, unleſs it be to the Advantage of the Church; which is not Law with us in *England*. † 16 Q. 1. 55. * 7 Q. 1. 17.

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†. ‖ 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 raised, 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 Dependance 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 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 *Crowland*, 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 *Malmsbury*; 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.

* X. 1. 6. 18.

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

Where-

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 Temporalties 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 Temporalties 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 Spiritualties 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 Temporalties 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 Temporalties were reſtor'd.

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

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 *Congé 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 Receipt

* 25 H. 8. c. 20.

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 Pœnam 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 Authoritate mihi commiſſâ Induco & Intronizo Reverendum in Chriſto Patrem Do-*

† §. 6. d. Star.

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 cæteri Barones debent interesse Judiciis curiæ 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 IId'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, not 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.

THO' *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 Clavaſius* *, 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. Leſſ. lib. 2. de Blaſph.

† Lindw. lib. 1. Tit. 5. cap. 1. v. *Blaſphemia.*

‖ In l. 5. c. 10. 11.

* In ſumm. v. *Blaſphemia.* 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 anathamatiz'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 Employment, 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 Ist'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 expresly 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 *.

† 22 Q. 1. 10.

‖ Anten. in c. 1. 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 Papal

† Reb. Prax. Ben.

‖ X. 5. 5. 4.

* Gloss. in Clem. 2. 9. c. unic. v. *Bullæ*.

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 aforesaid) 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*.

† Alex. conf. 215. vol. 2.

*A. D. 1638.

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 *.

* Myns. in 3. 3. J. 2. 1.

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 aforesaid Pope, who forbid the same by a *Decretal*, as already mention'd.

‖ 15 Q. 2. 12.

† X. 5. 29. 13.

‖ 13 Q. 2. 15.

* 13 Q. 2. 20.

† 13 Q. 2. 17.

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 Sepulcralis & Symbolum animæ*, and a *Saxon Soulshot*; which was required to be paid by the Council at *Ænham*, and inforced 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 substracted, 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 Sepulcralis* to be two distinct Things.

‖ Spelm. Con. p. 317.

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

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 IIId, made a Decree, that every one should, according to the Custom of the antient Patriarchs, be bury'd in

‡ X. 3. 28. 1.

‖ 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

* X. 3. 28. 8. 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,

† X. 5. 3. 8. 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-

‖ X. 5. 3. 36. Hoſt. ibi. X. 3. 29. 13. 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,

* X. 3. 29. 13. 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 antiently paid thereunto for every Perſon deceas'd, he ſhall prevail in his

‖ X. 5. 3. 42. 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

† X. 3. 28. 5 & 6. 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

‖ In c. 1. X. 3. 28. *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

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 Ground, 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 deceas'd †: 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. l. 1.

† In c. 25. X. 3. 28.

‖ X. 3. 25. 3.

Her-

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.

* Ch. 7. v. 33.

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 ‖.

‖ C. 3. 44. 14.

† 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.

By a Statute in *Charles* the IId'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

† 30 Car. ch. 3.

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 Assize 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 *Percy* 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-Almoigne* 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. 32. b.

† Lib. 44. Ass. pag. 8.

‖ 44 E. 3. Lib. Assiz.

† Bract. lib. 5. cap. 16.

** 19 H. 6. 2.

‖ 17 E. 3.

Of Calumny, and the Oath thereof.

THO' 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. S. 16. l. 1.

‖ X. 2. 7. 7.

* C. 2. 59. 2. 4.

† In c. 3. X. 2. 7.

‖ Bald. in l. 4. C. 4. 43. 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 *expreſly* 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 §. *Pœna.* 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, † V. 7. & 8. 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 Impe- *C. 2. 59. 2. rial 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. 1

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.

† Ægid. Bellam. Conf. 34. n. 4.

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-

‖ Dd. in c. 11. vi. 1. 5.

* 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 *Beguins* †, commands them to chuse some Monastick Rule or Order of Life.

* X. 3. 5. 25.

† X. 3. 36. 9. Glos. in c. 2. Cl. 1. 9.

‖ X. 1. 6. 47.

* Cl. 3. 10. 2.

† Cl. 3. 11. 1.

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 confer'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.

‖ Fed. de Sen. Conf. 290. n. 5.

* D. Conf. n. 5.

† Fed. de Sen. d. Conf. n. 5.

‖ Conf. 366. lib. 1.

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 IId'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-

* Cl. 1. 6. 2.

† X. 3. 7. 2.

‖ 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 ſtrengthen'd with an Oath by the Apoſtolick See †. † X. 3. 4. 13.

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. Conſ. 232.

* Conſ. 10. n. 58.

† Fed. de Sen. Conſ. 34. par tot.

Of Cancellation, or Cancelling of Deeds.

THO' *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 Inſtrument

‖ In l. 1. D. 28. 4. 3.

* Alex. Conſ. 74. lib. 1.

ſtrument 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.

* Conſ. 305. lib. 4.

† Bald. ut ſupra.

‖ Bald. ut ſup.

*Alex. conſ. 14. n. 17. lib. 6.

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.

† D. 28. 4. 1 & 2. & Dd. ibid.

‖ Gloſs. in l. 1. D. 28. 4.

* Zaz. Conſ. 2. vol. 1. n. 29.

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

‖ Dd. in l. 1. D. 28. 4.

Of Cardinals, their Riſe and Power in the Church.

ABOUT the Year 817, when Pope *Paſcal* the Iſt, 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 IId, 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 begin 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

† Glos. in c. 4. extra. de Cardinal. Bon.

‖ Cap. 2. de Sup.

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

——— *Haud tanto ceſſabit cardine rerum.*

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 *Joh. 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. 5. 33. 23.

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 ‖.

† X. 1. 33. 11.

‖ Pol. Virg. lib. 4.

Of Catechiſm or Catechizing.

Catechiſm is derived from the *Greek* Verb κατηχέω, 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 κατηχεῖν, 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 enjoin'd by the antient Canons of the Church, as may be ſeen in the 11th Canon of the Council of *Cloveſhoe*, 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 Biſhop,

ſhop, and to prevent his being found a Diſturber; it does not preſerve *Jus illæſum* 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 bettter 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 Dioceſs 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 illo. in 3. oppos. de Sepult.

‖ X. 5. 40. 10.

* Text. Glos. & Barr. in l. 13. D. 1. 3.

† 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* * stiles 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 subjecto præter ipsius subjecti 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. Glos. ibi.
* In l. 13. D. 18. 1. & 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 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*.

* C. 3. 1. 3.

† D. 37. 14. c. 2.

‖ C. 3. 1. 13.

* vi. 2. 14. 1.

† C. 3. 1. 2. C. 7. 51. 3.

‖ Conſ. 251.

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. 3*dly*, 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*. 4*thly*, In regard of a

† D. 7. 9. 14. 3.

* C. 4. 20. 9. Abb. in c. 59. 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 mind 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. *supra*. In respect of a *material* Cause, I make this Distinction, viz. There are three Things which arise from the Nature of a *Judicial* Process for the Advantage of the Publick, as the *Præsumption* of *Infamy* 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 *Pending 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 Contracts 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 sought 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 titled 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 *Extrajudicial*, 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 shewing or propounding any Exception on the Part of the Defendant: And 'tis said to be a *Controversy*, whether it happens *de facto* or *de Jure*. 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 above said: But a *Negotium* is said to be such either in or out of Judgment; as in other Terms, it may be either stiled *Judicial* or *Extrajudicial*. Hence a Proctor, *ad Negotia*, may be concerned for his Client both in and out of Judgment: that is to say, he may have the Management of Matters *Judicial* and *Extrajudicial*: But a Proctor, *ad Causas*, cannot have the Management of *Extrajudicial* 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 the Senses, he that renounces the Suit, is deem'd to renounce the *In-*

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 *Ivo* sets limits this receiv'd Opinion in four Respects. *First*, in favour of *Liberation* or a *Discharge*. *2dly*, *Quoad inducendam Litispendentiam*. *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 to be perempted, but that the Time 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 well, That if the Parties should intermit 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 to 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 to 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 tacitly renounce the *summary*, and embrace the *ordinary* way of Proceeding; whether the Parties do expressly consent or agree hereunto or no. So that if any Defect shall arise in *Judicial* Proceedings, which of *common Right* vitiates the Proceedings or Sentence, such Defect shall attend the Proceedings 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 adjudg'd and deem'd to have receded from the *summary* way of Proceeding; and, consequently, the Common Law ought to be observ'd. For, according to

* [illegible]

† [illegible]

‡ [illegible]

§ [illegible]

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 ||.

* Bald. in l. 5. C. 7. 14.

† Gloſs. in l. 22. D. 4. 2.

|| Lanf. in Clem. cap. ſæpe.

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 Satiſdation 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.

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

† D. 5. 1. 35.

|| D. 3. 3. 42. 2.

* H. D. 44. 7. 2.

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. 6. D. l. 14. 2.
† D. l. 3. 6. 3. 19.
‖ D. 41. 2. 3. 7.
* X. 2. 3.
† D. l. 2. 6.

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 ‖.

* Baldus Conſil. 1. 3. 2. 1.
† Baldus Conſil. 400.
‖ Clem. 2. 5. Rom. Conſil. 350. Num.

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

this ought to be underſtood, ſince theſe are of greater Weight and Im-
* D. 48. 19. 10. fin. portance than Civil Cauſes * ; and various Reaſons have been aſſign'd for
†D. 2. 12. 10. this Doubt. For it ſeems to impugn a Law in the *Digeſts* †, which grants Delays and Imparlances 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
‖ In l. 31. D. 12. 2. *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 *Imparlance* 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
* C. 3. 1. 13. 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
† C. 3. 1. 13. *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, Infirmity, 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.

Of

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 *Pœna animæ*, 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.

* Ch. 18. v. 18.

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 threefold; who being ask'd, what was meant by *Eccleſiaſtical Cenſures*, anſwer'd,

† X. 5. 42. 20.

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 ſtiles 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 Dioceſs, and the like.

*X. 1. 40. 10.

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*, *prorsùs*, *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

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 *latæ*, or *ferendæ Sententiæ*, it shall then be judged not to be *latæ*, but *ferendæ Sententiæ*: 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 faciendæ* *.

* 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. *Censuram 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 it self 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 *.

*X. 1. 3. 22.

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 adjug'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.

† 14 H. 6. 21 H. 6.

This Certificate of *Excommunication* by Biſhops, of all others is moſt in Uſe, and would be more ſo (eſpecially on the Statute *de Excommunicato 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 Spiritualties, 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 authoritate 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

|| Nov. Nat. Br. p. 64. f.

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.

* 5 Eliz. cap. 23.

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.

† Reg. in Brev. orig. p. 65. a. 66. a. 69. a.

‖ Ibid. 65. b.

* Ibid. p. 66. b.

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 Eccleſiæ ſeæ læſionem.* 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*.

† Ibid. p. 67. b. & in Brev. Jud. pag. 39. 71. b. & 74. a.

‖ Nov. Nat. Br. p. 64 & 65. f.

* Reg. in. Br. orig. p. 65. a.

† Ibid. p. 65. b.

Of

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 Diocæseos tantum**. But now a *Chancellor* as distinguish'd 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* Jurisdictions 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 expres'd by Word of Mouth, or

‖ C. 1. 3. 33. 2.

* Gloss. in c. 2. Clem. 2.

† vi. 1. 13. 2. Lindw. lib. 2. tit. 4. c. 1.

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 aforesaid 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 express 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 aforemention'd 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 *Yelverton* said, That upon a Conference, he and all the Court were of Opinion, that no Prohibition should be granted in this Case.

* vi. 1. 13. 2.

‖ Lindw. lib. 1. Tit. 10. c. 4. v. *Visitationibus.*

† Litt. Rep. P. 22.

‖ Mod. Rep. Pl. 4.

* Brown. Rep. pt. 2.

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-

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.

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 *.

† Cok. Rep. pt. 12.

‖ 5 & 6 E. 6. ch. 16.

* 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. 8. 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 unmarry'd, 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 *Powel* 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 deputes 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

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 *Provoſt* † 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.

* In c. 54. Q. 16. I.

† In c. 8. Diſt. 23.

‖ Clem. 5. 6. 1.

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 Dioceſs. 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.

* X. 3. 37. 1.

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 Dioceſs 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

† Lindw. lib. 3. Tit. 23. c. 10. v. *Capellis Pavoch.*

‖ Lindw. lib. 3. Tit. 23. c. 5. v. *Capellis.*

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 *, Prescription †, and by Privilege ‖.

* 16 Q. 1. 54.
† X. 2. 26. 12.
‖ X. 3. 30. 31.
* X. 3. 30. 3.
† X. 3. 30. 25.
‖ X. 3. 30. 30.

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 †.

* X. 1. 31. 13.
† 3. 29. 27.
* X. 3. 36. 2.
† Lib. 1. Tit. 6. cap. 2. v. *ad Ecclesiam.*

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 administred 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 a 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

‖ 1 Rep. 44. 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.

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 Gratiâ* 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 miniſtring therein are always obliged to yield Obedience to the Preſident thereof, in thoſe Things that relate to his Office.

* Lib. 1. Tit. 15. cap. un. v. *Capellarum.*

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 adminiſtred 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.

† Lindw. lib. 3. Tit. 23. cap. 10. v. *Capellis Parochialibus.*

Of a Church, and other Matters relating thereunto.

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 *Joh. 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:

* Mat. cap. 21.
† Joh. cap. 2.
† Dd. in c. 1. X. 3. 40.
|| X. 3. 38. 25. X. 3. 50. 9.

Boards: But, according to the Arch-deacon *, a *Tabernacle* is sometimes 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.

* 16 Q. 7.

‖ X. 3. 40. 19.

† 1 Corinth. cap. 1.

‖ Deut. cap. 23. v. 2.

* X. 1. 6. 27.

At first there was only one Church in each Diocess, *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 Diocess; 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

† 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 there- ‖ X. 1. 6. 41. of 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 *X. 2. 28. 48. Seal, and the Uſe thereof*. *2dly*, The Election and Choice of a Prelate X. 3. 39. 30. regularly ſpeaking. *3dly*, The Liberty of treating and debating Matters † X. 2. 19. 5. in common, as in a Chapter or Common-Council †. *4thly*, They ought X. 3. 24. 8. to have a common *Area*, or *Scite* belonging to it. And, *5thly*, They D. 47. 22. 1. ought to have a *Refectorium* and a *Dormitory*, if they be of a Reli- ‖ X. 3. 35. 6. gious Order ‖.

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 * Abb. in c. 3. X. 5. 31. N. 3. 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.

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.

* X. 3. 49. 5.

† X. 3. 49. 6.

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 Ecclesiæ*, in Respect of Cathedral Churches, which are there stiled *Majores Ecclesiæ*, 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 †.

‖ Lind. lib. 1. Tit. 10. cap. 4. v. *Ecclesiam Ecclesiæ.*

* Lindw. lib. 1. Tit. 1. cap. 2. v. *Minoribus Ecclesiis.*

† *Ibid.*

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. 26. 12. 2.

* Can. 1. Dist. 40.

† Con. 1. Dist. 33.

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 aforesaid) 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 administred 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 *public* *, so these are termed *private* † Oratories.

* Con. 1. Dist. 34 & 35.

† Con. 1. Dist. 33.

‖ X. 5. 33. 10.

* vi. 5. 7. 4.

† X. 5. 33. 10.

Of Church-wardens, and their Office.

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, Schismaticks, 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 hindred 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 aforesaid 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.

† Can. Jac. 115.

‖ Vid. Post. Tit. *Repairs.*

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 *ore 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 Quære* 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 *.

† 17 Car. 1. cap. 11. 13 Car. 2. cap. 12.

* Roll. 1. Abr. p. 675. Roll. 2. Rep. 107.

† Bulſtr. Rep. pt. 3d. p. 264.

‖ 8 E. 4. 6. 4 E. 4. 6.

* 26 H. 8. 5. b. 13. Cok. Rep. p. 70.

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 animæ*, &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.

† 8 H. 7. 1.

‖ 37 H. 6. 32.

* Keil. Rep. pt. 2. p. 23.

† Saund. Rep. pt. 1. p. 13. Syd. Rep. pt. 1. p. 302.

Of

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 *Cæmiteria*, and in *Engliſh*, *Dormitories*; the *Latin* Word *Cæmiterium* being deriv'd from the *Greek* Verb Κοιμάω, 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. & 11. 14. & 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 reſorted 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. * 15 C. 6. 1. prin. † 17 Q. 4. 6. ‖ D. 11. S. 3. *Pd. in c. 6. X. 43.

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.

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 Impropriator 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 Impropriator for felling them.

* 1. Roll. Rep. p. 235. 255.

† 35 E. 1.

‖ 1. Roll. Rep. p. 255. Roll. Abr. 311, 337.

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* *.

* 2. Roll. Abr. p. 287.

* 5 & 6 E. 6. cap. 4.

Of a Citation, and the Force thereof.

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 ſafe, 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-

† D. 2. 4. 1.

‖ D. 2. 8. 5. in fin.

* D. 2. 7. 1 & 4.

† Nov. 53.

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 aliend 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*.

* D. 2. 4. 22 & 25.
† D. 2. 4. 4.

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 *vivâ 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.

† Gail. 1. Obſ. 48. N. 1.

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, Infirmity, 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.

* X. 2. 28. 7.

‖ Innoc. in lib. 1. 5. X. 5. 1.

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

* D. 1. 1. h. t.

† Gloſs in D. 1. 1. h. t.

‖ X. 1. 29. 29.

Clerk,

* X. 2. 1. 17. † X. 2. 1. 8. 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 || Dd. in c. 2. Cl. 2. c. 10. 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 * Mynſ. cent. 6. obſ. 6. & cent. 2. obſ. 4. 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 ſucha 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 * Gail. lib. 1. obſ. 58. n. 2. regularly cannot be cited *.

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 remem- † D. 4. 8. 21. 5. bred. 2*dly*, A Citation ought to be made *ad locum honeſtum & tutum* †; † X. 2. 6. 2. 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 || X. 2. 28. † 7. 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, * Gloſs. in c. 4. 33. Q. 2. v. *Locus.* 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 † X. 2. 28. 47. 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 Proc- || X. 1. 38. 10. tor ||.

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 Ci- * Cl. 2. 10. 2. tation, 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*.

4*thly*,

4*thly*, 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. 12. N. 10.
‖ Abb. in c. 4. X. 2. 14. N. 19.
* In cap. 6. X. 2. 14. 4. & in cap. 5. X 1. 29. verb. *venire.*
† D. 2. 12. 1. 1.

5*thly*, 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.

6*thly*, 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 Sickness, or any bodily Infirmity, is a lawful Excuse or Impediment for the Non-Appearance of a Person cited ‖: and such Sickness or Infirmity may be easily proved, either by sending a Physician to prove the same, or else by such Physician's Certificate. When I say Sickness or Infirmity, 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. Tit. 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.

† Abb. in c. 19. X. 1. 6. N. 11.

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 coarcts himſelf to the Extremity of an Act, he muſt blame and impute it to himſelf, that he has thus coarcted 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 †.

* 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.

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.

|| D. 2. 5. 2. X. 1. 9. 5.

* X. 2. 28. 19.

I ſhall lay my *third* and *fourth* Conſideration together; and in diſcourſing of a *Simple* and *Peremptory* Citation, I will endeavour to point out

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 peremptes 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 expreſs 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 contemn 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 ‖:

* 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,

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 *.

* Glos. in lib. 4. cap. 9. 2. Glos. in c. 4. X. 1. 29.

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. 1. X. 2. 12. N. 5.

‖ Gen. cap. 3. v. 9.

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 *.

* Abb. in c. 23. X. 1. 6. N. 17.

† Bald. in lib. 6. c. 7. 52.

‖ Marant. Spec. Tit. 6. de citat.

* Abb. in c. 23. X. 1. 6. N. 8. 16 & 17.

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 †.

† Ant. Capy c Decis. 101.

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 requested 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 *Antonius* 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.

* Abb. in cap. 60. X. 2.

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.

† X. 1. 3. 28.

‖ X. 2. 6. 2.

* Alex. in c. 5. X. 2. 28.

† X. 1. 29. 22.

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 Infirmity 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. 62.

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 grounded on the Statute of

*23. H. 8. cap. 1. *Henry* VIII. * By which Act, no Person shall be cited out of the Diocess or Peculiar Jurisdiction, where he or she dwells: except it be by some Ecclesiastical Judge or other Person within the Diocess or other Jurisdiction, whereunto he is so cited for some Crime or Offence contrary to Right and Dury; 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 Prosecutor. But the Archbishop may cite for *Heresy* in any Dioceſs 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 Dioceſs, 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 *Pendreils*, for suing in the Prerogative Court for a Legacy of ten Pounds, whereas the Parties liv'd in another Dioceſs. 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.

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-

*23 H. 8. chap. 9.

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 Dioceses: 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, *nolente 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. *3aly*, 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.

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 ſtiled Eccleſiaſtical Miniſters ‖: ſo, ſurely, they ought to be Miniſters of the Chriſtian Religion, and of a pure Orthodox Faith. They are in *Latin* call'd *Cleri* or *Clerici* from the *Greek* Word Κλῆρος, 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 ſtiled 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 ſo ſtiled from the very beginning of Chriſtianity itſelf. But ſome think they were ſo called from the ſame *Greek* Word, which ſignifies *Election 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, Biſhops, as well as ſimple and inferior Clerks, may be ſtiled *Clerici*: for in the general Acceptation of the Word, according to the antient *Canon* Law, all Perſons were ſtiled *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 Biſhop; and others therein make nine Orders, by including the *Biſhop* 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) ſtiles *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 ought to be promoted to any of theſe ſeven Orders *per Saltum* *; nor ought

† C. 1. 3. 2.
‖ C. 1. 3. 10, & 27.
* 12 Q. 1. 7.
† 21 Diſt. c. 1.
‖ 21 Diſt. c. 1.
* X. 5. 29. 1.

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.

† Nov. 123. cap. 13.
‖ Nov. 37. cap. 2.
* 28 & 77. Dist.
† Cl. 1. 6. 3.
‖ Seſſ. 23. c. 12.

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 Tonſuræ*. And that Church likewiſe ſtiles 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.

*X. 1. 14. 11.
‖ In Cle. 1. 2. X. 1. 14. 11.
† Conſ. 91.

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 †.

‖ 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 Registring 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 impower'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.

* Nov. 133. cap. 2.
† C. 1. 3. 15.
‖ C. 1. 3. 17, & 18.
* C. 1. 3. 41.
† Nov. 123. cap. 10.
‖ C. 1. 3. 30.

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.

* C. 1. 3. 2. & 6.

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 publickly 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

† X. 2. 2. 12.
‖ C. Th. h. t.
* Nov. 79. c. 1. Nov. 123. c. 8. & 21.
† Prax. Qq. c. 31. N. 5.
‖ C. 1. 3. 33. 1.

that

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 cœnæ* reserv'd to the Pope alone for Absolution, as appears from the Words of that Bull. ‖ X. 5. 39. 49.

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. * Sess. 8. † Sess. 8. ‖ Can. 9. * Can. 9. † Sess. 25. cap. 1.

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 any

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 expreſly 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 †.

|| 1. 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.

Of Collation, and the Diviſion thereof.

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 *ſponte & 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

|| Hoſtienſ. Sect. *Et qualiter.* X. 3. 8.

* X. 3. 8. 14. & 15.

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 Dioceſs, 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.

* X. 3. 8. 15.

† X. 3. 5.

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 †.

‖ Com. Ban.

* Chap. 5.

† Crok. Rep. An. 5. Jacob.

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.

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.

* Cap. 3.

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 removeable 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 Infirmity, 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.

† Lindw. lib. 3. Tit. 23. cap. 2. v. *Annalia.*

‖ Lindw. ut ſup. v. *Anniverſariis.*

Our

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 *Depositt*: For the Word *Commendare* * sometimes imports the same as *deponere*; so that in this Sense a *Commendam* is nothing else but the 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

* D. 16. 3. 24. D. 50. 16. 186.

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.

† Suar. de Relig. Tract. 3. Lib. 4. c. 1. & Dd. omn.

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 Ecclesiastica 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*.

‖ A. D. 451.

* 21 Q. 1. 2.

† 21 Q. 1. 3.

‖ 21 Q. 1. 3.

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,

† X. 1. 6. 54.

*vi. 1. 6. 15.

unto, since the Pope cannot bind himself; and, therefore, says the Glos, 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 ought 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*. 2*dly*, 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. 3*dly*, '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, 4*thly*, '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

* Lindw. Lib. 3. Tit. 5. c. 2. v. *modum illum.*

† Otho. con. Tit. 30. *Commendam.*

‖ Otho. ut supr. v. *Canonici Ecclesiæ.*

* Hob. Rep.

 here

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. 3. 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. * X. 1. 6. 28

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.

† Con. 1. Diſt. 2.

‖ 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.

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. 2*dly*, '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. 3*dly*, Every Biſhop, before Conſecration,

‖ 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
* 23 Dist. 6. to his Metropolitan *: But if a Bishop be consecrated by a Person that has
† 68 Dist. 1. 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 Atten-
‖ 66 Dist. 1. dance ‖.

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. 2*dly*, Examine how many *Species* or Kinds of *Contumacy* there are. And 3*dly*, 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*
* D. 42. 1. 53. Citations, or elseby a *Peremptory* one *: And this is a Matter of *common Right*, as 'tis founded on the common Law. 2*dly*, The Plaintiff on the Return of a *Peremptory* Citation ought to accuse the Contumacy of the
† C. 3. 1. 13. 2. Bart. in l. 8. c. 7. 1. 43. 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* re-
‖ D. 5. 1. 73. 1. quires ‖. 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
* Gail. lib. 1. Obs. 59. N. 1. 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*
† D. 22. 1. 1. 1. Condition †. For tho' a just Cause of Absence excuses a Man from Con-
‖ D. 42. 1. 53. tumacy ‖, yet it does not exempt him from a *Circumduction* of the Term, in such a manner, as the same should remain in suspence. 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

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 Pœnam 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.

‖ Gloſ. 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*, *exiſtent*, and *preſumptive* Contumacy.

* C. 3. 1. 13. D. 5. 1. 73.

† 24. Q. 3. 6. X 2. 6. 52. D. 42. 1. 53. Dd. 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 *Pœna 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 Judicio 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 *Præmunire* inflicted by a Statute of *Richard* the Second †.

* X. 2. 2. 1, 2, 3, &c. Nov. 119 & 123.

† X. 2. 2. 5.

‖ X. 2. 2. 6. & 7.

* 24 H. 8. cap. 12.

† 16 Rich. 2. cap. 5.

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

‖ 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 *Clochier* 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. 30. 1.

† Antiq. Brit. de Priv. Sed. Cant.

‖ 23 H. 8. c. 9.

