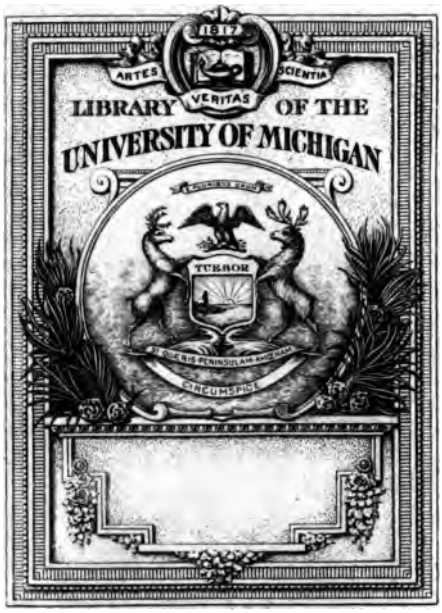
Horatio Cook

Colchester



DIRECTIONS

TO

CHURCH-WARDENS

FOR THE

FAITHFUL DISCHARGE OF THEIR DUTY.

BY HUMPHREY PRIDEAUX,

Rector * Arch-Deacon of Suffolk.

WITH

NOTES AND OBSERVATIONS, AND A COPIOUS INDEX.

A NEW EDITION, BEING THE SEVENTH.

TO WHICH IS ADDED,

A COMPENDIUM OF THE LAW OF TITHES,

ALPHABETICALLY ARRANGED.

London.

PRINTED FOR J. WALKER, PATERNOSTER-ROW;

By J. & E. Hodson, Cross-Street, Hatton-Garden.

1805.

THE acknowledged learning of the Reverend Author of the *Directions to Church-wardens*, is a sufficient recommendation of the Work. The notes and observations, it is hoped will be found to be useful. The *Compendium of the Law of Tithes*, contains much useful information on that subject.

G. C.

GRAYS INN SQUARE,
6 *Nov.* 1804.

TO THE

REVEREND THE CLERGY

OF THE

ARCH-DEACONRY OF SUFFOLK.

MY WORTHY BRETHREN,

The ignorance of Church-wardens as to the duties of their office, which they have been sworn to, making Visitations in a manner ineffectual, and also frequently causing great differences and disturbances at home among their neighbours, through the errors and mistakes which they run into, about the repairs of your Churches, and the levying of rates for the same; I have thought it necessary to draw up these directions for the preventing of the like mischiefs and inconveniencies for the future; and if you will join your endeavours with me so far, as out of this paper every year to inform and instruct your Church-wardens, that they may the better know their duty both in presenting such

things

things as are amiss in your respective parishes, and also in repairing your Churches, I would then hope that sin *might be more effectually corrected, and Churches so repaired, that the worship of God might be performed in them with that decency which is fitting, without making this matter a fire-brand of contention among you (as it too often happens) to the wasting of that Christian charity among your people, which it is one of the main duties of your Ministry to support and maintain among them. I pray God bless us all in our endeavours to promote his honour and glory in that holy function which he hath called us to;*

And I am,

Your affectionate Brother and Servant,

HUMPHREY PRIDEAUX.

DIRECTIONS

TO

CHURCH-WARDENS, &c.

CHURCH-WARDENS are officers of the parish in ecclesiastical affairs, as the constables are in civil, and the main branches of their duty are to present what is presentable by the ecclesiastical laws of this realm, and repair the Church[a].

For the better information of Church-wardens as to those particulars, which they are to present, [b]articles are to be given them extracted out of the

[a] It was not till about the year 700, that the Saxons in large districts, founded Churches for themselves and their tenants; and those were the original of parish churches. Seld. de Dec. 259. c. 9. s. 4.

Within these districts other Churches were afterwards erected, which in process of time have obtained tithes, burials and baptism, and thereby become Parish-Churches. Id. 262. c. 9. s. 4. D. of Plu. 92.

And therefore every Church having burial, baptism and tithes, is now esteemed a Parish Church. Id. 265. c. 9. s. 4.

And so if a place has not a Church, Church-wardens and *Sacramentalia*, it is not properly a parish.

So it shall not be a parish *by reputation* within Stat. 43. El. 2. if it had not a Parochial Chapel, Chapelwardens and *sacramentalia*, at the time of Statute.

Although it had a distinct overseer and maintained its own poor, Sal. 501. And though it had also a Chapelwarden by whom rates are collected there, and paid to another parish. Ibid.

A Church built within the precinct of a Parish Church, to which burial and sacraments belong, is a chapel of ease. 2 Rol. 340.

Churchwardens are lay persons, though ecclesiastical officers. Hard. 379 (see 2 Rol. 71. 1 Sal. 166. 5 Mod. 326.)

[b] The book of Articles delivered to them for their direction, are for the most part founded on the book of Canons made in 1603, and the Rubricks of the Common Prayer.

laws of the Church, according to which they are to make their presentments, *Can.* 119.

They are obliged twice every year, *i. e.* at the visitations of the Bishop, Arch-Deacon, or other Ordinary, to make their presentments, according to the said articles, of all such things as are amiss in their parishes, and may, if they think fit, do it oftener, as there shall be an occasion, but cannot be forced thereto, unless only when the Bishop visits, *Can.* 116, 117.

They are bound to present not only from their own knowledge, but also from common fame[a]; so that if there be a common fame in the parish of any one, that he lives incontinently, is a common swearer, or in any other particular contained in the articles, is a breaker of the laws of the Church, the Church-wardens are bound to present him at the next visitation, that enquiry may be made thereinto; and they are guilty of the breach of their oath, whenever they omit it, *Can.* 115, 117.

In case the Church-wardens omit to present any of those particulars, of which there is such a common fame in their parish, they may be forced to do it by the Ordinary in his visitations, on his having notice of the thing; and, if they refuse so to do, be proceeded against as wilful breakers of their oath, and in the interim be barred the communion by the Minister of the parish, *Can.* 26. 117[b].

It is the duty of Ministers to admonish Church-wardens of these particulars, and therefore they would

[b] This discretion should be exercised with great circumspection. *Commom fame*, as the adage has it, *is* (sometimes) *a common liar*, and it is presumed, that no one will *present*, till, by his own enquiries, he is satisfied, that *common fame speaks the truth.*

[a] By Act 4 J. c. 5. they are bound to present tipling or drunkenness, and recusants, 3 J. c. 4.

They

would do well, some time before every visitation, to cause them to read over their Articles in their presence, and instruct them in the meaning of them, and direct them how to make their presentments thereon, so as they may best discharge their duty to the honour of God, the good of the Church, and the safety of their own souls, in avoiding the heinous sin of perjury in the breach of their oath, which otherwise they may become guilty of, *Can.* 26.

As it is the duty of the Minister, so also it is of every good Christian, to advise the Church-wardens of what is amiss in their respective parishes, and to admonish and excite them to present the same; and every parishioner hath a right so to do, that so every scandal, which gives them offence, may be removed. And the Church-wardens are bound to have regard hereto, and present whatever upon any such informations or advices, either of the minister or parishioners, they shall find to be of ill fame in their parishes; and if they refuse or neglect so to do, they are liable to the same penalty, as when they refuse to do it on the admonition of the Ordinary; that is, are to be proceeded against as wilful breakers of their oath, and in the interim be barred the Communion by the Minister of the Parish, *Can.* 26. 116.

But here the Church-wardens must be advised to have a care, that they do not turn the groundless calumnies, and base slanders, which wicked and

They may present as often as they please, and shall not be obliged above once a year when it hath been so used, and not above twice any where, except at the Bishop's visitation. Can. 116, 117.

The Minister may present, if the Churchwardens neglect. Can. 113. But such presentment ought to be upon oath. 2 Vent. 42.

For the presentment of any Church or Chapel for one year, the register shall have only 4d. Can. 116, 117.

malicious persons are too often apt to raise of their neighbours, into formal accusations against them; but take heed that they present no other ill fame of any one, but such only, as there is that just ground for, as may make it credited and believed by honest and good men.

The Church-wardens are also to present all such as come not to Church, *(Can.* 90. *5to & 6to Edw. 6. c.* 1. 1 *Eliz. c.* 2. 3 *Jac.* 1. *c.* 1.*)* Nor doth the Act of Toleration at all supersede this part of their office. But since all such, who frequent any other assembly for God's worship tolerated by the said act, must on their pleading the same, and making proof thereof, be discharged; the governors of the Church do not now require, that the Church-wardens should give any trouble to such, who, they are well satisfied, do constantly resort to any of the said assemblies: But where they are not well assured of this, they are earnestly desired still to present the said absenters, least by their neglect herein, the said Act of Toleration, which was intended only for the ease of tender consciences, become a shelter and encouragement to the atheism and profaneness of such, who would gladly be at liberty to worship God no way at all. Nor need the Church-wardens be afraid of any trouble to themselves, from their thus discharging their duty in this particular, because the absence alone of any such from Church, will sufficiently justify their presenting of them; And that they have been at any other assembly tolerated by the said act, doth not lye on the said Church-wardens to take notice of, but on them to make proof of it, before they can have the benefit of the same. But where the Church-wardens have not good reason to believe they have been absent from all such assemblies, as well as from Church,

it

it is our desire, [a] that they should be vexatious to no one herein.

But all this is to be understood upon supposal, that such dissenters have qualified themselves according to the said Act of Toleration, to partake of the benefit of it; that is, have at the Quarter-Sessions taken the oaths[b], which are by an Act of Parliament made in the first year of King *William* and Queen *Mary*[c] appointed to be taken instead of the oaths of allegiance and supremacy; and also have made and subscribed the declaration mentioned in a statute made in the thirtieth year of King *Charles* II. entituled, *An Act to prevent Papists from sitting in either House of Parliament.* Or else, (if they be of that sect of Dissenters, who scruple and refuse to take any oath) have produced two witnesses to testify upon oath, that they believe them to be Protestant Dissenters; or a certificate witnessing the same under the hands of four Protestants, who are conformable to the Church of *England*; or have taken the oaths and subscribed the declaration aforesaid; and besides the said two witnesses, or certificate, have also produced another certificate

[a] The worthy and learned *Dean* seems by this expression to have been sensible, that there was danger to be apprehended, from Churchwardens who might be officious intermedlers in other mens concerns. To *admonish*, to *recommend*, to *advise*, is certainly right. But some doubt has been entertained of the policy of *compelling* men to attend divine worship. Certainly the most acceptable offerings are those made with a free will.

[b] I A. B. do solemnly declare, in the presence of Almighty God, that I am a Christian and a Protestant, and as such, that I believe that the Scriptures of the old and new Testament, as commonly received among Protestant Churches, do contain the revealed will of God; and that I do receive the same as the rule of my doctrine and practice.

It has been held that German Lutherans are within the protection of the Toleration Act. Peake's Cases, 132.

[c] This is the Act of Toleration, and was by the 19 G. 3. c. 44. declared to be a public act.

under the hands and seals of six or more of the congregation to which they belong, owning them to be of them; and on their doing of either of them in manner as aforesaid, have (being thereto required) at the Quarter-Sessions made the declaration of fidelity, and subscribed the form and profession of the Christian Belief, which are in the said Act of Toleration mentioned and required to be made and subscribed by them in this case. For if any shall without qualifying themselves in this manner, as aforesaid, resort to any assembly or meeting for divine worship dissenting from the Church of *England*, they can have no benefit of the said act of Toleration, or of any of the indulgences granted by it, but are liable to all the pains and penalties of law, not only for being absent from Church, but also for being present at the said dissenting meeting, in the same manner, as if the said act had never been made, and are by the Church-wardens to be presented for the same: And the same is to be said, if the said assembly or meeting shall be held in an house not legally registered and allowed for it; or if they shall meet there with the doors locked, barred, or bolted upon them. For in both these cases, as well as in the former, all that are present at any of the said assemblies or meetings dissenting from the Church of *England*, are excluded by the said Act of Toleration from receiving the benefit of it, and therefore are liable to be prosecuted thereupon, and must be presented by the Church-wardens in order to it, in the same manner as if the said act had never been made, (1 *W. & M.* *c.* 18.) And it is to be here observed, That if any dissenting Minister, not being in orders according to the Church of *England*, shall administer the Sacrament of the Lord's Supper in an unlicensed house,

or

or without qualifying himself as the said Act of Toleration requires, he is not within the benefit of the said Act, and consequently is liable to the penalty of 100l. forfeiture for every time he shall so administer the said Sacrament, 13 & 14 *Car.* 2. *cap.* 4.

And the said Church-wardens are bound not only to observe, who are thus absent from the Church, but also to see and take care, that all that resort thereto, do in time of divine service and sermon behave themselves orderly, soberly, and reverently, kneeling at the prayers, standing at the belief, and sitting or standing quietly and attentively at the reading of the scriptures, and the preaching of God's Word, (*Can.* 18 & 111.) That none walk, talk, or make any noise in the Church to disturb duty, which is there performing, *Can.* 18 & 111.) That none sit there with their hats on[a], or in any other indecent or irreverent manner, (1 *Eliz. c.* 2. *Sect.* 14. & *Can.* 18.) That none contend or quarrel about place, or upon any other occasion make any broil or brawling there, 5*to* & 6*to Edw.* 6. *c.* 4.) [b]That no idle person abide in the Church-porch, or Church-

[a] And therefore it has been resolved, that they may take off the hat of any one who wears it in the Church at the time of divine service, without a prosecution in the Spiritual Court. 1 Saund. 18. 1 Lev. 196. 1 Sid. 301.

[b] This statute enacts, that if any person shall, by words only, quarrel, chide, or brawl, in any Church or Church-yard, the Ordinary (on proof of two witnesses) may suspend every layman being an offender, *ab ingressu ecclesiæ*; (*i. e.* from entering into the Church) and every clergyman from the ministration of his office, so long as he shall think meet, s. 1. And, if any shall smite, or lay any violent hands on another in any Church or Church-yard, he shall be deemed *ipso facto* excommunicate, and be excluded from the fellowship and company of Christ's congregation. s. 2.

But Church-wardens, or perhaps private persons, who whip boys for playing in the Church, or pull off the hats of those who obstinately

Church-yard during divine service or sermon, but that they either come in, or depart, (*Can.* 19.) That no excommunicated person come into the Church, (*Can.* 85.) or any other disturbance or indecent behaviour be there permitted; but that every thing be kept in peace, and quiet, and due order, and all behave themselves with that decency, reverence, and devotion, which is suitable to the duty they are then upon, and none depart out of the Church, unless upon a necessary occasion, till the divine service and sermon, or other service of God, which they are then upon, be fully ended,

refuse to take them off themselves, or gently lay their hands on those who disturb the performance of any part of divine service, and turn them out of Church, are not within the meaning of this Statute. 1 Hawk. 139.

Although the statute says he shall be *ipso facto* excommunicate; yet in this and other like cases there ought either to be a precedent conviction at law, which must be transmitted to the Ordinary, or else the excommunication must be declared in the Spiritual Court upon a proper proof of the offence there; for it is implied in every penal law, that no one shall incur the penalty thereof, 'till he be found guilty upon a lawful trial. 1 Hawk. 139. And the offender shall not excuse himself by shewing that the other assaulted him. ibid. Or that it was in his own defence. Noy 171.

But if any shall *maliciously strike* another with any weapon, in any Church or Church-yard, or shall there draw any weapon with intent to strike, and shall be convicted thereof by verdict of 12 men, or confession, or by two witnesses, before the Judges of Assize, or Justices of the Peace in their Sessions, he shall be adjudged to have one of his ears cut off; and if he have no ears, he shall be burned in the cheek with a hot iron, having the letter F, whereby he may be known and taken for a fray maker and fighter; and he shall stand *ipso facto* excommunicate. 5 & 6. Edw. 6. c. 4. s. 3.

And in the case of *Bilson* v. *Chapman*, Hil. 9 G. 2. Cas. T. Hardw. 190. it was held, that the Ecclesiastical Court has jurisdiction to give sentence of excommunication; and that there must be a sentence declaratory at least, for striking in a Church-yard. And that this may be done without any previous conviction. Unless on the third clause of striking with, or drawing a weapon, and there a temporal punishment (the loss of an ear) being inflicted, and the excommunication an accumulated punishment, a prior conviction is requisite.

(*Can.*

(*Can.* 18.) And if any boys shall there behave themselves rudely and disorderly, or shall make any noise, or other disturbance, the said Church-wardens may chastise them for it; and if any person shall irreverently keep his hat on, they may take off the same (*Hall versus Flanner*, 2 *Keble*, *p.* 124. 1 *Sander.* 13. 1 *Siderfin*, *p.* 301.) And for this, or any other irreverend, or disorderly behaviour, present them at the next visitation, and also bring them before a Justice of the Peace, and make them pay to the use of the poor of the parish, the sum of one shilling for every time they shall so offend herein, according to the Statute, (1 *Eliz. c.* 2. *Sect.* 14.) which enjoineth, *That every person shall resort to their Parish-Church or Chapel upon every Sunday, and other days ordained to be kept holy, and then and there abide orderly and soberly, during the time of Common-Prayer, Preaching, or other Service of God there to be used, and ministred, upon pain of punishment by the censures of the Church, and also upon pain, that every person so offending, shall forfeit for every such offence twelve pence, to be levied by the Church-wardens of the parish where such offence shall be done, to the use of the poor of the same parish, of the goods, lands, and tenements of such offender by way of distress.* Where observe, that there are three offences mentioned in this statute, for which the said mulct of one shilling is to be imposed for every time they are committed. 1st, For absenting from Church. 2dly, For not abiding there till divine service and sermon be ended. And 3dly, For not behaving themselves orderly and soberly while there. And also, that over and above the said mulct, the offenders are to be punished by the censures of the Church; and therefore, notwithstanding they have paid the said

mulct, they must also be presented for the same at the next visitation.

And because such times as are devoted to the service and worship of God, ought not to be prophaned by being employed to any other work, but all ought then to exercise themselves in the duties of piety and religion both publicly and privately, the Church-wardens are to see, that all such times be duly observed, especially the Lord's Day, which hath by God himself been consecrated to his worship from the beginning of the world, and make all such pay their legal forfeitures, who are defective herein: For if any one shall do any worldly work or business on that day (works of charity and necessity only excepted) he shall forfeit five shillings. If one shall then publicly cry[a] or expose to sale any wares, he shall forfeit the said wares. If any carrier, carter, wain-man, carman, drover, horse-courser, waggoner, butcher, higler, or their servants, shall travel on the said Lord's Day, every one of them so offending shall forfeit twenty shillings. If any person shall on the Lord's Day, use, employ, or travel with, any boat, wherry, barge, or lighter, unless upon extraordinary occasions to be allowed by a Justice of Peace, he shall forfeit five shillings (excepting such wherries as are allowed to ply every Lord's Day between *Lime-House* and *Vaux-hall*, on the river *Thames*, by the *11th and 12th of Will.* 3. *c.* 21.) If any butcher shall on the said Lord's Day kill or sell any victuals, he shall forfeit six shillings and eight pence. And if any then meet at bull-baitings, bear-baitings, interludes, common plays, or any other sport or pastime whatsoever, every one so offending, shall forfeit three shillings and four-pence. All which forfeitures the said Church-wardens are by a warrant from a Jus-

[a] Only one penalty can be incurred in one day. Cowp. 640.

tice

tice of the Peace, or Chief Magistrate of the place, to levy on the offenders by distress and sale of their goods, and apply them to the relief of the poor of the parish where the said offences shall be committed: and where no distress is to be had, to put the offenders in the stocks, (1 *Car.* 1. *c.* 1. 3 *Car.* 1. *c.* 1. 29 *Car.* 2. *c.* 7. *Can.* 13.)

And because many, instead of employing the Lord's Day in the duties for which it is set apart, are apt to mis-spend it in idleness and looseness, at ale-houses, taverns, and other public places of debauchery; for the preventing hereof the Church-wardens ought frequently on the said Lord's Days to visit such houses, both in time of divine service, and also out of it, and if they find any tipling in the said houses, they are to make them pay three shillings and four-pence for the same, and the owner of the house ten shillings for entertaining them, and also five shillings more for using his trade on the Lord's Day; and if it be in time of divine service, they may make every one of them pay also one shilling for being absent from Church. All which forfeitures are to be levied and disposed of in the same manner as the last above-mentioned (1 *Jac.* 1. *c.* 9. 4 *Jac.* 1. *c.* 5. 1 *Car.* 1. *c.* 14.) And none of the said statutes, which are here quoted either in this article or the last, do supersede the jurisdiction of the ecclesiastical courts, but leave the said offenders fully in their power, to be corrected by ecclesiastical censures for their said offences; in order to which, they are by the said Church-wardens at the next visitation to be presented for the same.

The Church-wardens are also to take care, that none dissenting from the Church of *England* do within their parish keep school, either publicly,

or in any private family. For altho' the Government hath indulged them a toleration to worship God their own way in separation from the Church, it never intended that they should poison[a] posterity with their errors; and therefore it hath left all the laws as to this particular in their full force against them, in the same manner, as they were before the said toleration was granted. And by these laws all the strictest care possible is taken, that none should be entrusted with the education of youth, but such as will bring them up in a thorough conformity to the Church, as by law established. For it is enacted by the 23d of Queen *Elizabeth*, *c.* 1. *sect.* 6. That no corporation, or any person or persons whatsoever, shall keep or maintain any schoolmaster which shall not be licensed by the Bishop of the diocese, and constantly repair to church in such manner, as is by the Act of Uniformity in the first year of the said Queen, *c.* 2. enacted and required (*i. e.* on every Sunday and holy-day) on the penalty of ten pounds a month upon those who shall so keep and maintain him, and of a year's imprisonment upon the person who shall presume to teach school contrary to the tenor of the said act, and also of being disabled any more to be a teacher of

[a] A more enlightened policy than that which guided men in the time of our author, has since corrected the asperity of their well meant zeal. And a more liberal system has been adopted. See the Statute 19 G. 3. *c.* 44. No dissenting minister, nor any other protestant dissenting from the Church of *England*, who shall take the oaths, and make and subscribe the declaration against Popery, and the declaration mentioned in that Statute, shall be prosecuted in any Court whatsoever, for teaching and instructing youth as a tutor or schoolmaster. But this was not to extend to enable dissenters to hold the mastership of any college or school of royal foundation, or of any other endowed college or school for the education of youth, unless founded since the 1 W. and M. for the immediate use and benefit of protestant dissenters.

youth

youth ever after: And by the first of King *James* I. c. 4. That no person shall keep any school, or be a school-master in any public school, or in any private family either of the nobility or gentry, or in any other place out of our universities and colleges of this realm, except he be first licensed by the Ordinary, upon pain, that as well the school-master, as the party that retains, or maintains him, shall each of them for every day, in which they shall so wittingly offend, forfeit the sum of forty shillings: And by the 77th of the Canons of the said King it is ordained, that all who are allowed or licensed by the Ordinary to teach school, shall subscribe to the first and third article, and to the two first clauses of the second article, which are contained in the 36th of the said Canons: And by the 79th of the said Canons, that all, who are thus licensed to be school-masters, shall instruct the children committed to their care in the Church-Catechism, and shall bring them to the Parish-Church on all Sundays and Holy-days, as often as there shall be any sermon preached, and at all other times shall train them up in such knowledge of the scriptures, as shall be most expedient to induce them to godliness, on penalty of suspension from teaching school any longer, whenever they offend by omitting their duty herein. And by the Act of Uniformity (14 *Car.* 2. *c.* 4.) it is enacted, that every school-master keeping any public or private school, and every person instructing or teaching any youth in any house, or private family, as a tutor or school-master, shall subscribe the declaration in that act contained, *i. e. That he will conform to the Liturgy of the Church of* England, *as it is by law established.* And that if any person shall take upon him to instruct, or teach any youth as a

tutor,

tutor, or school-master, either publicly, or in a private family, unless he be first licensed by the Ordinary, and hath subscribed [a] the said declaration, he shall for the first offence suffer three months imprisonment, and for every offence afterwards, beside the said three months imprisonment, shall forfeit five pounds to the King, that is, for every day, in which he shall continue to keep school, or instruct, or teach any youth, as aforesaid, without qualifying himself for it by making the said declaration, and taking the said licence of the Ordinary, in manner as is by this act required. The sum is, no one is to teach or instruct youth either publickly, or in any private family, unless he hath subscribed the articles, and made and subscribed the declaration above-mentioned, and thereon taken a licence of the Ordinary to teach, and constantly comes to Church. And therefore, if any one without performing all this, takes upon him in any parish to teach, and instruct youth in manner as aforesaid, he is to be presented for the same. And it being a matter of great moment to secure youth from being corrupted with ill principles in their education, it becomes Church-wardens, and also Church-governors, with their utmost care to do their duty herein.