* Lindw. Prov. lib. 5. Tit. 2. cap. 1. v. *Officialis.*

† 24 H. 8. cap. 12.

‖ Inſt. pt. 4. 23 H. 8. cap. 9.

* 23 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. Conſ. 36. in fin. lib. 4.

† Alex. Conſ. 36. lib. 4. N. 9.

‖ Abb. in c. 51. X. 1. 6.

† X. 5. 20. 6.

* Socin. Conſ. 36. N. 11.

† Anc. Conſ. 55. 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 *Geminius* 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 †.

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-

* X. 2. 20. 26.
† D. 1. 3. 32.
* D. 1. 3. 32. 1.
† D. 8. 4. 13. 1.
‖ Bart. & Jaſ. in l. 3. D. 1. 3.
* X. 1. 4. 11. X. 2. 26. 4.
† Cyn. & Dd. in l. 2. C. 8. 53.
‖ D. 1. 3. 32. 1.

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. 4*thly*, '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* *. 2*dly*, 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 †. 3*dly*, When a Law is written *in neutram Partem*, that is to say, neither permitting nor forbidding a Thing to be done, † D. 1. 3. 37. X. 1. 4. 8. 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 incor- * X. 1. 4. 11. poreal, as the Rights of Jurisdictions, Elections, and the like, which have 1 Dist. 1. 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. 2*dly*, It is *born*, viz. when one or more Persons begin to do those Things, which right Reason advises and persuades to be done. 3*dly*, 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, 4*thly*, '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*. 2*dly*, 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. 3*dly*, 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, 4*thly*, 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. 5*thly*, 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, 6*thly*, 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.

Dd ibi. *D. 1. 3. 34.

|| Guid. Pap. Conſ. 116. 164 & 171.

* In l. 2. C. 8. 53. N. 57.

† Guid. Pap. Conſ. 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

Of Deacons, Sub-deacons, and their Offices.

THO' *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 inferiour 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 *Theodolphius* 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. 8. 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 *Nethanims* * 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-decacon 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 Eſdr. 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.

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 expreſly 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.

‡ 14 Car. 2. chap. 4.

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

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 Δεκὰς, 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 Jure 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.

Capit-

Capitulum or *Chapter*, this Verſe is made uſe of ſumming up the whole, *viz.*

Diſtinguit, Minuit, locat & collectio fertur.

The Chapter conſiſts of Canons or Prebendaries, which are ſome of the chief Men of the Church; and, therefore, are called *Capita Eccleſiæ*; 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 conv'ey'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 Edvardi 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.

* Anderſ. Rep. N. 167.

† X. 5. 7. 9.

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 Diocess, 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. 5.

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 Juiſdiction, 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.

*33 H. 8. c. 27. 21 E. 4. 27. 15 E. 4. 2. 9 H. 6. 32. 14. H. 8. 29.

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

† 11 H. 4.
‡ Lib. 5. Tit. 16. c. 1. Gl. in v. *Decano* and in v. *Decanum & Capitu.*
*Latch. Rep.
† 5 E. 3. 7.
‡ 5 E. 2. F. Brieff. 800.

And

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. & ibi Abb. & 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. ‡ Dav. 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.

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 †.

* 21 E. 4. 26. 27 Aſſ. 23. Dav. Rep. 48.

† Dav. ut ſup.

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 th 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 expreſly 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 *Quære*, and ſee *Regiſt. Original.* 230. But if ſuch Deanery be *meerly* 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, *Quære.*

‡ Fitz. N. B. Tit. *ſine Aſſenſ. Capituli.*

* 17 E. 3. 40. b.

‡ Dean Bar. 2c. 279. 349 Howd. 538.

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 *Vigetius* 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 Juriſdictions, 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. *Davids* 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. 39. 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 Fœdere 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.

'TIS 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 *Exauctoration*; 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.

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 *Exauctoration* 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

‡ X. 5. 34. 15.
* X. 3. 41. 14.
† X. 5. 40. 27.

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 Infirmity) in his own Perſon, he ought to have a Coadjutor aſſign'd him, and ſhall not be depriv'd or depos'd for this*. *Cyril* 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. 15. 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. 5. 6. 4.

* C. 1. 26. 3.

† X. 1. 6. 34. VI. 2. 13. 2. 15 Q. 6. 3.

‡ 50 Diſt. c. 6. & 22.

* 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

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.

* Ridley's View, &c. p. 2. c. 2. Sect. 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*, Illiteracy, 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

† 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.

* 26 H. 8. c. 3.

or within forty Days after, and the Bishop certifying this Default into the Exchequer.

But no one ought to be depriv'd of his Benifice, 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 aforegoing Paragraph.

* X. 2. 1. 1.
† X. 5. 1. 18.
‡ X. 5. 1. 21.
* 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.

A 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 *Cognation* (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 De-

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 Monition 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 Twofold, *viz.* *Special* and *General*. The firſt is that which is made by him, whoſe Intereſt it is to have a good Perſon 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 bonnd 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

Of Diffamation or Defamation, and the Cognizance thereof.

Iffamation, 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 Crime 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 ſhewn.*

By the Preamble alſo of the Statute for Citations †, 'tis plainly inferr'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 Canonicam imponendam agatur, tunc ulterius licitè facere poteritis, quod ad forum Eccleſiæ noveritis 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. *Quocunq; in* Gloſſ.

‡ Circumſp. agat. 13 E. 1.

* Artic. Cler. 9. Edw. 2. cap. 4.

† 23 H. 8. c. 9.

‡ F. 12. H. 7. fol. 22.

* Reg. p. 49. a.

† Reg. p. 51. a.

and the *Acceſſary* 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, par 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. 17.

‡ 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 E. 3. Stat. cap. 11.

‡ P. 18. E. 4. fol. 6.

* Tit. Prohibition.

profecuted 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
† Jones Rep. 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 de-
* Crok. Rep. pt. 3d. famed in her Reputation, whereby ſhe is hindred in her Marriage *, ſhe may either ſue at the Common-Law for Damage †, or in the Spiri-
† Poph. Rep. tual Court for Recantation, provided the Diffamation be of a Spiritual
‡ Crok. Rep pt. 3d. 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*,
* Jones Rep. and the like; or Woman *Queen* *, *Jade*, and the like, thro' the Un-
† Latch. Rep. Winch. Rep. certainty 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 Jade*; becauſe in the Spiritual Court a *Jade* is known and taken for a *Whore*; and that the Common-Law will give Credit unto the Spiritual Court, eſpecially after two
‡ Crok. Rep. pt. 3d. 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 privatum 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 privatum 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 Pub-
† D. 42. 1. 13. lick 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-Laws* therefore stiles 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 Schedulæ præsentibus annexæ, 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.

A *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.

* 34 Dist. 20. & de Consecr.
† 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 ‡ X. 1. 6. 54. 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 * X. 1. 23. the Titles quoted in the Margin *. Yea, tho' Archdeacons should have x. 1. 24. no Jurisdiction according to Custom; yet in respect of the Name, it has the Sound of a Dignity.

† VI. 1. 6. 1.

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 † Bald. Conf. 121. N. 7. 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 ‡ X. 1. 6. 41. the proper Electors unto the next Superiour ‡: But according to the *Lateran* Council, 'tis well enough, if other Benefices and inferiour Dignities be conferr'd within six Months, whether it be by * X. 3. 8. 2. Election or Collation *.

Of

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 enjoin'd to keep their Houſes and Edifices in good and ſufficient Repair *ſub Divini Judicii atteſtatione*, 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. *ſub 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 deceas'd, or his Adminiſtrators: And ſuch Grants made to defraud any Perſons of their juſt

* 20 H. 6. 46. 2.

† 13 Eliz. c. 10.

‡ 13 Eliz. c. 5. Actions are also render'd Void by a later Statute ‡. It is also enacted by a Statute of the 14*th 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. *Fructibus.*

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.

|| Cap. 97. ‡ 29 L. 3. 16. 2 H. 4. fol. 3. 9 E. 4. 4. * A.D. 1547. † 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 Presence 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.

A *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 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 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 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 ‖.

* Goffr. in c. 1. Q. 5. 3.

† Old. Conf. 326 & 327. ‡ Conf. ut sup.

† Old. Conf. 327.

* Old. Conf. 326. Fol. de

Now a Dispensation is a solemn Act, which ought to be [illegible] 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 who acknowleges a Superiour, there ought to be expres'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 expres'd; for it is not enough that it be therein tacitly imply'd and understood. And the Cause therein expres'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 expres'd. Now a just and sufficient Cause for granting a Dispensation ought to be such a one as administers

* [illegible] c. 326 & 327.

† Fid defen. Conf. 205 & 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 expreſly 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 Pennance for Adulteries committed, and other Crimes of an inferiour Nature *.

* X. 2.1.4.2.

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.

† X. 4. 14.6.

‡ X. 3. 5.18.

A

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 *Bartolus* †, 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 *Veſtiaria* or *Victualia*; becauſe they conduce to the Apparel and daily Subſiſtance 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 *Dodrans*, 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.

‡ Dav. de Rit. lib. 2. 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 Stile *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.*

* X. 3. 5. 19.

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.

* 29 Car. 2. c. 3.

† 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 325.

* 22 & 23 Car. 2. c. 10.

† Roll. Abr. 363. Civil. Rep. 7. & 75.

‡ Mar. Rep. p. 6 5 Roll. Rep. p. 114.

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 *.

*Vent. Rep. 2. p. 317.

On the 10*th* of *May*, 1681. *Wiseman*, *Exton*, *Lloyd*, *&c.* all Doctors of the *Civil-Law* certify'd to the Lord Chief Justice *Nevil*, 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. 520.

Of

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 Knowlege of ſuch future Contingencies as have not a determinate Cauſe, but depend on our Will alone; yet they may have a far greater Knowlege of future Things, and other Secrets of Nature than Men have. For *Firſt*, They know our Affections and Inclinations. *Secondly*, They have a Knowlege 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 expreſs 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 Knowlege 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 are

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.

A *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, *Cajus*, 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 reſciding 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'
*X. 4. 19. 5. he himſelf had given her Occaſion of committing Adultery *. For ſhe ought not to behave herſelf in a filthy and diſhoneſt Manner on any
† 32 Q. 5. 3. 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
‡ 32 Q. 4. 8. 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
* Gen ch. 16. 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-
† Gen. ch. 30. Maid †. For before the Law of *Moſes* Adultery was not expreſly 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 acqui-
‡ 32 Q. 4. 3. ring 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 Com-
*X. 4. 19. 4. & 5. penſation 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
† X. 4. 13. 6. 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
‡ 34 Q. 1. 1. & 2. her ſecond Husband, and to return to her firſt ‡, unleſs, after his Re-
*X. 4. 21. 2. turn, ſhe does with his Privity and Conſent remain with the ſecond *; or unleſs another Perſon had carnal Knowlege of her thro' Error and
† 34 Q. 2. 6. Miſtake, ſhe believing him to be her own Husband †. *Fourthly*, If ſhe
‡ 32 Q. 5. 4. 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 know-
* 32 Q. 1. 1. 2 & 3. ingly 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
† 32 Q. 7. 1. & 3. 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
‡ 32 Q. 7. 7. & 10. a ſecond Marriage ‡.
X. 4. 20. 9. 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 indiſſolvable 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 Knowlege 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

† C. 5. 17. 20.

* X. 4. 15. per tot. 33 Q. 1. per tot.

of Perjury; and, upon doing Pennance, be compell'd to return to the
†X. 4. 15. 5. & 7. 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 try'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 En-
‡X. 4. 15. 6. & 7. deavours to know each other ‡.

As to this Matter, there happen'd a very remarkable Caſe in the Reign
*40 & 41 Eliz. 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
† Dyer Rep. 179. 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 *Ca-*
*X. 4. 19. 1. & 2. *noniſts* 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

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 Sævitiam* 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.

* Cro. 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 Cauſâ 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 Menſâ & 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 *Cauſâ Adulterii* is no Bar of Dower; which ſhews that the Marriage is not diſſolv'd ‡.

† Noy. Rep. p. 102.

‡ 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

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.

*Abb. in c. 1. x. 4. 15.

Of Donatives, and the Original thereof.

ECCLESIASTICAL 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 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 Manners, 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.

*Cow. Interp. v. *Donative*.

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

† De Benefic. cap. 11. n. 10.

‡ Guid. Pap. Deciſ. 187.

* Lib. 3. Tit. 2. C. 1. v. *Beneficiati*.

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.*

† 20 E. 3. 9. 21 E. 3. 60.

‡ 6 H. 7. 4. F.N.B. 42.

But tho' Admiſſion, Inſtitution and Induction be not requiſite in the Caſe of a Donative, as aforeſaid; 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 Beneficcs 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 præſentare*, 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*.

* 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 Grosness 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 speakieg 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.

* X. 3. 1. 14.

And here I shall first observe, that all Drinking (*ad Potus æquales*) 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 *Spalato* (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.

† Concil. Angl. Vol. 2. 140. 200.

*A. D. 1102.

‡ X. 3. 1. 14.

* Lib. 3. Tit. 1. C. 1. v. *Vigilanter.*

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. 104.

‡ 44 Dist. 4.

† Can. 78.

‡ Brownl. Rep. p. 37.

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 them 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?

† Lev. ch. 10. v. 9. 10.

Of a Duplex Querela, *and the manner of proceeding therein.*

AS 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. 95.

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 *Jus-Patronatûs* 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 *Jus-Patronatûs*; becauſe the Right of Inſtitution *pro hâc 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* †.

* Moor. Rep. p. 879.

† Roll. Abr. 391. Moor. 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.*

THE 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 Salutary 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 *Aſiaticks*) 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 convened, 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 106*th* 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 prece-"dent 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 Catholicks 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 Arithmetician 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 *Autonomia*, 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 Emperor, 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. 7. ‡ C. 1. 4. 3.

Of Ecclesiastical Crimes in General, and the Distinction thereof.

THE 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 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 Ecclesiastcal 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.

* 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

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 enjoyn'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

‡ Tit. cap. 2. v. 12.

* 5 & 6 E. 6. cap. 4.

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; *Solicitation 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. in c. 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. VI. 3. 2. v. Delictis.

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 pœnæ*†: 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

† Abb. in c. 2. x. 2. 14. n. 15.

of

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.

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.

* X. 5. 1.

Of Eccleſiaſtical Elections, and of the Form and Confirmation thereof.

AMONG 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 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 Religous 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. 17.

† In Sum. X. 1. 6. prin.

‡ In Rub. 5. Gloſſ. in 1. vi. 1. 5.

* 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* Acceptation, when all Things intervene, which not only carry Substantials, but even Matters of Solemnity too along with them †. * X. 1. 6. 42. † 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 ‡ 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 Elections, as well as in other Respects Men ought to be honour'd, regarded 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 respects inferior Clerks, and not Bishops and upwards. ‡ 50 Dist. 12. * X. 1. 6. 47. x. 3. 8. 6. † X. 1. 6. 32.

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 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*. ‡ VI. 1. 6. 39.

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*, The more ancient Way or Form of Election was by the Inspiration of 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 *Matthias* the twelfth Apostle, in the room of *Judas Iscariot* ‡. And this Form of Election seems to be that, wherein all the Electors did * 42 Dist. c. 2. x. 1. 6. 42. † Mat. cap. 10 Luk. cap. 9. ‡ Act. 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
*X. 1. 6. 42. govern'd and directed by the Holy Spirit indeed *. And in this ſame unanimous manner the firſt Chriſtians choſe the ſeven Deacons in the
† Acts cap. 6. Acts cap. 15. Time of the Apoſtles †: And they themſelves choſe *Paul* and *Barnabas*; *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
‡ X. 1. 6. 42. 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
* VI. 1. 6. 21. 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
† X. 2. 43. 13. 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 de-
‡ VI. 1. 6. 23. clare 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 or-
* Abb. in c. 28. x. 1. 6. n. 2. der'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 what-
† X. 1. 6. 29. ever †: Nor can it be ſaid to be made by the Community, if all Perſons belonging to the Chapter do ſeparately and ſingly give their
‡ Abb. in c. 29. x. 1. 6. n. 8. 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. 1. 6. 23.

The Election of Canons may by Cuſtom belong to the Chapter alone without the Biſhop †, as the Caſe of the Chapter of *Volturno* was, which refuſ'd to admit and receive certain Canons, which the Biſhop of that Church had choſen and inſtituted thereinto; 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 *Volturno'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. 1. 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 immedi-

‡ X. 1. 6. 3.

* Abb. in c. 3. x. 1. 6. n. 1.

* 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
Justitiæ* 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
‡ X. 1. 33. 14. Chapter ‡: But 'tis otherwise in the Business of a Collation, or an Elec-
* X. 3. 9. 1. 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. *Actu* †. And 'tis the same Thing in an Election made by a Secular
College or Corporation: For the Election ought, according to Law, to
‡ Gloss. ut supra. 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
* Innoc. in c. 44. x. 1. 6. & D. 1. 14. 3. 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.
‡ X. 1. 34. 14. Because Confirmation is an Act of Episcopal Jurisdiction, which the
‡ VI. 3. 8. 1. 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
* Gloss. & Dd. in C. 3. VI. 8. 1. shall both elect and confirm during the Vacancy of the See *: For in
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 inferior 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. 64 Dist. 8. elect is confirm'd by some Primate, Patriarch, and sometimes by the
* 100 Dist. 1. Pope himself *: But in Places exempt, by the same Law the Pope ought
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. X. 1. 7. 1. ately subject to the Pope †: But 'tis otherwise, if they are only me-
‡ VI. 1. 6. 36. diately subject to him, as Provincials, and the like ‡; who tho' they
are exempt, yet they have a general Superiour of their Order, by whom
they ought to be confirm'd.

In

In granting Confirmation all such Persons ought to be first cited who have oppos'd the Election; and these ought to be cited *Nominatim*, if the Election was made by Part of the Electors: But if the Election was made unanimously and *Concorditer*, then all such Persons ought to be cited in general, who may or will object any Thing against such Election; to appear at a certain Day and Place, when the Confirmation is to be perform'd, in order to shew Cause of their disapproving of the Election, and to impeach the Confirmation thereof *. And thus as an Election gives a Beginning to some Church-Preferments; so does Confirmation add a Perfection thereunto: But 'tis the Entrance on the Office, that gives a Possession thereof †.

* VI. 1. 6. 47.

† Bald. in Rub. C. 1. de Coll. fin.

Of Espousals de futuro, *commonly called Præ-Contracts.*

THO' this Word *Sponsalia*, in *English* called *Espousals*, in the proper Import thereof only signifies a Prospect of future Marriage*; yet 'tis not always confin'd to this Sense alone: For sometimes 'tis extended to denote *Love-Gifts* made by Parties betrothed; as *Jewels*, *Bracelets*, *Chains* †, and namely the *Ring* itself ‡, being often us'd as an assured Pledge of a perfect Promise ||. But sometimes 'tis taken for that *Portion of Goods* which is given for, and in Consideration of the Marriage to be solemnized *; and sometimes for the *Banquet* or *Feast* made at the Celebration of Marriage †. Our Common Lawyers indeed do usually confound these Terms of *Espousals* and *Marriage*, using them promiscuously for each other ‡: But yet they do not confound their Natures with the Names themselves: For till the *Celebration* of Marriage they do not repute the affianced Couple as one Person, nor deem their Issue as lawful; nor does the Man gain any Property in the Woman's Goods, nor she any any Dower in his Lands by Force of a Matrimonial Contract alone, without Solemnization of Marriage *, according to *Perkins*, *Tit. Feoffments*, *fol.* 40. But tho' the *Civilians* seldom use the Word *Espousals* for Matrimony itself †, but rather for a Preamble thereunto ‡; making no less Difference betwixt *Espousals* and *Matrimony* than betwixt the Promise and the Performance of the Act ||: Yet both the *Civilians* and *Canonists* in favourable Cases generally *, in Matters indifferent often, and sometimes in strict and penal Cases †, do liken *Espousals* unto pure and perfect Matrimony. The *Canonists* indeed are somewhat more critical in the observing of Terms; and not only distinguish between *Matrimony* and *Espousals* ‡, but descending further, they distinguish betwixt one kind of Espousals and another, being the first Inventors of the several Names of Espousals *de futuro*, and Espousals *de præsenti* ||: And yet oftentimes they make little or no Difference betwixt the Natures and Effects of these Kinds of Espousals *.

* D. 23. 2. 1. Abb. & Felin. in x. 4. 1.
† C. 5. 8. 1. C. 1. 3. 56.
‡ Constant. Tract. de Sponsal. c. 2. n. 12.
|| Gen. cap. 24. v. 22. cap. 38. v. 18.
* 1 King. cap. 18. v. 25.
† Cic. lib. 4. Epist.
‡ Fitzh. Abr. Tit. *Bastardy* Brook. Tit. Eod.
* Rebuff. in l. 46. D. 50. 16. 1.
† Dd. in L. 1. D. 23. 1.
‡ Sichard. in Rub. C. 5. 1. n. 3.
|| D. 23. 2. 38. Dd. ib.
* Sichard. et sup. n. 1.
† Barr. in L. 4. D. 48. 9.
‡ X. 4. 1. Per tot.
|| X. 4. 31. 1.
* X. 4. 17. 12. Felin. in Rub. x. 4. 1. Gloss. in c. 1.
*Abb. in Rub. x. 4. 1.

The *Latin* Word *Sponſalia* is deriv'd from the Verb *Spondeo*, which
* D.23. 2. 2. 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, rightly and duly made between ſuch Perſons, as may
† D. 23. 2. 1. 30. Q. 5. 3. 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
‡ X. 4. 1. 26 & 31. x. 1. 21. 5. 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
|| Dd. in c. 31. x. 4. 1. Leg; and, conſequently, not of any Force in Law ||. And ſo *vice verſâ*, 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
* Abb. in c. 14. x. 4. 2. 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 Ap-
† Abb. in c. 5. x. 2. 23. probation 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
‡ X. 4. 16. 2. x. 4. 1. 29. 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
|| Alciat. Par. lib. 1. cap. 2. 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
* VI. 4. 2. 1. 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 gi-
† X. 4. 1. 14. ven 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
‡ X. 4. 1. 17. || X. 4. 1. 12. 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
* Bart. in L. 2. D. 5. 2. & Reb. in L. 73 D. 50. 16. to the Formalities of the Act or Contract *; but, in a more ample Signification, it comprehends whatever is included within the Compaſs of
† Luc. de Pen. in L. 10. C. 10. 10. 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
‡ D. 23. 2. 42. *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

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. 1.

† Sichard 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 præſenti*. 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 adjug'd to arrive at Puberty.

* X. 4. 2. 4. D. 23. 1. 14.

† D. 23. 1. 10.

‡ 32. II. 8. 4. 38.

* C. 5. 5. 2.

Eſpouſals are divided into Eſpouſals *de futuro*, of that which is to come; and into Eſpouſals *de præſenti*, 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 præſenti* 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 præſenti*. Hereunto I anſwer, 'Tis true that Eſpouſals *de præſenti* 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

* Weſemb. in Tit. 1. D. 23.

† X. 4. 1. 30, 31.

‡ Weſemb. 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 indiſſolvable 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 præſenti* 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. 1.

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 †.

‡ X. 4. 5. Hoſtien ibi. || Abb. in c. 5. x. 4. 5.

* X. 4. 5. 5.

† Abb. &Dd. inC. 22.x.4.1. * Frig. Tract. de Sponſ. †Frig. ut ſup.

‡Abb. & Dd. in c. 3. x.4.3.

† Hoſt. Sum. x. 4. 5.

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 præſenti* 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.

‡ Hoſt. Sum. x. 4. 1.

* X. 4. 3. 2.

† 30 Q. 5. 1. Gloſſ. in c. 3. x. 4. 3.

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

‡ X. 4. 1. 1. 15 & 31.

|| Maſc. de Prob. Vol. 3.

* C. 5. 1. 3.

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. 5. † Imol. in C. 10. 1. 2. 27. Aretin. Cons. 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 præsenti*, but even they who contract Espousals *de futuro*, are bound to the Performance of the same † : And to this the Parties betrothed are obliged, 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 præsenti*, 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 Quære.* 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 ‡. * Lind. lib. 3. Tit. 13. cap. 4. v. *Sanctarum*. † X. 4. 2. 7. Abb ibi. n. 4. 1. 7. Dd. ibi. ‡ X. 4. 2. 7. ‖ Abb. in c. 22. x. 4. 1. * D. 30. 1. 49. 8. † X. 4. 1. 31. ‡ X. 4. 2. 7. ‖ X. 4. 5. 3. * X. 4. 1. 24 & 31. † Dd. in c. 30. 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.*

Of

* 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 Conſuetudinem.*

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.

‖ D. [illegible]

‖ X. 2. 25. 1.

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 Juriſ-
*Cle. 2. 2. diction *: 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, be-
†Dd. in l. 19. C. 2. 13. cauſe 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 Knowlege 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
*X. 2. 25. 4. muſt make Oath *, as aforeſaid; or elſe prove that he had, before Suit
†X. 2. 25. 4. 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
‡X. 2. 25. 12. 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*;

suits; of which Kind we reckon an Exception *Rei Judicatæ*, *Juris-jurandi*, *&c.* for that, besides the principal Matter, they respect the *Substance* 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 *Consent* 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 ipsam negotiam 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' passed 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.

* *ff.* 3. 30. 1. &c.

† VI. 2. 3. 1.

‡ D. 14. 6. 11.

§ C. 2. 18. 1.

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 *Dowellus* 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 *consistent* Pleas of Judicature: For such an Exception may be proved after Contestation of Suit, as the Defendant does not thereby seem to prejudice himself.

* C. 3. 36. 13.

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.

A *Procuratorial* Exception is Twofold, *viz.* *Firſt*, That A. is not a
* D. 17. 1. 29. 4. lawful Proctor *: And, *Secondly*, That he cannot be a Proctor†. And if
† D. 22. 3. 19. 2. 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 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 adminiſtred 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 expreſly pronounces thereon; and, therefore, an Appeal lies from hence *: But two contrary Exceptions cannot be alledg'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 and Means of any Replication whatever: And ſuch an Exception breaks the Force of an Action, if it cannot be repelled by a *legal* Replication †. But Exceptions which do require a deeper Search and Inquiry, are not admitted in ſummary Cauſes, tho' they are reſerv'd in principal Cauſes ‖: And an Exception is ſaid to require ſuch Search and Inquiry, when it is involv'd with ſome Subtlety of Law. An Exception is more eaſily prepar'd and given to any one than an Action; but 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.

* Abb. in c. 2. n. 2. 3. n. 4.

‡ D. 5. 3. 47.

† D. 16. 3. 13.

‡ Abb. in c. 3. n. 1. 9. n. 13.

‖ D. 10. 4. 3. 13.

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 ſeparted 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-communion* ‡; 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 τίθημι 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 Eccleſiaſtica 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.*

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The *greater* is that which is called an *Anathema* (as aforesaid) excluding a Man *ab ingressu Ecclesiæ*, 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 Conscientiæ*, 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. 1 & 8.

‡ X. 5. 39. 46.

|| X. 2. 25. 2. X. 5. 27. 10.

** X. 1. 31. 14. X. 5. 38. 12. Sect. fin.

†† In c. 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 and void *ipso Jure*; and so is every Act done by a Judge after an *Extra-Judicial* Appeal, as al-

‡‡ X. 2. 28. 53.

|||| X. 2. 1. 7.

* X. 5. 39. 46.

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 Advantage from his own Malice and Iniquity *: And thus a Debt may lawfully be demanded and ſued for from all excommunicated Perſons †; for they may be conven'd and impleaded in Judgment, tho' they ought not rightly to anſwer by themſelves ‡. If a Defendant 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 abſolve 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 Excommunicator; and if he will not abſolve him, in *Popiſh* 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, together with the Oath of the Party objecting the ſame ‖; tho' *Speculator*, *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.

The Church, according to the *Canon-Law* †, derives this Cenſure of Excommunication from St. *Paul* the Apoſtle in his firſt Epiſtle to the *Corinthians*, 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 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 Chriſtians ought not to be excommunicated for light and trifling Matters, but

* X. 2. 1. 7.

† X. 5.39.31.

‡ X. 2. 1. 7.

‖ 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*.

* 11 Q. 3. 47.

† 24 Q. 3. 9.

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 Dependance that Abbots and Priors have on the Holy See: Of which hereafter under the Title of *Monaſteries*.

‡ X. 1. 33. 10.

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 Excels 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 Eccleſiæ*; 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 Eccleſiæ* 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.

* Mat. c. 18. v. 17.

† X. 5. 39. 45.

‡ 24 Q. 3. 17.

§ Lib. 5. Tit. 17. cap. 2.

‖ X. 5. 39. 48.

† 2 Q. 19. 4.

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 Facto* inflicted on the Tranſgreſſors thereof

‖ 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
† X. 5.39.29. 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
‖ Joh. c. 14. v. 27. 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.

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
* X. 1. 31. 3. the Biſhop ought to execute their Sentences *; and if he ſhall refuſe to
† X. 3. 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 Dioceſs *in remotis agend, &c.* And tho' the Biſhop be in his Dioceſs; 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. * 29 H. 6. 2.

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

† F. N. B. 62. 41.

‡ X. 5. 40. 25.

|| 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 25*th* 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 indè duxerimus ordinand'*, or *uſq; talem diem*; or thus, if he has arreſted him upon that Account, *tunc ipſum a priſonâ prædict' quâ*, &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

A Sentence of Excommunication is contemn'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 Knowlege 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 invocating 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*.

* VI. 5. 11. 6.
† 1 Q. 1. 67.
‡ X. 5. 39. 43.
‖ X. 5. 33. 25.
* X. 5. 39. 42.
† X. 5. 27. 5.
‖ 11 Q. 3. 56.
* VI. 5. 2. 7.

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 Legates, 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-

† VI. 5. 11. 1.
‡ X. 2. 28. 53.
‖ X. 5. 27. 2 & 7.
* X. 2. 28. 26.
† X. 5. 39. 52.
‡ X. 1. 4. 8.
‖ X. 1. 6. 16.
* X. 1. 31. 3.
† VI. 1. 5. 3. 11.
‡ VI. 5. 12. 1.
‖ D. 48. 19. 9. D. 18. 7. 5.
* X. 1. 40. 5.
† Dd. in c. 12 X. 5. 39.
‡ VI. 5. 11. 10.
‖ VI. 5. 11. 4.
* VI. 5. 11. 5.

admitted to Pennance, unleſs it be *in articulo mortis*; but 'tis otherwiſe
*VI. 5. 11. 24. of Perſons ſuſpended or interdicted *. *Eigthly*, On certain Feſtivals Perſons interdicted are admitted into Churches; but Perſons excommu-
† VI. 5. 11. 24. 3. nicated are not †. And, *Laſtly*, Becauſe Excommunication is never pro-
‡24 Q. 3. 1. nounc'd *pro Culpâ alienâ*; tho' an Interdict and Suſpenſion may ‡.

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 *Imperial* 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
*C. 1. 3. 28. 1. & 2. 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.

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 Threefold 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
* X. 3. 26. 17. execute Sentences and other Acts of Judicature *.

Among theſe Executors of laſt Wills and Teſtaments there are three
† Speculde Inſtrum. edend. Sorts of Executors †: Some of which are properly ſtiled *Teſtamentary*, others are called *Legal* Executors; and a third Sort are term'd *Datice* Executors. Thoſe are properly *Teſtamentary* Executors, whom the Te-
‡X. 3. 26. 17. ſtator appoints to this End and Purpoſe, as we daily ſee practis'd ‡.

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. 43
x. 3. 26 17.
* D. 34. 1. 3. ver. 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* Caſes 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.

* 1 Inst. 134.

† 3 Lev. 208.

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 assimulating 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.

* 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. 2. 3. D.14.1.2.

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,

* C. 6.42.32.

Oath, or Surety for the due Execution thereof; and for rendring 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 Claufe ‖. And if a Religious was made an Executor, his Superior gave 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 *. 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 †. 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*.

‖ C. 5. 37. 13. 14 &c.

* VI. 3. 9. 1.

† D. 26. 2. 3.

‡ D. 50. 17. 116. & 44.

§ D. 34. 3. 9.

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 hæreditatis*, 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 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 convened 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 Teſtators's Eſtate lies; ſince Men are not drawn away from their Eſtates and proper Employments without ſome great Diſadvantage.

‖ Ordinal. Tit. 14.

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 Diocefs to take Care and ſee that the laſt Wills and Teſtaments of Perſons deceas'd be demanded to Execution ‖, but even to the Diocefan whoever he be, that is to ſay,

† X. 3. 26. 19.

‖ X. 3. 26. 17.

ſay, to him who has Epiſcopal Juriſdiction exclûſive 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 Apellation 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.

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.

† I. 1. 26. 5. v.

‡ Gloſſ. in L. 6. I. 1. 26.

‖ C. 1. 3. 28. & 49.

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 Eccleſiæ*, 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. 19. 9.

† de Pia. 31. pia Cauſ.

Of the Execution of a Judicial Sentence.

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 deferr'd 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 obtain'd by the Sentence, in caſe the former Sentence happens to be revers'd. 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. 42. C. 1. 19. 5.

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 *Vivius* 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;

‡ 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.

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. whose Office it is effectually to execute the Force of the Judgment, after 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 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,

† D. 42. 1. 4. 6. D. 42. 1. 58.

† C. 8. 35. 8.

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 merum Imperium* incident thereunto: For to 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 delegated 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 *Merum 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 *A. Gellius*, a Month or thirty Days was indulg'd. But afterwards this Term was enlarg'd unto two Months: And at length *Julianus* 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. 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 ‖. 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. 42. 1. 5. C. 7. 15. D. 42. 1. 15. D. ibi. C. 7. 1. 17. 3. 7. 2. 2. 4.

|| C. 7. 1. 29. 16. & 28.

* D. 1. 21. 3. † In L. 15. D. 42. 1.

* C. 7. 54. 1.

‖ I. 4. 17.

* D. 42. 3. 6. D. 12. 2. 30.

For

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.

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 excuſs'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 †.

† D. 42. 1. 6. 3. Dd. ib.

‡ Alex. Conſ. 50. Vol. 2.

‖ D. 42. 1. 15. 2

* 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.

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 Houſhold 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

‡ D. 48. 20. 6.

‖ Bald. in L. 5 C. 7. 53.

of a Monk, unless the Monastery acquir'd such Goods by the Means of the Monk: Not 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 *Felon* †.

* Can. & Dd. in L. 25. D. 42. 1. † in L. 25. 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.

‡ 2. 41. 4. 8

C. 2. 4. 10.

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 advisable in Practice to sue for them by imploring and making Use of the Judge's Office.

* C. 3. 1. 13. 11. [illegible] 24. 1. [illegible] C. 3. 1. 15. [illegible] 2. 4. 6. [illegible] 3. 50. 4. [illegible] 5. 4. 5. D. 5. 1. 79. [illegible] 3. 1. ¶ Clar. in [illegible] 5. 2. 1. 4.

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. 2. 1. 15. Nov. 53.

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.

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.

† Dd. in L. 25. D. 21. 1. 8. & in L. 29. h. t.

‡ C. 3. 1. 13. Gloſſ. & Dd.

|| D. 16. 2. 7. 1

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 expreſly 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 ||.

* C. 3. 1. 13. 2.

† Nov. 82. 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

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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 Result*, as they call it †: And for *lesser Recesses* the fourth part of a Floria 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 Termini*, 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.

* D. 50. 13. 1. 10.

Secondly, Those *Judicial* Expences are said to be necessary, which are made for the Examination of Witnesses: And under these *Præmiatæ* 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*.

† Gail. lib. 1. obs. 131. num. 9.

‡ Carpz. p. 2. 19. 11.

§ Carpz. loc. sup. cit.

† Gail. lib. 2. obs. 14. num. 15.

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

* Carpz. p. 3. 19. 14.

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 illæsæ Dignitatis vitâ & 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.

* Bart. in L. 10. D. 48. 18. n. 7.

*Bart. ut sup. n. 15.

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 *suspicor*, 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

† X. 3. 2. 8.

‡ X. 5. 34. 2 & ||

|| 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. 2.

† 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. 5. 1. 17.

|| X. 5. 1. 17. ibi. Inn.

* Sacin. reg. 144.

§ X. 3. 2. 8.

‡ X. 5. 34. 8.

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 administred 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 Quære 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

X. 5. 1. 15

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.

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 Knowlege, 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.

† Gloſſ. in l. 3. D. 22. 5. 2.

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 *.

‡ In l. 10. D. 48. 18. n. 24.

‖ Bart. ut ſup. n. 25.

* Bart. ut ſup. n. 26.

Of Faſting, the ſeveral Kinds and Effects thereof.

THO' 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

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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 enjoin'd 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 Repentence 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. 3.

* 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 according to the preſcrib'd Order of the Church, or the receiv'd Cuſtom thereof in every Country. And hence it follows, that he who dines at
‡Con. 1. Diſt. 50. Noon ‡, and ſups in the Evening, (as the *Papiſts* do very plentifully
‖ 4 Diſt. 6. 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 refraining 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 enjoin'd 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 appears 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 Year, 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 *December*. 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 limitted, 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 *Vigilia*, 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. *Laurence*, 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.

* Dist. 3. 4. 5. † 3 Dist. 6. Con. 1. Dist.

‡ D. 8.

* Ch. 8. v. 19.

§ 76. dist. c. 9.

* c. 5. tit. 21. p.

* Ibid.

† C. 3. Ibid. 13.

Of Fees belonging to Eccleſiaſtical Courts, &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 Ἀλλάριον becauſe they, who receive Salaries, *indè ſe alunt*, do live and maintain themſelves from thence. A *Salary*, was a Sum of Money covenanted, and agreed on betwe[illegible] 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.

* Can. 185, 186. &c.

‡ Vide Append.

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 *Mepham*, Arch-Biſhop of *Canturbury*, forbidding any Demand to be made for the Probat 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 regiſtring 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 expreſly prohibited the receiving what was offer'd them by way of Gratuity, they had ſeveral Artifices to excuſs 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* Law. ‡

† Linw. lib. 3. Tit. 13. cap. 1.

‖ C. 12. 42. 1. ‡ 10. Q. 3. 1. & 7. in fin. Arch in c 9. vi. 1. 3. v. exigat.

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 Probat, or pronouncing of their Decree, touching the Validity of any Wills whatſoever, or for publiſhing, and engroſing 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

* Lindw. lib. 3. Tit. 13. cap. 7.

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 Two fold of what he had taken beyond such Sum towards the Fabrick of the Cathedral Church of that Diocess within a Months time, under Pain of being suspended, *ab Ingressu Ecclesiæ*: 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 Inducers 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 Ecclesiæ*, *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.

* Lib. 3. Tit. 6. sup. 1.

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, Archdeacon, 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

† Vid. Append.

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 18*th* of King *James*'s Canons, *versus finem*, touching any Question that might arise about the Certainty of these Fees.

* A. D. 1597.

† Vide Append. postea.

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 suâ*; 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 Ratâ 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.

† C. 2. 7. 17

‡ Bart. in l. 1 d. 50. 13. 13. N. 6.

Of

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-Almoign*.

* X. 3. 39. 1. X. 3. 30. 2.

† X. 3. 39. 1.

‡ Othob. Tit. 17. v. *ad hæc 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 Improprietor, 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 Impropriator, 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 Impropriator, are not payable of *Common-Right* to the Vicar, becauſe *Eccleſia non ſolvit Decimas Eccleſiæ*. 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. 1602.

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, † Sect. 643. 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, ‡ 1 Inst. 341. a. 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 † F. N. B. 49. b. Church was full †.

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 ‡ 1 Rolls Abr. 655. 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 || Bulstr. Rep. 184. 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 * Can. 87. Registry *.

Of the Habit or Apparel of the Clergy.

* Can. 74. 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 † 21 Q. 4. 5. 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 ad‡ Dd. in c. 2. x. 3. 1. minister Occasion of Scandal unto the People ‡. For tho' the Use of Cloaths or Meats is very far from being culpable in itself; yea, they || 21 Q. 4. 1. & 5. 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 publickly 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 Eccleſiæ*. 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.
‖ Luke 7. 25.
‡ 21 Q. 4. & 41 Diſt. 1. Sect. fin.
* Lindw. lib. 3. Tit. 1. c. 3.
‡ Lindw. ut ſup. & 2.
‖ Tit. 5.
* 21 Q. 4. 3.

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 expresly 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 Ὁράω, 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 Punishment †.

* Lindw. ut sup. cap. 3. v. *expressatis.*

† 21 Q. 4. 4.

Of Heresy, and the Punishment thereof.

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 αἱρέω, 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 Ἑτεροδιδασκαλία; 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

* 24 Q. 3. 27.

† Cap. 6. v. 2 & 3.

‡ 2 Epist. cap. 2. v. 1.

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 *Hercíſcor*, ſignifying the ſame as *Dívido*: 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*, deſining 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' ſhe 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. C. I. v. 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 enjoin'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. 25. 14. X. 5. 34. 10.

|| X. 5. 7. 13. 6.

* Lind. lib. 5. Tit. 5. c. 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 †.

* X. 5.40.26.
† 24 Q. 3. 32.
‡ X. 5.40.26.
|| Arch. in c. 2. vi. 5. 2. v. *defenſor.*
* D. 47.16.2.
† D. 26.10.9.

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.

* X 5. 7. 9.
† 24 Q. 3. 9. & 13.
‡ X. 5. 7. 10.
|| X. 5. 7. 13. 6.
* C. 1. 5. 9.

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

† C. 1. 5. 3. 1. L. 5 & 6. h. t.
‡ C. 1. 5. 2. in prin. L. 14 h. t.

not

not be admitted to the Sacraments or any Dignities in the Church *; 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, Shops, Ware-Houses, &c. within Church-Yards, or the Bounds of the Church, to trade in; this being only granted to the Orthodox ‡. Besides, 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 ||. Nor is the Evidence and Testimony of a Heretick admitted against an Orthodox Person, tho' he may give Evidence in Favour of him *. 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 proscrib'd Persons on a Suspicion of Heresy alone, unless they purge themselves from such Suspicion. But such as endeavour'd either publickly 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.

* C. 1. 5. 1 &c.
† C. 1. 5. 14.
‡ C. 1. 5. 22.
|| C. 1. 5. 4. 18 & 22.
* C. 1. 5. 21. Nov. 45.

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 exauctorating 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, 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 ‡, 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, 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-

† C. 1. 5. 6.
‡ C. 1. 5. 12.
|| C. 1. 5. 5.

committed to him. Indeeed 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. 6. 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 enjoin'd 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

‖ 2 H. 4. cap. 15.

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 Hæretico 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.

And

And this was *William Sautree*'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 Paliament †, 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 to be certify'd into *Chancery*; whereupon a Writ was issued out to burn him. But afterwards this Writ *de Hæretico 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

* An. 2. H. 4.

† 2 Roll. Abr. 220.

‡ F. N. B. 269.

* A. D. 1198.

* An. 5. Ric. 2.

† An. 6. R. 2.

‡ 2 Hen. 4. cap. 15.

‖ 29 Car. 2. cap. 9.

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.

|| VI. 5. 2. 16.

* Cap. 18. v. 15. &c.

† Cap. 15. v. 6.

‡ Joh. cap. 15. v. 6.

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.

* Rom. c. 14. v. 22.

Of

Of Hospitals, and the Care of them, &c.

AS 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 Infirmity, 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 ¶; lest 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 Divin Service. 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 collated to on the Presentation of a Layman.

* C. 1. 3. 15. C. 1. 2. 19.

† C. 1. 2. 19.

‖ C. 1. 2. 19.

¶ Mat. c. 19.

* 5 Q. 5. 2. Gl. ll. Can. 1. 2. 82 D.

† Ib. 2. 16. 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. in c. 4. x. 3. 26.

† Abb. in c. 10. x. 5. 33.

‡ Felin. in c. 4. x. 3. 26.

|| Gloſſ. in c. 2. Cl. 2. 1. 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 Pri ſt 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 *: 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 verify'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 Competentiæ*, 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

* VI. 1. 15. 1.

† Alex. Cons. 91. Vol. 2.

* Gail. lib. 1. Obs. 140. n. 1. n. 2. 3. 5. 2 & 3.

‡ C. 2. 13. 13. Part. de Zald. ibid.

‖ X. 2. 28. 5.

* Gail. ut supr. 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.

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* † In c. 13. x. 1. 33. 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.

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 expreſly 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 ‡ Gail. lib. 1. Obſ. 127. n. 10 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 || Mynſ. cent. 4. Obſ. 64. 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

Cauſes 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 Dioceſs 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 Diſpoſal 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 *plenam Jus* in the Living, as not having a Spiritual Right therein: And it may be deſin'd to be an *incelantary* 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 Diocefan, 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 Pope *Gregory*'s Decretals ‖.

* Cap. 6. pt. 3. fol. 80. cap. 9. pt. 2. fol. 253.

† X. 8. 7. 3.

‡ X. 3. 7. 6.

‖ X. 3. 7. 6.

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

* 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 †.

* Lind. in lib. 3. Tit. 2. cap. 1. v. *Regi-alem.*

† 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 *Jus ad Rem* *, and not *Jus 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. 59.

* 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 Plenary 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. 349. 294. 312. 1. Roll. Rep. 191. 227. 4. Rep. 72.

* 2 Inſt. 362. 9 Rep. 134.

And, therefore, if his Prefentee 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.

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.

‡ X. 1. 23. 7. & 9.

|| X. 1. 23. 4. & 7.

* VI. 1. 8. 1.

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;

* Lindw. lib. 3. Tit. 6. cap. 4. v. *Certificatorias Literas.*

† Dyn. de Reg. Jur. vi. 5. 1. Arch. in c. 18. vi. 3. 4.

‡ Arch. in c. 5. vi. 1. 6. v. *Confirmetur.*

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 Temporalties, 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 be a Bishop, he shall be suspended *ab Ingressu Ecclesiæ*, 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*.

* Innt. & Elem. lib. 1. c. 1. 4.

† In c. 2. Cl. 1. de V. Sig.

‡ VI. de R. J. Jur. 5. 1.

|| C. 2. 3. 20. I. 2. 1. 4.

* In c. 1. 16. Q. 2.

† In c. 5. Dist. 92.

‡ X. 5. 32. 19. in fin. 16. Q. 5. 1.

|| Pet. de Anch. in c. 4. X. 3. 8.

* X. 3. 38. 19.

† 4 Rep. 79. a.

‡ 2 Plow. 529. 530.

|| Lib. 3. Tit. 6. cap. 1.

* Lib. 3. Tit. 6. cap. 4.

Of

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 Houſhold 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 Knowlege 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.

‡ D. 33. 7. 12. 15.
‖ & 6.
* D. 22. 4. 1.

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.

† D. 22. 4. 2.
‡ Nov. 44. cap. 2.
‖ C. 4. 16. 23. 2. Dd. ibi. x. 2. 22. 12.
* Cok. 5. Rep. fol. 52.

Inſtru-

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 acknowledg'd 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 *Notorial* 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 ‡.

† Auth. Hoc.

‡ 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 *Romen* 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 Customs 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 Years or more, may invocate the Name of *Christ*, if he pleases *; because

* Gloss. in l. 6. D. 2. 13.

‡ Abb. in c. 2. X. 3. 45.

[F fff]

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 Dioceſs 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.

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

* Bart. in l. 6. D. 2. 13. 6. n. 7.

† Bart. in l. 31. D. 12. 2.

‡ Bart. in Nov. 47. cap. 1.

* Menoch. lib. Q. 99. n. 14.

† Dec. Conſ. 36. n. 6.

‡ Bald & Dd. in l. 1. D. 1. 39. n. 10.

‖ Bald. in l. 18. D. 1. 5.

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. de 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 construd 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 *.

‡ Fald. in l. 8. C. 6. 35.

‖ Dd. in c. 6. X. 2. 25.

* Cravet. Cons. 275. n. 2. & 3.

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

* Jas. in l. 8. D. 39. 1. 6. n. 47.

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 Curiæ*, 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.

*Bart. in l. 27. D. 35. 1. n. 1.

There are three Things which render a Writing or Inſtrument ſuſpected, *viz. Firſt*, The Perſon producing the ſame, as having been accuſtom'd 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

* Menoch. ut ſup. n. 18.
† Gloſſin. 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 *Praterperfecti* 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 Defeazance 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.

* Part. in cap. 1. Num. 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 *Separatum ſeparati facit 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. 5. D. 34. 9. 2. 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 l. 1. Num. 15. 2. 5.

* Part. in c. 8. Num. 20. 2. 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 Heir-"ſhip 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 Eſtates†. *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

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 reſpect

* 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.

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*.

* Conſtit. Tit. 14.

† Lind. lib. 3. Tit. 13. cap. 5.

‡ Lind. ubi ſupr. v. Bona.

* L. 22. l. 18.

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.

† Dd. in l. 13. C. 5. 71. 1.

‡ Dd. in l. 7. D. 26. 2.

‖ Dd. in l. 32. D. 1. 3.

* D. 38. 1. 2.

† 21 H. 8. c. 5.

‡ Rayn. Rep. [illegible]

In

In making an Inventory with us the Presence 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
* In l. 13. C. 5. 37. the Glos's 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.

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
* D. 38. 16. 1. in prin. 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
† D. 32. 1. 52. 4. 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 Diocese 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
‡ Bart. in l. 1. D. 38. 16. 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
‖ I. 3. 1. in D. in. *Intestable* ‖.

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 [illegible], 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. 3.

* 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 hindred; 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.

* Joh. cap. 14. v. 6.

† Pſalm. 25. v. 10.

|| Lib. 3. Ep. 18.

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 expreſly 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 pronounc'd 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* Proceeding 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 uncapable of Judging; and, therefore, he ſhall not have cognizance either of the principal Matter, or of any Incident thereunto belonging,

* 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, Family, or Conſanguinity ‖: for natural Reaſon will not ſuffer a Father to 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 not recuſe the Father being made Judge in his Son's Cauſe. And, therefore, the Reaſon why an *ordinary* Judge is by the *Civil* Law expreſly 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 †.

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 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 in his own Cauſe, but in the Cauſe of the Church †. And this is true, 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 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 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 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 the Biſhop's own proper Cauſe †. *2dly*, When the Diſpute and Action is about ſome criminal Cauſe committed by the Biſhop himſelf, and then he

* D. 1. 22. 3.

† C. 3. 5. 1.

‖ D. 2. 1. 10.

* C. 3. 1. 16.

† D. 2. 3. 1.

‖ 11. Q. 1. 46.

* 45 Diſt. 11. 23. Q. 4. 30.

† Inn. & Hoſt. in c. 9. x. 1. 6.

‖ 2. Q. 7. 16.

* vi. 5. 2. 18.

† 11. Q. 3. 30.

‖ 11. Q. 2.

† C. 3. 5. 1.

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 Caſe puniſh ſuch a Perſon, yet he may impriſom him, and reſerve the

† 23. Q. 4. 27. 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. 11. Diſt. 42. X. 5. 37. 11. 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 *Prelates*, 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

†Anch. Conſ. 210. 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 §. J. 1. 4. 5. * J. 4. 5. 5. 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 Opinions; 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

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 Injuriously 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 LL. 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 Collegue, and thus the Collegue proceeds in his own Name as a Delegate, and his Collegue'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 Collegue 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 Clause be not inserted in the Commission; for then one cannot act on the Death or Absence of his Collegue ‖. † X. 1. 29. 21. ‖ D. 42. 1.

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. 3. 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 l. 3. C. 3. 1 No. 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.

* D. 13. 4. 4.

†D. 2. 15. 8. 17.

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

* Paul. de Caſtro in L. 2. c. 2. I. 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 †. * D. 5. 1. 2. 6. † X. 2. 1. 5.

'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 Depositio*, 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 ‖. ‖ vi. de reg. Jur. 24. * C. 10. 1. 5. Dd. ibi. † Dyn. in l. 13. D. 2. 4. ‖ D. 36. 1. 65. 2.

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.

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.

‖ Abb. in c. 4. X. 1. 29. N. 1.

*X. 5. 20. 7. vi. 5. 9. 5. 16. Q. 1. 55.

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*.

† D. 28. 7. 2.

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 deſpight 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

*vi. 5. 2. 18.

† In. l. 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 administring 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 definʼd 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 Excellentiâ*, 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*.

* D. 2. 1. 3.

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 *Treſpaſſes*, and not of ſuch Crimes as Kings and Princes ſit in Judgment on: And ſuch Things as are the Ob-

† Bart. in l. 3. D. 2. 1.

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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.*

* Bart. & 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 Dioceses 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 *Lyndwood* * 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.

‖ Bart. in L. 5. D. 2. 1. N. 9.

* Lib. 5. Tit. 5. cap. 2. v. ordinario.

† 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 de-
†D. 2. 1. 6. legates 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
‖ X. 1. 29. 20. 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 De-
* X. 1. 29. 3. legacy 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
† X. 1. 29. 7, & 9. 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
* X. 1. 29. 41. ‖ Can. 127. 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
* X. 1. 29. 41. 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

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(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. 5. 26.
† X. 2. 23. 24. 33. Q. 3. 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 Commiſſional, then the common Form of Law is to be obſerv'd ‖. A Juriſdiction founded upon former Letters Commiſſional 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 expreſly 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. 1. 2 & 3.
* X. 3. 50. per tot.
† X. 5. 17. 4.
‖ 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 Commiſſional do not expreſly give him that Power, and the 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 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) 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, 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. 5.
† X. 1. 29. 39.
‖ X. 1. 29. 6.
* X. 1. 29. 21.
† X. 1. 29. 22.
‖ X. 1. 29. 23.