The Church-wardens are to take care, that no stranger be admitted to preach in their Church, of whom they are not well satisfied, that he is in orders, and licensed to preach by the Bishop of the Diocese *(Can.* 28.*)*. And if any such disorder should be there committed against their will, or if

[a] Masters of Grammar Schools may be licensed by the Ordinary, who may examine the party applying for the licence, as to his learning, morality, and religion. R. v. the Archbishop of York, M. 36. G. 3. 6 T. Rep. 490.

the

the Church be not in all other respects regularly served according to the good rule and orders of the Church of *England* now by law established, that is, if there be not on all Sundays morning and evening prayers duly and devoutly read, and on all Holy-days morning prayers at least, where a congregation can be gotten together for the same, (*Can.* 14.) If there be not a sermon at least once every Sunday, and catechizing of youth on the other part of the day, (*Can.* 45. 59. *Rubrick to the Communion-Office, and to the Catechism.*) If the sick be not duly visited, the dead regularly buried, recusants frequently conferred with, and the Sacraments faithfully administered, *i. e.* the Sacrament of the Lord's Supper, at least three times every year, and that of Baptism as often as there shall be occasion for the same, (*Can.* 66, 67, 68, 69, 21.) Or if the minister be not, according to law, constantly resident in the parish for his due attendance on these duties, (21 *Hen.* 8. *c.* 13. *Can.* 41; 45, 47.) Or if he marry any one clandestinely, be an haunter of taverns or ale-houses, lives incontinently, or under the fame of it, be a sower of discord among his neighbours, or in any other respect leads a disorderly and irregular life, and gives thereby an ill example to the prejudice of religion, the dishonour of God, and the scandal of good and religious people, all these particulars are to be presented; so that whensoever a minister offends in any of them, he may by the censures of the Church be corrected and amended, or else, if incorrigible, be removed, and another put in his place, *Can.* 62, 75, 122, *&c.*

But it is proper here to subjoin, that tho' the law requires full service from the minister of every parish, that is, both fore-noon and afternoon on every Lord's Day, yet this is not to be expected, but

but where the benefice is a competent maintenance: Where the living is sufficient fully to maintain the minister, there it is reasonable, that the people should fully have his ministry; but where they can but half maintain him, they must be content with half his service, and allow him to employ the other half in serving some other cure, thereby to help out the other part of his subsistence, *Can.* 48.

The Church-wardens are also to take care, that none be permitted to serve the Church as a Curate, who hath not been first approved of and licensed by the Bishop for that purpose, *Can.* 48. And moreover, that the Church with all its chapels, isles, and parts, be wholly kept for those sacred uses to which it is consecrated[a]; and that therefore no interludes, plays, feasts, banquets, suppers, church-ales, drinkings, musters, markets, fairs, temporal courts or leets, lay juries, or any other profane usage be permitted or allowed therein, or in the Church-yard belonging thereto, *(Can. Elix. An.* 1571. *De Ædituis* Sparrow's *Collection, p.* 236. *Can.* Jac. 88. *Degge. p.* 1. *c.* 12*)* And on Sacrament days they are to provide bread and wine for the holy Communion at the charge of the parish, and also observe who they are that absent

[a] No fairs nor markets shall be kept in Church-yards, 13 Ed. 1. St. 2. c. 6.

Clergymen shall not be arrested, and drawn out of any Church or Church-yard, whilst they attend to divine service; on pain of imprisonment of the offender, and ransom at the King's will and satisfaction to the party arrested, 50 Ed. 3. c 5. 1 R. 2. c. 15.

Also it is said, that arrests in civil cases ought not to be of persons going to or coming from Church; but that a warrant from a justice of peace for the King may be executed in such cases, Cro. Car. 602. Cro. Jac. 321. 2 Bulst. 72.

But altho' the officer may be punished for the same either in the spiritual or temporal courts, yet the arrest (if not on a Sunday) is good in law, Watson, c. 34. p. 344.

them-

themselves from it, and present them for the same at the next visitation, *(Can.* 20, 21. *Rubrick at the end of the Communion service.)*

If any one shall either by word or deed unlawfully interrupt, disturb, or abuse any minister in any Church or Chapel, while he is there in the performance of any of the duties of his ministry, he is by the *2d and 3d of* Edw. 6. *chap.* 1. to forfeit for the first offence ten pounds, or, if that be not paid within six weeks after conviction, to suffer three months imprisonment; and for the second offence he is to forfeit twenty pounds, or if that be not paid within six weeks after conviction, to suffer six months imprisonment; and for the third offence he is to forfeit all his goods and chattels, and be imprisoned during life: By the first of *Mar.* 1. *Stat.* 2. *ch.* 3. he is to be committed to goal for three months, and from thence till the next Quarter-Sessions, when he is to be released, or continued in prison, as the court shall see cause. By the 1*st of Eliz. c.* 1. he is to forfeit for the first offence an hundred marks, and if that be not paid within six weeks after conviction, to suffer six months imprisonment; and for the second offence to forfeit four hundred marks, and if that be not paid within six weeks after conviction, to suffer imprisonment for one whole year: And for the third offence to forfeit all his goods and chattels, and be imprisoned during life. And by the *First of W. and M. c.* 18. every such offender is to forfeit twenty pounds *toties quoties. i. e. as often as it shall happen.* And whenever any such offence is committed, it is the duty of the Church-wardens to see that the law be executed upon all that offend herein, that so the service of God may be secured from all such affronts and disturbances. And they

have the choice of any one of those statutes to prosecute them upon. The statute of the *first of W. & M. cap.* 18. provides, that the penalty of twenty pounds shall be inflicted also on those who shall disturb any dissenting congregation allowed by law, but as to this the Church-wardens are not concerned

No Church-wardens are to be vexed with actions or suits at law for their presentments, or any other acts which they shall do in the discharge of their office[a], *(Can.* 115.*)* And in case any should, and upon trial of the cause obtain verdict on their side, by virtue of the statute, *(21 Jac. 1. c. 12.)*[b] they are to have double costs. But the common lawyers would exclude them the benefit of this statute in all cases, where they act in ecclesiastical matters, and will allow it them only where they act in temporal matters as in the executing of the warrants of justices of the peace directed to them, in the making of poor's rates, and such-like matters. For say they, [c]the law-makers never intended to give double

[a] For neglect of duty, they may be sued in the spiritual court 3 Com. Dig. 614. As if they take bells out of the Church, 1 Sid. 281, 2. Or an action lies against them by their successors, 1 Sid. 282. But not a suit in the spiritual court, Godb. 279. So an indictment lies, if they take money &c. *corrupte*, colore officii, and do not account for it. 1 Sid. 307.

[b] See also Stat. 7 J. c. 5. They shall not only have double costs in case of a verdict, but also in case the plantiff be nonsuited or discontinue his action. They may also plead the general issue, and give the special matter in evidence.

And they may be removed for misbehaviour, and others chosen before the year expires. Lamb. Off. Ch. s. 3.

[c] See *Kerchival's* case, Mich. 8 Car. An action was brought against the Church-wardens for a presentment upon common fame of incontinency. Upon not guilty pleaded, it was found for the Church-wardens, and moved that they might have double costs; but it was resolved, that this being merely ecclesiastical, it is not within this statute; for that the statute was never intended, but where they shall be vexed concerning temporal matters, which they shall do by virtue of their office, and not for presentments concerning matters of fame. 3 Cro. *285, 286.*

costs, but where the officers were sued for temporal matters done by them in the execution of their office, (3 *Croke*, 285. 1 *Jones*, 530.) But there is nothing in the statute, that can warrant this distinction, or give the least colour for it: For Church-wardens are named in it, and put within the full benefit of it, without any limitation as to temporal or spiritual matters, but in such general words as plainly include both. And therefore the determination of the common lawyers in this matter seems plainly to be a perverting of the statute to the prejudice of the ecclesiastical jurisdiction. However this may be of use to caution Church-wardens not to make their presentments out of spight or malice, meerly to vex and trouble their neighbour, (for an action for this may justly be brought against them;) but for such matters, and such only, whereof there is such certain evidence, or such a certain and notorious fame, as will justify their presenting of them, and then there will be no handle for an action against them.

The Church-wardens were anciently the sole overseers of the poor, and it lay wholly on them, under the direction of the minister, to take care of all such as were in want in their parish, and provide for their relief; in order whereto they had the charity of well disposed persons, the liberal contributions of the clergy and the religious, and the poor-man's-box entrusted to them. But when on the dissolution of religious houses, and the alienating of tithes to the laity, the contributions of the clergy and the religious failed (which was the main fund, on which all the poor of the realm had hitherto been maintained) and the government was thereon necessitated by act of parliament (*Anno* 43 *Eliz.*

Eliz.[a]) to lay a tax upon the nation for their support[b]: The overseers, which are in that act superadded for the levying and disposing of the said tax, have in a manner superseded the Church-wardens care in this particular. However the Church-wardens are still by the common-law overseers of the poor in every parish; and the said act joins them in equal power with the other overseers appointed by that act, both for the levying and distributing of the said tax, and all other duties of the said office; and by several acts of parliament, whereby forfeitures are inflicted to the use of the poor, the said Church-wardens are entrusted with the receiving and disposing of the said forfeitures to the use aforesaid. But they having other business beside, *i. e.* to take care of the Church, and the other matters belonging thereto, the whole care of the poor is now usually left to the new overseers, which are superadded to them by the statute, and the said Church-wardens by the custom of most parishes, are allowed no farther to be troubled herewith, than of their good-will and liking they shall think fit.

As to the repairs of the Church and Church-yard, tho' they both are of the free-hold of the minister, whether he be Rector or Vicar, (11 *H.*

[a] Ch. 2. s. 1.

[b] In M. 15. Car. 2. a Church-warden was committed by the two next Justices as Church-warden, for refusing to account for money received and disbursed by him; but on an *habeas corpus* he was discharged: because by the warrant of commitment it ought to appear that he was overseer of the poor, for by the Stat. 43 Eliz. that is annexed to his office of Church-warden, and the Justices have no jurisdiction over him as Church-warden, but as Overseer. Dalt. 186.

[c] And therefore, the Parson alone may give a license for burying in the Church. 2 Cro. 367. Noy 104.

So he may make a lease of the Church and Church-yard. 2 Rol. 937. l. 10 And shall have the fees in the Church-yard for the repair of the Church. 3 Com. Dig. 614.

4. 12. 21. *H.* 7. 21. 2 *Cro.* 367. *Hobart*, 69. *Kitchin Title Wardens of Churches. Degge, part* 1. *c.* 12.) Yet since the parishioners have the use of the body of the Church to hear divine service, in, and of the Church-yard for the burial of their dead, they are bound to the repair of both, (*Can.* 85. *Coke* 2 *Inst.* 489. 653. *Shepherd Abr. Tit. Church-wardens. Johan de Athon in Othob. C. Improbam, verb. Cancellos, & verb. ad hoc tenentur.* Lindwood *De Officio Archidiaconi C. Archidiaconi, verb. Reparatione, & de Ecclesiis ædificandis C. si Rector, verb. Defectus Ecclesiæ.*) But the repair of the chancel still lies upon the parson, whether appropriator, impropriator or instituted rector (2 *Inst.* 489. *Rolls* 2 *Rep. p.* 211. *Degge, p.* 1. *c.* 12.[a]) [b]Except in the city of *London*, where by immemorial custom the parishioners repair the chancel as well as the body of the Church, (Lindwood *De Ecclesiis ædificandis, C. ut Parochiani, verb. ad quos pertinent, & de Officio Archidiaconi, C. Archidiaconi, verb. Reparatione.* Watson, *c.* 39. *p.* 301.[b]) Which same custom is also in the city of *Norwich*, and most other cities and large towns in *England*, where there are no tithes to be charged with this repair, or to be sequestred for it, if neglected. And except also in some Churches, where the Vicar is by special composition bound to this repair, (Lindwood *De Ecclesiis ædificandis, C. ut Parochiam verb. & Vicariis.*) And then the Vicar hath the freehold of the chancel, as well as of the body of the Church, and the Church-yard; the former by virtue of this composition, and the latter by virtue

[a] Sal. 165.

[b] Or, if there be a perpetual Vicar, it belongs to him.

[a] *Holt.* 1 Sal. 165. Lind. 89.

of his induction. For every Vicar, when he is inducted into the Church, takes possession of the body of the Church and the Church-yard, as of his freehold, and is then as it were by livery and seisin admitted thereto, as the Rector is by like induction to the whole Church. (*See* Watson, *c.* 39. *p.* 304.) But tho' the Church-wardens be not charged with the repair of the chancel, yet they are with the supervisal both of that and the minister's house, to see that neither of them be permitted to dilapidate, and fall into decay; and when any such dilapidations shall happen in either of them, if no care be taken to repair them, they are to make presentment hereof at the next visitation.

Anciently both the Church and Church-yard were repaired out of the revenues of the Church, and a fourth part of them, according to the primitive and well-known division of them, was always set apart for this purpose. And hence it is that the canon-law still enjoins it, and by virtue thereof in most other parts of *Christendom*, even to this day, where the minister receives the whole revenues of the Church, he is bound out of them to provide for the repair both of Church and Church-yard, and all other buildings belonging to them, as far as a fourth part of the said revenues will reach; and where he doth not receive the whole revenues, there he pays his share according to what he receives in equal proportion with those who have the rest. And on the first settling of the Christian Church here among the *Saxons*, this being then the order of the Romish Church, Pope *Gregory* recommended it to *Austin* to establish it here also, (*Bedæ Hist. lib.* 1. *c.* 27.) And accordingly it was for some time observed in this realm. But since that, it did, not many years after, by a special custom obtain

obtain throughout this land, that the burden of repairing the body of the Church and the Church-yard, was wholly cast upon the people, because of their use of them; and the repair of the chancel and parsonage house only is left to the minister. When and upon what occasion this custom was here first introduced, is not any where said, but it is certainly very ancient: For among the laws of king *Canutus*, who reigned here 700 years since, there is one, which lays the reparation of Churches upon the people; for the words of it are, *Ad refectionem Ecclesiæ debet omnis populus secundum legem subvenire;* i. e. *to the repair of the Church all the people* (i. e. *of the parish) ought to contribute according to the law*, (Brompton, *col.* 929.) Where observe, this is not here first enacted by a new law, but commanded to be observed according to law; which plainly implies, that there had been a law established in this realm, and fully settled in it, concerning this matter, before *Canutus's* time; how long before is uncertain. But whensoever this custom had its beginning, it hath ever since been continued in this land, and by virtue hereof the parishoners, since they have the use of the body of the Church to hear divine service in, and the use of the Church-yard for the burial of their dead, have also upon them the burden of repairing both, and the Church-wardens are officers appointed to act for them in this matter.

The Church-wardens are therefore bound in behalf of the parish to take care that the body of the Church[a] and the Church-yard be kept in good order and repair. And first as to the Church-yard,

[a] So of a public Chapel annexed to a Church. 2 Inst. 489.
And the inhabitants of a Chapelry, who anciently repaired the Church, shall not be exempted by disusage. 1 Sal. 164.

it is their duty to see that it be kept in decent and fitting manner; that it be cleared of all rubbish, muck, thorns, briars, shrubs, and every thing else that may annoy the parishioners when they come into it, or be any hindrance to them in the burying of their dead, when there shall be an occasion for it. That no sinks or gutters be made through it, or any thing else be there permitted, which may be unbecoming the place, which is consecrated and set apart to be a repository for the bodies of the faithful, which were once the temples of the Holy Ghost; and that for the preservation of the said bodies, and the graves in which they lie, the said Church-yard be well fenced, *(2 Inst.* 489. 653. *Lind. de Off. Archid.* 53. *Can.* 85. *Degge, Part* 1. *c.* 12.*)* For by the ecclesiastical law of this realm, this ought to be done at the charges of the parish. But if there be in any parish a custom to the contrary, and the minister or any other having lands, yards, or gardens abutting upon the said Church-yard, have immemorially repaired that part of the fence which lies next them, the custom must take place; and they that immemorially repaired the said fence, are bound to do so still *(Godolphin's Repertorium, c.* 13. *Sect.* 15. 2 *Rolls Rep. f.* 287.*)*

They are also to see, that the gates, stiles, and doors leading into the said Church-yard be kept in due repair, as also the ways leading through it to the Church, for all these are parts or appurtenances belonging thereto. But if any one hath a private door leading into the said Church-yard[a], or a private way through it, the parish is not to be put

[a] The right to a Churchway may be claimed and maintained by a libel in the spiritual court, see the case 2 Rol. Abr. 287.

to

to charge about these, they must be repaired by him that hath the use of them. But here it is to be observed, that no one can make any such private door into the Church-yard, or any such private way through it without the consent of the Minister, whose free-hold the Church-yard is, and a faculty also from the Bishop for the same. But if the inhabitants of any ancient messuage next adjoining upon the Church-yard have immemorially, they and their ancestors, had a way through the said Church-yard, and constantly have repaired the same, they can prescribe thereto in respect of the said messuage. And so if the owners of any lands adjoining to the Church-yard have immemorially, they and their ancestors, had a way thereto through the said Church-yard, and constantly have repaired the same, with the gates and stiles leading into it, they can also prescribe thereto in respect of the said land, *2 Rolls Abr. p.* 265.

The Church-wardens are also to see, that the Church-ways[a] be well kept and repaired, and that no one do any thing to obstruct or annoy the same, that so the parishioners may at all times without impediment or inconvenience resort to the Church, as often as any part of the divine service shall be there performed. The said ways must be broad enough not only for the passage of single persons, but also for the carrying of a corps through the same to be buried, as often as there shall be an occasion for it. And the stiles are to be so made, that persons of all ages may well be able to go over them. If these ways be in the repair of the parish, the Church-wardens must take care that they be well repaired at the parish-charge: But if they be in the repair of any other, either by custom or otherwise, they are by due course of law to compell

all such to do what they are obliged to in this particular, that all may have a free and convenient passage to the Church, where God is to be worshipped by them, and none be obstructed or incommoded herein.

As the soil and feed of the Church-yard is the Minister's, so also are the trees growing therein; but he is not to cut them down, unless for the necessary repair of the chancel, or else that he shall think fit out of charity and kindness to allow them to the parishioners for the repair of the body of the Church; but where they used to be topped, the toppings belong to the Minister. *Stat.* 35. *Ed.* I.

The repairs of the Church[a] are either of the fabrick or the utensils, and both these contain such things as are necessarily required, or else are only added either by way of ornament and decency for the more orderly and decent administration of the divine offices, or for the convenience and benefit only of the parishioners.

Whatsoever is fixed to the freehold, is reckoned of the fabric of the Church, and the parts necessarily required thereto are such, as either the law, or else the nature of the things themselves make necessary in every Church, and such are the walls, windows, doors, roof, floor, font, pulpit, reading-desk, seats, tower, &c. to which for greater ornament and decency are added in many Churches,

[a] It is said, if a church fall down, the parishioners are not bound to re-build it. *Read.* Ch. Service 1 Vent. 367. But if a church is so much out of repair, that it is necessary to pull it down, or so small, that it needs to be enlarged, the major part of the parishioners may make a rate for new building or enlarging as there shall be occasion. This was declared in the 29 Car. 2. by all the three courts successively; notwithstanding the cause was laboured by a great number of quakers, who opposed the rate. Gibs. 221.

paintings

paintings, altar-pieces, rails at the altar, &c. And for the benefit and conveniency of the parishioners, a clock, a dial, chimes, a superfluous number of bells, &c.

What are not fixed to the freehold of the Church, but are of the moveable goods belonging thereto, are called the utensils of the church: And these also are such, as either the law, or else the nature of the things themselves, make necessary in every Church, as the communion table with the carpet, and linen covering belonging thereto, the chalice, paten, communion flaggon, bible, common-prayer-book, the book of homilies, the surplice, poor-man's box, register-book, &c. or else are added only for the better and more decent administration of the divine offices, as a decent pulpit cloth, a pulpit cushion, a cloth for the reading desk, organs[a], silver basons for the offertory, branches for lights, candlesticks, and other such things, as we find in some more wealthy parishes to be provided by the parishioners, over and above what either the law, or the absolute necessity of the things themselves require.

The inventory of utensils, while this land was under popery, was very large in every parish; the vestments, images, vessels, and other implements necessary for the carrying on of that superstition being very many, and of great expence to the people in the constant repair, as well as in the first providing of them, from which they are now released by the reformation. A large catalogue of those popish utensils may be seen in *Lindwood, De*

[a] Church-wardens, with consent of the Ordinary and Parishioners, may ornament a Church at the public expence. Vide p. 31, 34, and 1 Str. 576.

And for ornaments a parishioner is liable only in respect to his personal estate. 2 Rol. 291. l. 5.

Ecclesiis ædificandis, C. ut Parochiani, and in *Staveley's History of the Church of England, ch.* 12. And it is remarkable, that the parochial Church of *Yarmouth* in *Norfolk* had in the times of popery so many goods and utensils belonging to it, that in the beginning of the reformation, *Anno Dom.* 1548. such of them as were then thought superfluous being sold towards the repair of their pier, the money raised thereby, as appears by their town-books, amounted to nine hundred and seventy seven pounds, six shillings and eight pence; which was a vast sum in those days, when money was at above three times the value that it now bears.

But here it must be observed of the seats in the Church, that when I reckon them of the parts of the fabric, it is upon supposition that they are fixed into the ground, as mostly they are; for if they be not fixed into the ground, but are loose and moveable, they are not then to be reckoned as parts of the fabrick, but are of the moveable goods or utensils of the Church: And from this difference have arisen the different determinations of law, which have been made concerning them.

And with all these things are the Church-wardens charged, that is, to look to the Church[a], Church-yard, its fences[b], and other appurtenances, and to restore and repair every part thereof, in which there shall be any failure or decay, as often as need shall require, (excepting only where any particular persons are by immemorial custom obliged to repair the same, as all are the isles and seats to which they prescribe.) And they are also to take the custody of the Church-goods (in respect of which

[a] Inhabitants of a chapelry are liable to the repairs of the mother Church, unless exempt from custom; but not where there is only a late erection. 1 Salk 164.

[b] The inclosure of the Church-yard belongs to the parishioners. 2 Com. Dig. 169.

they

they are a corporation, and capable of suing and being sued) and to repair, amend, and renew them, as often as they shall find them to be impaired or decayed; and for their discharging themselves herein, they are fully empowered both by the parish, and Ordinary, when regularly chosen, and regularly admitted into their office; so that they need not the advice, consent, or authority of either, in order to the repairing, amending, or renewing any of the said particulars, which belong either to the fabric, Church-yard, or utensils of the Church, of which they are made Church-wardens, but are themselves sole judges of what is needful to be done herein, as being invested with the authority of the Ordinary, and the whole trust of the parish for this purpose on their first entering on the said Office[a]. However it is adviseable for the greater content and satisfaction of the parish, that they do not enter on any great and chargeable repairs without first taking the advice of their neighbours, who are to bear the charges of them. *See* 1 *Vent.* 367.

But if they will act without any such advice, they have by virtue of their office full power and authority so to do; and although they should be so in-

[a] Churchwardens are a corporation, and morally competent to assent to a reasonable agreement beneficial to the parish, and may therefore bind the parishioners and their successors, and the succeeding Churchwardens. See Martin v. Nutkin, 2 P. Wms. 266. 2 Eq. Ca. Abr. 23. pl. 22.

The case of Martin and Wife v. Nutkin and another, was this: The Plaintiff's house being so near the Church that the five o'clock bell rung in the morning and disturbed the plaintiff, and he came to an agreement in writing with the Church-wardens and inhabitants at a vestry, that the plaintiff would erect a cupola and clock at the Church, and in consideration thereof the five o'clock bell should not be rung in the morning. It was declared that here was a meritorious consideration executed on the plaintiff's side; and that the Church-wardens might toll the bells or silence them. And the Court of Chancery decreed an injunction against the ringing of the five o'clock bell.

discreet as to make repairs where there is no occasion for them, or so improvident as to lavish away more of the parish's money therein than need, yet if they have truly and honestly laid out the money, they must be reimbursed again, and the parishioners can have no remedy herein. Fraud and deceit, if any such be proved against them, must at all times be redressed; but if they have only been indiscreet, or improvident managers for them, they should have chosen wiser men; this will not be any just exception against their account to hinder the allowing of it. For they being to the parish as a Proctor to his principal, the act of the one, as long as he keepeth within the verge of his commission, is looked on in law as the act of the other, and what is reputed a man's own act, he can have no remedy against; and therefore if the money hath been really and truly laid out without fraud, covin, deceit, or gratifying any by-end of their own, how foolishly and needlesly soever it hath been done, in that it hath been done by those whom they have appointed to be their stewards and agents in their stead in this matter, it is done as by themselves, and there can be no help for them; which is necessary to be here said, that the parishioners may be warned how they trust such men in this office, who are not fit for it; or if they do, not fruitlesly to commence suit against them afterwards for that, where they can have no redress. If their improvidence, indiscretion, or negligence be such as to waste the Church-goods in their custody, or otherwise much damnify the parish, they may on proof hereof, by the authority of the Ordinary, at any time be removed, and others chosen in their stead, (8 *Edw.* 4. 6. *Finch. lib.* 2. *c.* 17. 13 *Coke*, 70.) But as long as they are in the office, the trust of the parish, as well as of the Ordinary, is invested in

in them for all the acts and duties of it, and they must be allowed whatever money they lay out herein, provided they act not fraudulently or falsely in the expending of it.

But this must be understood only of those particulars, which are the necessary parts of the fabrick, Church-yard, or utensils, or else have before by the consent of the parish, and the authority of the Ordinary, (where it is needful) been added to them. For to the care and repair of all these particulars doth their office extend, and they can charge the parish with whatever sums they lay out herein. But if they add any thing new, either to the fabrick, Church-yard, or utensils, which was not before, they must have the consent of the major part of the parish, or else the parishioners may refuse to allow the disbursements in their account; for to such expences they cannot be charged without their consent[a], nor will the law in this case allow any rate to be good, that shall be made in order to it.

But it is not necessary for the Church-wardens to ask every man's consent in particular to such matters; for the legal method is, that when any such thing is to be proposed to the parishioners, the Church-wardens with the consent of the Minister call a meeting of the parish, which is to be done in this manner. The *Sunday* before, public proclamation[b] is to be made, either in the Church after divine

[a] Parishioners cannot be *charged* with new ornaments, without their consent, as well as that of the Ordinary. But a new erection, as an *organ*, may be made and maintained by voluntary subscription without their consent. Vide p. 34. in not.

[b] "*The inhabitants and rentens of this parish are desired to take notice that a public vestry will be held on* ——— *next, the* ——— *instant, at* ——— *at four o'clock in the afternoon of that day, in*

divine service is ended, or else at the Church door, as the parishioners come out from the same, both for the calling of the said meeting, and also for the appointing of the time and place for the assembling of it. And it will be fairest then also to declare for what business the said meeting is to be held, that no one may be surprized with any matter that shall then be proposed at it, but that all may have full time before to consider of the same. And that none may be mistaken as to the time appointed for the said meeting, it is usual, and also very convenient, that for half an hour before it begins, one of the Church bells be tolled, to give the parishioners notice for their assembling together[a]. And at every such meeting all those have a right to come, and a right to vote, who pay to the Church rates, and none other. And when they, who are thus qualified, are assembled together in manner as aforesaid, at the time and place appointed, the present include the absent, and the major part of the present include all the rest. For those, who absent themselves after such public notice given, do it voluntarily, and therefore do thereby devolve their votes upon those who are present, and every act of the major part of the present in all such meetings, is in construction of law the act of the whole parish. And therefore the consent of the major part at all such meetings, legally called and legally assembled at the time and place appointed, is all that is necessary to justify what the Church-wardens shall do in such matters conformable to the said consent.

order to take into consideration the propriety of erecting an additional gallery in the parish Church.

A *select* meeting or vestry does not bind the parish, without immemorial usage. 4 Burr. Mans. 1689.

[a] 5. Co. 67.

And

And to make this consent more authentic, it will be convenient that every such parish act be entered in the parish book of accounts[a], and that every man's hand consenting to it be set thereto; for then it will be a fixed and apparent rule for the Church-wardens to act by, and also by which the parishioners may judge, when they take their accounts, whether what they have done be according to their commission or no. And when all this is regularly done, it will be in vain for any particular parishioner, whether present at the same meeting or absent from it, afterwards to make any exceptions against what shall be then agreed on, because he being involved in the major part present, every act of theirs is in construction of law his act also, and against his own act no man can ever have a remedy. (*See Jeffreys's case*, 5 *Coke*, *p.* 66, 67. *St. Saviours Parish case*, *Lane* 21. *and Hetl.* 61. *Litt.* 263. *Popham*, 137. 1 *Mod.* 194, *and* 236. 2 *Mod.* 222. 1 *Vent.* 167. *Wats. ch.* 39.)

And if the new-added particulars be in the Church, the licence of the Ordinary is also necessary, as well as the consent of the parish, before they can be legally and justifiably added, or new erected there. For the Ordinary having the ordering and disposing of all things in the Church, nothing must be new erected there, without his licence, under any pretence of order or decency whatsoever, because neither the parishioners, nor the Church-wardens are the legal judges of what is best for order and decency in this case, but the

[a] "*At a public vestry of this parish, holden this day in pursuance of public notice for that purpose given, it is resolved, that it will be proper to erect a new gallery on the south side of the parish Church, and the Church-wardens are desired to cause the same to be immediately done.*"

Ordinary only. And therefore, though the major part of the parish be consenting to the new addition, and thereby the Church-wardens may be impowered, as far as in the parishioners lieth, to make and levy a rate for the reimbursing themselves of the charges, yet if any one person in the parish dissents from it, and refuseth payment, they can have no remedy against him, because the thing being illegally done without that authority, which the law requires to warrant it, no rate will be judged legal, which shall be made for it. And therefore if the Church-wardens would set up a new seat where there was none before, make a new gallery, or add any thing else to the Church, they cannot legally do it, unless they have first the consent of the major part of the parish[a], and next the licence of the Ordinary to justify

[a] The case of *Butterworth & Barker* v. *Walker & Waterhouse*, Ea. T. 5 G. 3. B. R. reported by Burrow, vol. 4. p. 1680. discusses some interesting points on the subject of consent of parishioners and of the validity of customs, and goes to shew, that a faculty may be obtained for an ornament to a Church which shall be erected and maintained at a private expence, without first obtaining the consent of the major part of the parish. The case was this: An application was made to the Court of King's Bench for a prohibition to stop the prerogative Court of York from proceeding to grant a faculty for an *organ* in the Church of Halifax. It appeared, that the cause below was for obtaining a faculty for it; and there was a citation of the parishioners and inhabitants to appear, and "shew cause why an organ should not be erected in their Parish Church." They did so; and their objection was, that the plaintiffs below had not the consent of the parish. The answer was, "but we have the consent of the Church-wardens: and there is also so large a subscription for erecting and maintaining it, that it will never be chargeable to the parish." And they also alledge the consent of a select meeting or vestry. The other side deny that the parish in general is bound by the consent of this select meeting or vestry, whereupon the applicants for the faculty alledge "that for 20, 30, or 40 years, it has been usual to collect the sense and consent of the parishioners about all parochial matters at such select meetings or vestries; and that the whole parish are, and for all the time aforegate, have been bound by the acts and consent of such select

justify them in it. The consent of the parish is made necessary to secure their estates from unjust taxations;

select meeting or vestries. Upon which the parishioners which opposed the organ moved for a prohibition. The Court observed that the very ground of applying for the faculty is "that the parish are not to be burthened with the expence of this organ;" the very *condition* of praying it is, "that it is to be maintained by a subscription." *Mr. Wedderburne*, who was for the prohibition said, that no matter of splendor or ornament in the Church can be done without the consent of the parish. Mr. Justice WILMOT asked him what authority he had for this position. He said he knew no such doctrine. It was then observed, that if the Ecclesiastical Courts allow the evidence of 10, 20, 30, or 40 years to be a proof of a custom, the alledging an usage for such a time only, without alledging it to be immemorially, would be only an artifice to *elude* prohibitions to hinder them from trying immemorial customs. And if ornaments can be imposed upon the Parish by the Ordinaries, without the consent of the parish, the parish will be bound to *maintain* them. Mr. Justice WILMOT thought they were proceeding below upon a *mistake*. The citation must be intended to have been issued, for the parishioners to shew "whether they have any temporal rights that will be injured by setting up an organ." But the *consent* of the whole parish cannot be essentially necessary to the Ordinaries setting up an organ, nor would the parish be bound to repair it when set up. Now if the consent of the parish is *not* necessary, then all these proceedings below are *nugatory*. It seems as if they did think such consent to be necessary, and I own that *if the consent of the parish were necessary*, I should think the prohibition ought to go, because the consent of the *vestry* cannot bind the *whole parish* without *immemorial usage*. Mr. Justice YATES also thought that a prohibition ought to go, *if* there were any temporal right to be determined. For an usage of 30 or 40 years is not sufficient: it can be no valid custom unless it has been *time out of mind*. This suit he said below, seems to me to be totally *nugatory*. *Parishioners cannot be charged with new ornaments without their consent as well as that of the Ordinary*. The citation might be intended only to prevent injury being done to the property of their private seats in the Church. Both sides here seem to have thought the consent of the parish necessary; which it is not. Mr. Justice ASTON, If proper trial of the custom is eluded by alledging the usage of 40, 30, or 20 years, I should take the observation to be right. The parish may be used to meet and consider of necessary repairs, but they cannot preclude the ecclesiastical court from ordering an organ or any thing else within their cognizance. This organ is stated to be provided by voluntary contribution. The citation was issued in order to receive reasons against injuries that might happen to the private property of the parishioners; but the ecclesiastical court

taxations; and the licence of the Bishop is required to secure the Church from having any nuisance or unfitting incumbrance erected in it, whereby the decent performance of the divine offices may be impeded, or the people any way hindered from fully partaking of the benefits of them. But if the thing that is added be not in the Church, nor is added to the fabrick or its appurtenances for any religious use, but only for the benefit, convenience, or curiosity of the parishioners, as a clock, a dial, chimes, a supernumerary bell, &c. in this case the licence of the Ordinary is not requisite, but it will be sufficient if the major part of the parish be consenting thereto.

But if the new erection be in the chancel, the leave of the Parson is also necessary, because the chancel belongs to him, and is as part of his glebe; and therefore if the Church-wardens set up any new seat in the chancel, or place rails there at the altar, they must have not only the consent of the parish, but also the leave of the Parson as well as the licence of the Ordinary, before it can be legally done.

Whenever any thing is thus legally added to the fabrick of the Church, utensils, Church-yard, or appurtenances, by such consent and licence as are requisite thereto, it thenceforth becomes the charge of the Church-wardens to take care of it, and they are obliged to repair, amend, and renew it, as need shall be, in the same manner as other particulars belonging to the said Church.

If any of the particulars of the fabrick, utensils, Church-yard, or appurtenances, which either the

does not encroach upon or interrupt the meetings of the Church-wardens about such things as belong *to them*; nor draw the cognizance of them into a different *forum*. Lord MANSFIELD. The ground we go upon is, that a prohibition *will not be material*.

A rate cannot be made to reimburse a Church-warden. Cas. Temp. Hardw. 381. And. 11. 2 Ld. Raym. 1009.

law,

law, or the nature of the things themselves make necessary to every Church, have been omitted or let down for any time, the Church-wardens are empowered to restore them, how many years soever may have been past, since they were last in use, without any consent of the parishioners, or licence of the Ordinary to authorize them thereto; because the duty of their office always obligeth them to this, and they are guilty of the breach of it as long as they omit it.

But if any of the particulars omitted or let down be not of those parts of the fabric, utensils, Church-yard, or appurtenances, which either the law, or the nature of the things themselves make necessary to every Church, but are only such as have been added by the consent of parishioners, or other licence requisite, for the more decent and orderly administration of the divine offices, or greater ornament of the Church, or only for the benefit, conveniency, or curiosity of the parishioners, if they have been out of use for above forty years, the Church-wardens have no more any authority to restore them, nor can any ecclesiastical jurisdiction enjoin it on them, or legally require it to be done, but they become then of the same nature in law, as if they had never been in the Church at all. For there being no law or absolute necessity for those particulars, the Church can have no other right to them but by prescription and former usage; but the utmost limit of ecclesiastical prescription being forty years, *(Coke 2 Inst. 653. Extra' de Præscriptionibus C. ad Aures nostras; where it is decreed; Quadragenalis Præscriptio omnem prorsus actionem tollit, i. e. A forty years prescription takes away all action.)* after they have been disused so long, the Church has lost its claim to them by the same

prescription

prescription against them, by which it first gained a right to them; and therefore they cannot after this time elapsed, be again restored without the consent of the parishioners, and other licence requisite, in the same manner as if they had never belonged to the Church at all.

And therefore for example, the rails at the altar being not required by any law, or of themselves absolutely necessary in any Church, as they cannot be first erected without the consent of the parish and Parson, and the licence of the Ordinary first had thereto, so neither after forty years disuse can they be again restored without the same consent and licence to authorize the Church-wardens to do the thing, and levy a rate upon the parish for it. And therefore tho' it be very decent and fitting that there should be rails in every Church to keep the communion table, at which the highest mystery of our holy religion useth to be celebrated, from that profanation, which it may otherwise be exposed to (and which is all that is intended by them) yet since this is a matter which often raiseth great contests and disturbances in parishes among weak and scrupulous persons, it is proper that Church-wardens have this advice given them, that they enter on no such attempt, unless in such a legal way, as may justify them in the doing of it.

But here it is to be observed, that the consent of the parish is not required as necessary to authorize the thing, but only to oblige them to pay for the doing of it. Whether it be fitting to be done or no, belongs only to the Ordinary to judge; but whether the parish will pay any thing towards it, being wholly in their power, this is all the reason that makes their consent requisite to the thing. And therefore if the Parson with the licence of the Ordinary,

Ordinary, or any other person with the consent of the Parson and the licence of the Ordinary, have a desire to set up rails at the altar at their own proper cost and charges, without concerning the parish to give any thing towards it, the parish is no way concerned either to give or deny their consent thereto.

The Church-wardens, in order to make the said repairs, are authorized by law to make a rate, and levy it upon the inhabitants and owners of the parish, 5 *Coke*, 67. *Popham*, 197. 1 *Bulst.* 20. *Noy*, 41, *Latch*, 203. *Hetl.* 61. 130. *Degge*, *P.* 1. *ch.* 12. *Sheppard Abr. Title Church-wardens.)* But before they can do this, they must be legally chosen and legally sworn into the said office.

The Church-wardens are to be chosen every year in *Easter* week, (by *Canon* 90.) on the day which the Minister shall appoint, and give public notice of it in the Church the Sunday before, (unless where there is an immemorial custom for another day.) And at the time appointed, the Minister and parishioners being met together[a], the Church-wardens shall be chosen by the joint consent of both[b]; but if they

[a] The Parson or Vicar cannot adjourn the vestry, but the majority of the parishioners may. Fort. 168. Str. 1045.

[b] Of common right the parishioners shall chuse one and the Parson the other. Stra. 1246. Cro. Jac. 532. Cro. Car. 551. Noy 31. 1 Vent. 267.

A Curate stands in the place of the Parson, for the purpose of nominating one Church-warden, and a Curate may make a presentment. Stra. 1246. and 2 Vent. 41.

If the Parson and parishioners neglect to appoint Church-wardens, yet the Ordinary has no jurisdiction; *Stutter* v. *Freston*, Str. 52. and if the Bishop or Ecclesiastical Court make an order that a select vestry shall choose, this does not exclude the other parishioners if they will be present at the vestry. Lane 21.

But by custom the election may be by a select vestry and not by the whole parish. Hard. 379. And where there is a custom for chusing Church-wardens, and it cannot take place, they must resort to the Canon. Stra. 145.

cannot

cannot agree, the canon directs, that the Minister shall name one, and the parishioners the other, (*Can.* of 1603. 89.) But where there hath been an immemorial custom for the parishioners to chuse both of the Church-wardens, there the custom shall take place of the canon, and they shall continue to chuse both still, (2 *Cro.* 532. 3 *Cro.* 551, 552. *Noy*, 31, 139. 2 *Rol.* 234. *Degge*, *P.* 1. *c.* 12. *Gibs. Codex*, 242.)[a] And accordingly by virtue of this custom, the

[a] But if chosen by parishioners they ought to be chosen by all the parishioners assembled. Lane 21.

And the Court of King's Bench will not grant a *Mandamus* commanding a vestry to be called for the election of Church-wardens. Str. 686. And yet in the above case of *Stutter* v. *Freston*, in C. B. it was said that the proper way was by *Mandamus*. Sed q. because it is not known to whom it should be directed, Str. 686.

Having mentioned the writ of *Mandamus* it may be proper to make a remark or two upon the law as it relates to the return of a *Mandamus*, and the first observation is, that the return of a *Mandamus* shall be made by those to whom the writ is directed. And then as to what shall or shall not be a good return of a *Mandamus* to admit or swear Church-wardens, in the case of *Rex* v. *Harwood*, it was held, that a return that the party *was not elected* a Church-warden, was a good return. 2 Ld. Raym. 1405. So, also that he *was removeable* ad libitum, without other cause, when this is warranted by custom or charter. Ray. 188. 1 Sid. 461. 1 Vent. 77. And this without shewing any summons to the party, or hearing him in his defence, or that the office is filled up. Str. 115. N.B. This last was not the case of a Churchwarden, but of a Sexton, yet the rule applies. See also Cowp. 413. *et post p.* 46. *in not.*

If a return to a *Mandamus*, for swearing Churchwardens elected by the parishioners according to the custom, says, that a suit pending in the ecclesiastical court concerning the custom is undecided, it is bad; for the ecclesiastical court cannot try the custom. Ray. 440.

So, If the return be that the Bishop inhibited the Archdeacon, it is ill, for the Archdeacon is but a Ministerial officer, and is obliged to do the act. Str. 610.

The Court will not grant a *quo warranto* information to try the validity of an election to the office of Church-warden; for it is not an usurpation on the rights or prerogatives of the crown, for which only the old writ of *quo warranto* lies; and an information, in nature of a *quo warranto* can only be granted in such cases. *The court*, therefore, were of opinion, that they ought not to listen to such an application;

the parishioners of most, if not of all the parishes in *London*, do there chuse both the Church-wardens, (2 *Cro.* 532. 3 *Cro.* 551, 552.) But in all the new-erected parishes of that city, it's clear, the canon must take place, unless it be provided otherwise in the Acts of Parliament, by which they are erected. For in them no custom can be pleaded, the very being of those parishes being of too late a date for the founding of any custom in them.

But here let it be noted once for all, that no custom or prescription doth supersede the law of the Church in this realm, but only common-law, custom, or prescription, that is, which is beyond the memory of man; and nothing is accounted to be so by the law of this land, which can by any sufficient evidence be proved to have been otherwise since the first year of king *Richard* I. *i. e. Anno* 1189.

Several persons are by the law of the land excused from bearing the office of a Church-warden, as 1. All Peers of the realm, by reason of their dignity. 2. All Clergymen in holy orders, by reason

application; it was destitute of every legal principle, and that in this case, even a rule to shew cause ought not to be granted, lest it should hereafter be drawn into a precedent The King v. Shepherd *et al.* 32 G. 3. B. R. 4 T. Rep. 381.

Mandamus directed to Morgan Rice he being Archdeacon of A. to swear I. S. who was chosen Church-warden by the parishioners of B. to this he returned that I. S. is a dairyman and a servant, and unable and unfit for the said office, and exception taken as to the uncertainty of the return, but not much taken notice of, because by the opinion of the court, the Archdeacon hath no power to refuse, for the parish have the right of election and are judges of the qualifications of the party by them elected; and if they choose an ignorant or beggarly fellow, it is at their peril, and a Church-warden's office is a temporal office, and a corporation by law, and it cannot be supposed that the Archdeacon should have more care of the parish, than they of themselves, and a peremptory mandamus awarded. *Morgan Rice's* case 8 W. 3. B. R. MS.

of their order. 3. All Parliament-men, and all in the king's service in ordinary, by reason of their privilege. 4. All Lawyers, Attorneys, and Clerks of Chancery, King's-Bench, Common-Pleas, and Exchequer, by reason of their attendance in the said courts every term, 2 *Rolls Abr.* 272. 5. Physicians and Chirurgeons in the city of *London*, and suburbs, by the statute of the 5th *of King Henry the 8th*, *c.* 6. and the 32d *of King Henry the 8th*, *c.* 40. because of their obligation to attend the sick. 6. Apothecaries all *England* over for the same reason, by the Statute of the 6th *of King William* III. *c.* 4. *The first of Queen Anne*, *chap.* 11, *and the 10th of Queen Anne*, *chap.* 14. 7. All preachers and teachers of dissenting congregations, by the statute of the *first of King William and Queen Mary*, *c.* 18. provided they have qualified themselves according to the said Statute. 8. All registered seamen, although not actually in service, by the statute of the *7th and 8th of King William the 3d*, *c.* 21. 9. All persons that have prosecuted any felon to conviction, by the statute of the *10th and 11th of King William the 3d*, *c.* 33. which excuseth them * from this, as well as from all other parochial or ward offices in the parish or ward where the felony was committed. 10. Freemen of the corporation of Surgeons in London, 18 *G.* 2. *c.* 15. 11. Roman Catholic Ministers, conforming to the Statute, 31 *G.* 3. *c.* 32. *s.* 8. 12. Serjeants, corporals, drummers of the militia, and private men, from the time of their inrollment, until their discharge, 26 *G.* 3. *c.* 107. *s.* 130. All these persons being exempt by law from bearing the said office of Churchwarden, they are not to be chosen into it, unless

* And the first assignee of the certificate. See 3 Burn 77.

they are content voluntarily to bear the same. But excepting these, all others are eligible, and must serve in the said office, when legally chosen into it as aforesaid[a].

But whosoever is legally chosen, must be an inhabitant of the parish, for no out-setter, who occupieth lands in the parish, but doth not dwell or inhabit there, is capable of being chosen Church-warden of the said parish. For by the duty of his office he is obliged to be present in the Parish-Church of which he is Church-warden on all Sundays and holy-days, to take notice of the absence of such parishioners as do not come to the said Church, in order to present them for the same, and also to take care, that no disorder be committed in the said Church or Church-yard during divine service and sermon, but that all things be kept in order and quiet, which he is incapable of duly performing, as long as he lives out of the parish.

At the next visitation, which shall be held after the said choice by the Bishop or the Arch-Deacon, or other ordinary, within whose jurisdiction the parish shall be, the new elected Church-wardens must appear in order to be sworn into the said office[b], (*Can.* 118.) For until they are thus sworn, they

[a] An Attorney may have a writ of privilege to excuse him; and if it be not obeyed by the Spiritual Court a prohibition. 2 Rol. 368.

So, if any who has privilege be chosen, a writ goes to the Ecclesiastical Court, that he be not sworn. Pal. 392

[b] The Church-warden being chosen, cannot be refused by the Arch-deacon or Spiritual Court, on pretence of poverty or other inability. 1 Sal. 166. 5 Mod. 326. *et ante* p. 41.

And the right of naming Church-wardens cannot be tried in Court Christian. 1 Bl. Rep. 28.

Nor

they can do no legal act as Church-wardens, nor can they have any authority, whatever money they lay out on the Church account, to make or levy any rate, or take any other method again to reimburse themselves; but whatever they do of this kind, while unsworn, is all to their own wrong, and if the parish refuseth to pay them, they can have no remedy in law to force them to it. And although they served the office the former year, and were then sworn into it, yet if they are chosen again, they must be sworn again, or else the case is the same. For they are chosen but for one year, and sworn but for one year, and therefore, when that one year is expired, their office and their oath are out together[a], and consequently they must be chosen again, and sworn again, before they can legally serve again in the said office for the year ensuing, (*Can.* 1. *Jac.* 89.) And where there are others fit to be chosen, it is not so well for the parish to chuse the same again. For hereby often the making of a just account is baffled for want of new Church-wardens to take it; and other inconveniencies sometimes follow: For the preventing of which, it would be best every year to dismiss the old Church-wardens, and chuse new ones in their stead, according to the statute of the *27th of Henry the 8th, c.* 25. which positively forbids any Church-

Nor can the Bishop's Court try the legality of votes for a Churchwarden. 3 Burr. Mans. 1420. 1 Bl. Rep. 480.

And if he be refused, *a mandamus* lies for swearing him. Mar. 22, 66. 1 Vent. 115. 267. Raym. 439. 1 Lev. 73. Pal. 51. 2 Rol. 234. 1. 15. Mod. Ca. 89. 2 Rol. 106, 107. Lut 1010. Carth. 118. Jon. 439. Cro. Car. 551. Cas. Temp. Hardw. 129.

[a] Church-wardens shall continue in office 'till the new ones are sworn. Can. 118.

And for misbehaviour it is said, the parishioners may discharge them, and chuse others. Lamb. ch. s. 3.

warden

warden to continue in his office above one whole year.

If any scruple to take the oath, he hath liberty allowed him by the Act of Toleration to offer a deputy to be sworn into the said office in his stead, and execute it for him; which deputy must be of the parish, and of such sufficiency to discharge the said office, as shall be allowed and approved of by the Ordinary, 1 *W. & M. c.* 18.

The oath to be taken [a] by the Church-wardens is, *That they will well and truly, [or truly and faithfully,] execute the office of a Church-warden in the parish where they are chosen for the ensuing year, and according to the best of their skill and knowledge present such persons and things as* [b] *are presentable by the ecclesiastical laws of this realm.* Which oath binds them to be diligent and faithful, not only in making their presentments in the manner above directed, but also in the custody

[a] A person chosen Church-warden, refusing to take his office and oath, may be excommunicated for refusal; and no prohibition will lie. Gibs. Codex 243.

And he may be required by the Spiritual Court to take an oath. 3 Com. Dig. 611.

But no oath shall be required of them except in general to execute the office. Hard. 364.

Nor can a fee be demanded for swearing them, or taking their presentments. 1 Sal. 330.

[b] This oath is said to have been agreed upon, at a mutual consultation between the civilians and common lawyers.

In large parishes there are officers called *Sidesmen* (antiently *Synodsmen*) or *questmen*, (properly *inquest-men*) to assist the Church-wardens in their inquiries and presentment of offenders. They shall be chosen yearly in Easter week, by the Minister and the parishioners, if they can agree; and if not, by the Bishop. Can. 90.

The Sidesman's oath is,

You shall swear that you will be assistant to the Church-wardens, in the execution of their office, so far as by law you are bound: So help you God. Gibs. 242.

and

and care of the Church goods committed to their charge, in the well repairing of the Church, Church-yard, and utensils, in the well husbanding of the parish-money levied for this purpose, and the employing of it to the best advantage for the end intended, and in giving a just and faithful account of all at last; and they become guilty of the breach of their oath, and load their souls with the heinous guilt of perjury, whenever they wilfully fail in any of these particulars.