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 *.

* Paul de Caſtr. in l. 74. D. 5. 1.
† 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 the

† 16. Q. 1. 10.
‖ X. 2. 27. 24.

the *Canon* Law (I grant) an Abbess may have Episcopal Jurisdiction *: 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 ‖.

* X. 1. 33. 12.

† 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 Commissional 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. *3dly*, 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, but

* In l. 3. C. 1. 1.

† Tit. de Jurisdict. & Imperii. sect. ult. vers. ad hoc judex.

‖ In l. 22. C. 1. 3.

* The mall. Pr. Tit. Quæ sint Sent. Nullit. resp. N. 9.

† In l. 2. D. 4. 7. N. 7. ‖ In c. 44. X. 1. 6. in 31. X. 1. 29. in c. 3. X. 1. 21. * in c. 3. X. 3. 31.

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 *D. 1. 16. 2. 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 † C. 1. 4. per tot. 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 * 9. Q. 3. 7. Knowledge and Conſent *: So a Patriarch or Primate, according to the †9. Q. 3. 8. *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 ‖ 9 H. 7. 12. 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

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.

† D. 38. 10. 4. 1.

‖ Nov. 118. c. 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 *Clavisius* 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 it ſelf 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.

† Conſ. 228.
‖ In c. 1. vi. 3. 11.
* In l. 30. C. 6. 42.
† Conſ. 82. lib. 1. N. 1.
‖ D. 29. 2. 30. 3.
* D. 33. 10. 7.
† 11. Q. 3. 103. X. 5. 39. 31.
‖ §. 1. verſ. ſed nunquid.
† D. 47. 16. 2.
* In l. 83. D. 35. 1. Dec. Conſ. 195. Anch. Conſ. 52.
† Socin. Conſ. 89. vol. 1. Jaſ. Conſ. 114. v. 1.
‖ Alex. Conſ. 90. vol. 6. Jaſ. 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. * Part. 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 Tranſverſly, 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 Grandfather 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 πατρὸς; and the Uncle by the Mother, is the Mother's Brother, and in the ſame Language is properly term'd μητρὸς; and each of theſe is, in that Tongue, promiſcuouſly call'd θεῖος, 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

† D. 38. 10. 1.

‖ D. 38. 10. 1. 12.

† Sect. 13. d. l.

* Sect. 14. d. l.

† D. 38. 10. 10, 11, 12, 13, 14, 15, 16, 17 & 18.

‖ D. 38. 10. 4. 5.

* X. 4. 14. 8 & 9.

† Pag. 209.

*35. Q. 5. a. 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 sufficieent 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

and

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, 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. Quanquam de Jure possumus, tamen ad Plenitudinem potestatis dictum ordinem reprobamus* †. And then their 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 *Troyes* 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 1188. Pope *Alexander* the Third, in a *Decretal* of his, stiles these *Templars* by the Name of Religious and Hospitaller Friars, saying, they had some Churches subject to them *pleno Jure*, and others for Institution whereunto they were to pray the Bishop's Authority *. This Order of *Templars* was approv'd of in *Italy* by Pope *Innocent* † III. who was elected to the Papacy *Anno Dom.* 1198. *Platina* in the Life of Pope *Clement* V. says,

* A. D. 1118.

† A. D. 1312.

|| Lib. 12. cap. 7.

* X. 5. 33.

† X. 3. 3. † X. 2. 1. 16.

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; ‖Lib. 7. de vit. Philip. 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 falſly 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 Darkneſs, 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 Abbeys 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 *Hoſpitallers* 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 *Hoſpitallers* 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

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 Temporalties, 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 of

* X. 1. 6. 7. 4.

† vi. 3. 2. 3. 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. p. 154.

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 *Cateshie*'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.

† vi. 3. 19. 1. 2.

‖ Glos. in c. 14. vi. 1. 3. & in c. 17. vi. 1. 6.

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 Natute 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 Dioceses, (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-

* 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.

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 *. Nor (I think) this Disfunction of four and six Months, in respect of Lay and Ecclesiastical Patrons, was ever receiv'd in *England*.

‖ X. 3. 5. 2. & 12. 3.

* D. 4. 6. 14.

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 *prima 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 Bozwick* * 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 Case 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 periculum animæ*, according to *Hostiensis* ‖ and others.

† D. 37. 6. 6.

‖ In c. 4. X. 1. 31.

* In c. 5. X. 3. 38.

† X. 3. 38. 29. in fin.

‖ In c. 24. X. 3. 38.

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 Diocess, 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 *de facto vacante*, the Chapter shall not collate thereunto by way of Devolution *, because a Collation unto Benefices is *in Foro Episcopi*; and, therefore, they shall be reserv'd to his future Successor to dispose thereof †.

* X. 1. 10. 2 & 3.

† vi. 3. 4. 32. Cl. 1. 5. 1.

‖ X. 1. 33. 14. Joh. And. in c. 17. vi. 1. 6.

* X. 3. 9. 2.

† vi. 1. 6. 42.

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

‖ Roll. Abr. pl. 20. 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.

* Rolls. ut sup. 266. Hob. Rep. 270.

† Dyer. Rep. p. 277.

* Rolls. ut sup. pl. 353. 9. Rep. 132.

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 Incumbravit* is brought against him *; but touching this, some have made a Query. Nor does a Lapse incur, when the Bishop refuses to award a *Jus-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 *Jus-Patronatus*) if it be not through the Bishop's default, that such *Jus-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 expresly 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 *Quære*, Whether this will make a diversity when it becomes by Deprivation? I think not, for the Reason already given ‖.

‖ 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

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 expreſly 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. 51. 2. 36. D. 50. 16.

|| Bart. & Dd. in l. 15. D. 28. 6.

* Mant. lib. 4. De tac. ult. vol.

An *univerſal* Legacy happens, when the Teſtator onerates 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
* D. 33. 1. 4. 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
† Bald. in l. 27. C. 6. 23. N. 1. 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
|| Tuſch. Concl. 102. v. Legatum. 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
* Bart. in l. 71. D. 35. 1. 3. N. 7.
† D. 34. 1. 14. 2. 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
* J. 2. 20. 31. 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

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 *Hypothecarious* 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 bequeath'd,

† 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. bequeath'd, the Legatee is in the Place of the Executor *; and as the deceas'd had no Property in his Executor's Eſtate, ſo conſequently the Legatee can have none without a wilful delivery from the Executor himſelf. But a Legacy is not valid, whereby the Teſtator bequeaths any Thing

†C. 6. 37. 13. 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

‖J. 2. 20. 10. 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 Executor 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,

†J. 2. 20. 6. and happen to the ſame Perſons †; nor by the Civil Law, regularly ſpeaking, 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 Legacy 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 conſentur etiam Legata Acceſſoria illius:* For that properly ſpeaking, the Principal trails the Acceſſory along with it. Thus if I bequeath my Veſtments or wearing Apparel, the Gold and Silver Ornaments thereunto belonging do go with the Legacy. And, again, if I bequeath all my Eſtate or Goods, all Rights and Actions are thereby underſtood 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 likewiſe Medicine, Phyſick, and other Things of this kind: For theſe Things are not only Accidents to Alimony; but are all comprehended under

*D. 34. 1. the ſame *. By a Legacy of Houſholdgoods 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 *Victuals* 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

†D. 33. 9. and Drinkables, in *Latin* called *Eſculenta & Poculenta* †. And 'tis the ſame Thing, if any one ſhall bequeath a Legacy by the *Latin* Word *Victus* 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

‖D. 34. 1. 21. 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* call ἐφήμερον. But Alimony and Education may be bequeath'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 Ornaments, which has no Acceſſories and Ornaments? *Ex. gra.* If a Horſe be

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 *Aggregatively* 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. 32. 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. 30. 2.

* D. 31. 2. 6.

† 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 Teſta-

‡ J. 2. 22. 1.

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 Luctûs*, except that Penalty which reſpects the Children had by a former
* X. 4. 21. 5. 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 inferr'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
† C. 3. 28. 26. 1. 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:
‖ Dd. in L. 22. D. 24. 3. 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;
* Mant. de conject. ult. vol. lib. 10. tit. 2. 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. *Præſumpt.* 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

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. 5. 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. S. 5.

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 Heretick, 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

* Mant. de conject. ul tim. vol. lib. 8. Tit. 6. N. 23.
* Abb. in c. 5. X. 5. 7. N. 1 & ...
† Abb. in c. 5. X. 5. 6. & Glol. ib.
‖ Nov. 131 * Cap. 9.
† Tuſch. Conc. 46. v. L...

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 *à 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.

*D. 34. 1. 11.

†Dd. in l. 1. C. 6. 51. 7.

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.

‖ D. 33. 5. 20.

*D. 33. 5. 19.

† D. 35. 1. 99.

‖ C. 6. 51. 1. 7.

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 indem-

†Paul. de Caſtr. in l. 14. D. 41. 1. N. 2.

* J. 2. 20. 5.

† J. 2. 20. 21.

demnify 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 *Pentris* *, 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 Debts, *&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. 4. p. 35.

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. 35. 1. N. 2.

† Kebl. Rep. vol. 1. p. 110.

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.

‖ 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 *per*

* D. 31. 1. 88. in prin. & Bart. ib.

† D. 30. 1. 54. in prin.

‖ J. 2. 20. 2.

per vendicationem. 2*dly*, He ſometimes ſaid, *Let my Heir ſuffer* Titius *to have this Thing or Eſtate*, and this was term'd a Legacy *Sinendi modo.* 3*dly*, 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.

* C. 6. 37. 21.

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 *incidently*: 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 *præſtando 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.

† Abb. in c. 6. X. 2. 20.

‖ D. 31. 2. 34. 3.

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 Domum*; 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 †.

* In L. 4. D. 33. 1.

† D. 36. 2. 20. D. 33. 1. 5.

‖ 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.

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

‖ D. 36. 2. 26.

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. 18.

† Cons. 193. in fin.

‖ D. 50. 16. 56. C. 6. 51. 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 stramq; pagi-nam*: 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. of a Judge, and sometimes for the Delegation of a Cause *. 4*thly*, 'Tis often us'd to denote a supplicatory Address or Petition, and in this Sense 'tis term'd a *supplicatory* Libel. 5*thly*, 'Tis taken for the Plaintiff's Petition or Allegation made and exhibited in a *Judicial* Process with

X. 2. 3. & 2. ‖ 3 Q. 3. 4. 3. 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

* Cyn. in cap. 3. Nov. 53. & in l. 1. C. 3. 9. † C. 7. 62. 39. 1. a Libel ought to be first short, and not verbose; because the Law abhors a Prolixity of Words †. 2*dly*, 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 Narra-

‖ C. 6. 26. 8. tion 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 Interpre-

* Bart. in l. 58. D. 42. 1. † D. 28. 5. 51. tation, 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.

‖ X. 2. 3. 3. 2*dly*, The Thing itself which is in Demand or Controversy ‖. 3*dly*, The Name of the Defendant, from whom the Demand is made. 4*thly*, The Action, whereby the Demand is made, and the Defendant sued. And, 5*thly*, 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. Ge-*

* X. 2. 3. 2. *nerality* *, *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.

†X. 2. 3. 1. 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

‖ Vide Pag. 24. (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. 2*dly*, In a Crime of *Bawdry*, in *Latin* called *Lenocinium*. 3*dly*, In a Crime of *Falsehood* or *Forgery*. 4*thly*, In a Case wherein a Feme-covert is admitted to an Accusation. 5*thly*, 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 petit sibi jus & justitiam ministrari, &c.* The second is, *omni meliori modo & Juris forma, &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. [illegible]

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.* *[illegible]*, the Injury not being specially deduced and set forth. *4thly*, A Libel may be obscure in point of Diction or Locution, not sufficiently concluded 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 [illegible] 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. 41. 1. [illegible]

‖ D. 45. 1. 15. 4 & 8.

* [illegible]

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 [illegible] the

[illegible]

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 tear 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. *Formam.*

† Vant de null. ſent. tit. Quis poſs. 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 him 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 expla in'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 entred 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. 8. N. 2.

† Felin. in c. 3. X. 2. 3.

‖ Bart. 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. 8. cap. 56. N. 4.

† Bart. in l. 17. D. 42. 1. 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 expreſly 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 Dioceſs 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.

* X. 2. 3. 3.

† X. 2. 3. 2.

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 Ineptitude 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-

|| Bart. in l. 3. C. 2. 1. N. 6.

ment

ment may be made to a Libel in respect of the Substantials thereof. *3dly*, A Libel is frequently amended in regard to the principal Qualities of such Libel *. And, *4thly*, 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.

* Part. ut supr. N. 7.

Judicial Pleadings are either made *vivâ voce*, or else in Writing; and such on the Plaintiff's Side as are made *vivâ 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 exhibited.

‖ Bart. in l. 1. C. 2. 1. N. 1.

* Paul. de Castr. in l. 21. D. 23. 1. N. 19.

† Alciat. in l. 22. D. 1. N. 51.

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.

* 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.

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 †.

‖ Abb. in c. 5. X. 2. 2. N. 10.
* Reg. Orig. F. N. B. 51.
† Kebl. Rep. vol. 3. p. 597.

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

‖ Paul. de Caſtr. in l. 2. 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*.

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

* Lindw. in c. 2. lib. 1. Tit. 9. v. Licent.

† vi. 1. 14. 6. vi. 3. 4. 26. ‖ X. 3. 15. c. unic.

* X. 5. 41. 2.

† X. 3. 4. 16.

‖ X. 1. 6. 20.

* Croke Rep. p. 165.

† In c. 24. vi. 1. 6.

‖ vi. 3. 11.

* J. 1. 21. 2.

† D. 26. 7. 42. ‖ Bald. cons. 268. N. 6. lib. 2.

not *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 Dioceſs, 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.

* Bald. ut ſupr. N. 5. v. *præterea.*

† Lap. alleg. 87. N. 3.

‖ Lindw. lib. 3. Tit. 15. cap. 2.

* Cl. 5. 7. 1.

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 Dioceſs is ſufficient, though it be only to preach within his Dioceſs, the Statute not requiring any Licence by the Biſhop of the Dioceſs 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.

† Stat. 1. Mar. cap. 3. 14. Car. 2. cap. 4. 13 Eliz. cap. 12.

‖ 1. Kebl. Rep. 503.

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.

* X. 5. 5. 1. 2. 3. & 4.

Of

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 λειτουργῶ, 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 λειτουργεῖν. And thus Chriſt is ſaid to be λειτουργὸς τῶν ἁγίων, 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 frantick

‖ Bibliath. Patr.
* Conc. Angl. vol. 1. 347.
† Can. 2.
‖ Can. 45.

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 encumbred 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 *Sabinius* 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 *Hebrews* or *Jewish* Synagogue to read some Portion of Scripture out of the Law of *Moses* on every Sabbath-day

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 †.

‖ Car. 89.

* Crok. 3. Rep. 551, 585. Rolls. 106, 107. Vent. Rep. pt. 1. p. 115.

† March. Rep. p. 22. §. 50.

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 Sea],

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 *Durbin*; 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 *.

‖ Vent. Part. 3. p. 356.

* P. 234, 247.

A *Mandamus* was alſo pray'd and directed to the Church-wardens of the Pariſh of *Kingſmore* in *Hampton*, to reſtore *John Wes* 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.

† Vent. ut ſup. p. 143.

‖ Vent. 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 Infirmity, 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 aſham'd to own this Doctrine at preſent. *Sylvius Æneas*, *Panormitan*, and other Writers of the *Romiſh* Church, were all againſt the Marriage of Biſhops and Prieſts: But *Caſſandra*, who was a better Chriſtan, 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, *Firſt*,

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 Virginity. *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 præsenti*, 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 præsenti*. 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. 14.

‖ D. 45. 1. 22.

* X. 4. 1. 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 infer'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.

† Can. 100. 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

‖ 27 Q. 2. 2. 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

*D. 23. 2. 25. 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

† J. 1. 9. 2. 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

‖ Orden. van Polit. binnen Holl. Art. 3 & 13. 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

† D. 50. 17. 30. 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

‖ X. 4. 1. 25. 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

*D. 24. 4. 1. to be of any Advantage to the Person deceiving another *. A second

Species

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* 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 contracted 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, 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.

† X. 4. 9. 2.

‖ X. 4. 1. 16.

* 39 Q. 1. 1.

Among unlawful Marriages, there are ſome which are ſtiled *inceſtuous* Marriages, from the *Latin* Word *Ceſtus*, as not being initiated *juſtâ venere*: For *Venus*'s Girdle, or *Ceſtus*, as made uſe of at all honeſt and decent Nuptials, was by the ancient *Civil* Law in *Latin*, ſtiled *Legitimorum connubium 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 Grandaughter; Grandſon and Grandmother; and ſo on *in infinitum* †. But God has not entirely forbidden us to marry our Kindred, but only the neareſt of our Fleſh, *Propinquos non Cognatos*, ſays the Law: for as to ſuch as are ally'd to us in a *collateral* Manner, this Prohibition only extends to ſome certain limited Degrees. Such Marriages as are contracted and enter'd into between

† D. 35. 1. 59 & 68. C. 5. 2. 17.

Aſcendants

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 expreſly 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 *Paranymphi* (as uſually 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 præſumpta*, 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 publickly 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

|| 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.

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 shew 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 Burio* †: 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 †.

* X. 4. 14.
8. Glos. in c. 34. X. 2. 4. v.
† In c. 5. X. 1. 29.
‖ In c. 34. X. 2. 24.
† Cl. 2. 1. 2.
* X. 4. 14. 1.
† X. 4. 1. 14.
‖ X. 1. 41. 3.
* C. 3. 32. 9.
† C. 5. 20. 2.

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, press'd 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

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
* Hen. 1. 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
† Anno. 25 H. 2. 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
‖ Anno. 7 R. 1. *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
* Tit. 14. *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
† 28 Diſt. 1. 2 & 5. 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

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 *publickly* 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 follicit 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.

† Lind. 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 m[illegible] to declare it *Felony* for a Priest to marry; or if marry'd, carnal[illegible] know his Wife, or so much as publickly to converse with her; [illegible] 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 †.

‖ [illegible]

* 31 H. 8. c. 14.

† 32 H. 8. cap. 10.

‖ 32 H. 8. cap. 38.

* 2 & 3 E. 6. cap. 21.

† 5 & 6 E. 6. cap. 12.

Of

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 lift 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 entring 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 ‖.

* Arg. 1. Q. 2. 3.

† Gloſs. in c. 1. 20 Q. 1.

‖ D. 34. 3. 20.

Secondly, A Perſon becomes a Monk by his own proper Profeſſion, and this either *expreſly* or *tacitly*. Expreſly, 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) entring 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 par-

* Arg. 1. Q. 2. 3.

† Gloſs. in c. 1. 20 Q. 1.

‖ D. 34. 3. 20.

D. 32. 1. 9.

† X. 3. 31. 16.

‖ 19 Q. 3. 6.

* X. 3. 31. 15.

† vi. 3. 14. 1.

‖ 20 Q. 1. 8.

* Seſs. 25. c. 15 & 16.

† vi. 3. 15. 1.

‖ Seſſ. ut ſup.

* X. 3. 31. 14.

ticular 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 professed, 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,

‖ X. 3. 31. 17.

* X. 3. 31. 13.

it

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 confer'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.

* Glos. in c. 4. vi. 3. 14.

† Glos. ut sup.

For if a Person being *compos Mentis* ‖, tho' he labours under some bodily Infirmity, 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. 25.

* X. 3. 34. 10.

† X. 2. 14. 7.

* X. 3. 35. 6.

† X. 3. 35. 4.

‖ 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. 5.

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.

* X. 3. 31. 24.

† Abb. in c. 24. X. 3. 31.

‖ X. 1. 6. 49.

* X. 1. 14. 3.

† X. 3. 36. 5.

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

is

is commonly attributed to *Paul* the Hermit and St. *Anthony*, as some file 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 embraced 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 *Vercell*, 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

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 *Jerome* 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. *Jerome*, *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 Nuſance 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; inſomuch 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, perſuaded 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.

ESTATES, or Things temporal, which are immoveable and given
* X. 3. 13. 5. 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
† 12 Q. 2. 20. ſell or alienate theſe Eſtates, they may be reclaim'd and revok'd again by
‖ X. 3. 13. 6. 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
* X. 3. 13. 12. 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,
† 7 E. 1. De *Religioſis.* 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.

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. 36. 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 E. 1. De Relig. &c.

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 IId'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. 32.

‖ 15 Ric. 2. c. 5. * 7 E. 1. de Relig.

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*.

† 23 H. 8. c. 10.

Of a Mortuary, and the Payment thereof.

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. 1. Tit. 3. cap. 1.

‖ Lindw. lib. 3. Tit. 15. cap. 2.

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 indè 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-

† A. D. 1276.

* Lindw. ut supr.

† Lindw. ut supr. v. *Ecclesiæ suæ.*

ſubſtraction of Perſonal Tithes and Oblations, and was given to the Church (according to the Faſhion of thoſe Times) *pro ſalute animæ*. But then this ſubſtraction of Tithes and Offerings ought to happen thro' Ignorance; for if perſonal Tithes and Offerings were ſubſtracted 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 *; ſinceto 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 Subſtraction 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 ſubſtracting 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. *Subſtraction.*

† Lindw. ut ſupr. v. *in hanc.*

‖ Lindw. ut ſupr.

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.*

* In c. 42. X. 5. 3.

† Hoſt. ut ſupr.

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 ſpeak-

‖ Lindw. ut ſupr. v. *Ecclesiastica.*

* Hob. Rep. p. 175 & 176.

ſpeaking, is a generical Term for all Church-Dues whatſoever; and ſo is
* Cok. 11. Rep. fol. 15. † D. 14. 1. 1. 15. D. 7. 1. 7. 1. 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
|| Lindw. ut ſupr. v. *Eccleſiaſtica.* 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
* Lindw. ut ſupr. v. *cujuſcunque generis.* 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 enjoin'd by ſeveral Provincial Conſtitutions; ſo it was likewiſe commanded by the Statute of *Circumſpectè agatis*; yet ſtill left to Cuſtom. But, by a Sta-
† 21 H. 8. cap. 6. tute 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 Houſekeeper, 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*
|| F. N. B. ||, 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

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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 *Prae 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, 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 †.

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 *Latwich* 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.

* 1 H. 4. Plac. 2.

† 2 H. 5. 10.

‖ Crok. Eliz. p. 151. 3. Mod. Rep. 268.

* 21 H. 8. c. 6.

‖ 2 Inst. 491.

† Mod. Rep. ut supr.

‖ Pag. 172.

* Kelw. Rep.

† Lutw. Rep. pt. 2. p. 1069.

Of a Notary or Regiſter, and his Office.

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.

‖ Nov. 44. cap. 1.
† In L. 1. D. 5. 1.
* 16 Q. 3. 15. 4.
‖ vi. 1. 3. 9. 7.

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-

† 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.

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. 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.

‖ Paul. de Castro. in l. 2. D. 40. 6. N. 2.

* D. 2. 13. 10.

† Abb. Conf. 43. 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 *Tabellio* †, *Actuarius*, *Registrarius*, *Scriniarius* ‖, and the like; all which Words are put to signify one and the same Thing: tho' we here in *England*, confine the Word *Registrarius* to the Officer of some Court, who has the Custody of the Records and Archives of such Court, and oftentimes distinguish him from the Actuary thereof; but (I think) a Register ought always to be a Notary Publick, because it seems to be a necessary Qualification to his Office *. Now the Office of a Notary in a *Judicial* 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 Request, Copies and Exemplifications of all such *judicial* Acts and Proceedings, 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 thereunto. 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 *judicial 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 compell'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. ut 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 raſing 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. & Hoſt. X. 2. 22. 15.

† Abb. in c. 1. Cl. 5. 3. N. 23.

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

|| Oldrad. Conſ. Anch. Conſ. 217. Alex. conſ. 166.

* Bald. in l. 2. D. 1. 14.

† Bart. in l. 13. C. 4. 1. Par. Conſ. 149.

* Conſ. 178. N. 3. vol. 2.

ſhall ſay in the Inſtrument, *that he was asked*, according to *Bartolus* *, 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. 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 L. D. 35. † In X. 2. ‖ Inc. X. 2. * C. † L. 42. ‖ D. 2. 13. 4. L. 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. 7. 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

‖ Inn. in C. X. 2. 2.

† 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.

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? 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.

‖ D. 34. 1. 3. 1.
* X. 1. 41. 5. 1. v. *perspeximus.*
† In L. 7. C. 2. 1.
‖ C. 7. 52. 6.

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.

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, wherein 'tis expresly 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 Months

* Arch. Conf. 151. N. 31.

† Roman. Conf. 231. N. 9.

‖ Roman. Conf. 6. per tot.

* 13 Eliz. c. 12.

† March. Rep. p. 119.

‖ 13 & 14 Car. 2. c. 4.

* 2 Roll. Abr. 365.

† Dyer's Rep. 308.

‖ Yelv. Rep. p. 7. Cro. 2. Rep. 48.

* 2 Roll. Abr. 364. Hen. 358.

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.

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.

‖ 2 Roll. Abr. 369.

* Crok. Eliz. 119. 1. Leon. p. 31.

† 3 Leon. Rep. p. 46. Larch. Rep. 192. 253.

‖ 14 H. 7. 21. a. Kelw. Rep. 49. v.

'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.

* Kelw. Rep. 154. 31 E. 1.

† Styl. Rep. p. 342. 1 Rolls. Abr. 643.

‖ 2 Vent. Rep. p. 48. Noy Rep. p. 19. 3 Bulſ. Rep. p. 336. Godbo. Rep. 229.

By

By an Act of Parliament in the first Year of *William* and *Mary*, it is * enacted, That if any Trustee, Mortgagee, or Grantee, of any Right of Presentation, Collation, or Nomination to any Ecclesiastical Living, Free-School, or Hospital, shall by way of Trust, present, nominate, or collate 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.

* 8 & 9. c. 24.

There are many other Cases, wherein Notice or Intimation ought to be given to the Parties that may have a Concern therein, as in Faculties 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. Q. 31. 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, according to *Baldus*, 'tis an Assertion or Promise confirm'd to us by the Attestation 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 Asseveration 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 Christians 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 befal 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, ità me* Diespiter (*salvâ urbe arceq;*) *bonis ejiciat, ut ego nunc hunc Lapidem*; 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. 58.

† Exod. c. 23. Jude. c. 11. Mat. c. 5.

‖ Æn. 12. v. 201.

Tango aras, mediosq; ignes et numina testor.

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 ſtiles 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.

† 22. Q. 1. S. 9 & 10.