If any Arch-deacon, or other ecclesiastical Governor having authority in this behalf, shall refuse to swear a Church-warden into his office, who is legally chosen into the same, there is a writ[a] at common-law issuable out of the King's-Bench to command the swearing of him, (3 *Croke*, 551. 589. 2 *Rolls Rep.* 106, 107. 2 *Abr.* 234. *Sheppard Abr. Title Commandment or Mandat.)*

As soon as the Church-wardens are sworn, they are then in the full power of their office, and that which they are first to do, is to survey the Church, Church-yard, and utensils, and having taken an account of what repairs they want, and estimated as near as they can the charges which the said repairs may amount to, they are to levy an equal rate upon the parishioners[b] for the defraying of it, (*Degge*, *P.* 1. *c.* 12.) And when they have got the rate confirmed by the Arch-deacon, or other Ordi-

[a] The writ here referred to is a *mandamus*, and it has been held that *lis pendens* is not a good return to this writ, tho' accompanied with very special circumstances. 3 Burr. 1420: 1 Black. Rep. 430. *vide ante p.* 40.

[b] Libel in the spiritual Court against *Catesby*, who had land within the parish but did not inhabit there, for a rate made for new melting the bells; and upon motion a prohibition was granted; for though *inhabitants*, are rateable towards ornaments as bells were held to be, yet landholders not resident are only rateable to the necessary repairs, and not to ornaments. East. 9 W 3. B. R. *Catesby* v. *Carter. MS.*

nary

nary authorized thereto, they may then sue it upon all that shall refuse to pay their proportions to it. [a] But if any think themselves over-charged, or otherwise aggrieved in the said rate, there is still room left after its confirmation, for them to put in their exceptions against it, and be redressed in the same manner as there is in the poor's rate, after it hath been confirmed by the Justices of the Peace. For all such confirmations are only till cause shall be shewn to the contrary, but redress in this case is to be sought for only in the Ecclesiastical Courts[b]. For there only this matter is cognizable, (*Stat. Circumspecte agatis*, 13 *Ed.* 1. *Coke* 2 *Inst. p.* 489.) unless the boundaries of the parish are called in question, and he that excepts against the rate, alledgeth, that the lands, in respect of which he is layed, are out of the parish. For then a prohibition will lie. For to judge of the boundaries [c] of parishes is now engrossed wholly to the common-law courts, and the ordinary is absolutely excluded from all jurisdiction in this matter. (*Degge*, P. 1. *c.* 12.) But anciently it was otherwise. For as long as the division of parishes was only for spiritual matter, as the Bishops first made these parishes, so it belonged wholly to them, to determine all controversies about them,

[a] If any refuse to pay the rates being demanded by the Churchwardens, they are to be sued for in the ecclesiastical courts, and not elsewhere. Gibs. 219. Degge 171.

[b] The Court of Chancery will not permit parties to come into that court for a discovery in aid to the ecclesiastical jurisdiction. The plaintiff cannot, because the Court of Chancery will not be ancillary to that; nor does the defendant there want it, because he may exhibit articles in that Court and have an answer on oath 1 Atk. 288. 2 Ves. 451.

[c] Church-wardens have authority throughout the parish, altho' it extends into different hundreds and counties, being, tho' temporal officers, employed in ecclesiastical affairs, and must therefore follow the ecclesiastical division of the kingdom. Shaw. P. L. 86.

parted

and set out the boundaries, by which they were parted each from other. But afterwards, when the limits of parishes were made the limits of temporal offices, as of constables, surveyors of high-ways, *&c.* which belong to the temporal jurisdiction, this drew the whole of this matter before the temporal Judges into the common-law courts, and there it hath been ever since. But to prevent the arising of any trouble from hence, the readiest way is for the Church-wardens to do their duty in taking care, that their annual perambulations be duly kept up at the usual time, and the boundaries of their parishes so carefully viewed and settled in them, as to leave no room for any doubt or contest about them. For this is part of their office, and it is a service of no small moment to their parish carefully to discharge themselves herein.

The rates must be made with the consent of the major [a] part of the parish, and therefore when the Church-wardens purpose to make any such rate, they must call a meeting of the parish in manner as is above directed, and then whatsoever rate shall

[a] At the common law, every parishioner who paid to the church rates, and no other had a right to vote. Shaw. 56. And those that pay no church rate shall have no vote in affairs relating to it, except it be the rector or vicar. Wood. b. 1. c. 7.

A *mandamus* will not lie to Church-wardens to make a rate, it being a subject of ecclesiastical jurisdiction. 5. T. Rep. 364. The King v. Thelford.

By custom there may be select vestries of a certain number of persons elected yearly to make rates, and manage the concerns of the parish for that year: and such custom is a good custom. *Read* Ch. Service. Gibs. 246. Stra. 428.

All persons who have a vote in the vestry have an equal right, and neither the Ministers nor Church-wardens without special custom, can adjourn the vestry; but this can only be done by a majority of the whole assembly. Stra. 1047.

If a parish consists of several villages, and there is a custom to levy the rates in certain proportions, they must pursue it. Andr. 32.

be made by the consent of the major part of those, who shall come to the said meeting, will be a good and legal rate. For those, who are absent in this case, devolving their right and votes upon those who are present, they who are present, how few soever they be, are in construction of law the whole parish (as hath been afore in another case fully shown). And therefore whatsoever rate is made with the consent of the major part of them at such a meeting, or by the Church-wardens alone[a] (if on the calling of such a meeting none else shall appear at it) will be interpreted as made with the consent of the whole parish. For the absence of those, who do not come to the said meeting, being voluntary, it will imply, that they do thereby entrust those who are present with their interest; and if none appear, but the Church-wardens alone, it will imply a like trust of the whole parish voluntarily reposed in them in this case. And therefore every rate thus made will be good in law. (*See Jeffereys's case*, 5 *Co.* 67. *Hetl.* 61. *Pop.* 197. *Lane* 21. *Degge*, *P.* 1. *c.* 12. *Watson c.* 39. *p.* 302. 1 *Vent.* 367.) and when it is confirmed by the Ordinary, may be levied by due process of law in the ecclesiastical courts upon all such as shall refuse to pay the same, reserving still their exceptions to all those who shall think themselves unequally laid in the

[a] For they, and not the parishioners, are to be cited and punished, in defect of repairs. Gibs. 220.

But otherwise a rate made by the Church-wardens only is not sufficient. 1 Salk. 165.

When the Church-wardens and parishioners are met, they are to consider what sum of money it will be necessary to raise for such repairs, as shall then be needful; and after they have agreed what sum is fit, they are to make an equal levy. Degge. 171.

It is most convenient, that every parish act be entered in the parish book, and that every man's hand consenting to it, be set thereto. Shaw. 55.

said rate as aforesaid, of which the ecclesiastical court is to judge.

No Parson or Vicar can be charged to the repair of the Church in any parish by reason of their tithes or glebes therein, because out of them they are bound to repair the chancel; but if they have any other estate in the parish, they are chargeable for that as well as other parishioners. And although one of them only repairs the chancel, and the other be exempt, yet in that either of them doth it, both are discharged all rates to the Church, because the repair of the chancel [b] equally lies upon the whole tithes and glebes that are parted between them; and that one of them doth it, and the other is discharged, is wholly by composition between themselves: But if no such composition appears for the laying of it on the Vicar, of common right it belongs to the Parson to do it, the Vicar being looked on only as his stipendiary to serve the cure, and the portion which he hath of the revenues of the Church, no other than as his wages in order thereto. But if the glebes be out of the parish, (as sometimes they are) their being glebes in this case cannot exempt them from being charged to the repair of the Church in that parish where they lie. For in that parish no repairs of the chancel lie upon them, and therefore they are there on the same foot, as to this matter, with the other lands of the parish, and consequently must be charged equally with them to all the burdens of it. For no glebes are to be excused Church repairs, but such as belong to the Church that is to be repaired, not those which belong to another Church out of the parish, in which

[b] An impropriator, tho' bound to repair the chancel, is also bound to contribute to the reparations of the church, if he hath lands in the parish, which are not parcel of the parsonage. Gibs. 221.

the

the said glebes lie, *(Lindwood de Ecclesiis ædificandis, C. licet Parochiani.)*

All such who are so poor as to be excused from paying to the poor's rate by reason of their poverty, ought also to be excused from paying to the Church-rate for the same reason. And all those who being thus excused and pay nothing to the Church, ought not to have any vote in any affairs relating to it; that is, in chusing the Church-wardens, making Church-rates, allowing Church-wardens accounts, *&c.* it being most reasonable, that they only who pay to the rates, should make the rates, and chuse officers who are entrusted with the levying and disposing of them, and take their accounts afterwards. But this must not be understood of the Minister, though he be not charged to those rates, because as having the freehold of the Church, he hath a special right in it, and as Minister of it he hath a special duty upon him to see, that it be well and duly repaired, and that rates be made to enable the Church-wardens to do it, and he must be responsible to the Bishop for his care herein, *(Vide Johan. de Athon in Othob. C. Improbam quorundum, verb. ad hoc tenentur. Lindwood de Officio Archidiaconi, C. Archidiaconi, verb. Reparatione.)* And therefore in every parish meeting he presides for the regulating and directing of this matter. And this equally holds whether he be Rector or Vicar.

If the Church-wardens defer to make or gather their rate, till they are out of their office (as is through mistake or negligence too often done) they are then deprived of all legal authority of doing either, and therefore they ought to take care, after having well surveyed and computed the repairs, to make and gather their rate as soon as conveniently they can, and within the time of their office pro-

secute all such who refuse to pay what they are laid to it, or at least present them in their last presentment at the *Easter Visitation*, when they go out of their office. For by this presentment they will not only have the benefit of being attached of the action while in their office, but also make it a cause of office upon the Judge to do them justice herein, and therefore may afterwards pursue it when out of their office, till they recover the money, which otherwise they cannot lawfully do. For no officer can have any right of action by virtue of his office after he is discharged of it. But if it happen, that there be no such prosecution begun, or presentment made, before they were out of their office, they may then on their giving up of their account pass over their arrears with the rate on which they are due, to their successors, who have full authority to sue for, and recover the same, all such arrears being in truth a debt due to the parish, which they are by their office to take care to recover for them. But because this may be apt to make Church-wardens negligent in collecting the money due on their rates, and their successors may have just reason to complain, if the burden be turned over upon them of gathering their predecessors rates, as well as their own, the best way to prevent this, and adjust the whole matter between both will be, that the old Church-wardens on the going out of their office, do account all the rates, they have made, as received, and take a deputation or letter of attorney from their successors to demand and recover in their names, what is left in arrear: for they cannot in this case do it in their own; and then predecessor and successor will equally bear the burden without casting off any part of it from the one upon the other.

According

According to the ecclesiastical law, that hath obtained in this realm, the laying of the Church rate ought to be according to the lands and the stock, which the parishioners have within the parish, so say *John of Athon*, and *Lindwood*, the ancientest and the best of our *English* Canonists. For the words of the latter of them, as taken out of the former, are, *Unusquisque Parochianus tenetur ad reparationem Ecclesiæ juxta portionem terræ, quam possidet infra Parochiam, & secundum numerum animalium, quæ tenet & nutrit ibidem. i. e. Every parishioner is obliged to pay towards the repair of the Church, according to the portion of the land, which he occupies in the parish, and the number of animals which he hath and feeds there, (Lindwood De Ecclesiis ædificandis, C. licet Parochiani, verb. reficiendarum Ecclesiarum. Et de Officio Archidiaconi, C. Archidiaconi, verb. Reparatione. Johannes de Athon in Othob. C. Improbam, verb. ad hoc tenentur.)* But this is not to be understood, as if any one were to be layed for both land and stock. They who make the rate may lay him according to either of the two, and even for the best of them, but not for both. *(See the judgement of Doctors Commons in* Godolphin's *Appendix, sect.* 31.) But the general usage now is to make a rate according to the value of the lands[a]. However it is to be taken notice of, that this rate is only a personal, not a real charge; for it is not laid upon the lands, but only upon the persons in respect of the lands which they occupy within the parish, and for this reason the farmer or occupier, not the landlord, is to pay the same, 5 *Coke, p.* 67. 1 *Bulstrod,* 20. *Degge, p.* 1. *c.* 12. 2 *Roll.* 289. *Sheppard Abr. Title Church-wardens.)* And what

[a] By an equal pound rate.

I here say of lands, is to be understood also of houses[a], for both according to their value are chargeable to these rates, (*Hetley*, 130.) And in some places houses only, as in cities and large towns, where there are houses only, and no lands to be charged hereto.

But concerning the lands which are occupied by out-setters, that is, by such as live out of the parish, there is some difficulty and difference of opinions. For there are many who hold that out-setters are not parishioners, and therefore ought not to be charged towards the utensils, clerks wages, sacramental bread and wine, and other incidental charges of the Church, because the parishioners only have any benefit of these, and those who are not parishioners none at all; and to be charged to expences where they receive no benefit, they say, is hard and unreasonable; and consequently, according to this doctrine, two rates ought in every parish to be made, one for the repair of the body of the Church and the Church-yard with their appurtenances, to which all are to be charged that have lands within the parish, whether out-setters or in-setters; and the other for the utensils and incidental charges of the Church, to which only the in-setters are to be charged, because they only have the benefit of them, (1 *Bulst.* 20. 2 *Roll.* 291. 2 *Rolls Rep.* 270. *Godolphin's Repertorium*, *c.* 12. *sect.* 29, 34, 41. *Degge*, *p.* 1. *c.* 12.) But there are others, who are of a different opinion concerning this matter. The former opinion went chiefly upon this supposition, that out-setters were no parishioners, and therefore ought not to pay to that, whereof parishioners only had the benefit. But these say, that

[a] But a man shall not be charged to the repairs of the Church in respect of a light-house, Bunb. 81.

out-

out-setters, by reason of the lands which they occupy in the parish, are as much parishioners as the in-setters, and may at their choice come to either Church for the hearing of divine service, as they shall think fit, and have a vote in the parish-meetings of both; and that therefore they ought to be charged to the utensils and incidental charges, as well as to the fabrick of the Church. And for the support of this opinion they urge the confusion and inconvenience which would follow from doing otherwise; for (say they) to make two rates cannot but prove a very confused, perplexed, and vexatious thing, and must necessarily embarrass the parish with more difficulties than the thing is worth. And it is further objected, that it is possible that all that occupy lands in the parish may live out of it, and have none but servants, day-labourers, and poor shepherds in their farms; and to charge only these poor people to the utensils and incidental charges, and discharge their rich masters, who own all the lands in the parish, from paying any thing towards them, would be very unreasonable and unequal. And it must be acknowledged, that there is a constitution of *John Stratford*, Archbishop of *Canterbury*, made *Anno Dom.* 1342, which ordains agreeable to this opinion, That all who have lands in the parish, should be equally charged to the ornaments of the Church, as well as to the fabrick, whether they live within the parish or elsewhere. For the words of this Constitution are as followeth; *Præsentis approbatione Concilii duximus statuendum, quod tam religiosi, quam alii quicunque possessiones aut prædia seu reditus, quæ de Gleba reficiendarum ecclesiarum, seu de dote non existunt, in quibuscunque parochiis nostræ provinciæ obtinentes, seu in posterum habituri, in ipsis degentes,*

vel alibi, ad quævis onera parochianos ipsos, ipsorum ecclesiam, ac ornamenta ejusdem concernentia, & eis in his de jure vel consuetudine incumbentia, consideratis possessionum et redituum hujusmodi quantitatibus, cum cæteris parochianis ecclesiarum prædictarum, quoties opus fuerit, contribuere teneantur; i. e. *By the approbation of the present Synod we have thought fit to ordain, that as well the religious, as all others, that now have, or shall hereafter have, possessions, lands, or revenues (which are not of the glebe of the Churches to be repaired, or of the endowments that belong to them) in any parishes whatsoever of our province, whether they dwell in the said parishes, or elsewhere, shall be obliged to pay with the other parishioners towards all the charges, which are either of common right, or by custom incumbent on the parishioners for the repair of the Church, and the ornaments belonging thereto, according to the quantity of the possessions*[a], *and the revenues which they have in the said parishes, as often as there shall be need for the same, (Lindwood De ecclesiis ædificandis, C. Licet parochiani.)* And now the practice generally goes according to this opinion, and the ecclesiastical Judges, as well as the temporal, for the sake of the ease and convenience which accrues from the making of one levy for all give countenance hereto, and begin to treat the law to the contrary (if ever it were law) as obsolete and out of doors. *Concerning this whole matter see* 5 *Co.* 67. 2 *Brownl.* 10. 1 *Bulst.* 20. 2 *Rolls Abr.* 291. *Degge, p.* 1. *c.* 12. *Godolphin's Repertorium, chap.* 12. *sect.* 23, 26, 29, 34, 41. [*and Shaw's Parish Law.*]

[a] But a man shall not be charged for a stand in a market in the same parish, when he inhabits in another parish. 2 Rol. 2890. l. 35.

When

When therefore a Church-rate[a] is to be made, all that occupy any lands or houses within the parish, are to be laid to it according to the value of the said lands or houses, by an equal pound-rate, without grieving or over charging one, or sparing or easing another, or leaving any out of the rate who ought to be charged to it. For if any be overcharged[b], or others undercharged, the Ordinary will condemn the wrong done, whenever it comes before him. But if any one be left out, who ought to be charged to it, injury is hereby done to the whole parish by overcharging them so much, as those ought to pay who are omitted. And this is a sufficient reason for the Ordinary,[c] when complaint is made to him hereof, to quash the whole rate, and send the Church-wardens to make a new one. In all these rates it will be fairest for the Church-wardens not to assess themselves, but to leave this to be done by the parishioners, who concur with them in making the said rate. But if there be a stated valuation of all the lands and houses in the parish justly and fairly made, and all be equally laid according hereto by a pound rate, there can be no error or injustice in this matter.

If any quaker[d] refuseth to pay the Church rate which is laid upon him (as mostly those of that sect perversely do) complaint must be made to the two next Justices of the Peace, who by the statute

[a] Church rates depend upon prescription alone. 4 T. Rep. 669.

[b] Or rated for more than he has, or that the rate was needless. Wood, b. 1. c. 7.

[c] If any one finds himself aggrieved at the inequality of the assessment, his appeal must be to the ecclesiastical judge. Degge 172.

[d] Also a quaker, refusing to pay Church rates, may be sued as other parishioners in the ecclesiastical court.

of the 7th and 8th of King *William* the third, *cap.* 34. have full power hereon to convene the person before them, and hear the said complaint, and on having examined upon oath into the truth and justice thereof, to judge and ascertain the sum that is due, and make an order under their hands and seals for the payment of it. And if any quaker shall, after such order made, refuse to obey the same in paying the said sum, then any one of the said Justices, who made the said order, shall and may, by warrant under his hand and seal, empower the Church-wardens to levy the money so ordered to be paid by distress and sale of the goods of the offender, rendering to him the overplus. And in case he appeal to the Quarter-Sessions from the said order, and be there cast in his appeal, he shall pay all the costs of the same, and be excluded all other remedy as to the said rate.

If any plead a prescription to be exempt from those rates in respect of any of their lands or houses, it cannot be good without a special cause shown for the discharge. The Parson of the parish, as also the Vicar, are exempted for their tithes and glebes, because out of them the chancel is repaired, (as hath been already said.) A patron, as in the right of the founder, may prescribe not to pay to the repairs of the church by reason of the foundation, and if he hath on this account been immemorially freed, it will be a good reason for the discharge (*Degge, part* 1. *c.* 12). And so if an hamlet, having a chapel of ease[a], which they constantly resort

[a] A Church built within the precinct of a Parish-Church, to which burial and sacraments belong, is a chapel of ease. 2 Rol. 340. l. 50.

And

resort to, and have always repaired[b], have instead of being rated to the Mother-Church equally with the other parishioners, immemorially paid a set annual sum in lieu of it, this will be allowed to be a good prescription. For it will be supposed, that it was originally upon an agreement made upon some just consideration with the whole parish, and they have a power to bind their successors thereto. But if there be no such payment alledged, the prescription cannot be good; for what they have done in building them a chapel, and constantly repairing thither, instead of going to the Mother-Church, is only for their own ease, and that must not be made a dis-ease to the rest of the parish, in casting the burden of the repair of the Mother-Church wholly upon them, and that especially since they are still, notwithstanding their Chapel, members of the Mother-Church, and have all rights in it equally with the rest of the parish, and therefore must equally with them contribute to the repairs of it, (*Hobart* 67. *Noy* 41. 2 *Rolls Abr.* 289, 290. *Degge*, *p.* 1. *c.* 12.). If a parish plead a custom to be laid

And it belongs to the Parish-Church and the Parson of it. 2 Rol. 341. l. 2.

And therefore a Parish-Church cannot be a Chapel. 2 Rol. 340. l. 55.

The Parson of a Parish-Church ought to find a Chaplain for a Chapel of Ease within his precinct. 3. Com. Dig. 609. But he may officiate there himself. Ib.

If a Chapel has parochial rights, as Clerk, Wardens, &c. rights of divine service, as baptism, sepulture, &c. and the inhabitants have a right to them there and not elsewhere, and the curate has small tythes and surplice fees, and an augmentation; it is a perpetual curacy, and the curate is not removeable at pleasure. Attorney Gen. v. Brereton, 2 Ves. 425.

N. Nomination to a perpetual curacy, may be by parol, as well as presentation to a Church. Ibid.

[b] In the case alluded to, they had burial in the Mother-Church. 3 Mod. 264. see also 2 Rol. 289, l. 50. Hob. 66.

only for lands, and not for houses, or to be laid only for arable lands, and to be excused for their pastures, or to be laid only for their sheep-walks, and not for the rest, the custom cannot be good. For by the law all lands and houses are to be equally laid, and their paying for some part can be no good cause for the discharging of the rest, *Hetley*, 130. *Latch.* 203. *Godolphin, c.* 12. *sect.* 22. *Degge, part* 1. *c.* 12.)

When two Churches are consolidated, the rates and repairs are still to be separate as before, *Hob. p.* 67. And therefore though one of the Parish-Churches be demolished, and the parishioners constantly make use of the other, and have seats in it, yet they cannot be charged to any of its repairs, or other expences; which is to be understood only of country parishes consolidated by virtue of the statute of the 37th of *Henry* VIII. *c.* 21. For as to such parishes in cities and towns corporate, which have been, or shall be consolidated by virtue of the statute of the 17th of *Charles* II. *c.* 3. remedy hath been provided hereto by a late act of parliament, 4 *&* 5 *W. & M. c.* 12. whereby it is ordained, that in all such consolidations, if one of the Churches is or shall be demolished, the parishioners of the demolished Church shall pay to the repair of the other, according to the proportion which the Bishop of the Diocese shall direct, and till such directions be given, shall bear one third part of the charges. It would have been well if the same had extended to all other consolidations also; for want of it many parishes, who have their own Churches demolished, enjoy the whole right and benefit of Churches in other places, and pay no Church-rates at all.

But although consolidations by the Statute cannot extend

extend hereto, yet consolidations by common-law may. For before the said Statute of the 37th of King *Henry* VIII. there was a power by the common-law of the land in the Bishop, with the concurrence of the Patrons and Incumbents, to consolidate any two contiguous parishes, which is mentioned and acknowledged in the said statute, *sect.* 4. And the said statute, as well as that of the 17th of King *Charles* II. being both in the affirmative, and not in the negative, do not take away the common-law; but still, notwithstanding the said statutes, such consolidations as might lawfully have been made before the said statutes were enacted, may at this day be lawfully made also. And therefore all that the said statutes do effect is, that whereas before the said statutes no consolidations made according to the common-law were good, without the previous licence or subsequent confirmation of the king, these statutes do limit what consolidations may now be made without the King, that is, by the Bishop only, with the consent of the patrons and incumbents of the parishes consolidated. And therefore consolidations, that are so made without the King by virtue of the said statute, can extend no farther than is by the said statute enacted. But if they be made without any relation had to the said statutes according to the common-law, with the previous licence or subsequent confirmation of the King or Queen Regent, they are good to all intents and purposes, and in as full and ample manner as they were by the common law of the land, before the said statutes were made. And anciently the common-law of the land, as to this particular, was, that the Bishop, with the consent of the patrons and incumbents, might consolidate any two contiguous parishes upon

a Just

a just and lawful reason, and in such legal manner of proceeding, as was by the common-law required as to this matter. Now the lawful reasons for a consolidation were, 1. The vicinity of the Churches. 2. The paucity of the inhabitants of one or both of the parishes. 3. The inability of one of the parishes to keep up their Church by reason of their poverty. 4. The meanness of one or both of the livings, as not being sufficient to maintain a Minister, so as to enable him to keep hospitality. 5. If the said parishes had at first been illegally severed, *(Johan. de Athon in Othob. C. Cum sit Ars. verb. Redintegrentur.)* And when there was one or more of these reasons suggested for such a consolidation, the manner of proceeding for effecting it was, 1. A commission of enquiry went out to examine into the truth of the said reasons. 2. All persons concerned were to be legally cited, to alledge what they had to say about it. 3. On hearing of all parties, a decree was to be made for the legality of the consolidation. 4. The true value of both the livings consolidated, was to be put into the instrument of consolidation. And besides these, there were many other niceties and formalities to be observed in this matter, and a failure in any one of them made a nullity in the whole, and a suggestion afterwards offered of a falsity in the reasons, on which the consolidation was made, or a failure in the legal method of doing it, if proved, was sufficient to set aside all that was done. And therefore to put a ban against this, the authority of the Pope was called in, and his confirmation salved all defects. And for this reason, for a long while before the reformation, no consolidation was made without the Pope's confirmation; and long usage at length made it thought a necessary part of the law in this matter.