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 *Caſuiſt*, 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.

* Mat. c. 5. v. 34.
† Ibid. v. 37.
‖ 22. Q. 1. 2. X. 2. 24. 26.

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

* Vid. Pag. 443.

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 *Domat*'s Treatiſe of an Oath. The Oath of *Calumny* is an Oath of Credulity, which the Litigants take touching the Conſciouſneſs 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. & C. in l. un. C. de rei uxor. act. 2.

‖ Vid. Pag. 12.

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 adminiſtring 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 adminiſtred 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 admonith'd to appear; and thus this Oath ought to be adminiſtred 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. 4. C. de teſt.

‖ C. de teſt. l. 4. 7.

† Gail. Obſ. 108. N. 6.

* Jaſ. in l. 9. D. de jur. jur. 10.

† Cornel. Conſ. 47.

'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 Mora*, and muſt blame himſelf. Before this Oath be adminiſtred, the Judge ought to enquire into

‖ Gail. obſ. 108. n. 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 †.

* Socin. Conſ. 155. N. 5. vol. 2.

† Socin. ut ſup. N. 9.

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 adminiſtred, *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 adminiſtred †; 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.*

|| Gloſs. in l. 7. D. 13. 4.

* Dd. in l. 31. D. 12. 2.

† Gloſs in l. 3. D. 12. 2.

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 *Juramentum 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 *Juramentum Veritatis, viz.* the *neceſſary*, *voluntary*, and *judicial* Oath.

* D. 12. 2. 17. & 28. 10.

† D. 12. 2. 25 & 26. 2.

|| C. 2. 59. 1. 7.

Of Oblations, Obits, Obventions, and the like.

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

* Lindw. lib. 1. Tit. 3. cap. 1. v. *oblationum.*

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. 29. con. Diſt. 1.

‖ Cap. 6. n. 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 *Parochical* Churches, then only the third Part to the Biſhop.

† Conc. 3. c. 6.

‖ In c. 10. Con. 1.

* De Diſpenſ. c. 22.

† 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 enjoin'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 making up the Church's Stock, which was to be divided into four Parts, || Can. 10. *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 particular 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 Oblation which was made to the Church out of the Lands and Goods of Perſons 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. 2 & 3. *mortis Cauſâ*. A Donation *mortis Cauſâ*, by the *Civil Law* *, is when ſomething is given *for fear of Death on thoughts of ſome preſent or future 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 inveigled 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. 13 & 15. 16 Q. 1. 21. the People †, and they are never due to Foreigners performing Maſs or Divine Service, tho' they ſhould come to their hands; becauſe the Perſons, 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 otherwiſe if the Biſhop celebrates Divine Service in Perſon in any Pariſh Church of his Dioceſs; 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. 30. 9. riſh than in another; for if he does, he ſhall not have theſe Oblations *. 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 virtue 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 aforeſaid: 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. Raym. in. c. 19. X. 3. 30. But here in *England*, ſince the 25th of *Henry* VIII. which aboliſhes this part of the *Canon* Law, in reſpect of Altar-Oblations to the Prieſt, all Oblations there made, are converted into Alms of Charity towards the Maintenance of poor Pariſhioners, which ought to be diſtributed according 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*, *Whitsuntide*, 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 falsly 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 publickly appointed to prefer Crimes to the Magistrates †. The *Second* denotes to us an Apparitor, as appears in these Words, viz. *Officio, quod tuis meritis obsecundat, non civitatum quarumdam, nec 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*, we

† C. 9. 2. 1.

‖ C. 12. 50. 1.

* C. 12. 50. 11. C. 1. 51. 1.

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.*

*D. 19. 2. 56. D. 19. 1. 51.

† Lib. 1. de Triſt.

Judicis officium eſt, ut res ita tempora rerum
Quærere ———.

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

‖ Vid. Pag. 309, *&c.*

* Vid. Pag. 207, *&c.*

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 *.

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 sollicit 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 on *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 is not 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 Prosecuter, 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.

* Conrad. cons. 258. N. 1

† Alph. lib. 3. c. 11.

* Arg. in c. 4. X. 1. 38.

† Add. in c. 24. X. 5. 1.

‖ Arm. X. 2. 20. 13. X. 1. 38. 4.

* Host. in c. 53. n. 20.

‡ Arm. X. 2. 20. 12.

It has been already noted, that the Jndge'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 *incidently* made uſe of: And the Judge's Office may be *incidently* 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. N. 2.

|| 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 Ordinations, 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 *Psalm*, 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 [illegible]; 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 Juridiction 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

* [illegible]

† [illegible]

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 Dominicæ 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.

‖ 32 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 Apostolical Authority.

‖ vi. 1. 9. 1.

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 Patrimonal 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.

* 70 Dist. cap. 2.

† X. 3. 5. 2. 4. & 16.

* X. 5. 3. 45.

‡ 31 Eliz. c. 6.

‖ X. 3. 5. 4. Glos. in hoc verb.

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

* 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.

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 *.

‖ X. 1. 29.

† X. 1. 12. c. unic.

‖ vi. 1. 9. 2.

† vi. 1. 9. 3. 72. Dist. per tot.

* 24 Dist. 2. X. 2. 28. 45.

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 Pennance. 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 unseasonable 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.

‖ X. 1. 11. 13.

* X. 3. 41. 3.

† X. 1. 11. 15.

‖ 63. Dist. 14. 75 & 76. Dist. per tot.

* X. 1. 11. 8.

† X. 1. 11. 16.

There

There are several Impediments to the Susception of Orders, according to the *Canon* Law, some of which I shall here set down. As *1st*, 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.

* X. 2. 24. 4.
† X. 1. 20. 5.
‖ X. 1. 18. 1.
* X. 2. 20. 56.
‖ X. 1. 21. 1.

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 ‖.

† X. 5. 28. 2.
‖ X. 2. 29. 1.

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

* Abb. in c. 23. X. 3. 5. N. 1. 2, &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 παρέχω, 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 *Diocеſs*: 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 alloting 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.

* 1 Pet. Ep. 1. c. 5. v. 2.

† Acts c. 20. v. 28.

‖ Heb. c. 13. v. 17.

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 with in 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 found

* Stillingfl. Cases, p. 1. Pref. p. 14. † Lib. 1. cap. 30.

found ſtanding; and thus *Auſtin* at firſt made uſe of St. *Martin's* near
† Bed. lib. 1. *Canterbury* †; and afterwards repair'd Chriſt-Church, which were both
* Cap. 33. *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
† Lib. 2. c. 3. Biſhops and their Clergy to live together †. *Wilfred* converted the *South-Saxons*, and ſettled Presbyters in the Iſle of *Wight*, but they were but
|| Lib. 4. c. 13. 16. two ||. In the *Weſtern* Parts, *Birinus* built ſeveral Churches about *Dor-chester* where his See was fix'd *. In the Kingdom of *Mercia* there were
* Lib. 3. c. 7. 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,
† Lib. 4. c. 12. 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
|| Lib. 5. c. 4. 5. *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
* Bed. Ep. ad Egb. p. 64. 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
† Conc. Angl. vol. 1. p. 248. 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*
* Cap. 9. *the Confeſſor*, 'tis ſaid *, *That there were then three or four Churches, where there had been but one before.* Some will have it, that this Diviſion 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 Diviſion 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
|| Hoſtienſ. §. in quibus. X. 3. 29. 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,
† X. 3. 29. 2. 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
|| X. 3. 29. 2. 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 con-

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 ‖.

* X. 3. 26. 15. X. 1. 43. 1. 16 Q. 1. 1.

† X. 3. 29. 2.

‖ X. 3. 29. 5.

* D. 50. 1. 6.

† X. 3. 4. 4.

‖ C. 10. 39. 2.

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

* Rebuff. ad concord. de Collat. Sect. Stat. N. 2.

2 M

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 expreſs 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.

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* 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.

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,

‖ An. 26. H. 8.

* X. 3. 29. 4.

† Lindw. lib. 5. Tit. 15. c. 1.

‖ A. D. 1260.

* Mich. 14. Jac. B. R.

† Levin. Rep. pt. 1. p. 78.

‖ Abb. in c. 4. X. 3. 29.

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 *Ministring-Clerks* †. In the Synod of *Worcester*, under *Walter Cantelupe*, in *Henry* the IIId'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 *Aqua-bajulus*; and that his Office, which is Ecclesiastical, is called *Aqua 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 91st 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 *Aditui*; 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 Clericales* ‖, 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

* Jud. de Acts. in Tit. Constit. 9.

† X. 3. 38. 5.

‡ Lindw. Lib. Tit. 6. c. 2.

‖ Lib. 3. Tit. 7. c. 2. v. *Aquæ bajulus.*

* 12 Q. 1. 7. X. 1. 14. 11.

† Lib. 3. Tit. 7. c. 2. v. *Aquæ bajulus.*

‖ Lindw. ut supr.

* A. D. 1571.

† Lindw. ut supr.

‖ Reg. fol. 54. b.

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 *Grawſhaw* for *White-Chapel* Pariſh †; and the like was granted between *Beaumont* and *Weſtley* for the Pariſh of St. *Cuthbert's* in *Wells*.

* 22 Jac. B. R.

† 19 Jac. B. R.

Of Patrons, Right of Patronage, Preſentation, &c.

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 Dioceſs, 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 contended 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 Dioceſs; '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 Dioceſs 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 expreſly 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

* 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.

the Maintenance of such Ministers as serve the Cure thereof *. All these 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, * 16 Q. 7. 31.

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, Relignation, 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. † Hostiens. in c. quid sit X. 3. 38. ‖ D. 3. 1. † Joh. Andrian. in Rubr. X. 3. 38. * 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. * Glos. in 63 Dist. in fum.

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

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; * X. 3. 38. 10. 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, || X. 3. 38. 4. 16 & 17. 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 * X. 3. 38. 15. & 26. 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; † Gloſs. in c. 15. X. 3. 38. 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 * 14 H. 8. 3. a. 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 † 35 H. 6. 59. 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 * Lindw. lib. 3. Tit. 21. c. 1. 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 || X. 3. 8. 2. 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

or Controverſy between them recover or evince a Right of Patronage *. But now by a Provincial Conſtitution 'tis ordain'd, That the Biſhop ſhall conſer 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 Preſentation,

* 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.

sentation, 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 *à fortiori*, do this in the Beginning, to the end that the Bishop may chuse one of the several Presentees *.

* 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.

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. 2*dly*, 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 3*dly*, The Temporalties, 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.

† X. 3. 38. 22 & 27.

* X. 1. 30. 6.

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 Spiritualty 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

‖ 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 Things 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 †. † Abb. in c. 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 currente* *. 2*dly*, He ought to be well recommended for his Knowledge, 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 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 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 Regiſter*. The *Preſentee* is the Clerk, that is thus preſented by the Patron. In a Statute of *Richard* II. mention is made of the King's *Preſentee*, *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 a College, or an aggregate Corporation, cannot be made by the Head of ſuch College or Corporation alone, without the Conſent of the greater part of the College, Chapter, or Common Council *. The Perſon preſenting, and the Perſon preſented, may by the Common, as well as the *Canon* Law †, have an Action to remove him, whom the Biſhop has inſtituted in contempt of the Patron's Preſentation.

* X. 1. 6. 7. 3.

† vi. 1. 6. 14.

‖ X. 3. 7. 2.

* Lindw. lib. 3. Tit. 21. c. 3. v. *Clericum ſuum.*

‖ Lindw. ut ſupr. Fol. 322.

† Abb. in c. 1. Cl. 5. 6. N. 14.

‖ Abb. Conſ. 76. N. 1. fol. 105.

* X. 3. 10. 6.

† Abb. in 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 præſentatum recipimus* ‖. Tho' this Right of Preſentation belongs to the Patron in virtue of his Right of Patronage *, eſpecially when Admiſſion and Inſtitution belongs to another Perſon, yet ſuch Preſentation is, by the *Canon* 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 ſpeaking,

‖ X. 1. 30. 6.

* X. 3. 38. 31. X. 2. 27. 18.

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
*X. 1. 30. 6. 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
†X. 3. 8. 2 & 3. 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.

‖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
* 18 E. 3. 31. b. 21 E. 3. 5. a. 29. a. 30. a. 24. E. 3. 26. 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 In-
† 12 E. 3. ‖ 50 E. 3. 26. 9 H. 6. 16. b. 24. E. 3. 26. ſtitution 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
* 24 E. 3. 30. † 44 E. 3. 3. 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)
‖ 17 E. 3. 40. remain in the King ‖, and ſo does the Nomination of the Perſon to be elected now.

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 Pre-
*14 H. 4. 22. ſentation 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.

* 24 E. 3. 69. b. 14 H. 4. 11. a. 1 H. 7. 1, 2, & 16. 5 E. 4. 127. *

† 55 Diſt. 1. Arch. in c. 8. vi. 1. 6.

‖ D. 28. 2. 1 & 2.

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*, *Patientiâ reformatæ Eccleſiæ*, 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.

* X. 2. 27. 12. Gloſs. in c. 10. Diſt. 63.

† X. 5. 7. 15 & 15.

‖ X. 3. 38. 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*.

risdictions, becauſe they are under no *Ordinary*, but becauſe they are not under the *Ordinary* of the Dioceſs, 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 Neigbouring 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 remembred 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 antient 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 Eccleſiaſtical 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 *volantary* 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 requeſted 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 Heretick 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. 10.

* X. 2. 26. 16.

† X. 2. 26. 18.

‖ vi. 5. 7. 9.

* vi. 5. 7. 11 & 12.

Of

Of publick Pennance, and Commutation of Pennance.

AMONG ſuch Puniſhments as relate to Eccleſiaſtical Crimes, we may reckon *Pennance*, 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 *Pennance* 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 commiſiſſe dolet* †. Now *Pennance*, 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* Pennance, they define to be that which ſhews itſelf by external Signs, as by Confeſſion, Tears, Faſting, and other outward Means; and an *Internal* Pennance, 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 *Pennance* 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 *Pennance* to be a Sacrament, ſay, That a true and ſalutary *Pennance* 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 conſcientiæ*; 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 Pennance are a ſincere Reformation of our Lives. And of this kind of *Pennance* St. *Auſtin* ſpeaks, when he ſays, *Every one, 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 Pennance, ought not to be referr'd to *external*, but to *internal* Pennance; 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

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 Quadrigesimæ*, 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-

† Whop. 153.

‖ Lind. lib. 3. Tit. 14. & Lyn. 2. Sect.

* 5 Dist. 6.

† 3 Dist. 6.

‖ 9 F. 2. c. 2. & 4. Lindw. lib. 3. Tit. 28. c. 4. v. Redemptiones.

* Gloss. in cap. 2. X. 5. 37.

† C. 1. 5. 1.

‖ 3 Dist. 10.

* 63 Dist. 2.

† 63 Dist. 2.

‖ 36 Q. 1. 3.

* 25 Q. 5. 1.

mutation, ſave their Pennance; 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 Pennance; 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 Convo-
*A.D. 1597. cation 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 Pennance, 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 Pennance, 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 Pennance 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.

SINCE *no Man can ſerve two Maſters* (as the Scripture obſerves) *but*
† Luke cap. 16. v. 13. *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*.

† X. 1. 7. 2. M. 5. 31. 8.

‖ ci. 1. 16. 3.

* 16 Q. 1. 61. ‖ vi. 1. 3. 7.

* Arg. X. 1. 2. 6.

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.

† X. 3. 4. 6.

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

* Lib. 3. Tit. 5. c. 2. v. *ſit cuſtos tuus.*

‖ 10 Q. 3. 3.

* Can. 5.

‖ 21 Q. 1. 1.

* X. 3. 5. 7.

† X. 3. 4. 3.

‖ X. 3. 5. 3.

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, *de facto*, 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* †.

* 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. 3. 32.
* In c. 6. X. 3. 8.
† In c. 12. X. 5. 1.

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 *Caſuiſts* 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 meerly 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 Mannor 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* Caſuiſts look upon this as a very great Sin, even thoſe who attribute to the Pope the higheſt *diſpenſing* Power in this Caſe.

* Lib. 1. c. 34. Dub. 27.
† In c. 54. X. 1. 6.
‖ De Ben. 4.
* De Ben. 35.
† Sum Caſ. 5. c. 8.
‖ Vid. p. 466.

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-

‖ 21 H. 8. c. 13.

in

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 adjuged 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,

* Hobs 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

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.

† Can. Jac. 41.

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, Archdeaconry, Chancellorship, Treasurership, Chantership, or Prebend, in 'any Cathedral or Collegiate Church, nor Parsonage, that has a Vicar endow'd, 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.

* 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.

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 ‖. 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 Aſſignation 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. *Zaberella*, 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. *Prebendam.*

‖ 1 Q. 3. 7.

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.

* Arg. D. 10. I. 4.

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 expreſly 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 *.

† 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. 5. 5. 4.

* X. 3. 5. 30.

Of

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 *Judicial* 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*, 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 †, if the Defendant dissents thereunto, unless such Proctor appears *pro conjunctâ Personâ*, 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 ‡; 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* allign'd them, they may constitute a Proctor in Respect of *Extra-judicial* *, tho' not in Respect of *Judicial* Matters. But a *Syndick* of 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; because they are till then made Principals in the Suit ‡: But they may constitute a Person called an *Actor* or Agent for themselves.

* D. 3. 3. 1.

† X. 1. 37. 1.

‡ Gloss. & DJ. in l. 1. D. 3. 1. 1. Gloss. & DJ. l. 9. C. 2. 19. * D. 3. 3. 43. 5.

‡ C. 2. 13. 8. & 12. D. 3. 3. 34. ‡ C. 2. 13. 11. in fin. ‡ D. 50. 17. 142. * C. 2. 13. 18.

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, Sickneſs, 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
*C. 2. 13. 25. 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
†D. 3. 3. 40. 2. *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
‡C. 2. 13. 11. 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
†D. 1. 3. 25. 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 Madneſs. So 'tis no Wonder, that if they cannot make a Contract or ſtand in Judgment, they ſhould
‡D. 42. 1. 9. 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
*VI. 1. 19. 1. 2 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
†VI. 1. 19. 1. 3. of Suit †. A Proctor *in Rem ſuam* is he, to whom another Perſon aſ-
‖D. 3. 3. 25. ſigns 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 ano-
*VI. 1. 19. 1. 3. ther 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 ſubſtitued before joining Iſſue in the Cauſe, ſuch Subſtitution is ſo valid, that the Perſon thus ſubſtituted cannot afterwards be ſet aſide: But I
‖C. 2. 13. 24. 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 ‡.

† D. 3. 3. 43. 1.

* C. 2. 13. 18.
† C. 2. 13. 4.

‡ C. 2. 13. 7. & 9.

‖ C. 2. 13. 10.

† C. 2. 13. 11.

* D. 3. 3. 2.

† D. 3. 3. 33.

‡ D. 3. 3. 8.

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 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 Restitu- "tion 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

‖ VI. 1. 19. 5.

* D. 3. 3. 51.

† D. 3. 1. 1. 3.
‡ C. 2. 13. 12.

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
* D. 4. 4. 23. 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
† C. 2. 13. 17. abſent Perſon †. And 'tis ſufficient for the Plaintiff to have an Action
‡ D. 3. 3. 45. 2. *ex Stipulatu Judicati* to compel a Proctor to make good his Damage, if
D. 3. 3. 45. 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
‖ C. 2. 13. 5. 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 par-
* C. 2. 13. 26. ticular 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
† C. 2. 13. 2. 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 Pre-
‡ C. 2. 13. 26. in fin. ſence in every part of the Suit ‡. If ſeveral Proctors are aſſign'd or retain'd even without this Clauſe, *viz. Quòd 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.

‖ D. 48. 1. 13. 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 Ab-
* Fachin. lib. 1. Controv. c. 24. &c. ſence he cannot ſuffer a corporal Pain *.

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 cannot

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 intrinsick 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 contary, 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 Ratihabition; since 'tis not in a private Man to make a Sentence, which is null, to be valid and consistent. Nor can any Stress 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.
† Fachin. lib. 8. Contr. 61.

There is another Exception stiled an Exception of *not giving Satisdation* 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. 1.

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
35. 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 receiv'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
‖ C. 2. 13. 2. & 21. give Security for his Wife's ſatisfying the Judgment ‖, unleſs (perchance) 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 Adminiſtration of Things veſted in him as being in a Civil Senſe the Pro-
* C. 5. 12. 3. prietor thereof *. But here in *England* this Diſtinction of Husband and 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 pronounc'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
‖ D. 3. 3. 10 & 42. 1. fraudulently or deceitfully by him ‖. A Proctor *ad lites* may commence 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, conſequently, 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.* provided it be without any Diminution of the Patrimony; and give an Oath, make a Demand, barter one Thing for another, pay Money, and (in general) do all Things which his Client or Principal may do *. And
* D. 3. 3. 54. & 63. 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. 33.
† Cod. 2. 1. [illegible]

But some Things ought necessarily to be expres'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 *incidently* 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 ||.

‡ Vinnius ad Inst. 4. 10.
§ VI. 1. 19. 2.
|| VI. 1. 19. 2.

As soon as a Proctor has finish'd his Office or Business, an Action *de 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 *bonâ 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. 2.
† C. 2. 13. 1.
‡ D. 3. 3. 42. 2.
§ D. 3. 3. 46. 4, 5 & 6.
|| D. 3. 3. 42. 2.
* 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 libera potestate*. But tho' a Proctor be fully made with a free Power of doing all Things without Control; 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 ‡.

† C. 2. 13. 5. Salycetus ibi.
‡ D. 3. 3. 33. 4. D. 3. 3. 46. 4. C. 2. 13. 1. D. 3. 3. 1.

As a Proctor has the Management of the Business of particular Individuals; so a *Syndick* manages the Affairs of aggregate Corporations ||: And

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 stil 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 *Actor 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.

* D. 3. 4. 1.

† X. 1. 39. 1.

‡ X. 1. 39. 1.

‖ D. 3. 4. 10.

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.

*C. 2. 13. 28.

† Hostiens. & Andr.

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 *vivâ 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 Determintion 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. 3. 31.

‖ C. 2. 13. 22.

* D. 3. 3. 16 & 17.

† C. 2. 13. 23.

dertaken by him *. But if the Proctor shall be constituted *ad Integram 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 to appeal within ten or fifteen † Days after Sentence, or (at least) to 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 Dependance on the Appendix, or what is connected to the *first Instance*.

Of Procurations, Synodals and Pentecostals.

PROCURATIONS, in *Latin* stiled *Procurationes*, 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 demanded 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. *Vallensis* d fines a * *Procuration* to be an exhibiting and providing 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 Procuration in Meat and Drink at *Bordesly*, and lodge there all Night †. See *Stevens*'s Historical Discourse 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 *Extravagants* ‡. In the Time of *Hubert* Archbishop of *Canterbury*, which was about the Beginning of King *John*'s Reign, the Canons of the Church took Care †, "That Bishops should not be burthensome to "their Clergy by the Number of their Attendants in their Visitations, "which were then Parochial, and not from Deanery to Deanery, as at "present; and the Number then allow'd being twenty or thirty Horse, "it was thought too heavy for the Clergy to bear:" And, therefore, 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 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 Night's 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* *.

We read in the Books of the *Canon-Law* †, that some Prelates were become so very Burthensome 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*

* Lib. 3. Tit. 22. cap. 1. v. *de Visitationis. Justiup. cap. 5.*

† X. 3. 39. 23.

‡ 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

the Fourth *, and afterwards ratify'd by a General Council at *Lyons* 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 *Victuals*, 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 Ecclesiæ*. 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.

* VI. 3. 20. c. 1.
† VI. 3. 20. c. 2.

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 *Victuals* 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 *eâ 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 *nomine suo*, shall receive the Procurations for himself and his Attendants in *Victuals* *.

‡ Lib. 1. Tit. 9. cap. 1. v. Statutum.

|| X. 3. 39. 2.

* Dd. in c. 1. X. 3. 39. VI. 3. 20. 2.

But now this Payment is become a certain and settled Revenue on the Archdeacon, and 'tis in effect his Subsistance, 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 Impropriator. 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

† Lib. 3. Tit. 3. c. 3. Tit. 20. cap. 1. v. Statutum.

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. Andreas* †, 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 removeable at Pleasure, as I have already remember'd under the Title of *Chapels* ‖.

* Lib. 3. Tit. 22. cap. 5. v. *una Ecclesia.*

† In c. 4. x. 1. 14.

‡ X. 1. 31. 13.

‖ Pag. 165.

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, Synodies, 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 stiles 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 ‖.

* 34 H. 8. c. 19.

† Hard. Rep. 180.

‡ 31 H. 8. c. 13.

‖ Hardr. Rep. p. 388.

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 *.

* Rast. Entr. 483. 2. Roll. Rep. 293.

But

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.

† Rym. Rep. p. 51.

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* Synodalium *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 frudulent Manner, under different Names: *Et hujusmodi Exactionem* (says that Epistle) *ut eam liberius vindicamini 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 34*th 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 Cathedræ Episcopalis* †; and the other was term'd *Synodaticum* ‡, from the Time of Payment, it being at the Synod. *Provincialis* says, That this *Cathedraticum* was a Pension paid formerly to the Bishop from every Church of his Diocese, 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. 18.

† 19 Q. 1. c. 1.

‡ X. 1. 31. 18. Glos. ibi.

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.

* Lib. 1. Tit. 11. cap. 2. v. *Onera Eccleſiaſtica.*

Pentecoſtals, otherwiſe called *Whitſon-Farthings*, were Oblations made by the Pariſhioners to the Pariſh-Prieſt at the Feaſt of *Pentecoſt*, commonly ſtiled *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 Epiſcopal 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 Treaſury 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 *Lammas-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 diſtrictione Anathematis* ||.

† 33 H. 8.

‡ Stev. Hiſt. de Proc.

|| 10 Q. 1. 13. & 14.

Of a Prohibition, where it ſhall lye and where not.

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 ſtiled 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

* 27 E. 3. c. 1.

poral as the Ecclesiastical Courts, if they transgress their Jurisdiction; yet I shall here confine my self to speak only of such *Prohibition* and *Præmunire* 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. B.

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 *Hankford* held *, That by the Statute *de regiâ 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 *Brooke* *, 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 Cædua*; yet *Brooke* says, 'tis otherwise in the Common Pleas.

* 21 E. 3. 19.

† 1 R. 3. c. 9.

‡ 18 H. 4. fol. 19.

‖ Lib. 5 Tit. 5. c. 3 & 5. 6. 7. Cap.

* 21 H. 6. 14.

† 2 H. 5. c. 3. § 34 H. 4. c. 12. ‖ 2 H. 5. c. 3.

* Tit. Prohib. n. 1.

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

† 1 H. 7. fol. 12.