And

And what power the Pope had used, was on the abrogation of the papal authority in this realm, transferred on the King by the statutes. And therefore from that time, to make a good consolidation, the King's confirmation was made necessary, in the same manner as the Pope's was before, and a previous licence, say the Lawyers, operates the same thing with a subsequent confirmation. Whatsoever therefore the Bishop with the Patrons and Incumbents could do in the consolidating of two parishes before the reformation with the Pope's confirmation, the same with the King's licence or confirmation they have been able to do ever since, and are now still able to do. But before the reformation, it is manifest the episcopal power in this matter reached to every thing that was of an ecclesiastical nature, and could consolidate two parishes, not only so as to make them one benefice, but also to make them one parish in all things ecclesiastical. And therefore the Churches, Church-rates, and the office of Church-wardens being all of an ecclesiastical nature, and wholly depending on the ecclesiastical jurisdiction, the Bishop in his consolidation of two parishes could unite them in all these, as well as in the benefice, and join all the inhabitants in one Church for divine worship, and in one and the same Church-rate for its repair, and under the same Church-wardens to take care hereof, in the same manner as if they had originally been one single parish, with one Parish-Church only therein. And this was always done where one of the Churches was demolished, or not capable of being any longer repaired, by reason of the poverty of the parishioners; and many instruments of such consolidations may be seen in the Episcopal Registries of this

this realm, where the ancient Register-books are still preserved, and in every county several parishes may be brought for instances hereof, which having been formerly two or more, having been by virtue of such old common-law consolidations so united, as that now they have only one Parish-Church to which they all resort for divine worship, one and the same Church-rate for its repairs, to which all equally pay, and the same Church-wardens in like manner as other single parishes have, which have never been consolidated. And therefore since the common-law still remains the same as to this particular, notwithstanding the Statutes aforesaid, there is authority still by the common-law, altho' not by the said statutes, to do the same thing, and the Bishop still can, even unto this day, where there is the same reason for it, by a common-law consolidation unite parishes so as to make them one, not only in the benefice, but also in the Church, Church-rates, and Church-wardens, in the same manner as I have shewn he formerly could. For these are all of an ecclesiastical nature, and wholly depending on the ecclesiastical jurisdiction, and therefore the Bishop hath full power over them.

But as to other things, which are not of an ecclesiastical nature, the Bishop having no jurisdiction or power over them, his consolidation cannot reach unto them. And therefore as to the Constables, Overseers of the poor, Surveyors of the high-ways, and all other matters which belong to the civil jurisdiction, the parishes, notwithstanding the Bishop's consolidation, must still remain distinct, as they were before, unless they have been united also as to these by the civil jurisdiction, as well as they have been by the ecclesiastical as to the other. Concerning common-law consolida-

tions,

tions, see *Austin and Twine's case, Croke Eliz. p.* 500. *Moore, p.* 408, & 661. 2 *Rolls Abridgment, p.* 778. *Hughs's Parson's Law, c.* 26. *Watson's Clergy-man's Law, c.* 1. 16. *p.* 127. And the said Statute of the 37*th of King H.* VIII. seems to give a power, as well as the common-law, to unite parishes as to Church and Church-rate, as well as to the benefices also, altho' the interpretation of lawyers goeth otherwise. For in the preamble there are two reasons given for the act; 1. The insufficiency of one of the livings to maintain a Minister; and, 2. The inability of the parishioners to maintain two Churches or Chapels with all manner of reparations, ornaments, and other accustomed duties pertaining to a Church, *of which* saith the said preamble, *they ought to be eased and remedied by the uniting of two such parishes in one.* By which it is plain, that the act intends to relieve and ease the parishioners by uniting the parishes into one Church and one Church-rate, as well as the Minister by uniting them into one benefice; and therefore since in the enacting part of the said act it is said, *that all such unions and consolidations had or made of two Churches in one, or of a Church and Chapel in one, as is aforesaid, shall be good, sufficient, lawful, firm, stable, and available in the law, to remain, endure, and continue for ever united and knit in one, in such manner and form as by writing or writings under the seals of such ordinaries, incumbents, and patrons it shall be declared and set forth:* I see no reason but that, if the Bishop, with the concurrence of the patrons and incumbents, should make the writing or instrument of consolidation in that manner and form, as to answer the second reason in the preamble of the said statute, as well as the first, it will be good

for

for the one as well as the other. But here it is to be observed, that whether the consolidation be made either by the common-law or statute law, if it be in a city or town-corporate, it cannot be good, since the said statute of the 37th of King *Henry* VIII. without the consent of the corporation: For saith the statute, *all unions and consolidations within any city or town-corporate, without the consent of the Mayor, Sheriffs, and Commonalty of the said city, or without the consent of the bodies corporate of the said town in writing under the common-seal, shall be clearly void and of no force or effect, any thing before expressed, or any ordinance, law, custom, or statute to the contrary thereof in any wise notwithstanding.* Which clause being in such general words, as to comprehend all manner of consolidations whatsoever, and with a *Non obstante* to any other law, custom, or statute, it must reach common-law consolidations, as well as statute-law consolidations, in all such cities and towns corporate, and make the one as well as the other wholly void, if made since the date of the said statute, contrary to the form thereof in this particular.

Church-wardens being appointed for the repair of the Church, can have no power or authority to deface or demolish any thing in it; but if there should be any superstitious pictures, or paintings in the windows, or on the walls, or elsewhere, which may give just cause of offence, or any thing else, which may either be an hindrance to the due performing of any of the divine offices, or be inconvenient to the parishioners in their attendance on them, the licence of the Ordinary must be first had, before they can be legally removed, (2 *Croke* 366. *Noy* 104.) But the monuments, coats of arms painted

painted in the windows or elsewhere, pennons, hatchments, &c. put up in the Church for the memory of the deceased buried there, if regularly set up with the consent of the Minister who hath the freehold, cannot be pulled down again either by the Church-wardens, Minister, or Ordinary, because they belong to the heir, and he will have his action upon the case against any that meddle with them, (2 *Cro.* 366. *Noy*, 104. 2 *Bulst.* 150. 3 *Inst.* 202.) But if any of the said particulars be an incumbrance or any annoyance to the Church, or any way hindring or incommoding either the Minister in performing any of the divine offices, or the parishioners in partaking of them, in this case the Ordinary hath power to give his order for their removal, and the Church-wardens will be justified in the executing of it. For the original intent of the Church being the service of God Almighty, nothing is to be permitted there which shall be any way obstructive of it; and of what is so, or is not so, the Bishop is the sole judge, (12 *Coke*, 105, 106. 3 *Inst.* 202.) And therefore no one can be safe in any new erection there, who hath not had the Bishop's licence for the same, especially in setting up of altar monuments, which most an end are a nuisance and incumbrance to the Church wherein they are placed.

As the Church-wardens have the care of the Church, so also have they of all the seats therein, and not only to repair them, but also to see that good order be preserved in them, and no disturbance or contention be made about them in the house of God, but that every man regularly take that seat, and that place in it which he hath a right to, whether it be by prescription, or that he hath been placed there by the order of the Bishop or by themselves.

For

For if the Lord of a Manor, or any other gentleman of the parish, having an estate and an ancient messuage therein, have immemorially, they and their ancestors, sate in an isle[a] of the Church, buried their dead there, and always repaired the same, they can prescribe to the said isle, and cannot be dispossessed of it, either by the Churchwardens, the Minister, or the Ordinary, but will have their action if disturbed therein. For such an immemorial possession will carry with it a presumption, that the isle was first built by the founder of it, with the consent of the Minister, Patron, and Ordinary, with intent to have it solely to himself[b], (2 *Cro.* 366. *Hob.* 69. 12 *Coke* 105. 3 *Inst.* 202. *Noy* 104. *Godb.* 200. *Moor* 178. *Palm.* 46. 2 *Rol.* 288. l. 10.

And upon the same reason, should now any gentleman, having an house in the parish, by the like consent of Minister, Patron, and Ordinary, build a new isle, and have a faculty from the Bishop to hold the same to the use of him and his family to bury their dead in the said isle, and also to sit there for the hearing of divine service, on condition constantly to repair it, this faculty would give him a good title to the said isle.

But no such title can be good, either upon prescription, or any new grant by a faculty as aforesaid, to a man and his *heirs*[c], but the said isle must

[a] Now usually spelt *aisle*.

[b] An aisle in a Church, which hath time out of mind belonged to a particular house, and hath been maintained and repaired by the owner of that house, is part of his frank tenement, and the Ordinary cannot dispose of it, or intermeddle with it. Gibs. 221.

But if an aisle of a Church be always repaired at the common charge of the parish, the Ordinary may dispose of the seats there. 2 Cro. 366.

[c] T. Rep. 432. For the seat doth not belong to the person, but to the inhabitant. Gibs. 221.

always

always be supposed to be *held in respect of the house*[a], and therefore it must always go with the house to him that inhabits it, whether he be the heir, or else some other occupant, who hath it by assignment from him. (*Brabin* and *Tradum's* case, *Popham* 140. 2 *Rolls Abr.* 288, 289. *Godolphin, c.* 12. *sect.* 4.)

And in like manner may the Lord of the Manor, or any other inhabitant of the parish dwelling in an ancient messuage within the same, prescribe to a seat[b] in the body of the Church, which he and his ancestors have been immemorially possessed of, and have always repaired the same at their own costs and charges. And in like manner may an inhabitant in respect of his house prescribe to first, second, or third place in the same seat, which hath immemorially been repaired by him, and the rest that jointly sit with him in it. But this right cannot go to the heirs, but is annexed to the houses, and must always go with them in the same manner, as the right of an isle above-mentioned, *Hobart* 69. 12 *Coke* 106. 3 *Inst.* 202. 2 *Bulstrod*, 150. *Noy*, 129. 2 *Rolls Abr.* 289. 1 *Sider.* 88, 201. *Raym.* 52. 1 *Keb.* 345. 2 *Keb.* 92.)

As to all other seats in the body of the Church[c], which are repaired at the charges of the parish, they are in the disposal of the Church-wardens, with the

[a] For no one can claim a seat in a Church by prescription as appendant or belonging to land; but it must be laid as belonging to a house, in respect to the inhabitants thereof. Wood, b. I. c. 7.

[b] Or priority in a seat. Gibs. 221.

[c] There cannot be a gift of a pew to a man without a faculty. Rogers v. Brooks. 1 T. Rep. 431. n.

Possession alone of a pew in a Church, though for above 60 years, is not a sufficient title to maintain an action on the case, even against a wrong doer, for disturbance in the enjoyment of it: but the plaintiff must prove a *prescriptive* right, or a *faculty*, and should claim it in his

advice

advice of the Minister, but still in subordination to the Bishop who hath the primary right of disposing and ordering of this matter in every Church of his Diocese. For he having there the primary cure of the souls of the people, and the chief government and direction of all matters relating to order and decency, is presumed by law to be the properest person to be entrusted with the judging of the different qualities and degrees of the people, in order to the placing of them in the Church each according to his rank, so that there be no contention there about this matter. And therefore if any thinks, that justice is not done him in the seat assigned him by the Church-wardens, he may apply to the Bishop for remedy, whose determination is final in this matter, unless an appeal be made to the Arch-Bishop. For the common-law hath nothing to do

declaration as *appurtenant to a messuage in the parish.* Stocks v. Booth. Mich. 21 G. 3. 1 T. Rep. 428.

But a *possession* even for 36 years, where the pew is claimed *as appurtenant to a messuage*, is a good presumptive evidence of a faculty. Rogers v. Brooks et Ux. Mich. 24 G. 3. B. R. 1 T. Rep. 431. n.

So uninterrupted possession of a pew in the chancel for 30 years, unexplained, is presumptive evidence of a prescriptive right to the pew in an action against a wrong-doer. 5. T. Rep. 298.

But that presumption may be rebutted by proof that prior to that time, the pew had no existence. Ibid. And in this case it seemed, that the declaration ought to state repairs; but that the want of it would be cured by a verdict. See 1 Lev. 71, and 1 Sid. 201. S. C.

If a faculty be annexed to a messuage, it may be transferred with a Messuage to another person. 1 T. Rep. 431.

There may be a faculty for exchanging seats in the Church. Ibid.

If a man be disturbed by the Parson, Ordinary, or Church-wardens by suit in the Spiritual Court, he may have a prohibition. 2 Cro. 366. Godb. 280.

Yet to intitle him to a prohibition, he ought to suggest some ground for such a prescription; as that he has repaired. Hob. 69. 2 Cro. 366. Noy 104. 1 Sid. 89.

Or, for a seat in the Chancel, that he has the rectory impropriate; for the Rector ought to repair the chancel. Noy 133.

with

with those seats, to which no prescription is claimed, and therefore all these remain under the ordering of the Bishop, which he may either leave to be disposed of by the Church-wardens with the advice of the Minister, as is for the most part practised, especially in *London*, or else dispose of them himself; and when he doth this latter, it is by an instrument called a Faculty, (*See Hobart* 69. 12 *Coke*, 105, 106. 3 *Instit.* 202. *Godbolt*, 200. *Hetley*, 95. 2 *Bulstrod*, 150. *Sheppard Abr. Title Church-wardens.* 2 *Rolls Abr.* 288.)

But it must be taken notice of, that how much soever it may have been the usage in any place for the Church-wardens to dispose of the seats in the Church, it can never amount to a prescription to exclude the Bishop*, because they being officers under him, whatsoever they do in this kind, must always be supposed to be done by an authority derived from him, either positively granted, as by his faculty, or else tacitly allowed. And this must hold in *London*, as well as every-where else. For although in that city the Church-wardens take it wholly upon them to dispose of seats, yet no usage can give them a title to do this exclusive of the Bishop. For when any controversy ariseth, they have no where else to go, but to the Bishop, for a decision of it. The Common-law never meddles with this matter, but where a seat is claimed by prescription. All other seats it wholly leaves to the disposing and ordering of the Bishop, and as long as he hath the decision of all controversies about them, this will always be a proof of his right in this matter; and therefore whatsoever usage the Church-wardens may pretend to in any Church for

* The disposal of all seats *in nave ecclesia* belongs to the Ordinary. 3 H. 7. 12. Godb. 200. 2 Bul. 150.

the

the disposal of the seats in it, they must be understood to do this solely by the authority of the Bishop as officers under him, not by any of their own, (12 *Coke*, 105. 106. 3 *Inst.* 202. 2 *Bulstrod*, 150. *Hobart* 69.)[a]

But whether the seats in the Church be repaired by the parish in general, or by such particular persons, who prescribe to them, care is to be taken, that they be not so built, as to be an hindrance to the Divine Service, or to any particular person from

[a] As therefore the disposal of the pews is *prima facie* in the Ordinary, so, in case of any disturbance in the enjoyment of the pew, the Plaintiff must make out his title either against the Ordinary, or against a wrong-doer, by shewing his title by prescription to the pew as appurtenant to a messuage, or under a faculty from the Ordinary. 2 T. Rep. 428. But there seems to be this difference; that where the action is again *a stranger* for a disturbance, the plaintiff need not state, nor prove repairs: it is sufficient to lay his title generally, *as appurtenant to a messuage*. But where the action is against the Ordinary he should shew both *prescription* as appurtenant to a messuage and *repairs;* for where the plaintiff declared on his right to the pew, as appurtenant to an ancient messuage, and that he and those &c. had used to repair it, but no repairs were proved; the first was held to be sufficient, the defendant being a stranger. 1. Wils. 326. See also 1 Sid. 88. 203. 3 Lev. 73. 2 Jon. 3.

It is said that an action of *trespass* will not lie for entering a pew; because the party has not the exclusive possession; the possession of the Church being in the present parson. 1 T. Rep. 490. But an action on the *case* will lie. 1 Gilb. Ev. 547.

In trespass for taking down a pew the evidence was that the pew was fastened to the *pillar* of the Church with a *chain;* this is no evidence to prove the declaration: otherwise it is if it had been fixed to the pillar by a *nail:* for in the one case it is not fixed to the freehold; but in the other it is: for whatever is *fixed* to a Church or House, is reckoned part of the Church or House in which it is fixed; for the Church is an house that consists of its frame and building, of several distinct materials fixed one in another: whatever therefore is fixed to the Church or House is a *part* of it; but if it be fixed to another thing, which is fixed to the Church or House, it may then belong to another; for not being immediately fixed to the frame of the House or Church, it cannot be reckoned a part of it. Wood's Inst. b. 11. Ch. 6. p. 33. Buller's N. P. 34.

partaking

partaking of the benefit of it, or be any other way obstructive of the good orders of the Church. And therefore if any seat be built so high, as to hinder those that sit behind, from well hearing the Minister, or the Church-wardens from well observing the behaviour of those that sit in them (which they are bound to present, if there be any thing amiss in it) on complaint made to the Ordinary, this is to be remedied, and the seat taken down to such an height as is fitting, (*Noy* 108. *Degge, part.* 1. *c.* 12.)

Although the seats in the body of the Church be fixed to the freehold, which is the Minister's, yet the materials do not therefore become his, when taken down again, but belong to the parishioners. For they having a right to put them there, because of the common use which they have of that part of the Church, have a right to take them away again. And therefore when any seat in the body of the Church, which is in the common repair of the parish, is pulled down either to be new built, or for any other reason, all the materials are to go to the Church-wardens for the use of the parishioners, and are to be disposed of accordingly in the same manner, as are the old materials of the roof, or any other part of the Church, which they are bound to maintain. But if the seat be illegally set up by any private person, and be therefore ordered to be pulled down again, in this case the materials do certainly belong to the Minister, in that they have been fixed to his freehold. The Church-wardens cannot claim them for the parish, because they did not put them there; and the private person, who built the seat, having had no right to put them there, he can have no right, after having fixed them to the freehold, again to take them away; and therefore neither he nor the Church-wardens can have any thing to

plead in bar of that right, which the Minister hath acquired to them by having had them fixed to his freehold. If a man wrongfully plants a tree in another man's soil, by putting it there, he makes it part of the freehold, and therefore whenever it is again removed, it belongs to him that owns the land; and the case before us is exactly parallel hereto. *(See Degge, part.* 1. *c.* 12.)

But although the Bishop's right to the disposal of the seats in the body of the Church be undoubted, yet some dispute there is about it in respect of the chancel[a], because the Parson hath not only the freehold of it, but also repairs it. But to this it is to be replied, that the Bishop's right is the same through the whole Church, that is, in the Chancel as well as in the body of the Church. And as the parishioner's repairing of the body of the Church, doth not exclude his right there, so neither doth the Parson's repairing the chancel exclude it here, but he hath in both an equal right to dispose of all the seats in them. But as the Lord of a Manor, or any other owner of an ancient messuage, may prescribe to a seat in the body of the Church, which he and his ancestors have immemorially used and repaired, to the exclusion of the Bishop, so may the Parson prescribe to a seat in the chancel, which he and his predecessors have immemorially been possessed of. And if not so, yet since the charge of repairing that part of the Church, as well as the freehold, is in the Parson, it is most reasonable he should be first provided for with a seat for his family in it. And the case is the same whether the Parson be appropriator, impropriator, or instituted rector of the parish. But if there be room for any other

[a] A person may prescribe for a pew in the chancel of a Church. Griffiths v. Matthews. T. 33 G. III. 5 T. Rep. 297.

seats,

seats, the Bishop can grant faculties for the building and disposing of them in the chancel, as well as in the body of the Church. Only if the Bishop doth not interpose, then the Parson may dispose of the seats in the chancel, in the same manner as the Church-wardens do those in the body of the Church, because of his repairing of it: But if there doth any controversy arise, then there doth lie an appeal to the Bishop from the one, as well as from the other, *(See Watson, chap.* 39.*)* But as to this matter the case is very peculiar in the city of *London*, for there the Church-wardens repairing the chancel, as well as the body of the Church, do equally dispose of the seats in both. But it must be understood still with the same subordination to the Bishop, as in other Churches [a].

But although the freehold of the Church and Church-yard be in the Minister, yet as he can hinder no parishioner from having a place in the body of the Church for the hearing of divine service, so neither can he hinder any such from having a place in the Church-yard for the burial of his dead [b]. For as the one is a common hearing-place for the living, so the other is a common burying-place for the dead. But as to the burials in the Church it is quite otherwise: for that not being a common burying-place, but only by leave and sufferance, no one can be buried there without the leave of him that hath the freehold, that is not in the body of the Church without the leave of the Minister, whether Vicar or instituted Rector, and not in the Chancel without the leave of the Parson, whether Appro-

[a] Gibs. 223, 224.

[b] But by usage in London, the Church-wardens take the money for burying in the Church or Church-yard, and the Parson has nothing but in the chancel. 2 Sho. 184. Vide p. 82, 83.

priator, Impropriator, or instituted Rector. And neither the Patron nor the Ordinary can here intermeddle, or can either of them have any authority to over-rule them herein, or give any licence without them. For the freehold being theirs, the power of granting leave to make a grave there is solely in them, (2 *Croke* 366. *Noy* 104.) But still the fee for breaking the soil belongs to them, on whom is the burden of repairing the pavement, that is, to the Parson for the Chancel, and to the Church-wardens for the body of the Church, (3 *Keb.* 504, 523, 527. 1 *Vent.* 274.)

But if the burial be in an isle, which the owner doth prescribe to, and which he constantly repairs, there no fee is due for breaking the soil, either to the Parson or to the Church-wardens, because neither of them is to make good the pavement, but he alone who owns the isle; only if there be a customary payment in this case to the Minister, as it is reasonable there should, it will be supposed to have been reserved in the original grant in consideration of that part of the Church-yard, which was taken in to build the isle upon, and then the Minister will have as good a right to that payment, as the other to the isle.

Although the parish stands in several counties, yet the authority of the Church-wardens is the same in every part of it, as if it had stood all in the same county. That it is otherwise as to Constables, Overseers of the Poor, and other Parish-officers, is from the difference, which is between the civil and the ecclesiastical jurisdiction. For they being Officers of the Civil Jurisdiction, must follow the divisions of that, which is into counties, hundreds, and tithings. And therefore, where there are different tithings, different hundreds, and different

ferent counties, there must be different Constables, and different Overseers of the Poor, altho' in the same parish, and they must account for their offices at different sessions, and different assizes. But the Church-wardens being officers in Ecclesiastical affairs, must follow the division of the ecclesiastical jurisdiction, which is into dioceses, arch-deaconries, deanries, and parishes; and therefore where there is the same parish, the same deanry, the same arch-deaconry, and the same diocese, the same Church-wardens must serve for the whole parish, and they have the same power of executing their office in every part of it, in how many different counties or different hundreds soever it be, and must at the same visitation, whether of the Bishop, or Arch-Deacon, or other Ordinary, account for the discharge of it. And because the Church is that, wherein all the Members of it are united, of that deanry, and of that arch-deaconry, and of that diocese must the whole parish be reputed to be, in which the parish-church stands.

As the Church-wardens are thus charged with all repairs belonging to the Church, Church-yard, or utensils, so also are they with the custody of all the Church goods, whether they be the said utensils, or else money, bonds, bills, indentures, or other writings, goods, or chattels appertaining to the said Church, in respect of which they are a corporation (as hath been afore observed,) and can sue or be sued as such; but they being a corporation for the benefit of the parish, and not to the prejudice of it, they cannot dispose of any of the Church goods without the consent of the parish, and the licence of the Ordinary; not without the consent of the parish, because they are their goods; and not without the licence of the Ordinary, be-

cause they appertain to holy things, of which he hath the care and ordering; and therefore if the Church-wardens would sell an old bell towards other repairs, or put off old communion-plate to buy new, or dispose of any other of the goods of the Church, altho' to the use of the parish, they cannot do it without the consent of the parish [a], and the licence of the Ordinary, as aforesaid, and the disposal of any of the said goods without the consent of the parish, is void in law. (3 *Bulst.* 264. *Yelv.* 173. 2 *Brownl.* 215. 1 *Roll.* 393. 1 *Roll. Rep.* 426. *Finch. lib.* 2. *c.* 17. *p.* 179.) For the parishioners are the proper owners of them, and the Church-wardens are only entrusted with their custody for the use of the said parishioners. However in this case the parishioners themselves can have no action for such goods thus disposed of, either against the receivers to recover them, or the Church-wardens for disposing of them; for altho' the goods belong to the parishioners in common, yet not they, but the Church-wardens are the corporation, in whom they are invested for their use; and therefore when there is cause for any such action, they must tarry till they have new Church-wardens, and in their name bring the suit, who have a right to call their predecessors to an account before the Ordinary, and also to commence suit against them for any such waste made by them of the Church-goods, as aforesaid, or for any other damage done the parish, contrary to the trust invested in them, (See *Watson, c.* 30. *p.* 304. *Kitchin, Tit. Ward. of Ch. p.* 387. 13 *Coke,* 70. *Finch, lib.* 2. *c.* 17. *p.* 179.)

But altho' the Church-wardens are a corporation [b] for

[a] See note p. 34.

[b] Church-wardens being sworn are so far *incorporate* by law, as to be *enabled to sue for* the goods of the Church, and to bring an action of trespass

for the Goods of the Church, they cannot be so for lands, (1 *Inst.* 3. *a.* 1 *Roll.* 393. *Kel.* 32. *a. Finch, lib.* 2. *c.* 17. *p.* 179.) And therefore, if any one gives lands to the parish for the use of the Church, it must not be to the Church-wardens and their

trespass or other possessory action for them; and also to purchase goods for the use of the parish: but they are not a corporation in such sort as to purchase lands, or take by grant, except in LONDON by custom. Canons of 1603. 241. 11 H. 4. 12. a. 12 H. 7. 29. a. 1 Rol. 57.

And this action of trespass will lie altho' another parishioner, or the Vicar himself takes them. 11 H. 4. 12. a.

And a suit for them by the Parson in the Spiritual Court shall be prohibited. 1 Rol. 57.

And the succeeding Church-wardens may maintain trespass for goods taken in the time of their predecessors. 12 H. 7. 28 a. Cro. El. 145, 179. 1 Lev. 177. But it was doubted in Dal. 105.

And if one releases, it does not bar his companion. 2 Cro. 234. Yelv. 173.

So if goods are given to a parish or Church, the Church-wardens may take them; for they are a corporation for such purpose. 12 H. 7. 29. a.

And the successors may have account for them against their predecessors. 8 Ed. 4. 6. b. 1 Vent. 89.

So, if goods are put into the Church to be there used; for that is a gift. Lamb. Ch. s. 2.

So, Church-wardens may have trespass against any one who defaces a monument, &c. Godb. 279.

But they cannot mantain trespass for breaking the windows, walls, &c. of the Church, or cutting down trees in the Church-yard. 3 Com. Dig. 613.

So they cannot sue for a legacy, or a thing never in their possession, by action at common law. Ibid.

Nor can they commence a suit after their year is expired. Str. 852.

So they cannot dispose of the goods of the Church. 13 H. 7. 10. a. 2 Cro 234. Yelv. 173. 1 Rol. 392. l. 20. 1 Rol. 426.

Yet a disposition by them, with the consent of the parish is good. 1 Rol. 393. l. 26.

Or, the sending a bell, with consent to be cast, shall be a discharge upon account, tho' no bar to an action. 1 Vent. 89.

Churchwardens *de facto* may maintain an action against a former Churchwarden for money received by him for the use of the parish, tho' the validity of the plaintiff's election to this office be doubtful, and tho' they be not the immediate successors of the defendant. 2 H. Black. 559. Vide p. 83.

successors, but there must be an especial Feoffment made for it in the hands of Feoffees in trust for the preserving of the said lands to the use intended, which is from time to time to be renewed, as the old trustees die off, by putting new ones in their stead. But this cannot be done by a bare election made by the survivors. For this alone is not sufficient to vest the trust in them. To do this legally the surviving trustees must transfer the whole right and trust to them. But because this would be a divesting of themselves, if the trustees are not willing so to do, or else if it shall appear inconvenient for the parish to be deprived of the stewardship of those, who have been long used and experienced in it, the best course that can be taken in this case will be, that the old trustees do by deed convey their right and trust into the hands of some one single person, who shall immediately by another deed convey it again to them in conjunction with as many other new trustees, as shall be thought fit to be added to them, still preserving the lands to the use of the original donation. This would be convenient to be done, before the trust be reduced to one only surviving trustee; but if it shall happen to be thus reduced, the transmission of the trust will then be absolutely necessary forthwith to be put in execution, and it will behove the parish, without any further delay to press that surviving trustee to it. For otherwise, in case the said trustee should die before the said trust be legally transferred to others, the lands will descend to his heir, and it may cost the parish a *Chancery* suit again to revive the trust.

And here I cannot forbear observing, that when any such lands are given to the repair of the Church, the Minister hath wrong done him, if it be not extended

extended to the repair of his chancel, as well as to that of the repair of the body of the Church. For the word Church doth equally include the chancel, as well as the nave or body of the Church. So saith *Lindwood, Vox Ecclesia comprehendit Ecclesiam integram, videlicet Navem cum Cancello*, i.e. *The word Church comprehends the whole Church, to wit, the Nave or Body of the Church with the Chancel. (De Officio Archidiaconi C. Archidiaconi verb. Fabricam Ecclesiæ.)* And therefore whatsoever is given in general for the repair of the Church, must equally extend to the nave, and chancel, and accordingly be expended in a just proportion upon both, that is, in such a proportion as the chancel and body of the Church bear to the whole; as for example, if the chancel be one third, and the body of the Church two thirds of the whole, then one third of the donation must go to the repair of the chancel, and the other two to the repair of the body of the Church, and so proportionably in other cases, where the proportion is otherwise. If the donation be to the body of the Church only, then I confess the Minister is excluded. But if otherwise the gift be to the repair of the Church in general, he certainly hath as good a right to a proportionable share for the repair of the chancel, as the parishioners have to the rest for the repair of the body of the Church, and he is very much wronged whenever he is excluded from it. If it be said, that what is thus given, is given in charity, and therefore cannot be intended for the Minister, who may well be supposed to be above it; I answer hereto, that there is scarce a parish in the kingdom, in which there is not some parishioner, who thinks himself in wealth and quality above the Minister; and in many of them there are men of great estates,

and high dignities, as Esquires, Knights, Baronets, Barons, &c. who are undoubtedly much more above gifts of charity, than the best preferred parish Minister in the realm; yet since these are not excluded from partaking of those donations in the repair of the body of the Church, but have their estates eased thereby in the Church-rates, of what otherwise they must pay towards them, can any one give a reason why the Minister may not have a share in such a charity for the repair of the chancel, as well as any of these for the repair of the body of the Church?

But whereas it is above said, that Church-wardens are a corporation only for goods to the use of the Church, and not for lands, the city of *London* is in this to be excepted. For there by special custom the Church-wardens with the Minister make a corporation for lands, as well as for goods, and may as such hold, purchase, and take lands for the use of the Church, and sue, and be sued on the account thereof, as well as for goods and chattels. And this is alledged as a reason for that other custom, which hath also obtained in *London*, for the parishioners there to chuse both Church-wardens exclusive of the Minister. For, say they, if the Minister should there chuse one of the Church-wardens according to the Canon, he, with the said Church-warden, as the major part of the corporation, may dispose of their lands to the damage of the parish, and therefore it is not safe there to lodge so great a trust in him. But there being no such custom in any other part of the kingdom, every where else the Church-wardens only make the corporation for the use of the Church, and are such only for the goods belonging to the same, and not for lands. (2 *Cro.* 532. 3 *Cro.* 551, 552. 1 *Inst.* 3. *a.* *Lane* 21. 1 *Roll. Abr. p.* 398.)

And

And therefore if any one break the Church-windows, cut down the seats in the Church, demolisheth any part of the walls, either of the Church or Church-yard, or any other way damnifieth the Church in such particulars, as are not of the goods of the Church, but are either parts or appurtenances of the freehold; in this case the Church-wardens cannot sue in their own names for reparations to be made for these damages, but must bring the action in the name of the Minister, to whom the freehold belongs, (10 *H.* 4, 9. *Kitchin, Tit. Wardens of Churches, p.* 387, 388. 2 *Roll. Abr. p.* 337.)

But if the damages be done to any of the utensils or goods[a] of the Church, in this case the Church-wardens are to bring the action in their own names, because the property of all such utensils and goods is in them as a corporation for the use and benefit of the parish; but in the doing hereof they are to observe two things: The first is, that being a corporation they act jointly together; for neither of them alone is that Corporation, but both together, and consequently what one doth without the other hath no force in law. For should one of them alone commence the action in his own name, without joining the name of the other with it, or when it is rightly commenced in the name of both, should either of them give a discharge from the action, or from the costs or damages, which are recovered upon

[a] Churchwardens are a corporation for the purpose of taking care of the goods and property of the Church, and maintain actions for money withholden from the parish: and the actions are maintainable by the Church-wardens *de facto*, who are admitted and sworn into the office, tho' there may be a doubt as to whether legally appointed or not; and an action may be maintained by the Church-wardens *de facto*, against any former Church-wardens for money of the parish received by them and not accounted for, and that tho' the plaintiffs are not their immediate successors. 2 H. Black. 559. Turner and others, v. Baynes.

it, all that is so done is void and null in law, and so it will be in every thing else, wherein either of them shall take upon him to act alone in his office without the other, (2 *Croke*, 235. *Yelverton*, 173. *Noy*, 129. 3 *Croke*, 179. 2 *Brownlow*, 215. 1 *Roll. Rep. p.* 57, 426. *Danvers, Title, Church-warden, b.* 788.) except only in presentments. For each of them being sworn to present according to the best of their skill and knowledge, one of them may have knowledge of some offences committed, which the other hath not. And besides, it is possible that one of them may be so perverse and wicked, as to refuse to present what is notoriously known to both, but that is no reason that the other should be perjured in doing so too. But when both are equally willing to do their duty, and both equally know the facts to be presented, it's best that both join in the presentments, and this is the usual practice in this matter. But, *Secondly*, As they must act jointly in all such matters as are above mentioned, so they must take care in all actions at law, that they lay them right. If the damages for which they sue were done in their own time, they may then lay the action either *in damnum Parochianorum*, or *in damnum ipsorum*. For the parishioners have damage, because they are their goods, and the Church-wardens because they having them in trust, must answer and account for them. But if the damages were done in the time of their predecessors, or the action be against the said predecessors for such damages as were done by them in time of their office, they must lay it only *in damnum Parochianorum*. For they not having had those goods in their trust when those damages were done, can by no means be accountable for them, or any damages then done them, nor can on any other account

as

as Church-wardens have any proper interest in them; and therefore in this case, if they should lay it *in damnum ipsorum*, it would void the action, *(Kelway* 32. *a.* 1 *Croke*, 145. 1 *Leonard*, 177. 2 *Brownlow*, 215. *Degge*, *p.* 1. *c.* 12. *Danvers*, *Title Church-warden p.* 788.)

When any such damage is done, the Church-wardens may seek remedy in the ecclesiastical court, as well as at common law; but with this difference, that only the restitution of the thing taken away can be sued for in the ecclesiastical court, but damages can be recovered no where, but at common law. As for example, should any one carry away a bell out of the Church, he may be cited into the ecclesiastical court, and there admonished to restore the same, and on the refusal be excommunicated till he shall comply to do right herein. But if the bell be broken, and the metal disposed of, and the parish would have damages for the same, there is no other way for the recovery of them, but by an action at common law. And the case is the same, if any one takes away the Church Bible, Common Prayer Book, Surplice, or any other goods of the Church, or doth injury or damage to any of them (as by breaking a bell, tearing the books, &c.) And therefore if the parish will have reparation made them for these damages, they must seek it at common law. For the ecclesiastical courts can give them no help in this matter, *(Coke's* 2 *Instit. p.* 492. *Danvers Abr. Title Church-wardens*, *p.* 787. *under the letter (b) in the Margin. Watson*, *c.* 39. *p.* 303. 1 *Siderfin*, 281, 282.)

Church-wardens can have no action at common law for goods, of which neither they, nor their predecessors ever had possession. And therefore, if a legacy be given to the Church, or that be any

other

other way entitled to goods, which never were in the custody of the Church-wardens, they must have recourse to the ecclesiastical courts, and if they cannot help them, they must then go to *Chancery*, for they have no other way to recover them. But if any goods be once put into their possession as Church-wardens, this alone immediately vests the property in them for the use of the Church, and they have remedy at law against any one that shall afterwards take them away. As for example, should any one buy a bell and hang it in the steeple, or make a pulpit-cloth, and place it on the pulpit, they thenceforth become the goods of the Church; and tho' neither word nor writing were made signifying this purpose, yet on their being thus put into the possession of the Church-wardens, by that act their property immediately vests in them for the use of the Church, and the owners placing them there will be interpreted as a consecrating and a giving of them to it. And after that the Church-wardens will have for them, as well as for any other goods of the Church in their custody, an appeal of robbery against him that shall steal them, and an action of trespass against him that shall wrongfully take them away, [a] though it be the Vicar or Parson of the parish, or the person himself who placed them there. And the damages recovered thereby shall go to the use of the parish. (*Nelson's Rights of the Clergy, Title Church-wardens. Meriton's Guide to Church-wardens, ch.* 3. *Kitchin, Title Wardens of Churches,* 3 *Croke,* 343. *Degge, part* 1. *c.* 12. *p.* 184.)

If any person doth in the night-time break up the Church, and enter into it, he is guilty of bur-

[a] He who steals goods belonging to a parish Church, may be indicted for stealing the goods of the parishioners. 1 Hawk. 94.

glary.

glary. For, say the Lawyers, *Ecclesia est Domus mansionalis Omnipotentis Dei*, i. e. *The Church is the Mansion-house of God Almighty*. For to break into the mansion-house of any one in the night with a felonious intent, is burglary. (*Dyer* 1, *Mar.* 99. *Coke*, 3 *Instit. cap.* 14. *p.* 64.)

At the *Easter*-Visitation, when the Church-wardens go out of their Office, they must take care to make their presentments of what is amiss in their parishes, before the new Church-wardens are sworn. (*Can.* 118.) For after the new ones are sworn, the old ones are out of their office, and therefore can then have no right to present as Church-wardens. But if they neglect to make the said presentments, this is no reason to hinder the new ones from being sworn. Where-ever there is such a neglect, it is to be punished; but notwithstanding that, the new Church-wardens are to be admitted to their office, and the old ones are to be discharged, and there is nothing in the canon that can be interpreted to intend otherwise. And on their being discharged, [a] they must within a month after make their account, in order whereto they must give notice in the Church the Sunday before for a parish-meeting, that all that have paid to the rate may, if they think fit, be present to take an account, how the money hath been expended. At which meeting the Church-wardens having first produced the rates which they have made, must give an account, how they have expended the sums levied by them, and when this account is allowed by the major part of the parishioners then present, it is to be entered in the Church-book of accounts, which every parish is to have for

[a] The Canon 1 Jac. 89, says, they shall in a month *after the end of the year*, give account of all monies received and disbursed, and deliver up to the parishioners what is in their hands.

this

this purpose, and those who allow the account, are there to set their hands to it, and if there be any money remaining over, they are to deliver it with the said book of accounts to the succeeding Church-wardens, to be put by them to the account of the next year. But if the said rate falls short of the disbursements, as much as it doth so, becomes a debt of the parish, which the succeeding Church-wardens are bound to pay unto them, and account it among their disbursements at the end of the next year.

If any dispute ariseth about the account, it is to be decided before the Ordinary[a], where the Church-wardens are to justify it against all exceptions, first, by swearing to the truth and justness of it, and also by proving the larger disbursements, that are excepted against. For any sum not exceeding forty shillings their oath alone will be allowed, without any other proof to make good the account, unless where disproved by sufficient evidence to the contrary; but for all sums above forty shillings they must also produce their receipts, and prove them too, if required, or bring other sufficient testimony to witness the payment, before their account can for those particulars be allowed and judged good.

[a] The Spiritual Court has no jurisdiction to settle a Church-warden's accounts. Adams and Rush. Str. 1133.

But altho' the Court cannot decide on the propriety of the charges, yet it can compel them to deliver in their accounts. And if it take any steps after the accounts are delivered in, it is an excess of jurisdiction, for which a prohibition will be granted, even after sentence. 3 T. Rep. 3.

And to a suit in the Spiritual Court to compel them to an account, after the account allowed by the Minister and parishioners, a prohibition lies. 2 Rol. 71.

And no suit shall be against them by their successors for a thing done *ratione officii* Godb. 279. But this must mean a suit in the ecclesiastical court, for an *action* at common law lies against them by their successors, 1 Sid. 282.

And

And therefore it is necessary for Church-wardens, that for all such sums laid out on the Church account exceeding forty shillings, they be careful to take receipts of the parties to whom they pay them, and get them witnessed too by such as see them pay the money. And it is adviseable, that for sums under forty shillings, (unless they be very small ones) they also follow the same course. For although their oath alone will justify them as to these by law; yet their reputations as to a just discharge of their trust will be best preserved against all cavils and objections, and satisfaction will be best given to the parishioners, if there be vouchers also.

The exceptions against a Church-warden's account may be, 1*st*, as to the particulars on which the disbursements are made, and 2*dly*, as to the justness and truth of the disbursements themselves.

For if a Church-warden hath of his own head laid out the parish-money; where he hath no authority by his office so to do, that is, on new erections, or other such particulars, where the consent of the parish, or licence of the Ordinary, or both, ought first to be had, the parish may refuse to allow it him in his accounts: And he may be further punished by the Ordinary for the contempt put upon his authority herein, if it be in a particular where his licence was requisite for the doing of it.

And although his disbursements be within the limits and power of his office, yet if not fairly stated, there lies a just exception against the account; and if it appears that he hath not dealt justly and fairly with the parish herein, but hath either charged to them more than he hath laid out, or falsely and fraudulently expended more than need for by-ends of his own, altho' there be no remedy against a foolish and indiscreet Church-warden (as is afore

observed)

observed) yet there is against a false and a knavish one, and such an one shall not only be defalcated all those particulars in his account, where the fraud appears, but may also be further punished by the Ordinary, as one that hath notoriously broken his trust, and violated the oath of his office by his knavery and falseness herein.

And it will be a strong argument against Church-wardens of their guilt in this particular, if they accept of any entertainment from the workmen they employ, or the persons of whom they buy the materials; or if they make use of any materials of their own, unless they call some principal inhabitants of the parish, and fairly agree with them the price, before they convert them to the use intended; or if they employ such workmen, or buy the materials of such persons as are in their debt, and set it off by the money they were to pay them, or make use of any other practice, wherein they have a by-end and self interest of their own, which men are too apt to prefer before the public: And whenever any such fraud is detected, it will be a just reason to condemn that particular in the account in which it is committed, or at least defalcate it to the value of the fraud which shall be discovered in it. And whenever any Church-warden hath his account condemned for any such fraud, he must be condemned too in the charges of the suit which shall be occasioned about it.

Would Church-wardens consider the oath they have taken, when they first enter on their office, and the obligation which then they take upon them of well and truly discharging themselves in this, as well as in all other branches of their office, that is, to the best of their care, skill, and fidelity, they would discharge themselves with a better conscience,

and

and a better credit with their neighbours, than too many of them usually do. In affairs of this nature, a man ought to act with the same care and good husbandry that he doth in his own, or rather with much more. For a man may dispose of his own goods as he shall please, without loading his conscience with any guilt in so doing; but he cannot do so with other mens committed upon oath to his care, without breaking both his oath and his trust thereby. Besides, all such are desired to consider, they are not only obliged by the promissory oath, which they take when they first enter on their office, to deal faithfully and truly with the Church and parish in the managing of the trust committed to them; but also must, whenever called before the Ordinary to justify their account, take an assertory oath also, that they have accordingly done so as to all particulars in the said account contained. And therefore Church-wardens need take care, that they be so exact and faithful in their accounts, as to put nothing into them, but what, if called to it, they may safely swear to, otherwise they may become guilty of double perjury herein.

At the same time when the Church-wardens thus pass their accounts to the parish, of all money received and expended during their office, they must also give an account of the Church-goods committed to their charge and custody, which must be then brought forth, called over, and examined before the parishioners, and after that they are to be delivered over to their successors by bill indented, as must also the keys of the parish chest, wherein are kept what public evidences belong to the parish, to which are usually three keys, of which the Minister is to keep one, and the Church-wardens the other two; and when they have faithfully accounted

counted for all these particulars, they are then fully acquitted of the said office. *Can.* 89.

For when the old Church-wardens have thus fairly accounted[a] before the Minister, the succeeding Church-wardens, and the major part of the parish, and their account is allowed by them, it shall not afterwards be in the power of the minor part, much less of any single person who shall pretend to be dissatisfied, to make them account again; but in case they shall by any such be called before the Ordinary for this purpose, on their alledging, and making proof, that they have already accounted before the Minister, the Church-wardens that succeeded them, and the major part of the parish, and that their accounts hath been allowed by them in the manner as above expressed, this is a peremptory exception against all further process, and they must be dismissed with their charges; that is, when they are cited only in general to account. But if any fraud be charged upon them, and they be cited to answer for that, they can have no shelter or protection against it from any such plea. For no allowance of account can discharge them of any

[a] If they refuse to account, they may be presented at the next visitation by the new Church-wardens; or any of the parish that are interested may by process call them to account before the Ordinary; or the succeeding Church-wardens may have a writ of account at common law. And if they have disbursed more than they have received, the succeeding Church-wardens shall pay what is due to them, and account it among their disbursements. 1 Roll. Abr. 121.

The allowance of the account may be by entering it in the Church-book of accounts, and having it signed by those in the vestry who allow the accounts. Barl 105.

The Church-wardens were cited to the Court of *Litchfield* to account. They pleaded that they had accounted at the vestry according to law, which plea was rejected; and therefore a prohibition was granted: for the Ordinary is not to take the account, he can only give a judgment that they do account. Stra. 974, 1193. *E. 7. G. 3. Haintright and Bagshaw.*

fraudulent

fraudulent dealings, which they may have been guilty of in their office; but whenever any such are detected, they are accountable for them, and every parishioner hath a right to claim justice against them herein; [a]and there doth not only lye a cause of *instance* against them on the part of the prosecutor for the repairing of the damages done them by the said fraud, but also a cause of office on the part of the judge to correct them for it. For every such fraud is a breach of the oath, which they took at their entering on their office well and truly to discharge the same; and it is the duty of the Ordinary to punish them for it, whenever by any sufficient proof they are convicted before him to have been guilty of it.

But this must be understood only of the money, which the parishioners pay to the Church-rates. For as to the Church goods, they being in an especial manner under the care of the Ordinary, as is before expressed, altho' all the parish have allowed the account, yet as to these, if the Ordinary be dissatisfied, he may call them *ex officio* to account before him too; and also punish them, if he finds they have disposed of any of any of them on what account soever, although they have the consent of every inhabitant of the parish for it, unless they have his consent too. For otherwise the parishioners may all combine, for the saving of their purses to the Church-rates, to sell all the Church goods and utensils, to bear the parish-charges (as we find sometimes done) and so leave the Church without

[a] If the Church-wardens waste the goods of the Church, the new Church-wardens may call them to an account before the Bishop, or bring their action at common law. *Read.* Ch. Service. And in such action the evidence of parishioners, other than such as shall receive alms, shall be taken and admitted. 3 W. c. 11. a. 12.

that,

that, which is necessary for the performing of the divine offices, which the Ordinary is bound to prevent. For he hath as to these a right of trust as well as of jurisdiction, and therefore none of them are to be disposed of, or otherwise converted to any use whatsoever without his consent first had thereto.

Although it be the properest method to bring the Church-wardens to account before the Ordinary[a], yet if there should be any difficulty or obstruction in coming at justice this way, it may also be sought for by a writ of account at common law, and therefore those who are aggrieved in this matter, have their choice of either way. (*See Godbolt*, 279. 2 *Rolls Rep.* 71, 106, 107. 1 *Siderfin*, 281, 282. 2 *Keble*, 6, 22. 1 *Ventris*, 89.)

Among other particulars of the Church goods, which the Church-wardens have the custody of, and are to deliver over to their successors at the end of the year, are the terriers of the glebe lands, and the parish Register-book, both which are carefully to be kept and preserved in every parish.

The terrier is to contain an exact account of all the glebe-lands, meadows, gardens, orchards, houses and tenements, with their abuttals and dimensions, and of all portions of tithes lying out of the parish, and of all stock, implements, and all other lands, rights, goods, or chattels whatsoever, which are belonging to the parsonage or vicarage, and are from one Minister to another to go with the same. This being carefully taken by

[a] The Spiritual court may compel the Church-wardens to deliver in their account, but cannot decide on the propriety of the charges. And when they have delivered in their account, they have done every thing which that court had a power of enforcing, and there is an end of their jurisdictions, it is *functus officio*, and if they take any step afterwards, it is an excess of jurisdiction, for which a prohibition will be granted even after sentence. Leman v. Goulty and another. Hil. 29. G. 3. B. R. 3 T. Rep. 3.

the

the Minister, with the assistance of other honest men, appointed by the Bishop, is to be fairly written out, or engrossed in two fair copies on parchment, whereof one is to be laid up in the parish chest, and the other in the registry of the Bishop of the diocese. And because abuttals frequently alter, by reason of the frequent change of the persons that possess the lands abutting, it is usual for the Bishop of the diocese at every visitation to require a new copy of the said terrier, subscribed and attested by the Minister and Churchwardens, to be returned to him, that so an account being given from time to time of all new abuttals, according as they shall happen, the right of the whole may be thereby the better preserved. But here Ministers are to be cautioned, that they be careful not to make any alterations in the said terriers, save of the abuttals only, where there is an occasion for it, but exactly preserve the same number of parcels, and the same dimensions of them, as first entered in the original terrier. For as long as all the terriers of a parsonage or vicarage agree herein, they are of force when produced in a court of judicature; but if they vary, and one hath more or less than another, it creates an uncertainty in them all, which destroys their evidence, and makes them to be of no force for the preservation of those rights, for which they were intended, (*Can.* 87.)