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, * M. 2. H. 4. fol. 15. 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 †Stat. de Conſult. 24 E. 1, Dr. & Stud. lib. 2. c. 24. Court of *Chancery* †. Yet this has two Exceptions, *viz. Firſt*, Whereever the Spiritual Court holds Plea quite to another end. For when one and the Self-ſame Caſe 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 ano‡ Fitzh. Proh. ther 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 Juriſ‖ 38 H. 6. fol 21. diction ‖; 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 a* 13 E. 1. mount 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 †Dr. & Stud. lib. 2. c. 24. 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 ‡ 11 H. 4. fol. 85. 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 ‡ Fitz. H. 7. fol. 22. 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 ‖ Brook. Conſultation. n. 5. an Eccleſiaſtical Court for *Diffamation* ‖. *Sed Quære.* 'Tis alſo ſaid, that a Prohibition lies, when the Party in Suit has an Action given him at

at the Common Law for the *original* and *principal* Matter, whereon the Suit in the Ecclesiastical Court did grow. The Case was thus, etc. 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. 11. 4. Ed. 22.

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 Chanel 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. † Hob. 87.

A Prohibition ceases and loses its Force after a Consultation is once granted, as appears by the Statute *de Consultationibus*: For the *King's Chancellor* 24 E. 1. c. 9.
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 Prejudicium 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 *Pits* it was the * Hob. 85. p. 120.
Opinion of Chief Justice *Foster* and *Tanfield*, 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 be 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 † Hob. 87.
the Discretion of the Court to deny a Prohibition, when it appears to them that the Surmise is not true.

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 Entries, the Oath being to ‖ Hob. 87.

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 excuſs 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.

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 theupon 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 ‡.

‡ Mar. h. Rep. p. 92 & 98.

|| Ibid. p. 96.

* Ibid. p. 93 & 94.

‡ Ibid. p. 45.

|| Ibid. p. 73.

* Ibid. p. 73.

† 11 H. 4. 2. 27. H. 6. 30. 8. E. 4. 6.

‡ Crok. 2 Rep. p. 234.

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

|| 23 H. 8. c. 9.

* Crok. 3 Rep. p. 239.

for such Jurisdiction; and the Archbishop visits not in the Diocese 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 Diocese 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 Diocese 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 gratiâ* and not *ex debito Justitiæ*; but *Keeling* and *Twisden* positively deny'd that. And because the Court was divided, the Matter rested as before ||.

* Cro. Jac. 185

† 1 Cro. Car. 141.

‡ 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 *solely* 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 ‡.

* Cro. Jac. 4 Rep. 1. a. Mayor of Bath's Case, p. 11.

† Mayor of Bath's Case, p. 11.

‡ 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 **, *viz.*

|| Lewin. Rep. pl. 1. p. 79.

** Vid. p. 431

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 itwas deny'd, becauſe that Court had Juriſdiction in the
* Mod. Rep. Vol. 1. p. 3. 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
† Mod. Rep. Vol. 1. p. 21. 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 Dioceſs of *Peterburgh*, who was cited into the *Court Chriſtian* there for marrying without Banns or Licenſe: But the King's Court
‡ Mod. Rep. Vol. 1. p. 22. deny'd the ſame ‡. A Sentence was pronouc'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
* Hob. Rep. p. 246. 247. 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* †.
† Hob. Rep. p. 247. 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 24*th* of *Eliz.* a Suit being in the Spiritual Court for theſe Words, *viz. Sir Prieſt, you*
‡ Ventr. Rep. pt. 1. p. 2. *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 called 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

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, *Præmunire facias* præfatum A. B. &c. *quod sit coram nobis*, &c. where *Præmunire* is used for *Præmonere*; 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 *Præmunire*: Which I have cited, that Men may avoid the Judgment of so heavy a Punishment. For the Judgment in a *Præmunire* 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 *Præmunire*, 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 *Præmunire* ‡, 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 *Præmunire 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 Incroachments 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 curs'd Statute, and the Passing of it *factum & turpe facinus*, a base and wicked Act.

* 3 Ed. I. c. 1. 27 Ed. 3. c. 1. 38 Ed. 3. c. 1. 2 R. 2. c. 5. 12 R. 2. c. 2. 13 R. 2. c. 2. 16 R. 2. c. 5. 3 H. 4. c. 3. 4 H. 4. c. 23. 2 H. 5. c. 7. & c. 8. H. 5. c. 6. 1 Hen. 6. c. 1. 7 Hen. 6. c. 1. 15 Hen. 6. c. 6. & 8. 27 Hen. 8. c. 2. 31 Hen. 8. c. 8.

† 5 Eliz. c. 1.

‡ 12 R. 2. c. 15.

Of Proof, or Judicial Evidence in general, &c.

THERE 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 argutè 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.

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.

* Gloſſ. Bart. Azo & Sich. in Tit. 19. c. 4.

† X. 5. 40. 10.

‡ Calv. lex. Jur. v. *probatio.*

‖ Abb. in Rubr. x. 2. 19. n. 2.

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 dedue'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.* *Laws*, *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 Adverſary 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.

And, *Firſt*, I ſhall conſider the ſeveral *Species* of *Artificial* Proof, in other Terms called legal and judicial Evidence, as they are comprehended under the ſecond Branch of this my general Diviſion of Proof. For this ſeems moſt properly to belong to a Diſcourſe of this Nature, wherein we have to do with the Buſineſs of Judicature. Now legal or canonical Proof conſiſts of ſeveral *Species* or Kinds of Evidence ‖. As for Example: There is one Kind of Proof, which we call *Evidentiſſimi*, 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 proprio* ¶; and this is the ſtrongeſt of all Evidence in reſpect of Condemnation. The other two ways of Confeſſion are what we ſtile a *feigned* and *præſumptive* 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 Title. And the Gloſs on the Law adds a fifth *Species*, *viz.* that of a violent Preſumption. But *Huſſenius* ſubjoins four others, *viz.* a *Confirmed* Fame ‖, the giving of an Oath §, the Ocular Inſpection of the Judge ¶, and ancient Books and Records *. And he alſo ſays, that Proof is of

* Lib. 1. c. 15.

† Lib. 2. de Orat.

‡ Lib. 5. de Inſt. Orat. c. ...

‖ V. 2. 14. 15. 20.

† 11 Dyer. 29. 11 Dyer. 1.

§ X. 2. 15. 15.

¶ 5 Co. 6.

* X. 2. 19.

† 10 Co. 92. 3 Co. 72. 5 Co. 38. 6 Co. 3. 9 Co. 118. 6 Co. 29. 10 Co. 92.

‖ 2 Co. 3. 6.

§ 2 Co. 3. 6.

¶ 2 Co. 3. 6. 9 Co. 118. 6 Co. 29.

* 2 Co. 3. 6.

tain

* 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 administred on a half Proof made in Defect of a full Proof makes a full

* X. 2. 19. 2. 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*

† X. 2. 19. 13. *juvant* † *vel officiunt.* 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

‡ X. 2. 12. 3. 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

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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 ſhew 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 Obſ. 3. n. 5.

† D. 22. 3. 19.

* Lind. lib. 2. Tit. 6. c. 4. *ſubſtituit Legitimas.*

‡ Ang. in l. D. l. 4. n. 2.

ought to be given to every one in the Art and Buſineſs wherein he has
X. 2. 19. 4. been converſant, and is therefore preſum'd to have Skill and Knowlege. 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 concludent 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'
† Caſtr. in l. 31. D. 12. 2. all Proofs are arbitrary, and left to the Judge's Diſcretion †, yet the
‡ Rom. Conſ. 376. Hipp. Conſ. 8. n. 25. 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
† Gail. lib. 2. Obſ. 93. n. 18. 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
‡ Groenv. de Ll. abrog. C. 4 19. 6. 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 *Mævius* 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 Knowlege 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 Knowlege 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 Witneſs 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*,

That, which he has only receiv'd from Credulity, or a ſtrong Preſumption, if he tempers his Evidence *ad mentas 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 *Almanach*, wherein a Father has wrote his Son's Nativity, in *England* has been allow'd as good Evidence to prove his Son's Nonage.

* Add. in l. 32. X. 3. 3.

† D. 5. in l. 31. D. 12.

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 Fallhood 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 reſerv'd. 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 Knowlege 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.*

* X. 2. 19 c. † X. 2. 19. ‡ Abbas in l. 15. C. 2. 4. ‖ Arm. Conſ. 23. n. 4. * Abb. in c. 2. 19 n. 3.

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 called 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

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 *Jew* 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. in c. 23 x. 2. 19. n. 1.

†Abb. in c. 5 x. 5. 16. n. 6.

Of Canonical Purgation, &c.

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 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*, *eluere*, and *delere moram*. *Purgare innocentiam* ‡, *purgare exiſtimationem* ||, *purgare pudorem* *, *purgare rivum* †, *purgare fontem* ‡, &c. In the *Prætor's* Edict it ſignifies to level a Publick Way, and to cleanſe a Street, *&c.* But in *Judicial* Matters, as I ſhall here handle 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 wont 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 the Example of Duelling in the 17*th* Chapter of the firſt Book of *Samuel*, touching *David* and *Goliah*, 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,

* D. 48. 1. 5.

† D. 45. 1. 91. 3.

‡ D. 49. 14. 22
|| D. 47. 10. 1. 6
* D. 3. 3. 25
† D. 43. 22. 1. 6
‡ D. 48. 1. 5.

|| X. 5. 35. 1.
* X. 5. 34. 8.
† 5. 35. 3.

‡ C. 11. 43. 11
x. 5. 4. 35. 2.

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 Knowlege 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 aforesaid: And it is called *Canonical Purgation*, because it was invented and introduc'd by the *Canon-Law*. ‖ X. 5. 34. 1.

This Purgation may be enjoin'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 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 proveable before the Bishops and others: And this Opinion is commonly held good. Indeed *Hen. de Bozwick* 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 su-

* X. 5. 34. 12.

† X. 5. 1. 25.

‡ X. 5. 34. 7.

X. 5. 34. 10.

‖ 11 Q. 3. 52.

‖ 2 Q. 5. 8.

* X. 5. 34. 6.

† Cl. & Inn. X. 5. 1.

‖ Archi. in 6. 2 Q. 3.

‖ X. 5. 34. 8.

* 6 Q. 2. 3.

† In. 5. 34. 1.

‖ Ayl. 6. 1. 14.

ſpected 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.

‖ Dd. in c. 2. 7 Q. 2.

Before the Judge proceeds to enjoyn *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 limitted in many Caſes ‡, yet at this Day the Number is arbitray ‖: And where the Aſſignation of a Number is arbitary, '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.

* X. 5. 34. 8.
† Bern. in c. 4. x. 1. 29.
‡ Hoſt. Sum. x. 5. 34.
‖ X. 5. 1. 21.
* 22 Q. 2. 8.
† 33 Q. 2. 9.
‡ 89 Diſt.
‖ 2 Q. 1. 7.
†† 3 Q. 4. 4.
‖‖ 11 Q. 1. 22.
* X. 5. 20. 7.
† X. 5. 5. 6.
‡ X. 5. 19. 5.
‖ 32 Q. 7. 13.

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 enjoyn'd; but a Sentence of Condemnation ought to be pronounc'd ‖: Nor ought Purgation to be enjoyn'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. in c. 5. x. 1. 41. v. *Diſtantiam.*
‡ 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 & 8.

and

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. Glos.

† 2 Q. 5. 12.

‡ X. 5. 1. 12.

Of the Recusation of a Judge, and the Reasons for it, &c.

THERE 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 Knowlege, 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 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 Knowlege 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 thereunto.

† C. 2. 1. 16.

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 adjug'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 Delegrate, 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 recuſe 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 aggrieving 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 recuſe 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. Conſ. 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. Alex. & 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 recuse 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 *Jews* say, 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 subtile and arduous Nature; for that, according to *Baldus*, Causes of Subtlety ought not to be committed to gross and fat-headed Judges; and *Felin* says, That this is a

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 *Jaſon* *, 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 accuſtom'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.

*In l. 16. C. 3. 1.
† In l. 2. D. 1. 6.
‡ Bald. in c. 12. x. 2. 19.
‖ In c. 2. Cl. 5. 11.
‖ In c. 36. x. 2. 28.

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 Procedings 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.

* Felin. c. 36. x. 2. 28.
† In c. 25. x. 1. 29.
‡ Joh. Andr. in C. 1. VI. 2. 15.
‖ In C. 61. x. 2. 28.
* In l. 16. C. 3. 1.
† Gloſſ. In l. 16. C. 3. 1.
* C. 3. 1. 18.
† Arg. D. 42. 1. 47.
‡ X. 2. 28 61. Gloſſ. in c. 39. x. 1. 29.
‖ Gloſſ. ut ſup.
* C. 3. 1. 18.
† C. 3. 1. 16. Nov. 86. c. 2.

Of

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 handſomly 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 Land 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 Cancellam*, or out of the Chancel.

* Can. 5 Ld.

† X. 1. 23. 1. & 7.

* 12 Q. 10 & 11. 10 Q. 2 & 3.

† 12 Q. 2. 27.

‡ Joh. Andr. in c. 1. X. 3. 48.

|| Med. Rep. 36. 1. p. 238.

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

* Med. P. P.

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 re-

* Mod. Rep. pt. 1. p. 235. 237. fuſing to pay it *.

Though two Parochial Churches ſhould be united; yet the Reparations of them ſhall be ſeveral, as before ſuch Union †: But if there be

† Hob. Rep. p. 67. 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

† 26 Eliz. 30 Eliz. 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

‡ P. 66. 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

‡ Hob. Rep. p. 67. 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

‖ Faſch. 17. Car. 1. B. R. 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

*March. Rep. p. 91. 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

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 Ecclesiæ*, 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.

‖ 1 Mod. Rep. 66 Sup.

* 10 Q. 3. 3.

† 1 Mod. Rep. 66 Sup. Lind. Lib. 1. Tit. 19. c. 4. v. Synodum.

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 the Parish shall conclude the lesser for enlarging a Church as well as for repairing it.

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. 9.

† 1 Mod. Rep. 66. 3. P. 33 C. 2. Lib. 3. 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

‖ Lind. in c. 1. de Censibus. v. Ornamenta.

Perſons having Lands, *&c.* of this Kind ſhall contribute to the Repairs and Ornaments of that Church within the Pariſh whereof they are
* X. 3. 39. 1. 3. 30. 2. 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 Eccleſiaſti-
† Ottob. Tit. 1. cal Nature, according to *John de Athon* on the *Legatine* Conſtituions †; 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
‡ Joh. de Ath. in Tit. cund. v. *Hoc tamen-tur.* Animals which he has therein ‡.

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 Impropriate Parſonage for not repairing the Chancel of the Church. *Sed Quære*, Whether they can do it for not repairing the Parſonage-Houſe? For 'tis clearly held, that they may excommunicate the Impropriator 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
‖ Arg. D. S. 2. 21. 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
‡ 11 Q. 3. 1. 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
* Lindw. lib. 1. Tit. 10. c. 4. v. *Sub pœna* 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.

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 Brevium* †, who gathers it from the *Regiſter*. For if a Biſhop (ſays he)
† F. N. B. Tit. Conſult. fol. 50. cites any of the Pariſhioners of a Church to be Contributary 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 *E-*
‡ A. D. 1559. *lizabeth*'s Reign under the Great Seal of *England* ‡ for a better Record of the Matter, the Queen being authorized thereunto by *Act of Parliament*.

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 Tye-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 enjoyn 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. Licet significamus, quod super Reparatione & Emendatione defectuum corporis Ecclesiæ (juxta consuetudinem approbatam) faciendâ, procedere poteritis, & ea facere quæ ad forum Ecclesiasticum noscitis 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 Pennance can be enjoyn'd but Pecuniary*†. But I need not prove that the Sun shines at Noonday to any Person that has his Sight.

* Reg. 142. a.

† Consult. speak against 13 Ed. 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 †.

‡ Othobon. Tit. 1.

* Reg. Pat. 1. 1. fol. 1. Cl. 1. 1. 1. Indorsatur.

Of

Of Reſidence, the Duty of it, and the Puniſhment of Non-Reſidence, &c.

AS 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.

*X. 3. 4. 11.

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 Parſonages 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 *Beza*, 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. It has been a Question among some subtle *Casuists*, 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 *Casuists* 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. Cook Mear, &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. 2.

* X. 3. 38. 6. X. 3. 50. per tot.

† X. 3. 4. 6.

‖ C. 1. 1. 13.

¶ X. 3. 34. 10.

* X. 3. 31. 4.

ſome Prebend or Dignity; for then the principal Perſon is excus'd from
* X. 3. 5. 30. 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 Dependance 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
† Anch. in c. 30. x. 3. 5. is in the Hands of the Vicar †.

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*
* Tit. 21. Conſtitution 'tis ſaid *, That Biſhops ought to reſide and attend their Churches, particularly, on *Sundays* and *Holidays* during the Time of
† Lindw. lib. 3. Tit. 4. c. 1. Ottobon. Tit. 21. *Lent* and *Advent* †. And in another Conſtitution 'tis ſpecifically expreſs'd, *viz. de die Cænæ:* For then they ought to be preſent at their Churches, according to the *Romiſh* Worſhip and Diſcipline, *ad conficiendum Chriſma*; 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 Cathe-
‡ X. 1. 7. 4. dral 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.

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
‖ X. 3. 5. 30. x. 3. 4. 3. 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
‖ D. 8. 1. 9. Arch. in c. 14. VI. 1. 6. v. *Reſidentiam.* 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
† X. 1. 6. 54. ‡ X. 3. 5. 30. & 33. 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
‖ X. 3. 5. 11. & 30. there are more Miniſters than one, it is not taken in ſo confin'd and
* 82 Diſt. 2. 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 Negli-
† X. 1. 23. 3. gences whatever †.

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
‡ X. 2. 4. 8. to return to his Church by a Time prefix'd in the Citation ‡; and if 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 Dignity, Archdeaconry, or Benefice, and another Person substituted in his room *. 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 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-Residents 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 administring 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 *mortal* Simony in him at least. By a Statute of the Realm of *England* ‖, every Spiritual Person promoted to any Archdeaconry, Dignity or Prebend in any Cathedral or Collegiate Church, or being benefic'd with any Parsonage or Vicaridge shall be personally Resident and Residing 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 28*th 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 21*st 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 Lessor 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.

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 Legislators Mind being always to be regarded: So (say the *Canonists*) we ought sometimes to depart from the Rigour of the Laws, and to follow the Equity of it, which allows of Non-Residence in many Cases reckon'd up in the Canon Law.

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 Servic (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 infer'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 Subſiſtance 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.

taining 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 *Casuists* give * why a Personal Residence is not commanded in Scripture, as otherwise it might.

* Reginald. pract. [illegible]

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.

† Vide Aleg. Jur. Can. Lib. 1. Tit. 11. c. 3.

† Linds. 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. 3. Tit. 4. cap. 1. [illegible]

* Lib. 4. Tit. 3. cap. 2.

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 †.

* Tit. 10.

† Joh. de Ath. in Tit. 10.

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.

‡ X. 1.11.15.

‖ 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 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 *. A *vitiated* 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 ||.

* X. 1. 9. 1.

† VI. 1. 4. 2. X. 1. 9. 3.

‡ X. 3. 31. 1 & 23.

|| X. 1. 9. 8. 18 Q. 2. 8. 7 Q. 1. 10. 33 Q. 5. 3.

Now there are six just Reasons on which Account a Superiour ought to admit of a Resignation, *viz.* A Consciousness 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*, A Consciousness of some Crime committed; but then this Crime ought only to be such which may hinder and impeach him in the execution of his Office after a Performance of Pennance, 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 Infirmity 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 Person, 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.

† X. 1. 6. 42.

‡ 3 Q. 7. 2. 17.

|| X. 1. 9. 10. 3. 7. Q. 1. 18.

‡ 19 Q. 1. 1. 38 Dist. 1.

|| X. 1. 9. 10. 5.

* X. 1. 9. 10. 6.

† X. 1. 6. 7. 10 Dist. 56.

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 Diocess to grant Admission and Institution, *&c.* or whether he be an inferiour Prelate, who may have this Power either by Custom
* X. 1. 9. 4. *cum ibi notatis* 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 & purè*, 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
† Goff. & Bern ‡ c. 8. x. 1. 9. *in* C. 7. 32. 4. 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 Bi-
‖ Innoc. in c. 8. x. 1. 9. shop'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 tendring the same shall in the mean while repent thereof, (the *Matter remaining entire*) he may without any new Institution occupy and repossess
* Arg. D. 20. 6. 10. x. 1. 9. 15. 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 *purè & liberaliter*; for if he makes any Covenant in relation thereunto,
† Gloss. in c. 12. x. 1. 29. 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 o-
‡ 1 Q. 2. 2. x. 1. 35. 4 & 8. therwise: Which Condition ought not to be made before the Ordinary, because such a Resignation savours of Simony ‡. And tho' the Person leaving the same may intreat the Ordinary to confer it on such a one
‖ Gloss. in c. 10. x. 1. 14. 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 annull'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

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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 diſpoſſeſs'd 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 ſponteneâ Reſignatione* are preferr'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 Diocеſs: 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 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, *secunda 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 Feriendis 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

* Luk. c. 18. v. 12.

† Marc. 16. v. 2 & 9.

* Tertull. de Jejun.

† Gen. cap. 1.

‡ 75 Dist. 5.

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-Laws* 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 Delfland* on the 15*th* 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 now be

* C. 3. 12. 3
Exod. 20. 8. v. 21.
‖ Nov. 54.
‡ A. D. 540. Can. 21.
* Febr. 28. A. D. 1456.
† 25 Ed. 3. cap. 14.
‡ 27 H. 6. 5

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. c. 3. *days* in the Years should be kept Holy. 'Tis true this Law was re-
‡ Ann. 1 Mar. peal'd in Queen *Mary*'s Reign ‡, and stood repeal'd till the first of King
‖ 1 Jac. c. 25. *James* ‖, who repeal'd Queen *Mary*'s Act, but did not by express Words 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 *Ezechiel*; and would likewise infer it from the Words of the fourth Commandment. Indeed in all these Places of the Old Testament we are commanded to sanctify the *Sabbath*, and to keep the *Seventh Day*. *The Seventh Day* (says the Lord) *shall be Holy unto you, a Sabbath*
† Exod. cap. 31. v. 14. *and a Day of Rest* †. But I find no express Command for the Celebration 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 honour and worship his Saints. And by the *Canon-Law* the Pope and a general Council have a Power of appointing Holidays, and also of abrogating such as the whole Church has receiv'd: But they have abrogated 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 58*th* 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 sear'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 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* †: 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 *Saints' Days* higher than the eighth or ninth Century, if we follow good Authority.

* 3. Q. 1. 24.

† 3. Dist. 9.

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 expresly 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 *Terragon* ‡, where we find the first mention of any Monks in *Spain*, it was decreed, That after the manner of the *Jewish* Sibbath, 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, 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*.

‡ A. D. 516.

‖ X. 2. 9. 1.

* X. 2. 9. 2.

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 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 Causes whatsoever, unless Piety or Necessity be concern'd. But here I only speak of such Holidays as are enjoin'd by the Authority of the

† X. 2. 9. 1.

‡ X. 2. 9. 5.

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 *Feriæ repentinæ*; 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.

* Hoſt. in Sum. § *Qualiter.* x. 2. 9.

Of the Sacraments, and the Law concerning them.

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 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.

* Con. 2 Diſt. 32
† Con. ut ſup.
‡ Con. 1 Diſt. 69.
|| 26. Q. 7. 1.
* Pæn. 1 Diſt.
† 30. Q. 2. 41.
‡ Con. 4. Diſt.
* X. 5. 3. 9 & 42.

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*

† Cap. 6. v. 10. & 11.
‡ Cap. 6. v. 53.

Western Church very generally till the eleventh Century; when the absurd Doctrine and Belief of *Transubstantiation* 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 *Eulogiæ*: 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 introitus* †. The *Eucharist Sacramentum progressionis*; and for that Reason it is also called a *Viaticum* ‡. Pennance they term *Sacramentum redemptionis* ||. 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, † Can. 4 Dist. 142. ‡ 26 Q. 6. 7. ||. 26. Q. 7. 4. * 26. Q. 7. 1. † Con. 7. Dist. 2.

By a Provincial Constitution in *Lindewod* 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 [illegible], *viz.* at *Easter* *, *Whitsuntide* † 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 *Whitsuntide* from the first Day of *Rogation-Week* till *Whit-Sunday*. 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 Ecclesiæ*, 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. 3. Tit. 15. c. 16. ‖ Can. 21. * X. 3. 43. 1. ‡ Can. 21. ||. 19. * Can. 11. sup. ‖ Lindw. ut supra. * X. 5. 38. 12. † 1. Q. 1. 56. ‖ 23. * 1. Q. 1. 39. 1. Q. 1. 38. * 23. Q. 5. 34.

And by another Constitution in *Lindewod*†, 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. * Ar. D. 7. 1. 19. ‖ 26 Q. 6. 12. ‡ 5. Dist. 35. 1. Q. 1. 7. * Can. 4 Dist. 1. 3.

In

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.*

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 Diocefs 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.

* 1 E. 6. c. 1.

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 Schiſmaticks, and the like ‖: For they require not only a good Diſpoſition of Mind towards Religion, but Repentance of a paſt wicked Life.

† 18 Q. 2. 18.

‖ 26 Q. 7. fere per tot.

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 *Fitzherbert'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.* 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 ||.

† Lib. 1. Tit. 21. Par. 26.

* 17. Q. 4. Par. 3.

† Lib. 5. Tit. 17. c. 1. & Par. 1. in fin.

‡ C. 1. 3. 54.

|| 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. 2. Can. Si quis Archi.

† 17. Q. 4. 31.

‡ ut supra.

|| D. 48. 13. 7. & 4.

* L. 6. 2. 21.

† 12. Q. 2. 3. & 4.

‡ 12. Q. 2. 7. 9 & 10.

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 facto* ||: 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 Sickness he receiv'd Pennance and Absolution from the Parish-Priest.

|| 17. Q. 4. 29.

* 17. Q. 4. 21.

† X. 5. 17. 5.

‡ 17. Q. 4. 15.

|| X. 5. 17. 3.

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 stollen 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 stollen from thence, an Action of
†D. 48.13.6. 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
‡17. Q.4.21. 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
‖An.38.H.3. 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 curs'd 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 pro-
*Sider. Rep. p. 281. per 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
† Dyer. Rep. p. 99. 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.

Of

Of the Sacrist, Ostiarius, *and other Church-Officers.*

THO' 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 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 unto which a Trust or Charge is annex'd without any Prerogative of Honour.

* In l. 6. C. 12. 1.

‡ In c. 1. x. 1. 4.

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 ‖; 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 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* term'd *Praefectus Thesaurarius* ‡. The *Sacrist* had a Minister or Servant under him, called *Custos Ecclesiæ*, 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.