The parish-register is a parchment book, in which all the christenings, marriages, and burials of the parish are recorded. This was first ordered by the Lord Vicegerent *Cromwell*, in the 30th year of King *Henry* the 8th, *Anno Dom.* 1538. (*Cowell's Interpreter, verb. Register. Spelman's Glossary, p.* 482.) And from thence all parish-registers have their beginning. King *Edward* the *6th*, and

Queen

Queen *Elizabeth*, each in the first year of their respective reigns, confirmed this order, and by their injunctions strictly commanded the observance of it, (*Sparrow's Collection, p.* 4, 70.) And in the 39*th year of the said Queen, anno* 1597, a canon was made in convocation, and ratified by her for the establishing of it, (*Sparrow's Collection, p.* 257.) But the force of the canons of that convocation expiring with her, because not confirmed by her for her heirs and successors (the words heirs and successors being left out in the ratification, through the neglect of him that drew the instrument, *Ham. Lestrange's Alliances of the Divine Offices, p.* 22, 23.) in the convocation which was held *in the first of King* James *the First, Anno. Dom.* 1603. another canon was made for the settling of this matter, whereby it is required, 1. That a fair parchment-book be provided at the charges of the parish to be the register. 2. That this book be carefully kept in the parish-chest under three locks, of which the Minister is to have one key, and the Church-wardens the other two. 3. That every *Sunday*, after morning and evening prayers, as often as there shall be an occasion, this book be taken out of the chest, and that the Minister do then in the presence of the said Church-wardens, write and record therein the names of all persons christened, together with the names, and sirnames of their parents, and also the names of all persons married, and buried in that parish in the week foregoing, and the day and year of every such christening, marriage, and burial, and that then the book be locked up in the chest, as before. 4. That when a page is filled with such registrations, the Minister and Church-wardens write their names at the botton of the said page, for the attestation of all that is therein registered.

registered. But this method being operose, and the exact performance of it, by reason of the many accidents that frequently intervene, in a manner impracticable, it is now no where in all particulars followed. If such a book be kept in every parish, and all christenings, marriages, and burials duly registered therein, all is fully executed that the law intends. But if thus much be not done, it is incumbent on the Church-wardens to take notice of the neglect, and present it to the Ordinary at the next visitation. *Can.* 70.

By the same Canon it is also required, that every year within a month after *Lady-day*, a copy be made out of the said book of all registrations therein entered in the year foregoing, and that being subscribed by the Minister and Church-wardens, it be transmitted to the registry of the Bishop of the diocese, to the end that the same may be there faithfully preserved. And this is the foundation, on which bills indented of all christenings, marriages, and burials, are given in at every *Easter* visitation by the old Church-wardens, on their going out of their office, although through the neglect of the Officers, whose duty it is to take care hereof, the said bills are never sent into the Bishop's registry, but usually after the visitation is over, are thrown by, and no more taken care of, whereby the intent of the canon is wholly defeated, which was, that a register should be kept in general for the whole diocese in the Bishop's registry, in the same manner as is in every particular Church for the parish belonging thereto.

I cannot pass over this head, without cautioning Ministers, as well as Church-wardens, not to suffer any to be entered, and recorded in the said parish-

register, but such only as have been baptized, married, or buried within their respective parishes, according to the Order of the Church of *England*. For a practice hath of late been admitted in some places, to receive certificates from dissenting ministers of baptisms administered by them, and thereon enter them in the parish-register. And this is done for the base lucre of a six-penny or twelve-penny fee, given to the Minister for that purpose. But whatsoever Minister is guilty of this vile practice, betrays both the Church and his trust thereby. For he admits those to the privileges of the Church, who separate from it, and by so doing encourageth their schism, which is a betraying of the Church. And he being entrusted with the keeping of this book, for the registering of such baptisms only as have been regularly administered within his parish, if he records any other therein, he betrays his trust. And moreover, by entering on the register which is appointed only for such regular baptisms, other baptisms, which are not so, he records for regular baptisms, those which are irregular, and thereby gives his *teste* to a falsehood, and makes himself *falsarius*, that is, a forger of false records, the guilt whereof exposeth him to penalties, which would disgrace him all his life after, were they duly executed upon him.

As the bells are of the appurtenances of the Church, that are under the Church-wardens care, so doth it belong to them to govern and regulate the use of them; and especially they are to take care, that they be not rung on superstitious or factious occasions, nor at unseasonable times, or on any other times or occasions (excepting such only for which their ordinary use is ordained) but what shall be allowed

allowed by the Minister and themselves. (*Can.* 88.) And if at any time they shall think fit to give leave for them to be rung for the recreation of those, who would exercise themselves this way, it would be just and fitting to make them pay to the use of the parish, as much as may compensate for the wear of the bells, bell-wheels, and bell-ropes, and the damages which are done them hereby on all such occasions.

Another branch of the Church-wardens office is, to have the sequestration and care of the benefice during its vacaney, whether the avoydance happen by death or otherwise; and therefore as soon as there shall be any such avoydance, the said Church-wardens are to apply to the Chancellor of the diocese for the sequestration, and having taken out an instrument for it under the seal of the office, are thenceforth to take the whole benefice under their care, and are to manage all the profits and expences of it for the benefit of him that shall next succeed. Which they are to do with the best of their care and skill, and with the same fidelity and good husbandry as if they were their own; that is, according as the season of the year shall require, they are to plow and sow his glebes, take in the crop from off them, gather in his tithes, thresh out and dress his corn, and dispose of it at the best market they are able. And they are also to repair his houses, make up his fences, pay his tenths, synodals, and procurations, and discharge all other burdens of the living, which shall be incumbent on it while it is under their trust, and do every thing else which may be best for his advantage. And principally they are to take care, that during the vacancy the Church be well and

duly served by such a curate as the Bishop shall approve of, whom they are to pay out of the profits of the benefice. And it will be safest for them to get it stated by the Ordinary, when they take out the Sequestration, what they are to pay him weekly for the serving of the said Cure; for then there can be no contention about it, when they make up their accounts. And this trust in them is to last, till it be superseded by the institution of a new Minister, unless in the interim the Ordinary shall see just cause to recall the said sequestration, and grant it to others. And as the Ordinary on any such just cause hath power to grant the sequestration to others, so also hath he in the first issuing out of it, and may then, if he see reason for it, put the said trust into the hands of other men that are willing to accept of it. But the Church-wardens are the proper officers for this business, who are bound by virtue of their office to take it upon them, whensoever enjoyned; and therefore should they be backward to take out the sequestration, or unwilling to meddle therewith, the Ordinary may by his citation call them before him, and command them under the penalty of contumacy to take this charge upon them, that so the fruits of the benefice be not lost, dissipated, or embezzled during the vacancy, for want of proper trustees to take care of them.

As soon as a new Minister is instituted, the said Church-wardens, or other Sequestrators, are to acccount to him for all the profits of the benefice which they have received during the vacancy. For all these belong to him from the death of the Predecessor, how long soever the vacancy may have been. (28 *Henry* 8. *c.* 11.) And if he be satisfied with

with their account, he gives them his discharge, and this wholly concludes the matter. But if he be dissatisfied in any particulars, either that he thinks they charge him too high in the expences, or themselves too low in the receipts, or in any other matter have not discharged themselves as faithful Stewards for him, he may then bring them to account before the Ordinary, by whom all things relating hereto are to be examined and decided.

And sometimes livings are sequestred on other occasions than on vacancies. For on a suspension there must be a sequestration for the serving of the cure, and in case of dilapidations, either in the chancel, or the Minister's house, a sequestration is often necessary for repairing of them, and sometimes a sequestration is commanded by the King's writ for the payment of the Minister's debts. In all which cases the Church-wardens are necessarily obliged to be the sequestrators, unless the Ordinary finds others willing to undertake it, whom he judgeth proper to be entrusted with it. In all which sequestrations there must be the like management, and the like account given, as is abovementioned. And to oblige the sequestrators the more hereto, the Ordinary usually binds them to it by a bond, especially when the profits sequestred are like to amount to any considerable value. Which bond may be sued at common law, if the sequestrators cannot otherwise be brought to give a true and faithful account of their trust.

In all sequestrations the Church-wardens, or other sequestrators, are to take care, that they meddle not with any timber, trees, wood, or underwood standing upon the glebes of the living,

unless it be for necessary repairs, nor commit any other waste upon the living. (9 *Hen.* 3. *c.* 5.) For if the Minister himself should fell any timber to sell, or for any other purpose, unless for the repair of his house or chancel, or should cut down any wood, unless for the repairing of the gates, stiles, or fences of the premises, or for necessary fuel in his house, he doth thereby make waste upon his living, which waste is reckoned a dilapidation of it, and when it is wilfully committed, it is a just cause of deprivation. (11 *Coke* 49. 3 *Inst.* 204. 1 *Rolls Rep. p.* 86. *Degge, part.* 1. *c.* 8.) But should the sequestrators, who are Trustees to preserve the living, make any such waste upon it, it would be much more criminal in them.

In larger parishes Side-men are also added to the Church-wardens, to be their assistants in that part of their office, which obligeth them to inspect the manners of the parishioners, and to present what they shall find presentable among them at the next visitation. And these are they, who in the canon law are called *Testes Synodales*, because their business anciently was to attend Diocesan Synods, as now they do at visitations, and there visit and present whatsoever they found amiss within their respective districts.

And here I cannot omit taking notice, that till the rebellion, *Anno* 1641, these diocesan synods were kept up in the diocese of *Norwich*, and all the clergy of the diocese constantly met at them every year, that is, the clergy of *Suffolk* at *Ipswich*, and the clergy of *Norfolk* at *Norwich*. In which Synods the Deans Rural, having presented whatsoever they had found defective, either in the manners and duties of the clergy, or in the reparation of the Church,

Church, chancel, or Minister's house in every parish within their respective Deanries, care was thereon taken of rectifying whatsoever was amiss herein. But on the restoration of King *Charles* II. the keeping of these Synods, as also the appointing of Rural Deans, were by Bishop *Reynolds* (a presbyterian in principle, though then promoted to this See) both let down, to the great damage of the Church in this diocese, and have never since been revived in it, and perchance now after so long a disusage it would be in vain to attempt it, especially in our present circumstances. Bishop *Lloyd* went so far in his primary visitation, as to name rural Deans in every deanry of the diocese, but found such opposition to it, both from the perverseness of some persons who thought themselves concerned in interest to oppose it, as well as from the ill temper of the times, which we were then fallen into, that he was forced to let all drop, and proceed no further; and so it must rest till a more favourable juncture shall arise for the setting of all right again that hath gone wrong among us. For it is to be hoped, that there is in the lap of Providence an appointed time yet to come, when through God's mercy towards us, discipline may be thoroughly revived in this Church, and Christian religion again restored to its primitive purity in it, although through the ill disposition of the present times, it may justly be feared, that without a long purifying in the furnace of affliction, there will be no attaining thereto. I pray God grant the end, whatsoever may be the means whereby we are to be brought to it.

There are several other duties incumbent on Church-wardens, in respect to the Civil Govern-

ment[a] of the kingdom, under which they are in many cases by Acts of Parliament made officers for the executing of the law in reference to them; but it is none of my business to give them any directions as to these matters.

Reviewed, Corrected, and Enlarged in the Month of September, Anno 1712.

HUMPHREY PRIDEAUX,
Arch-Deacon of Suffolk.

[a] They are to provide for such bastards, for whose sustenance the parish have made no provision. Hays v. Bryant, Trin. 29 G. 3 in C. P.—They are to collect charity money upon briefs. Stat. 4. Ann. c. 14.—They are to apply to Magistrates to convict offenders for not burying in woollen. Stat. 30. Car. 2 c. 3.—The penalties for reforming abuses as to butter and cheese, are payable to them. Stat. 13 and 14 Car. 2. c. 26.—They are under a justice's warrant to levy the penalties as to conventicles. Stat. 22 Car. 2. c. 1.—They are to receive the penalties under Stat. 1 Jac. 1. c. 27. for destroying game; and under the stat. 4 G 1. c. 5. 21 G. 2. c. 7. and 1 Jac. 1. c. 9. against drunkenness.—They are to sign the certificates of out-pensioners of Greenwich Hospital, under stat. 3 G. 3. c. 16. To apprehend hawkers and pedlars, and receive the penalties. Stat. 9 and 10 W. 3. c. 27. and 9 G. 2. c. 23. They are to provide a book with proper stamps for entries of registers of births, burials, marriages and christenings. Stat. 23 G. 3. c. 67. They and the Overseers may compel persons to take apprentices. 43 Eliz. c. 4. s. 35. stat. 8 and 9. W. 3. c. 30. s. 5. and 18 G. 3. c. 47. And they may compel certain persons under age to be bound apprentices, and on refusal may commit them. Stat. 5. Eliz. c. 4. s. 35. and may put out poor boys apprentice to the sea service. Stat. 2 and 3 Ann. c. 6. and 4 Ann. c. 19. They and the Overseers, with the consent of two Justices, may bind certain boys of 8 years old or upwards, under certain regulations, to be apprentices to chimney sweepers. Stat 28 G. 3. c. 48. They or the Overseers must pay the county rate and may appeal against it. Stat. 12. G. 2 c. 29. They shall receive the penalties for servants, labourers, apprentices or journeymen gaming in public houses. 30 G. 2. c. 24. and for servants carelessly firing houses. 6 Ann. c. 31. They (or the Overseers) shall receive the penalty for selling corn by a wrong measure. 22 Car. 2. c. 8. They shall levy the penalties relating to weights and measures. 16 Car. c. 19. 22 Geo. 2. c. 8. And they, with the Constable and Surveyor of the highways, in chusing and returning new Surveyors. 13 G. 3. c. 78.

A Circular

A Circular Letter to the Clergy of the Arch-Deaconry of Suffolk.

MY WORTHY BRETHREN,

[a]ALTHOUGH it hath been my constant practice in all my visitations to examine the Church-wardens one by one, as on several other other articles, so particularly on this; Whether there be any in their parish, that absent themselves from Church, who resort to no other assembly for the worship of God, which is by law now tolerated? And I have frequently extorted from them confessions, that there are several such in their respective parishes, yet have always found them so obstinately bent against putting them into their presentments, that notwithstanding whatever I have said unto them, either from the obligation of their oaths, or any othe argument to press them to do their duty in this particular, I have not yet been able to prevail, that any more than six or seven only from one parish (whom I have since reformed) have ever been presented to me on this account. The reason of which I find to be, that there is a wicked persuasion propagated among them, and now generally spread through the whole body of the people, as if by the late act of indulgence they were now wholly let loose from all manner of laws relating to re-

[a] This Letter is founded upon an opinion, in which all men do not agree, which is, that men, if *not willing*, should be *forced* to be religious; or, at least, to put on a religious appearance. The letter contains however an excellent display of the zeal of the learned author, and of his indignation against evil doers. *The Editor.*

ligion, and every man left to the freedom of his own choice, whether he will pay any worship to God or no: Which being a licence they are very fond of having, this makes them obstinately persist (whatever they are told to the contrary) that it is now granted unto them. And in confidence hereof the people neglecting to come to Church, and the officers of the parish refusing to present them for it, and through want of their presentments all process of law against such absenters having now for some years last past wholly surceased, such a gap becomes open hereby to atheism and irreligion, that (as I am from many hands well informed) the dissenters from our worship, for whose sake the said indulgence was granted, begin now in most places to be exceeded by the number of those, who take a liberty from hence to pay God none at all. And they being like still to increase as long as thus permitted to their own wicked inclinations, I think it now concerns us, whose peculiar duty is to attend the honour of God, and the salvation of the souls of men, to interpose all the endeavours we are able, both by discipline as well as doctrine, to put a stop to so great a wickedness. And in order hereto, the most effectual course being to remove the cause from whence it proceeds, *viz.* that pernicious error they have so greedily imbibed concerning the liberty granted by the said act of indulgence: And the only way now likely to do this being sensibly to convince them of their mistake herein, by a strict prosecution of all such irreligious wretches, who thus live without God in the world, and renounce his worship; that I may be enabled to do my duty in this particular, I desire that you would take some fitting time before my next visitation to call the officers

officers of your parishes together, and then as effectually as you can, inculcate into them these following particulars.

1. That the said act of indulgence gives no liberty for irreligion and prophaneness, or extends any further than the granting a toleration to protestant dissenters, such as are commonly known by the names of presbyterians, independents, anabaptists, and quakers, of worshiping God their own way.

2. That all such as are not members of some of the said tolerated assemblies, and constantly resort to them at all times of public worship, are still under all the penalties of the law, whenever they absent from Church, in the same manner as before the said act of indulgence was granted. For the words of the act are as follow;

Provided always, and it is the true intent and meaning of this act, that all the laws made and provided for the frequenting of Divine Service on the Lord's Day, commonly called Sunday, *shall be still in force, and executed against all persons that offend against the said laws, except such persons come to some congregation or assembly of religious worship, allowed or permitted by this act.*

3. That therefore, if the said officers of your parishes know any who absent themselves from their Parish-Church in time of public worship, who are not members of some of the said tolerated assemblies, and constantly resort unto them every Lord's Day, they are bound still by their oath to present them in the same manner as before the said act was made, that is, the Constables to the Sessions, and the Church-wardens to the ecclesiastical Court. For although I have nothing to do with the Constables, yet it will very well become both you to

put them in mind of their oaths, and exhort them to keep a good conscience in the faithful discharge of them; and also me to let you know, that it is part of your duty as their Ministers so to do.

4. That the said Church-wardens, whenever they omit their duty herein, and either neglect or refuse to present such persons as they know to be thus presentable, do thereby desperately and irreligiously incur the horrible crime of perjury, and are to be corrected for it with the highest censures of the Church; and to convince them hereof, I desire you would read unto them the 26th and 117th canons of King *James* the first, and also to take notice therein, what is your duty in this case to be performed.

5. That the duty of Church-wardens obligeth them to present, not only upon certain knowledge, but also upon common fame, (*Can.* 115.) and therefore if any shall answer concerning these prophane apostates from God's worship (as I foresee many will) how know they, but that they resort to some other assembly now by law tolerated? I desire that in reply hereto, you would tell them, that none of their parishes are so large, but that usually every one therein knows what every man doth in a thing of so public a nature, and that therefore, although they know it not upon their own particular observation, yet at least they may by the common report of neighbours, and that this is a sufficient ground for a presentment. However there will be no danger of doing any injury hereby, because whenever any so presented by them, shall but send into my court a certificate from any tolerated assembly, attesting them to be Members of it, and that they constantly resort thither every Lord's

Lord's Day for the worship of God, when absent from Church, the presentment shall be immediately dismissed without putting them to the least trouble or charge herein.

I am sufficiently sensible, that it will be no easy task for you, now a lawless license in matters of religion is so much affected, either to convince those men of their duty in this particular, or prevail with them to do it; however, that is no argument to excuse us from the discharging of ours. And therefore I earnestly beseech you, that you would employ your hearty endeavour herein, and if they will not present any of those prophane absenters from God's worship, that you would have them, in this case the 113th Canon impowers you to do it, and the 114th, as I take it, necessarily enjoins it on you, as often as they absent from the sacrament of the Lord's Supper. That you have already made particular application to all such irreligious wretches in your parishes (if you have any such there) by your exhortations and admonitions to reduce them to a sense of that duty and worship which they owe unto their God, I cannot but suppose, it being so obvious a part of your duty, vowed at your ordination, enjoyned by the Canons of our Church, and so often inculcated into you by your superiors. And therefore where doctrine hath been ineffectual, our next course must be to have recourse to discipline, that we may leave no means of our Ministry un-attempted, if possible, to save those whom God hath committed to our charge. And that you may be assured I will not be wanting to execute that part which belongs to me in this particular, I do promise you I will, by God's help, employ my utmost care herein, as far as the law shall

shall empower me to inflict the censures of the Church, and you enable me by the method afore prescribed to proceed thereto.

I do foresee here will be two objections made to what I propose; First, That I put you upon an odious work, the prosecution of your people; and the second, That this prosecution may become a means to drive them to the conventicles, because, when they see a necessity put upon them of either going to Church or to the Conventicle, it is most likely, that out of spite to us, who put this necessity upon them, they will rather chuse the latter, and so the numbers of those be increased who are enemies to our Church.

As to the first objection, my answer is, That nothing is more contrary to my intentions, than the putting of any thing upon my brethren, which may draw the least odium upon them from their people. With such as are their people, I would rather desire them to proceed with the spirit of gentleness and meekness, as best becoming them, especially in these times, and leave the odious part to those who are under their oaths to execute it. But can these wicked apostates from God's Worship be reckoned of your people? certainly if any, these ought to be cast out from among us, and cut off from the society of all Christian people till reformed. For men that have erring consciences something may be said, but I never yet heard of any to have pleaded for such as have none at all; nor do I think you need ever fear, that your denying a toleration to the atheistical and irreligious, will ever be called a persecution. For these are such, whose cause is too bad for any one to countenance; but all that own the name of God, must ever have in utter detestation

detestation all such prophane and wicked apostates from him, and will be so far from making themselves parties for them, while under so great an impiety, that instead of your drawing any odium upon you on their account, I reckon the more rigorously you proceed with such, the more it will turn to your praise, even among the bitterest of those sectaries that are adversaries unto us. For although such have cried out persecution loud enough against us, I apprehend in this case there is greater danger from them of the contrary extreme, and that, if we do nothing herein, we shall as assuredly find them ere long (now they have nothing else to say) laying this very heavily to our charge, that we can be content to permit such irreligious wretches to live without censure among us in so great an impiety, altho' they themselves in reality have given the occasion that led them thereinto. In sum, no one that pretends any thing to religion, can ever be offended with any method that you take for the reforming of such as profess none at all. And therefore I think you need not fear any odium upon you for any thing that you do on this account. However, as to your presenting them yourselves in case the Church-wardens will not, I only recommend it unto you, but press it no farther than you in your own discretion shall judge most proper. But since the perjury of those Church-wardens, who thus refuse to do the duty they have been sworn to, can no otherwise be detected but by yourselves, who only besides them have right to present, I hope you will not permit such a wickedness to pass without that correction which it deserves.

As to the second objection, if any so prosecuted for their irreligious neglect of God's worship, do thereon

thereon go to conventicles, my answer is, so let them if they will. It is much better they should serve God any way, even with the schismatic or the heretick, than no way at all. Were we to promote a party only, or study the interest of a sect, then I confess it would be the wiser course rather to let them stand neuters, than list themselves with the enemy, and be of no religion at all, rather than of theirs that are adversaries unto us. But our business is to promote the honour and worship of our God, whose Ministers we are; and what will best conduce hereto in the executing of those powers intrusted with us, whether of doctrine or discipline, that is it which we are to do without any other by-regard whatever. And therefore as far as we do by these means of our Ministry make those wretched people to own God and his worship, whether it be with us, or whether it be with them that separate from us, thus far certainly we serve the end of our calling: But I hope no such effect may at all follow, as is here objected; on my considering the whole matter, I am apt to believe there will not, or at most very rarely, it not being probable that those who have no zeal for the public worship of God, should immediately for the sake thereof put themselves to the trouble of going sometimes six or seven miles to a conventicle, and also to the charge of contributing to the maintenance of the Minister they there resort to, when without either they may discharge themselves at home at their own Parish Church. If spite should do this for once or twice, they will soon grow weary in this case, and unless atheism become turned into enthusiasm, you shall be sure to see them at Church again. However, were the danger much greater than is here supposed, that is

no

no reason for us not to do our duty. If we will follow the practice of Primitive Christians, which most Churches desire to make their pattern, I am sure it will not. For they never thought it a reason to relax their discipline, least their people when pressed therewith, should revolt to heathenism; but on the contrary, for this very cause held it up to the highest pitch of strictness and severity through all their Churches, as the properest means to keep them from that apostacy. And this with the blessing of God amidst their greatest pressures became the prime reason of their support; and if we will act therein with the same sincerity as they did, I doubt not, we may have the same success. However, thus far I am sure, if we faithfully discharge our duty in all the parts of our Ministry committed unto us, whatever the event be, we can say as to ourselves, *Liberavimus animas nostras.* And altho' it really happen, that the people thus prosecuted, as I propose, from atheism run into fanaticism, yet it will be some advantage to gain them thus far. And there will be also this further benefit, that others, who are prone enough, if left to their own liberty, to neglect the worship of God, will be deterred from falling into this apostacy, when they see by the corrections and punishments inflicted for it, that they cannot do it with impunity, but are still liable, as formerly, to the censures of the Church, and the penalties of the law for the wickedness hereof.