‖ X. 1. 23. 3.

* X. 1. 26. 1.

† In l. 9. D. 1. 8.

‡ 25. Dist. 1.

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 *Ostiarii* or *Janitores*, 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

‖ 1. p. 9. v. 26.

be

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 † 25. Diſt 1. Church †: And the Symbol or Badge of the Order granted him is the ‡ 23. Diſt. 19. 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, ‖ 50. Diſt. 64. to keep ſuch Perſons out of the Church during the whole Service-time, as are enjoin'd the Performance of publick Pennance. 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 ‖ Can. 91. may be ſeen in the *Latin* Verſion of King *James*'s Canons ‖.

Of Schiſm and Schiſmaticks, &c.

THE Word *Schiſm*, which is deriv'd from the *Greek* Verb Σχίζω, 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 Definiton 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 * 24. Q. 3. 26. 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, † 24. Q. 3. 26. 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 ‡ 24. Q. 1. 34. Schiſmaticks, 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

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 Gallies 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 *Walbe*'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. 3. 8. 1.

‡ 9. E. 2. c. 3.

† 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. 14. 40.

‡ 1. Q. 1. 11. 2.

* 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 †.

† 11. Q. 1.

Of Seals Authentick, and the Evidence thereof.

AS 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 Authenticknes 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,

* Vid p. 444.

† X. 2. 22. 2.
‡ X. 2. 22. 9.
|| X. 2. 19. 3.

* 1. Q. 7. 21.

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 ſtrengthned 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 ſtrengthned and corroborated by the Judge's *Authentick*

† 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. in c. 1. de fide inst. n. 3. 12.

† X. 2. 22. 2.

‡ X. 2. 22. 3.

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 *secunderily*.

* 11. Q. 3. c. 1. Dd ibi.

† C. 6. q. 1. 2. Dd. ibi.

‖ Barr. in c. 2. X. 2. 22. n. Syllabus Authentic. num.

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.

‖ Lind. l. Tit. 18. c. 1.

* D. 28. 1. 22. 5. Pæn. 2. Dist. 65. v. *Quidam Laici.*

† Otho. Tit. 27.

Of

Of Seats and Monuments in Churches.

AS 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 Dioceſs, 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*.

* Hetley's Rep.

† 3. H. 7. 12. 9. E. 4. 14.

‡ Vid. Hall's Caſe.

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 poet exier* 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 *Heſſey* the Term before, wherein a Prohibition was granted, notwithſtanding the Appeal.

* Rolls Rep. p. 44.

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.

† 2 H. [illegible].

‡ Bulſtr. Rep. pt. 2d. Addy 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 Houſhold, 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

† Cok. 12. Rep. p. 104. 2 Crok. Rep. p. 560. Godb. Rep. p. 200.

* Noy. Rep. p. 75. Lutw. Rep. p. 116. Palm. Rep. p. 422.

† Cokes 12. Rep. fol. 105. Noy. Rep. 129, 132.

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 †.

* 1. Levinz. Rep. p. 72.

†Crok. 2. Rep. p. 604. Palm. Rep. p. 46.

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.

‡ Noy Rep. p. 109.

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 ||.

|| Noy Rep. p. 133.

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 Cauſâ violationis Sepulcri*. The Lady *Wych* 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.

* 3d Inſt. p. 202. 9. Edw. 4. 14. a.

† 9. E. 4. 14. a.

Of Sentences Diffinitive and Interlocutory.

A 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

*Abb. in Rub. x. 2. 27.

† D. 8. 5. 6. 3.

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. de Constitut.

‖ In 3. 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 aforesaid. 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 Judicatam*, 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. 2. 45. 1. D. 42. 1. 1.

† Angel. Cons. 114. & 115.

‖ Alex. in Rub. D. 42. 1. & in l. 14. D. 42. 1.

† Alex. in Rub. D. 42. 1. & in l. 14. D. 42. 1.

* D. 42. 1. 15

‖ D. 42. 1. 14 & Jas. Perez. Alex. & Bal.

† Dec. Cons. 35.

‖ Cl. 2. 1. 5 & ibi. Card. & Paul. in l. 3. D. 49. 1.

* Gloss. in l. 9. D. 1. 16. 1.

† Paul. D. in l. 16. D. 49. 1.

‖ C. 7. 45. 1.

† Gloss. in c. 11. c. 2. q. 6.

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 inſerted 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 equipolant 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 expreſly 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*

* 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 & 20.

‡ Gail. lib. 1. Obſ. 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. 32.

ly

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. 35. n. 2. de n. 34.

† Menoch. Presumpt. lib. 1. n. 6. ‡ Marsil. ar. D. q. 8. 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 Judicatæ* 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 Judicatâ*.

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 *Retractative* 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 *Absolutory* 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 Case 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 abſent Perſon not cited to appear *, unleſs it be in Matters notorious (for Things notorious do not require a Sentence † (at leaſt) a ſolemn one) or againſt a Perſon not convict or not confeſſing his Crime ‡, ſuch Sentence is null and void *ipſo Jure:* And a Sentence which is null and void *ab initio*, cannot be called a Sentence. A Sentence pronounc'd againſt a Perſon deceas'd, or againſt a Perſon under ſuch a grievous Infirmity *, as he cannot appear to hear the ſame read, is null and void: But then ſuch Death or Sickneſs 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 Sickneſs 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 *Sentence* paſſes againſt the Heirs or Executors by way of *Interlocutory* ||. 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 render'd null and void *. Sometimes the Falſhood of the Cauſe conſiſts 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 *Sentence* †: 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 any previous Taxation thereof ‡: For ſuch a Sentence is valid, tho' the Sum or Quantity of ſuch Expences be not therein declared and ſet forth, becauſe Expences are only Acceſſory to the principal Cauſe. Altho' a Sentence pronounc'd by an incompetent Judge be not valid, even tho' the Parties ſhould conſent thereunto ||; yet a Sentence pronounc'd by a Judge

* D. 49. 8. 1. 3. D 5. 1. 68. † Abb. in c 3 x. 1. 7. n. 7. ‡ Abb. in c. 10 x. 1. 2. n. 11.

* C. 1. 18. 1. D. 2. 11. 2. 3.

|| Gail. lib. 1. obſ. 109. n. 5.

* Papienſ. prax. Tit. 20.

† X. 2. 27. 16.

‡ Abb. in c. 5. x. 2. 14. n. 8.

|| Paul. de Caſtr. in l. 1. C. 7. 48. n. 1.

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 extensâ*; 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 præcedere 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 repulsed 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.

* Abbas in 4 c. x. 1. 2. 24. n. 8.

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

† Paul. de Castro in l. 4. C. [illegible] 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 expreſly 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 *expreſly* 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. in c. 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 *bene judicatum & male appellatam*, 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.

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 intrinſick 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.*

† Bald. in l. 1. C. 7. 50.
‡ X. 2. 27. 7.

tention: 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 Judicatam*, if it be not appeal'd from thence.

Of Sequestration, and the Species *thereof.*

A *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 Threefold, *viz. Casual, Necessary* and *Voluntary*.

* D. 1. 5. 4.

† C. 4. 4. 1. unic. & ibi. Glos. in *Sequest.*

‡ C. 4. 4. 1. unic. 2. X. 2. 13. Gl. ff. in v. *Sequest.*

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

‖ X. 2. 13. 4. D. 24. 3. 22. 7. D. 49. 1. 1. in fin. C. 7. 65. 5.

* D. 4. 8. 5. D. 1. 15. 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
† D.24.3.22. the Husband to live on †. And in the like manner may the Husband's
7.C.5.12.30. Goods and Eſtate be ſequeſtred in the Caſe of his Madneſs. *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 Obe-
‡D.37.6.1.10. dience ‡. *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
‖ X.2.13.13. 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 ſtollen and car-
* X.4.1.14. ried 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 mortuariâ*, 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 Enmi-
† D.7.1.13.3. Spec. Tit. Sequeſt. Verſ. *ſed numquid.* ties 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 Squab-
‡D.7.1.13.3. D.7.1.35. blings of Parties ‡: For each Party may feign or counterfeit a Quarrel, *&c.*

&c. 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 Curiâ 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. ... 17 ...

A Sequestration may be granted in Ecclesiastical Affairs on several Accounts: As, *First*, for Instance, when a *Spoliation* 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 sequester'd †, and to order the Church-wardens to collect them; and they 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. ... 1.52. ‡ D. 16. ... 1 2. D. 16. 3. ... 8 9.

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 Impropriator or Incumbent shall, upon an Admonition, neglect to do it, then some of the Profits of his Living or Impropriation (as some say) may be sequester'd for that Purpose: But it has been a Question, Whether the Tithes of an Impropriation 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. *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 Balliva 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. 58. † Stat. 13 ... Westm. 2. 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 practiſed 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 Ox, Horſe, or any Thing elſe that is wont to be ſold. The ſecond they ſtile *Pretium Linguæ*; as the Defence of an Advocate, a Recommendation to a great Man's Favour, and the like. And the third they term *Pretium obſequii*, as any Miniſterial Service in Temporal Affairs. And, *laſtly*, 'tis ſaid to be given *for ſomething Spiritual*, or *ſomething annex'd thereunto* †; as Orders, the Right of Patronage, the Perpetuity of receiving the Fruits and Profits of the Church, and the like; becauſe a Thing merely Temporal is not the Object or Subject of *Simony*.

* 11. Q. 1. 3

† Abb. in c. 14. X. h. t.

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 expiain the Divine Law: And hence it is, that ſeveral Popes * have reckon'd it among the greater and more heinous Crimes. Among the Number of theſe pretended holy 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 Folly; that St. *Ambroſe* holds this Crime of *Simony* to be worſe than the Sin of Idolatry itſelf ‡. And *Gregory Nazianzen* calls it a Capital Crime §. And, therefore, 'tis no Wonder that *Baldus* ¶, *Roland a Valle* ‖, and other Creatures of the Papacy, ſhould make it equal to the Crime of High-Treaſon. *Panormitan* ſays, That the Peſt of *Simony* in reſpect of its Magnitude, exceeds all other Diſtempers and Maladies of Vice whatſoever. I will not here defend the Crime of *Simony*, as we uſually define 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 by the Law of God: And as to the Law of Man, tho' it might be founded at firſt upon good Policy in the Church to exclude want of Merit 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 Prieſtcraft 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.

* Panorm. in Cap. Cauſam. II. Q. 1. 11.

‡ In 1. 41. C. de Epiſc. & Cler. n. 21. n. 1. a. Vol. 3.

§ Cap. 1. X. 5. 34. 6. ad fin.

¶ Cap. ult. II. Q. 1. 11.

‖ Tr. de Nobil. c. 1. n. 1.

† Lindw. lib. 2. Tit. 6. c. 1.

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 Communion 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 Conſtitution 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; inſomuch, 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 tempted 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 verſâ* 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 Knowlege 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.
† Conſ. 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 sollicits 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 prefer'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. 55. x. 5. 3. n. 1.

† X. 3. 5. 16.

‡ X. 3. 5. 1.

§ Abbas in c. x. 1. 4. 2. *

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* Simoniacal Persons shall be incontinently remov'd from the Church, when any notable Signs and Tokens of Simony do appear against them †. And *Joh. Imanias* 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. Imanias* 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 Simoniacal 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 Hereſy; 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 remem-
* Pag. 489. ber'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.*

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
† 22. Can. Apoſt. 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 inflicted 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 Simoniacal Perſon, and others
‡ lib. 1. Tit. 4. c. 2. v. *Simoniazos.* 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 Simnoniacal 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
‡ X. 5. 3. 35. officiate therein ‖: Yet ſometimes the Pope has hought 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
† A.D. 1547. publiſh'd by King *Edward* the Sixth †, and others by Queen *Elizabeth*‡,
‡ A. D. 1559. 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 uncapable 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 Ma-
‖ 31 Eliz. c. 6. jeſty. 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 ob-
* Hob. Rep. p. 75. taining 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. p. 165. 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
‡ p. 165, 166 167. 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 Laws* 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 *Eckard*'s History †, if we may believe it, was the first time that Simony was known in *England*.

* Vide Ch. Prec. p. 34.

† X. 5. 1. 21.

‡ Dyer, fol. 8. pl. 2. 12.

§ Addit. to C. p. 5. 5.

† Pr. 1. p. 59.

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 honesto*, 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 Staute. 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.

‖ Hob. Rep. p. 105.

¶ Cro. Jac. m. Rep. p. 175.

* Keny Rep. p. 22.

† Hob. Rep. p. 105.

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 hindred 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.

* Vide c. 15. can. 1. & c. 10.

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 Eccleſiaſticks, 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 Aſſecution 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*.

* Navar. c. 27. n. 151.

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 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 pronouc'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

† Sylveſt. v. *Suſpenſio.* Quæſt. 2.

‡ Bonacin. tom. 1. 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. Can. Tit. 6. v. Ultimum Canonicum.
† 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 publickly denounced: But 'tis otherwise in a Person suspended by the Canon, and not publickly 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-Laws* suspended *ipso facto*; and so are Heretick and Schismaticks: 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.

|| Othon. Can. Tit. 2. v. 2. *Missam scilicet.*

* X. 1. 4. 8.
† X. 5. 27. 10.

Of

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 Knowlege 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.

*X. 3. 30. 1.

*lib. 18. c. 2.

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 expreſly 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. 13.

‡ 16. Q. 1. 47.

† X. 3. 30. 20. & 32.

‖ Dd. 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 and Oblations are mentioned together †, as making up the Churches Revenue, which was to be divided into four Parts, as already remember'd ‡: The first was given to the Bishop, the second to his Clergy, 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 establish'd by divers Acts of Parliament, but he also mentions the *Saxon* 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 Tithes were first order'd to be paid in *England* at a Synod or a Council called by King *Offa*, 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 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, whether it may be in the Old: And, therefore, by the *Canon-Law* a Layman cannot receive Tithes in respect of any Custom whatsoever, tho' it should be on a Custom founded on Prescription *. I shall not here enter into any Controversy about the Divine Right of Tithes due to the Clergy, but consider them as given to the Church by Human Law 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 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 again, *Concerning the Tithe of the Herd, of the Flock, even of whatsoever passeth under the Rod; the Tenth shall be Holy unto the Lord* ‡. But this was a Law unto the *Jews* alone on the Account of Sacrifices and other Offerings, according to the Ceremonial Law, which was abolish'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 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 Man; *and does not the Law say the same Thing also?* So that tho' 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. *Hale* 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 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

† Vid. Gib. Cod. Lib. 1.

‡ Pag. 504.

§ 2. Inst. p. 642.

‖ Hist. Vol. II. p. 59.

* 25. 3.

* C. 3. 36. 7.

‡ 1. Tim. 5. 18.

‡ Deut. 12. 6.

‡ Deut. 14. 22.

‡ 1 Cor. 9. 11.

‡ 1 Cor. 9. 7.

‡ Vid. Hob. Rep.

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 *Doddridge* 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.

* 3. Bulſt. Rep. p. 242.

† Cok. 11. Rep. fol. 8.

* Hob. Rep. p. 44. 297. 298.

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 prædiis* 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 *Fructus*, 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 Cædua* *. 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

† X. 3.30.23.

‡ Lindw. lib. 1. Tit. 3. c. 2. v. *Fructus.*

† 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.

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 accustom'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 enjoin'd ¶, 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 aforegoing 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 Land, 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 ‡.

* X. 3. 30. 1. † Lindw. lib. 3. Tit. 16. c. 3. ‡ X. 3. 30. 24. § X. 3. 30. 8. ‖ 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. † Lindw. ubi sup. & Gibs. 22. Gibs. ubi supra. Lindw.

So

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 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 *. 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, especially for small Tithes as *Job Ananias* observes †. But tho' Laymen may lawfully compound for a past Subtraction 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 ‡. 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.

† X. 3. 30. 3. ‡ X. 1. 36. 8. ‡ X. 1. 36. 2. || Bern. in c. 2. X. 1. 36. * Host. in c. 2. X. 1. 36. † X. 3. 30. 7. ‡ X. 2. 26. 7. || 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 partu 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 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 which he makes of such Cheese sold, where Personal Tithes are paid †. In Autumn and Winter, when Cheese is not usually made, Tithe shall be

† In c. 3. X. 3 30. v. *minutis* ‡ Cap. 11. Ver. 22. * VI. de reg. Jur. 83. † X. 3. 30. 28.

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 Cædua*, 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 *plerierres 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

† Lindw. l. 3. Tit. 16. c. 3.

‡ Vern. Rep. pl. 1. p. 25

* 1 Roll. Abr. p. 637.

† Lindw. l. 3. Tit. 16. c. 3.

‡ Ibid.

† 1 Roll. Ab. p. 642.

‡ Ibid. p. 643.

‡ Ibid. 642.

* Ib. 640.

† Ibid. p. 644.

‡ Ib. 647.

* Cro. Eliz. p. 276.

† Gold. Rep. p. 194.

‖ Roll's R. p. 649.

* Ib. 650.

‡ 11th and 12th W. 3.

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 *Kent*, 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 Endowment †.

* Rep. p. 77. Sid. Rep. 283.

† Abr. p. 144.

* Sid. Rep. p. 443.

† Vent. Rep. pt. 1. p. 61.

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 fold 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 fatting; 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,

‖ Crok. 430. 2. Crok. 575. 1. Roll. Rep. 62.

* 1 Roll. Abr. p. 647.

† Lib. 3. Tit. 6. c. 6.

‖ 11th. Nov.

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 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* *.

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 *ferœ 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 inclos'd, 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 *Haward* ‖ seems to think, that the Tithes of Fishes taken in the Sea (for they are titheable by the *Canon* Law) are Predial Tithes.

* Johnson's Case. 2 Roll. Rep. 239.

† Hard. Rep. 3. 2 Roll. Abr. 639.

‖ Roll. Abr. P. 646.

* 1 Inst. 151. 3 Leon. 202. 5. Rep. 37. Cro. Car. 375. Noy. 128. 2 Roll. Abr. 646. 1 Brownl. 182. Hob. 85. Cro. Jac. 139. 2 Roll. Abr. 646. 1 Brownl. 182. Hob. 85. Cro. Jac. 139.

† D. 42. 1. 6. in pr. fin. * D. 41. 1. 30. 1. 2. 1. 37

‖ Cro. Car. P. 359.

* Roll. Abr. P. 646.

† Hard. Rep. 3. Cro. Jac. 139. 1 Brownl. 182. Hob. 85. 2 Roll. Abr. 646.

† Hard. Rep. 3. Cro. Jac. 139. 1 Brownl. 182. Hob. 85. 2 Roll. Abr. 646.

* Dyer 281. 2 Roll. Abr. 646. 1 Inst. 122. 2 Cro. Car. 370.

‖ Hard. Rep. 3.

Beasts

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.)

‡ D d in c. 6. X. 3. 30.

* Hetl. Rep. p. 147.

† Roll. Rep. p. 2.

‖ Ut super v. *debito modo.*

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 Substracting 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 Trespass 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 Trespass at the *Common-Law*.

* X. 3. 30. 20.

† 2 & 3. E. 6. c. 13.

‖ Lindw. l. 3. Tit. 16. c. 7. v. *si vendantur.*

* Crok. Eliz. 476. Owen. Rep. 74. Moor Rep. 909.

† Latch Rep. 125. Sid. Rep. 183.

‖ 2 & 3. E. 6. c. 13.

A Prescription to pay the Parson the tenth Sheaf or Load, is a good tenth *Sheaf* is not good *: But a Prescription to pay the ordinary Tithes in that Year wherein the Field was fallow, or Custom to have it the Sheaf into Shocks, when the Field was sowed, is good and valid by Law. The Ground pays no Tithes for the Fallow 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 Common 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, is 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 is 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 tithable, 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 *decimas minores 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 convenient, 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. '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 Manner, *&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 Cædua*, which 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 *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 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 Fewel 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 ‖.

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 Tithe-Wool ought to 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 more

* Lindw. lib. 3. Tit. 16. c. 3.

† 1. Roll. Rep p. 355.

‡ 45. E. 3. c. 3.

‖ D. 32. 1. 55. 2.

* Moor Rep. 762. 908.

† Brownl. Rep. 33.

‡ Moor Rep.

‖ Crok. Eliz. p. 100.

* Lindw. l. 3. Tit. 16. c. 6. v. *ratâ temporis.*

† ut ſupr. v. *decima lanæ.*

more then to pay the tenth Part *sine villa & tallia* 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 ſhow 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, 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 ſhearèd or ſold, and that 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* 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, 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.

* 2 Roll. Ab. 648.

† 2 Roll. Ab. 649.

‡ Ibid.

§ Ibid. 638.

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 *Auſterius*, it has been adjudg'd in the Parliament of *Thoulouſe* in *France*. And *Hobart* tells us *, that a Cuſtom for Pariſhioners to pay their Tithes 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 ſubſtracted (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

* Hob. Rep. P. 107.

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 Dominii*, to the Lord of the Mannor by way of Acknowledgment, or as a Quit-Rent, and these were stil'd *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 Tithes in their own Right, but are also actually privileg'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 privileg'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 *Præmonstratenses* 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.

* 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. 1. p. 31.

* P. 417.

† P. 202.

Of

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 the 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 Commissional 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. 16.
† D. 14. 1. 4.
* Jeh. de Ath. in Colum. conf. Tit. 1. in Prolegom.
‖ 16 Q. 1. 19. 21. 23. Dist. 29.
* 7 Q. 1. 15 & 16.
† 98 Dist. c. 5. 55. 9.
* ii. 1. 13. 3. 11. 3. 4. 5.
‡ Lind. 15. 3.
* 4 X. 1. 13. 2 & 3.
* X. 11. 5.
‡ X. 1. 31.

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.

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 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 Inſtitution into the Church itſelf*. And ſome obſerve; that, according to the antient Law, this Allocation or Aſſignation 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 Aſſignation of the Biſhop at the Time of Inſtitution was not practis'd in his 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

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* Othobon. Conſt. Tit. 22. X. 3. 5. 12 & 30.

† X. 1. 28. 3.

*X. 3. 5. 12.

† 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 ſupr. v. *ad minus.*

a leſſer Sum than this ought not to be aſſign'd the Vicar (which is 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?

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 ‖.

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 IId's Time, Pope *Alexander* the

* A.D. 1342. † Lind. Lib. 3. Tit. 28. c. 1.

‖ Lindw. Lib. 1. Tit. 12. c. 1. v. *Quia*, *Mutatum*.

* A.D. 1378. † Lind. l. 3. Tit. 28. c. 11.

‖ Page 153. of Tythes.

* Art. 31. Dist. 11. † Panl in c. 1. Cl. 5. 12. & [illegible] ‖ Lind. l. Tit. 12. c. 2. v. [illegible] X. 3. 1. 3.

the IIId. 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 *Salva*; 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 IId's Time, when *Alexander* the IIId. 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 sullen, 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 enjoin'd 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.

* 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.

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. 2*dly*, 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 Impropriator 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.* 3*dly*, The Law of *England*, as to a competent Subsistence for Vicars

† 31 H. 8. cap. 13.

‖ 2. Rolls. P. 337. 9 Car. 1.

* 40 E. 3. cas. 15. fol. 28.

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 *expressed*, 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. 38. 29. X. 3. 29. 3.

* 55 D. 8. 1. 16 Q. 1. 4. 3. 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 IId 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 Good-will 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. Tit. 10.

† X. 1. 28. 4.

Otho's Conſtitution obliges Vicars to perſonal Reſidence; yet it does not
* In Tit. 10. Othon. v. *Reſidentiam.* ſpeak of Miniſtration: But *Joh. de Athon* thereupon obſerves *, that this Reſidence is not enjoin'd them on the account of a conſtant Attendance and Service in adminiſtring the Sacraments, and doing other Sacramentals only; but likewiſe on the ſcore of maintaining Hoſpitality: for a perſonal Reſidence, implies a perſonal Duty of adminiſtring 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
† Cl. 1. 7. 1. the Adminiſtration of the Sacraments, and other Sacramentals †.

Of Viſitations Provincial, Epiſcopal, &c.

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, accord-
* Conſ. 158. ing 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 Dioceſs 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
‖ Cl. 3. 10. 2. Cauſes annex'd to it: But in all Viſitations, the Viſitor may ſummon ‖
* 10 Q. 1. 11. 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 Viſitatorial 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
† vi. 3. 20. 1. 1. over his Province †; and a Biſhop throughout his Dioceſs ‖. But a *ſimple*
‖ 10 Q. 1. 9 & 10. 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 Dioceſs: 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 ipso*, included in his Commission by way of Accessory; because, according to this Maxim in Law, *concesso uno videntur concedi omnia ad illud accessoria**. And this is particularly true, if the Person delegating has the Power himself of depriving Persons of their Benefices: But otherwise not. * L. 1. 49. tit.

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 Diocess, and the Clergy and Laity thereof in a full and ample manner†: And after he has visited his own proper Diocess, he may either in part, or in the whole, visit all the Cities and Diocesses 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 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 Diocess 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 the Word of God, by giving the Congregation a Sermon. *2dly*, They 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 Diocesses 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 Diocess 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 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, 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 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 Diocess (as he thought fit) and to these, being all Men of mature Age, and eminent Honesty and Veracity, he al-

† vi. 3. 20. 1.

‖ Innoc. in Nov.

* vi. 3. 20. 1.

† vi. 3. 20. 1. 5.

‖ 10 Q. 1. 10 & 11.

* Cl. 3. 10. 2.

† Regin. Colleg. Can. lib. 2. p. 2. 5.

‖ Regin. Colleg. lib. 2. p. 2. 4. 35 Q. 6. 7.

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 Dioces, 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*.

* X. 2. 21. 7.

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 Dioces 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 †.

† 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.

† Pr. 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.

5*thly*, 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 whole 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.

* X. 3. 14. 2. & 3. 5. 3. 22. Cl. 3. 1. 1.

† Lib. 2. p. 253.

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. 2*dly*, 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 Incurſion, 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 ‖. 3*dly*, 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

* 16 Q. 1. 48.

† X. 3. 35. 1.

‖ X. 3. 36. 2.

* 16 Q. 1. 48.

† X. 3. 34. 2.

Consent of his Chapter, and the Patron of the Church unto whom the
‖ X. 3. 24. 7. same belongs ‖ : But the Pope may do it without the Consent of either, *propter Magnum Bonum Ecclesiæ*, as the Papal Law stiles it.

When an Union is only for the Life-time of the Person, the Benefice *re-*
* Gomes. *de Reg. possess.* Q. 8. *vives* (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 scan-
† Compeg. *de Union.* n. 1. 8. 10, &c. Flam. Paris. *de Resign.* lib. 12. c. 3. N. 49. dalous, 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
‖ Brook's Tit. *Union.* 37 H. 8. c. 21. *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
* D. 7. 2. 3. 2. 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
† D. 7. 2. 6. 1. *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*,
‖ X. 3. 5. 26. 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
* X. 5. 31. 8. 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
† 16 Q. 7. 33 & 34. Inn. & Compost. in c. 8. X. 1. 2. 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 Ecclesiæ*; 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*,
‖ X. 3. 5. 25. 1. The Consent of those to whom the Church belongs ‖. 2*dly*, That they do
* Arg. X. 3. 5. 25. v. *propter quod institutionem.* intend to increase the Number and Benefices *. 3*dly*, That there be a reasonable Cause for such Division †. And 4*thly*, That it be a fat Benefice, and sufficient to maintain two or more Clergymen from the Income
† 10 Dist. 1. 1. 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
‖ X. 3. 5. 26. full Orders, of a holy Life, perfect in Learning, and of sound Doctrine:
* Othon. Tit. 11. 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

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 falsly 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 Assecution of a second Benefice which is incompatible with the first ‖; and this our Common Lawyers call *Cession*.

* D. 40. 5. 2.

† vi. 1. 5. 10. v. *vacant.*

‖ v. *vacant.*

* Arch. in c. 4. vi. 1. 6. v. *vacant.*

† Bern. in c. 1. X. 5. 13. v. *similiter.*

‖ 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, 1*st*, *Ipso Facto tantùm*: or, 2*dly*, *Ipso Jure*; or, 3*dly*, By a Sentence; or, lastly, *Ipso Facto & Jure simul*. A Benefice is void *ipso Facto 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 facto* 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 facto* 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.

‖ D. 4. in c. 10. X. 3. 4. Glos. in c. 35. vi. 1. v. *impedimento.*

* vi. 3. 4. 18.

† 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 ||. 2*dly*, 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. 3*dly*, 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, 4*thly*, 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.

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*.

|| X. 1. 9. 4. * X. 1. 7. 2. & Dd. ibi.

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.

† Othon. con. Tit. 11.

Of

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 asunder 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 *lucrative* and *mental* Usury, (for in respect of a depray'd Intention, any Profit or Lucre conceiv'd in the Mind, they deem *mental* Usury) stile this *lucrative* Interest: and this first kind of *lucrative* 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 Poenam*, 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 *damnum emergens*. And from hence it follows, that

† D. 2. 14. 17. in prin. D. 12. 1. 11. 1. X. 5. 19. 1 &c.
‡ Par. pall. Glos. in l. 1. c. 1. n. 3. l. 3. n. 4.
‖ X. 5. 19. 10. X. 5. 19. 3. 4. 18.
* Exod. 22. Levit. 25. Deut. 23.

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 *Logick, 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.

† X. 3. 22. 2. Glos. in c. 8. X. 5. 19. v. *de Feudo.*

|| Luke c. 6.

* X. 3. 19. 2.

Secondly, In respect of *Perjury* or the *Breach of an Oath*, by the *Canonists* sometimes in *Latin* called *læsio 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 sundry 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 *læsio 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-

† 13 Edw. 1.

|| 5 Eliz. c. 23.

* 5 Eliz. c. 9.

† Pag. 215.

|| M. 2. H. 4. 15. Dr. & Stud. lib. 2. c. 24.

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 *Fee-farm*, 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 judicium Ecclesiasticum.* And in another place of the same Book he assigns a Reason for it; because, says he, *Jurisdictionem regiam non mutat fides interpositis. 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 perjur'd 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 perjur'd 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 præsenti* 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 *Rebuffus* do both agree, that he ought to be decreed *privandum fore*. See *Soto*, *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,

‖ 1. H. 6. fol. 24. Decretal. Lib. 2. Tit. 24. cap. 8. Fee-farm.

* Hob. Tit. Prem. etc. Rep.

† Lib. 3. C. 9.

‖ Lib. 5. c. 9.

† M. 5. 4.

* Cap. 1.

† C. 2. 4. 41.

‖ D. 3. 2. 11.

* X. 2. 24. 2.

† Gomez in [illegible] J. 4. [illegible] n. 7. [illegible] fol. 47. [illegible] Part. 1. lib. 1. [illegible]

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.

† Lindw. lib. 1. Tit. 11. c. 1. v. *Perjurio.*

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 hardned 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.

† 5 Eliz. c. 23.

Of Laſt Wills and Teſtaments, Codicils, &c.

THERE are two ſorts of Succeſſion to the Eſtates of Men deceas'd, *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,

* J. 1. 10. 1. in prin.

† Lib. 6. Eleg. c. 36.

‖ Lib. 6. c. 12.

* In l. 35. D. 39. 6.

† Oldenb. lex.

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,

‖ In l. 1. D. 29. 3.

* J. 2. 12. 1, 2, 3, &c.

† Ut ſupr.

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 causa* may be term'd a *Last Will*, but not a *Testament* †; and so may a *Codicil*, according to *Lucherannus*, be taken for a Last Will; for as *Baridus* observes ‡, an imperfect Testament proves the Will of the deceas'd. And consequently wherever any Solemnity is wanting, which the Law requires, it may from hence be stiled a *Last Will*, tho' there be a *Conflat* 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 subscribed 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 subscribed 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

* D. 28. 1. 21. 1.
† C. 6. 23. 19. & l. 21.
* C. 6. 23. 19.
† C. 6. 23. 25.
‡ C. 6. 23. 25.
* D. 28. 1. 21. 2. C. 6. 23. 31.
† C. 6. 23. 25.
* C. 6. 23. 19.
‖ C. 6. 23. 21.
¶ C. 6. 23. 21.

sufficient in some Cases; for a Will made by a Father *inter Liberos*, does
*C. 6. 23. 21. 1. 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
† J. 2. 10. 6. 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
‖ C. 6. 23. 19. number of Witnesses are sufficient, if the Will be registred or engross'd as
* C. 6. 23. 21. 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
† Alex. cons. 70 & 177. vol. 2. and the like †. And by the *Canon* Law, in respect of Wills made *ad pias*
‖ X. 3. 26. 10. *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
* 29 Car. 2. c. 3. 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 Commen-
† C. 1. 1. 1. tators 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
*Guid. Pap. Dec. 262. Mynsi. 5. Obs. 19 & 20. Gail. 2. Obs. 123. 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
† X. 3. 26. 16. 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
* X. 3. 26. 15. 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
† J. 2. 10. 1. made *per Emancipationem familiæ* 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
‖ J. 2. 10. 4. 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

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 Testi-'mony shall be received of such *nuncupative* Will, unless the said Testi-'mony 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,

* J. 2. 10. 14

‖ 29 Car. 2. c. 3.

* J. 2. 10. 14

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* there upon 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

† C. 6. 23. 29.

* J. 2. 20. 34.

‡ D. 28. 2. 1.

‖ D. 28. 2. 3.

pass

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 expreſly appointed, or by Name not diſ-inherited: For a Son, by the *Civil* Law, ought either to be expreſly made an Heir by Name, or elſe to be expreſly 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 Priviledges 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. 5. 37. 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 expresly 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 expresly 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 ‖.

* Mantic. lib. 3. Tit. 14. N. 11. † Inl. 3. D. 28. 2. ‖ D. 29. 7. 8. * D. 29. 7. 8. † J. 2. 25. 2. ‖ Molin. Disp. 124. Col. 3. Ostorcen. in Inst. 2. 25. 1. N. 26.

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 * C. 6. 23. 21.

be deſtroy'd, unleſs the Teſtator ſhall afterwards, in the Preſence of ſeven Witneſſes, expreſly 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 extrinſick 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 extrinſick 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 as 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.

† In l. 21. C. 6. 23.

‖ C. 6. 23. 21.

* C. 6. 23. 12.

† Mantic. ut ſupr. 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 infer'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. 6.

† Tusch. Tom. 8. Conc. 104.

‖ Mant. de Conj. ult. Vol. Tit. 5. Masc. de Probat. Concl. 825. N. 13. C. 6. 22. 10.

† C. 6. 22. 10.

‖ J. 2. 11. 2. C. 6. 22. 10.

* C. 22. 12. 2.

† C. 6. 22. 10.

‖ Tusch. Tom. 8. Concl. 120. N. 15.

* J. 2. 12. 1, 2, 3, 4, &c.

† D. 6. 3. 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:

* Bart. in l. 57. D. 36. 1.

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 Con-

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.

* Jac. 20. in l. 21. c. 16.

† 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. 37. 5. Lindw. Lib. 3. Tit. 13. c. 1. v. *Legitima teſtandi.*

‖ 3 Cok. 5. Rep. fol. 29.

* Anton. de Butrio in c. 19. X. 3. 26. in fin.

† X. 3. 26. c. 7. & 9.

‖ Lindw. Lib. 1. Tit. 3. c. 1. v. *Legata.*

* Othob. Conſt. Tit. 14.

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 Regiſtring 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.

† Lindw. Lib. 3. Tit. 13. c. 5. v. *Laicis.*

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 *Tiraquel* 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.

‖ 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.

The Inſinuation or Regiſtring 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.

† Ottobon. 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. 18. 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. 59.
† 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. 20. 10.
† Socin. Cons. 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 † C. 4. 20. 11. 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 adminiſtred 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 Party.

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 ‖ D. 22. 5. 3. 5. 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 ‖ C. 4. 20. 11. 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, 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, Ætas, 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-

* Gloſs in l. 7. D. 5. 3. Bart. tract. teſt. 5. quæſt. 1. N. 3.

† Gloſs & Dd. in c. 29. X. 2. 20. & l. 7. D. 5. 3.

‖ X. 2. 21. 1. & 3. D. 22. 5. 1.

* 5. quæſt. cod. tit.

† C. 4. 20. 4. Dd. ibi.

‖ D. 22. 5. 1.

* 15 Q. 3. 1.

† D. 22. 5. 3.

mony of a Perſon not yet arriv'd at the Years of Puberty, is (therefore)
* D. 22. 5. 3. null and void *, tho' nothing be objected to or againſt his Perſon: And the ſame thing may be ſaid of a Bondman or Vaſſal †.
† X. 5. 40. 10. 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.

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
* D. 22. 5. 3. *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
† Q. 2. 7. 39. even in Civil Cauſes †; ſince a good Name and Reputation for Credit
* X. 2. 29. 25. 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
‖ X. 2. 20. 13. 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.

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
† X. 2. 25. 1. 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
* D. 22. 5. 3. 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
† X. 2. 25. 1. 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
* 2 Q. 7. 39. free from four Things, *viz. Firſt*, From any Crime itſelf *. *2dly*, From the
† X. 2. 25. 1. 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
‖ 2 Q. 7. 39. Life and Converſation ‖. Now this laſt may be underſtood in a twofold Senſe

Sense and Meaning, *viz. De Mundâ animâ*, which ought to be more regarded then 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 *in dictâ mulctâ*, 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.

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 Fasting ‖: But this is not practis'd here in *England*.

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

* D. 3. 3. 2. C. 4. 20. 19.

‖ X. 2. 21. † X. 2. 21. 2.

† Vide Speculat.

‖ X. 2. 20.

* X. 2. 2. 3. 2. 9. 2.

‖ X. 2. 20. 51.

† Cyn. in l. 11. C. 4. 20.

* Bart. in l. 1. D. 49. 2. 3. 35. in l. 6. D. 5. 1.

‡ D. 48. 18. 1. ‖ 2. 2. 1.

* 14. Q. 1.

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 renounc'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.

* Barr. Tract. de Teſtib.

† Farinac. Tract. de Teſtibus.

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.

* 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.

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* *, repeat 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. 55.

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. 2. 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. 3.

† X. 2. 28. 22. X. 5. 3. 35.

of *Informations* it ſhall be diſcuſs'd, whether he ought to be credited or not. Therefore, a Witneſs that is an Enemy by an outragious 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 under ſtood 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

* Nov. 90. c. 7. X. 5. 3. 31.

† C. 4. 20. 6.

‖ D. 22. 5. 9.

‖ Gloſs in l. 4. D. 22. 5.

* D. 22. 5. 3.

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 Sollicitor 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.

* C. 4. 20. 18. Nov. 90. c. 2.

† Arg. D. 3. 3. 25. Dd. in l. 19. c. 4. & 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.

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 †.

* X. 2. 20. 11.

† X. 2. 20. 21.

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

‖ 4 Q. 5. 10.

* X. 5. 4.

Day-

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
*X. 2. 20. 9. 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
† X. 2. 23. 8. touching the ſame †: For they are preſum'd to be better acquainted with
‖ Conſ. 154. 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
*D. 22. 3. 28. contrary thereunto *.

When 'tis ſaid in our Books, that more Credit is given to two Witneſſes
‖ Gloſs. in l. 27. D. 4. 3. 3. 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
† Papienſ. aurea prax. Tit. 12. Gloſs. 11. N. 4. 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
* 28. Diſt. 4. 82. Diſt. 2. *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 ne-
† X. 2. 20. 23. ceſſary †. 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

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. & 1.

* Dist. c. 19 v. 1.

† X. 2. 1. 1.

|| X. 1. 29. 1.

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 expreſly 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*, Into *Reprobation* 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. tit. 10. Gloſs 9.

† X. 2. 20. 51.

* 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.

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 ſubtus in aure alicujus ipſum male ornare* ‖.

† X. 2. 19. 9.

‖ D. 48. 2. 9. & 12. 2. 33.

* Wilh. in c. 2. Cl. 2. 8. v. *ſubornatio.*

† X. 2. 19. 9.

‖ Gloſs. in c. 2. Cl. 2. 8.

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 Witneſs 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 ſubſcrib'd 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.

* Cl. 2. 8. 2.

† Abb. in c. 3. X. 2. 18. N. 22.

* X. 2. 21. 7. Dd. ibi. X. 2. 20. 53. & ibi Notata.

FINIS.

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.
* Abingdon, 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
Birlingron.	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. *Edr.*	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	05	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

The

The Names of Monasteries, and Priories.	*In what Counties.*	*When Founded, Ann.*	*Of what Order.*	*Of what Value per Ann.* l.	s.	d.
Chicksand, Pr.	Bedford	*Wm.* 2.	WhiteCanons	212	03	05
* Cirencester, Ab.	Glocester	*Hen.* 1.	Can. St. Auft.	1051	07	01
St. Clare.	Wr. Algate	1292.		1418	08	02
Clerkenwell, Pr.		K. *Step.*	Benedictines	262	19	00
Colchester, Ab.	Eſſex	*Hen.* 1.	Can. St. Auft.	523	17	00
Comb, Ab.	Warwick	K. *Step.*	Ciſtercians	371	15	01
Combermere, Ab.	Cheſhire	1134	Ciſtercians	225	09	07
St. Croſs, Ab.	Stafford	1153	Ciſtercians	227	05	00
* Croyland, Ab.	Lincoln	716	Benedictines	1803	15	01
Croxden, Ab.	Leiceſter	*R.* 1.	Præmonſtr.	385	00	10
Croxden, Ab.	Stafford		Ciſtercians			
St. Cuthbert, Ab.	Durham	842	Benedictines	523	17	00
Darby, Abby.	Derbyſh.	*Hen.* 2.	Can. St. Auft.	258	14	05
Dartford, Ab.	Kent	43 *E.* 3.	Can. St. Auft.	380	00	00
Dinkſwell, Ab.	Devon	1201	Ciſtercians	294	18	06
Dorcheſter, Ab.	Oxon	635	Can. St. Auft.	219	12	00
Dunſtable, Ab.	Bedford	*Hen.* 1.	Can. St. Auft.	344	13	03
Edington, Pr.	Wilts	1352	Can. St. Auft.	442	09	07
* Edmondsbury, Ab.	Suffolk	1020	Benedictines	1659	13	11
Einſham, Ab.	Oxon	K. *Eth.*	Benedictines	441	12	02
Elmeſton, Ab.	Bedford	*Wm.* 1.	Benedictines	284	12	11
Epworth.	Lincoln	*W. R.* 2.	Carth. Monks	237	15	02
Fair-place, Ab.	Hampſh.	1204	Ciſtercians	326	13	02
Farley.	Wilts	1125	Cluni	217	00	04
Feverſham, Ab.	Kent	1147	Cluni	286	12	06
Ford, Abby.	Devon	1133	Ciſtercians	374	10	06
Fountain, Ab.	York	1132	Ciſtercians	998	06	08
Furnes, Ab.	Lincoln	1127	Ciſtercians	805	16	05
St. Germains, Ab.	Cornwall	*Athelſt.*	Can. St. Auft.	243	08	00
* Glaſſenburg.	Somerſet	300	Benedictines	3311	07	04
* Glocester, Ab.	Glocester	680	Benedictines	1946	00	00
Gisborn, Ab.	York	K. *Step.*	Can. St. Auft.	628	03	04
Godſtow, Ab.	Oxon	K. *Step.*	Benedictines	294	05	10
Hales, Abby.	Glocester	1246	Ciſtercians	257	07	08
Hales-Owen, Ab.	Worceſter	K. *John*	Præmonſtr.	282	13	04
Hales-Owen, Ab.	Salop	K. *John*	Præmonſtr.	337	15	06
Haghmond, Ab.	Salop	1100	Can. St. Auft.	259	13	07
Hertland, Ab.	Devon	*Hen.* 2.	Ciſtercians	294	18	06
* Hide, Abby.	Hampſh.	K. *Alfr.*	Benedictines	865	18	00
Hinton, Pr.	Somerſet	*Hen.* 3.	Carthuſians	248	19	02
Holmeoltron, Ab.	Cumberl.	1135	Ciſtercians	427	19	03
Holynell.	Lond. *&c.*	1318	Black Monks	347	15	06
Hulme, Abby.	Norfolk	K. *Can.*	Benedictines	583	17	00
Jervall, Ab.	York	K. *Step.*	Ciſtercians	234	18	05
John of Jeruſalem.		*Hen.* 1.		2385	12	08
Ixworth, Pr.	Suffolk	*T. Conq.*	Can. St. Auft.	280	09	05
Keynſham, Ab.	Somerſet	*Hen.* 1.	Can. St. Auft.	419	14	03
Kennelworth, Ab.	Warwick	*Hen.* 1.	Can. St. Auft.	538	19	00
Kingſwood.	Glocester	680	Benedictines	244	11	02
Kirkham, Ab.	York	*Hen.* 1.	Can. St. Auft.	239	09	04
Kirkſtall, Ab.	York	*Hen.* 1.	Ciſtercians	329	02	11
Kirkſted, Ab.	Lincoln	1139	Ciſtercians	286	02	07

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.* 1.	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	*Adelſted*	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
Melſam, 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
Perſhore, 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.	Berkſ.	*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

The Names of Monaſteries, and Priories.	*In what Counties.*	*When Founded, Ann.*	*Of what Order.*	*Of what Value per Ann.* l.	s.	d.
Selby, Ab.	York	*T. Conq.*	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.	*Hen.* 5.	Can. St. Auſt.	1731	08	04
Smithfield E. Ab.		34 *E.* 3.	Ciſtercians	602	11	10
Southwick, Pr.	Hampſh.	*Hen.* 1.	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.	K. *Step.*	Præmonſtr.	258	08	05
Strata Florida.	Cardigan	*T. Conq.*		1226	06	00
St. Swithin's.	Wincheſt.	634	Benedictines	1507	17	02
Tarrent, Ab.	Dorſet	*Hen.* 3.	Ciſtercians	214	07	09
* Taviſtock, Ab.	Devon	961	Benedictines	902	05	07
Taunton, Pr.	Somerſet	*Hen.* 1.	Can. St. Auſt.	386	08	10
Thame, Ab.	Oxon	*Hen.* 1.	Ciſtercians	256	13	11
* Tewxsbury, 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.	*Hen.* 1.	Can. St. Auſt.	259	09	04
Titchfield, Ab.	Hampſh.	*Hen.* 3.	Præmonſtr.	242	16	01
Tinmouth, Pr.	Durham			397	11	05
Tinmouth.	Northum.	A Cell to St. Albans.		511	04	01
Torre, Ab.	Devon	*Rich.* 1.	Præmonſtr.	369	11	00
Twineham, Pr.	Hampſh.	1042	Can. St. Auſt.	326	13	02
Vale of Holy Croſs.	Denbyſh.	*Edw.* 1.	Ciſtercians	214	03	05
Walton, Ab.	York	K. *Step.*	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	K. *Step.*	Can. St. Auſt.	391	11	07
Walter, Priory.	York	*Hen.* 1.	Can. St. Auſt.	221	03	10
Warden, Ab.	Bedfordſh.	4 *Step.*	Ciſtercians	389	16	06
Warſon, Pr.	Nottingh.		Can. St. Auſt.	239	10	05
Welbeck, Ab.	Nottingh.	K. *Step.*	Can. St. Auſt.	249	06	08
Wenlock, Pr.	Salop	1181	Cluni	401	07	00
St. Wereburg.	Cheſhire	1095		1103	05	11
Weſt Deerham.	Norfolk	*Hen.* 2.	Præmonſtr.	228	00	00
* Weſtminſter.		K. *Edg.*	Benedictines	3471	00	02
Weſtacre, Ab.	Norfolk	*W. Ruf.*	Cluni	260	13	07
Whale, Ab.	Lancaſt.	1172	Ciſtercians	331	09	01
Whitby, Ab.	York	*T. Conq.*	Benedictines	437	02	09
Whorwill, Ab.	Hampſh.	K. *Edg.*	Benedictines	339	08	07
Wigmore, Ab.	Salop	1172	Can. St. Auſt.	267	02	10
Wilton, Ab.	Wiltſhire	K. *Eth.*	Benedictines	601	01	01
* Winchcomb, Ab.	Glouceſter	787	Benedictines	391	18	02
Witham, Pr.	Somerſet	*Hen.* 2.	Carthuſians	215	15	00
Wooburn, Ab.	Bedford	K. *John*	Ciſtercians	391	18	02
Wymundham, Ab.	Norfolk	1139	Benedictines	211	16	06

A

TABLE

Of the FEES 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.*
 Literæ Teſtimoniales	05	00
Commiſſio	10	00
Exemplificatio	10	00
Significavit	10	00
Quietus eſt	10	00
Adminiſtratio cujuſlibet defuncti cujus bona extendunt ultra 40 *l.*	10	00
Literæ ad colligenda bona	06	08
Sequeſtratio fructuum	06	08
Commiſſio Tutelæ	06	08
Licentia Solemnizandi Matrimonium 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 reliquorum	ob.	00	04
Pro die ad exhibendum Inventorium	01	00
Pro parte purgata	00	09
Pro primo Compurgatore	00	09
Pro quolibet reliquorum	ob.	00	04
Literæ intimatoriæ ſive proclamatoriæ	01	00
Admiſſio cujuſlibet exhibiti	00	04
Caveat pro Teſtamentis & Adminiſtrationibus	00	06
Caveat pro Inſtitutione ſive Matrimonio	01	00
Dimiſſio cujuſlibet cauſæ incontinentiæ & inſtantiæ poſt litis Conteſtationem	00	05
Pro interrogatoriis miniſtratis	00	03
Licentia Solemnizandi Matrimonium tempore prohibitionis de Bannis edendis	02	00
Pro exhibitione conjuſlibet procuratorii 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 Juriſdictionem	05	00

Fees due to the Regiſter.

Literæ Teſtimoniales	06	08
Inſtitutio cum Mandato	06	08
Commiſſio	06	08
Exemplificatio præter ſcriptionem 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 Matrimonium abſque Bannis	03	04

Licentia

	s.	d.
Licentia deserviendi vel docendi	01	04
Inhibitio in causa Matrimoniali	01	08
Suspensio	00	08
Absolutio ejusdem	00	09
Excommunicatio	00	08
Absolutio ejusdem	00	09
Schedula Excommunicationis ex Officio	00	06
Certificatorium de Absolutione	00	08
Citatio	00	05
Decretum	00	10
Productio partis principalis	00	09
Productio primi testis	00	09
Productio cujuslibet reliquorum ob.	00	04
Pro parte purgata	00	09
Pro primo Compurgatore	00	09
Pro quolibet reliquorum ob.	00	04
Literæ intimatoriæ sive proclamatoriæ	01	00
Commissio Tutelæ	03	04
Admissio cujuslibet exhibiti	00	04
Caveat pro Testamentis & Administrationibus	00	06
Caveat pro Institutione vel Matrimonio	01	08
Decretum interlocutorium	01	08
Dimissio cujuslibet causæ incontinentiæ & instantiæ post litis Contestationem	00	05
Pro interrogatoriis ministratis	00	09
Licentia Solemnizandi Matrimonium tempore prohibitionis de Bannis edendis	01	04
Pro quolibet actu	00	04
Licentia lectandi extra Jurisdictionem	05	00
Pro qualibet Obligatione	01	00
Pro copia cujuslibet materiæ exhibitæ secundum quantitatem	00	00
Pro literis Diaconatus ordinis	03	04
Pro literis Presbyteratus ordinis	03	04
Pro licentia prædicandi, deserviendi & docendi	01	04
Pro exhibitione literarum Diaconatus ordinis tempore Visitationis	00	04
Pro exhibitione literarum Presbyteratus eodem tempore	00	04
Pro exhibitione Institutionis cum Mandato	00	04
Pro exhibitione cujuslibet Dispensationis	01	00
Pro exhibitione cujuslibet procuratorii tempore Visitationis	02	00
Pro exhibitione cujuslibet billæ detectionis eodem tempore	00	04
Literæ Interdictoriæ	01	04
Licentia non residendi	01	04
Commissio pro Absolutione alicujus	01	04
Testamenta & Administrationes prout in statuto prædicto	00	00
Pro exhibitione cujuslibet procuratorii pro Testamentis	01	04
Administratio cujuslibet defuncti cujus bona extendunt ultra 40 *l.*	06	04
Pro exhibitione cujuslibet procuratorii	01	04
Admissio Resignationis	02	06
Transmissio processus quantum taxatur per Judicem	00	00
Scrutinium factum in Registro	01	00

Fees due to the Procurator.

PRO Consilio	02	00
Pro quolibet die Juridico	01	00
Pro schedula excommunicationis	00	06
Pro schedula expensarum	01	00
Pro feodo ad probandum Testamentum	01	00
Pro libello	05	00
Pro qualibet materia	03	04
Pro interrogatoriis	03	04
Pro Conceptione Computi	03	04
Pro Conceptione Sententiæ	03	04
Pro Conceptione cujuslibet responsionis personalis	02	06

Fees due to the Apparitor.

FOR execution of every Citation of Instance, Excommunication and Decree *per* Mile	00	02
For every Detection	00	04
For every intimation upon purgation *per* Mile	00	02
For every Suspension, Excommunication *& viis & modis ex officio per* Mile	00	02
For every Testament or Administration above 5 *l.*	00	06
For every Sentence	01	04
For every Interdiction *per* Mile	00	02
For dimission of every Cause of Incontinency	00	03

Fees due to the Keeper of the Seal.

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THE END.


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