I earnestly beseech you (my dear brethren) that you would not be wanting to your diligence in any part of your duty, now in these times of falling away, if possible, to keep your flock together with you. Atheism and irreligion are wickednesses of the

thereon go to conventicles, m[illegible]ost defection them if they will. It is m[illegible]ost resents, and serve God any way, ev[illegible]endeavour to put a heretick, than no[illegible]which if permitted still a party only, or[illegible]s other mischiefs, be- I confess it wo[illegible]strong for us to stem, and them stand r[illegible]n in the guilt thereof. For enemy, ar[illegible]nder the countenance of a theirs th[illegible]to do) and no law is executed is to p[illegible], the whole community thereby who[illegible]parties to the guilt, which private du[illegible]s; and in that they countenance the tr[illegible]not what they ought to repress it, [illegible] make it their own. And national judgments [illegible]usual consequences of national sins, you cannot better befriend the land in which you live, or the Government under which you have your protection, than by putting that stop to this great impiety of atheism and irreligion, as may divert those heavy punishments from the revenging hand of the Almighty, which otherwise so great a provocation must necessarily draw down upon us. We have seen our land long enough the theatre of God's judgments, and at present I suppose there are none but must be sensible how much we smart under them. And the end of their being sent on the earth being, that the inhabitants thereof should learn righteousness, if instead of answering this end, for which we have them upon us, in reforming our lives and departing from our iniquities, we grow worse under their chastisements, and to vice and debauchery add atheism and irreligion, and to schism and heresie a total defection from the Almighty, what else can we expect, but that his correcting judgments will be turned into destroying judgments,

judgments, and the great enemy and oppressor be let loose upon us to take from us both our land and nation? They who by such wickednesses as these provoke God against us, work stronger for our destruction, than all the power of *France* and *Rome* united together against us, and therefore ought to be detested by us as the greatest troublers of our *Israel*, and the common enemies both of ourselves, as well as of our God; and every authority that is in the land ought to be employed to suppress them; and I know no other way but this to avoid making the guilt to be ours as well as theirs, and thereby involving the whole nation in the vengeance which is due thereto. The punishment of those *Achan's* may again bring back God to our nation with his blessing of peace and prosperity upon us, and the reforming of our iniquities become a means of thoroughly reconciling him unto us, and when his judgments are in a land, I know no other means whereby it may be effected.

If any tell you, that I make too much haste in pressing you with these particulars, and that the time is not seasonable, that it is properer to tarry till their Majesties being freed from the present pressures, may be at leisure to back us with their authority in these proceedings; objections which I have often heard; my answer is, That when such iniquities begin to grow upon us, as atheism and irreligion, we cannot too soon endeavour to put a stop to so great a mischief. The first beginnings of a thing of this nature ought not to be neglected. For sin is of a very prolific nature, and if let alone to spread itself, will soon grow to an head too hard to be mastered, and we become overpowered therewith. And as to the seasonableness of the time, I think

I think the first time that we have, always the most seasonable to do God's work and our own duty in. Life is short, and opportunities are few, and if we neglect the present, how know we that we may have any more? And for this reason, say I, without placing dilatory hopes, and dilatory expectations on future times, let us lay hold on the present, and while we have them, do all the good in them that we are able. And if we will have their Majesties and their kingdoms freed from the present pressures, I know no means can be more effectual for it, than the removing out of our land those sins which they are sent to punish. The bringing of righteousness and religion into a land, is the most successful way to restore peace and prosperity unto it. And if we do our part in effecting the former, we may thereby become the blessed instruments of restoring the latter. And then the blessing and favour of the Almighty shall rest upon the heads both of us and our King. But to tarry for God's establishing of this blessing among us, before we will reform ourselves, is to put the effects before the cause, and impose that unreasonable condition to the Almighty for our amendment, as to expect he should invert the whole method of his providence for the sake hereof, and first bribe us with his blessings, before we will betake ourselves to that righteousness, which is to make us worthy of them. I confess their present Majesties, whom God hath now advanced to the government of these kingdoms, are excellently fitted for the work of a reformation, both by their zeal for religion, and their exemplary practice of it themselves, and all good men have great expectations from them this way, and I doubt not they will fully answer them by

by some more than ordinary attempts to this end, as soon as the exigency of their affairs will admit. And indeed at the present they have not been wanting to do their part herein, as far as in the ordinary course of their power they are able. For the hands of Kings by which they act, are their Officers and Ministers which execute their authority under them; and it is well known, what their Majesties commands have been to all these in order to the reforming of the iniquities that are among us. Their proclamations have frequently come forth for the putting of their laws in execution against them. And that the ecclesiastical power might also concur with the civil in order hereto, we have their Majesties excellent letter to the Bishops to this purpose, and through them to all others invested with ecclesiastical jurisdiction under them, commanding us to put all our canons and constitutions in force for the reclaiming men from sin, and reducing them to that practice of righteousness and piety, which the holy religion we profess requires from them. And therefore if we want the authority of the King to put us forward in this work, thus far we have it already, as well as the commands of our God upon us faithfully to discharge all the duties of our Ministry in order hereto. And these particulars I now press upon you, being especial parts thereof, how can we answer it to either, if we do not our diligence herein to the utmost we are able? I hope that when all hath been considered that I have now said, we shall be all willing and earnest so to do. And then I doubt not, but that by God's gracious blessing upon our endeavours, we shall reap that good effect hereby which we propose; that so all atheism and irreligion being suppressed among

us,

us, and the true practice of righteousness and piety advanced in their stead, God's holy name may be glorified, his people edified, our Church and nation blessed, and our own souls everlastingly saved in the day of the Lord. I pray God direct us in all things for the accomplishing of this end,

And I am,

Your most affectionate Brother and Servant,

HUMPHREY PRIDEAUX,

Arch-Deacon of Suffolk.

August 17*th*, 1692.

A COM-

A COMPENDIUM

OF THE

LAW RELATING TO TITHES.

1. *Of the Nature of Tithes.*

TITHES are a species of incorporeal hereditaments, and are defined to be "a *tenth* part of the increase yearly arising and renewing." *First*, immediately from the soil; i. e. from the profits of the land. *Secondly*, mediately, i. e. from the increase of animals. *Thirdly*, by the labor and personal industry of man. The first species is usually called PREDIAL, as of corn, grass, hops and wood, including tithe for the *agistment* of cattle. The second, MIXED, as of wool, milk, pigs, &c. consisting of natural products, but matured and preserved in part by the care of man; and of these two sorts the tenth must be paid in gross: The third species, is usually termed, PERSONAL, as of manual occupations; trade, fisheries, and the like; and of these only the tenth part of the clear gains and profits is due. *See* 2 *Bl. Com.* 3.

Tithes are payable of common right of all things which annually increase, either spontaneously, or by the industry of the parishioner. 3. *Com. Dig.* 490.

Tithes are also divided into GREAT and SMALL. *Great Tithes* are chiefly corn, hay, and wood. *Small Tithes* are the predial tithes of other kinds, together with mixed and personal tithes.

Tithes by law are denominated *great* or *small*, according to the nature of the thing, and not from the

the mode of cultivation, or the quantity produced, or the use to which it is applied.

Thus the tithes of *beans* and *pease* whether sown in fields or gardens are *great* tithes, and do not fall under the denomination of tithes of gardens, technically called *decima hortorum*. 5 *Bro. P. C.* 586.

So potatoes are a small tithe, tho' sown in great quantities. 3 *Atk.* 364. *Com. Rep.* 639.

When *arable* land is turned into *pasture*, it is an agistment tithe, and becomes a *small* one from a *great* one. *id.*

Predial *great* tithes are corn, grain, hay, clover grass when made into hay, wood, underwood and beans and pease.

Predial *small* tithes are flax, hemp, madder, hops, garden roots, and herbs, as potatoes, parsley, cabbages, saffron; and the fruits of all kinds of trees, as apples, pears, acorns, &c. and all kinds of seeds.

Mixed tithes are natural products matured.

Personal tithes are only payable by special custom, and perhaps are paid no-where now in England, except for fish caught in the sea, and for corn mills. —3 *Burn. Eccl. L.* 473.

Great tithes generally belong to the Rector, and small tithes to the Vicar. *Cro. Car.* 20.

The Rector is *prima facie* intitled to ALL the Tithes of the parish, and nothing can be presumed in favor of the Vicar, without endowment or prescription. *Yelv.* 86. 1 *Gwill.* 226.

As a general rule, it may be observed, that tithe ought to be paid as soon as the tenth part can be severed from the whole, if there be no custom to the contrary; as, for corn and hay, as soon as made into shocks or cocks. 2 *Gwill.* 563.

A Freehold

A Freehold LEASE of tithes cannot commence *in futuro*. *Yelv.* 131. 1 *Gwill.* 221.

A lease of tithes for all the time the lessor shall continue Vicar, is good, and passes a freehold. 4 *Gwill.* 1418.

2. *Of Agreement as to Tithe, Composition, Notice, &c.*

A real composition is, when an agreement is made between the owner of the lands and the Parson or Vicar, with the consent of the Ordinary or Patron, that such lands shall be discharged from payment of tithes by reason of some land or other real recompense given to the Parson in lieu and satisfaction thereof. 2 *Inst.* 490. *Regist.* 38. 13 *Rep.* 40. And it cannot now be established without evidence of the actual existence of the deed by which it was created. 3 *Bro. C. R.* 217.

With regard to compositions entered into between the tithe-owner and any parishioner for the latter to retain the tithe of his own estate, it has been decided, that they are analagous to leases from year to year between landlord and tenant; and, if they are paid without or beyond an agreement for a limited time, they cannot be put an end to without six months notice before the time of payment; and the parishioner may avail himself of the defect of notice, at the same time that he controverts the right of the incumbent to receive tithe in kind; an objection not permitted to a tenant, who denies the right of his landlord. 2 *Bro. C. R.* 161.

A Rector AGREES with a parishioner for his tithes for a certain sum payable at Michaelmas, the Rector dies in the beginning of September, the agreement determining by the death of the Parson,

the successor shall be intitled to tithes in kind only from the death, and the executor of the late incumbent to a proportion according to the agreement till the time of his testator's death. *Bunb.* 294. 2 *Gwill.* 703.

A parole agreement by the Parson with a parishioner, to retain his tithes for three years is good. 2 *Gwill.* 611. 744. *vide Hilton v. Heath.* 3 *Gwill.* 845.

An agreement or composition between an incumbent and his parishioners, for the acceptance of land in lieu of tithes, or for a certain pecuniary compensation, will not bind his successor, tho' ratified by a decree in equity. 3 *Gwill.* 914. 1001. 1199.

But if the successor, on coming to the living, *accept* the composition, that will amount to a confirmation, and then he must give notice. 3 *Gwill.* 1001.

An agreement by deed between the Vicar and the Patron, with the consent of the Ordinary and the inhabitants of a ville within a parish, to pay 6l. in lieu of all tithes arising within the ville, tho' acquiesced in for 100 years, is not binding on the successor of the Vicar. *Id.* 1060.

Where the lessee of tithes agreed with the *owner* of lands, for certain collateral considerations not to take tithes in kind from the tenants for 12 years, but to accept a reasonable compensation, not exceeding 3s. 6d. per annum, and thereto bound him and his successors. This agreement was held void, from the uncertainty of the sum to be paid, and the under-lessee who sued the tenant of the land for tithes in kind, had a decree. 4 *Gwill.* 1418.

To a libel in the Spiritual Court for tithes, the occupier may plead a parole agreement with the Parson's agent for the purchase of them, and a tender

tender of the money, and if such plea be rejected, a prohibition will be granted. 3 *Gwill.* 926.

As to NOTICES, it is to be observed, that the Lord Chancellor seemed to think, that the rule between landlord and tenant, ought to be adopted with respect to notice of the determination of a composition. 4 *Gwill.* 1323.

A notice too late to determine a composition from year to year, will not serve for the succeeding year. *Id.* 1321.

A defendant may object to want of sufficient notice to determine a composition, though he insist upon it also as a modus. *Id.* 1412.

Notice given in the month of January is not sufficient to determine a composition running from Michaelmas to Michaelmas, so as to entitle the Parson to tithes in kind for the *current* year. 3 *Gwill.* 985.

A notice on the 8th September to determine a composition for tithes from year to year, as from the Michaelmas following, for the ensuing year, is not sufficient. *Id.* 1204.

When a composition is payable at Christmas, notice any time *before* Christmas for the succeeding year, is sufficient. *Id.* 1030.

If a composition for tithes be made by A. as proprietor, and he lease them to B. whose interest is afterwards put an end to by A. before any alteration is made in the composition, A. cannot determine it without 6 months notice. 4 *Gwill.* 1517.

Where a Parson entered into a written agreement with his parishioners to compound for their tithes for three years, and after the expiration of the three years, continued to take the composition for several years, it was held, that notice given only three weeks before hop-picking time, that he should take the tithe in kind, was not sufficient. 2 *Gwill.* 612.

3. *Of a Modus, Custom, &c.*

A CUSTOM to pay only part of the tithe, without substituting any thing in lieu of the remainder, is bad. But a custom to pay less than the whole tithe may be good, where something in lieu of, and as a compensation for the rest, is paid to the Parson. 7 *T. Rep.* 93.

A modus is a composition time out of mind. 2 *Gwill.* 591.

A modus is a real composition founded on an agreement. 2 *Gwill.* 689.

The only difference between a *modus* and *composition* is, that the first is, time out of mind, and the last, only a late agreement. *Id.* 612. 4 *Gwill.* 1397.

A custom to pay 4d. an acre in lieu of the agistment tithe of barren cattle above a year old, if fed one month in the parish, is good. 3 *Gwill.* 1048.

A custon to pay 3d a head for sheep agisted between Candlemas and shearing day, and a fleece of every hundred every month for all sheep brought into the parish after the 2d of February, and shorn therein is bad. 3 *Gwill.* 1048.

To constitute a good MODUS, it seems necessary that it should be such as would have been a *certain*, *fair*, and *reasonable* equivalent or composition for the tithes in kind, before the year 1189; and, therefore no modus for hops, turkeys, or other things introduced into England since that time, can be good. *Bunb.* 307.

A modus of one penny for every sheep, and a halfpenny for every lamb brought into the parish after Candlemas, and sold out before shearing time, is not an agistment, but a wool modus. 4 *Gwill.* 1462. 1468.

4. *Of*

4. *Of Setting out Tithes.*

It is a common opinion, that the parishioners are obliged to give the Parson notice of setting out their tithes; 'tis true the canon law obliged them to do so, but it is otherwise by the common law, which prevails in this case; for if the parishioner sets out his tithes truly, he is not bound to give notice, either to the Parson himself, or any other general notice at the Church. But notice is sometimes required by special custom, in which case it is good, and must be complied with. And where the tithes are not removed in a reasonable time, notice must be given before an action can be maintained, or cattle turned in. 1 *Rol. Abr.* 643. *pl.* 1. 2 *Vent.* 48. 2 *Atk.* 605. 2 *Bl. Rep.* 958.

When custom, renders notice necessary, an hour's notice is sufficient. 4 *Gwill.* 1438.

Where by the usual mode of husbandry, clover hay is not made into cocks at all, the tithe may be set out in the swathe. 2 *Anst.* 481.

By Stat. 2. and 3 Ed. 6. All manner of predial tithe shall be set out, divided and paid, justly without guile, in such manner as hath been of right used for 40 years past. And it shall be lawful for any to whom tithes are due to, or his servant, to see his tithes truly set forth, and severed from the nine parts, and the same to take and carry away.

For further particulars on this head, see the several articles in the following alphabetical arrangement.

5. *Of Subtraction of Tithes.*

By Stat. 2. and 3. Ed. 6. 13. no person shall carry away predial tithes before he hath justly set forth the tithes, or agreed for the same with the

Parson, &c. or farmer, under pain of treble value of the tithes carried away.

Evidence that land had always been remembered to be in pasture, and had never within living memory paid any tithe, was holden insufficient to defeat an action on this statute. 5 *T. Rep.* 260.

The action lies by an impropriator or his lessee, tho' lay, as well as by an ecclesiastical person. 2 *Inst.* 650.

An action lies not on this statute for any other than predial tithes. 1 *Brownl.* 31. 2 *Inst.* 649.

6. *Of Recovery of Tithes.*

Remedy for subtraction of tithes lies either in the Spiritual or Temporal Courts. The remedy in Temporal Courts, may be pursued in the Hundred or County Court, before the Mayor of London, in the Courts of Westminster, or in a Court of Equity.

The Stat. of Limitation is not pleadable to a bill for tithes. 2 *Gwill.* 674. But under circumstances, length of time will be considered as a sufficient ground to refuse an account. 4 *Gwill.* 1582.

7. *Of Discharge from Tithes.*

Mere non-payment of tithes, though for time immemorial, is no discharge from payment of tithes; without setting out, and establishing the exemption from one of the greater abbies. 3 *Gwill.* 904.

The lessee of lands cannot claim to hold discharged of tithes, under any covenant between his lessor and the lessee of tithes. 3 *Gwill.* 1418. *Vide ante of Agreements as to Tithes, &c.*

8. *Of removing Tithes.*

If the Parson does not take away his tithes within a reasonable

a reasonable time, but suffers the same to continue upon the land to the damage of the parishioners, an action on the case lies. *Noy.* 31.

But to justify the parishioners in taking tithes, *damage feasant*, he ought to shew that the tithes continued a long time upon the land. 3 *Bul.* 336.

Tho' the proprietor of tithes does not remove them in a convenient time, the owner of the land cannot put in his cattle and depasture them. 1 *Ld. Raym.* 187. & *T. Rep.* 72.

The following alphabetical arrangement will furnish useful information on the subject of tithes.

ACORNS.—Acorns, as they yearly increase, are liable to the payment of tithes; but this is where they are gathered and sold, and reduced to a certain profit: not when they drop, and the hogs eat them. 2 *Inst.* 643. *Hetl.* 27. They are a small tithe. *Bunb.* 640.

AFTERMATH shall pay tithes, but not *after-pasture*, except by custom. 2 *Inst.* 652. 2 *Danv. Abr.* 589. *L. Raym.* 243. *But see* GRASS.

AFTER-PASTURE vide *Aftermath.*

AGISTMENT.—Tithe of agistment is a predial small tithe, (3 *Anstr.* 760.) and is usually the tenth part of the value of the herbage eaten by cattle not titheable. 1 *Anstr.* 332. and is not within the Stat. 2 and 3 Ed. 6. *c.* 13. *s.* 3. Agistment of cattle upon pasture land, which hath paid no other tithes that year, pays tithe for the cattle. But where meadow grounds have paid tithe of hay the same year, they are not liable to an agistment tithe for cattle depastured on the after crop. 2 *Gwill.* 613. If a man breeds or buys barren unprofitable cattle and sells them, he shall pay for the agistment; but, if he depastures his land with his cattle, used in husbandry in the parish where depastured, he shall

pay no tithes. Nor is tithe payable for milch cattle reserved for calving, while they are dry; but, if afterwards sold, or milked in another parish, an agistment-tithe is due for them for the time they were dry. *Hetl.* 100. 1 *L. Raym.* 130. No tithe is due for the pasture of young cattle, reared to be used for husbandry or the pail. *Cro. Eliz.* 476. But, if such young beasts are sold before they come to such perfection as to be fit for husbandry or to give milk, tithe is payable. *Hetl.* 86. An agistment-tithe is due for all such cattle as are kept for sale. *Cro. Eliz.* 446, 447. *Jenk.* 28. *pl.* 6. *Cro. Car.* 237. *Cro. Jac.* 430. 1 *Roll. Abr.* 647. *pl.* 14. But if any cattle which have neither been used in husbandry nor for the pail, are killed and spent at home, no tithe is due for their pasture. *Jenk.* 281, *pl.* 6. *Cro. Eliz.* 446, 476. *Cro. Car.* 237. Agistment tithe is due for depasturing any sort of cattle, the property of a stranger, to be paid by the occupier of land. *Cro. Eliz.* 276. *Cro. Jac.* 276. *Bumb.* 1. *Freem.* 329, 2 *Gwill.* 502. No agistment tithe is due for any beasts depastured on the headlands of ploughed fields, so that they are not wider than is sufficient to turn the plough and horses upon. 1 *Roll. Abr.* 646. *pl.* 19.

Where the occupier sows turnips tho' on fallow ground, and then agists the sheep of a stranger, or fattens his own and kills them, he shall pay tithes for the herbage or agistment. 2 *Gwill.* 537.

Horses kept on one farm for its cultivation, and used occasionally on another farm in a different parish, shall not pay agistment tithe. Alitèr if habitually so used. 2 *Anstr.* 498.

Sheep kept principally for the sake of folding, if sold out of the parish before shearing time, shall pay agistment tithe. 2 *Anstr.* 500.

Agistment

Agistment tithes are payable for sheep depastured after shearing time, and sold off or taken out of the parish, before the next shearing day, tho' the sheep so sold or disposed of, be immediately succeeded by others, and the stock at the next shearing day consist of the same number it did at the last. 3 *Gwill.* 1048.

Where sheep are agisted part of a year on a common in one parish, appurtenant to a farm in another parish, an agistment tithe is not due to the Parson of the former, tho' the sheep be all shorn in, and the tithe of the wool wholly paid to the Parson of the latter. 3 *Gwill.* 1022.

If a man holds a farm and lives in the parish of A. and holds other lands quite distinct from, and independent of his farm, and no way exempted in the parish of B. and depastures his sheep upon the lands in that parish, but shears them in A. the Parson of B. shall have an agistment tithe. 3 *Gwill.* 1026. 1029 *in not.* 1030 *in not.*

The demand for agistment tithe, should be against the occupier, not against the owner of the beasts. 2 *Gwill.* 627. *in not.* 3 *Gwill.* 859. *in not.* 4 *Gwill.* 1584. *See* CATTLE.

ALDER-TREES, Ash, Asp, Beech, &c. *See* TREES.

APPLES. Windfall Apples are titheable. 2 *Gwill.* 579.

BARK of Trees is not titheable, if the trees were timber. 11 *Rep.* 49. *See Bunb.* 98.

BARLEY and OATS are titheable in cocks and not in the swaith. 3 *Gwill.* 967.

BARREN LAND, that is land of which no profit ariseth or groweth, is not titheable; and, by *Stat.* 2 and 3 Edw. VI. c. 13. s. 5. barren land improved, shall, for the first seven years, be discharged of

tithes; but it shall, during the seven years, pay such small tithes as have been used to be paid before. 1 *Gwill.* 59. 60. And, if land is over-run with bushes, or become unprofitable by bad husbandry, it is not barren land; and, if it be grubbed, or ploughed and sown, it immediately pays tithes. 2 *Inst.* 656. *Cro. Eliz.* 475. 2 *L. Raym.* 991.

Fenny Land drained is not within the stat. of Edw. but shall pay tithes immediately. So land grubbed up and made meadow or arable. So land where wood grew, and is stocked up and converted into tillage. 1 *Gwill.* 166. 2 *Gwill.* 562, 563, 549, 714, 823.

Newly inclosed lands, which will not produce crops by the ordinary mode of culture, are entitled to exemption under the Stat. of Edw. 3. *Gwill.* 1197. 4 *Gwill.* 1594.

If land, after being grubbed up will produce nothing, without being dunged or chalked, it is within the statute; if it will produce one crop with only ploughing, it is not. 1 *Vesey* 115.

Lands inclosed with hedge and ditch, are not exempted as waste or heath. 3 *Com. Dig.* 501.

BEANS.—See *Pease.*

BEES. Tithes are not payable of Bees, but for their honey and wax by the tenth measure and tenth pound. 1 *Roll. Abr.* 651. 3 *Cro.* 404, 559. *F. N. B.* 402.

BRICKS pay no tithe; for, they are of the substance of the earth, and of no annual increase. 1 *Cro.* 1.

CALVES are titheable; and the tenth calf is due *when weaned;* and the Parson is not obliged to take it before; but, if in one year a person hath not ten calves, the Parson is not entitled to tithes in kind that year, without a special custom for it; though he may take it in the next year, throwing both years

years together. 1 *Roll. Abr.* 648. *Raym.* 377. For calves bought in, and sucklers, no tithes are due.

A single Calf is titheable, and the tithe is the tenth part of the value, when taken from the Cow to be sold or killed. 2 *Gwill.* 541.

CATTLE sold pay tithes; but not such as are kept for plough or pail: but, if such cattle are sold before used, or if, being past labour, or barren, are fatted and sold, or are used in another parish, tithes are due; 3 *Gwill.* 1110. 2 *Gwill.* 558. but not if the owner kill and spend them in his house. 3 *Gwill.* 861. Agistment tithe is not due for saddle horses, or horses used for mere pleasure. 4 *Gwill.* 1571, 1582. Cattle feeding in large commons, where the bounds of parishes are not certainly known, shall pay tithes where the owner of them lives; and, if fed in several parishes, and they continue above a month in each parish, tithes shall be paid to the two parishes proportionably. 1 *Roll. Abr.* 635, 646, 647. *Hardr.* 35. *Stat.* 2 and 3 Edw. VI. c. 13. sect. 3. *See* YEARLINGS and YOUNG ANIMALS.

If a man depastures unprofitable cattle in his ground, he shall pay tithes in proportion to the number of the cattle, and the value of the land, generally at the rate of 2s. in the pound, and the same proportion is to be observed if they are travelling cattle that come and go successively. *Bunb.* 1. Where the number or kind of cattle agisted could not be ascertained, a per centage in the pound on the rent was allowed. 2 *Gwill.* 660.

Cattle fed upon meadow ground after it is mowed, shall not pay tithes unless by custom. *Bunb.* 1.

Tithes for depasturing unprofitable cattle, ought to be paid by the occupier, not by the agistor. *Bunb.* 3.

No tithes shall be paid for cattle depasturing that are trespassers. 2 *Gwill.* 544.

CHALK and *chalk-pits* pay no tithes, nor do bricks, clay, coal, or mines, they being of the substance of the earth, and not annually increasing. 2 *Inst.* 651. *Vide Gravel.*

CHEESE is a small tithe and pays tithe by custom, where tithe is not paid for the milk; but, if the milk pays a tithe, the cheese is discharged. 1 *Roll. Abr.* 651. *See* MILK.

CHARCOAL.—See *Wood.*

CHERRIES.—Wild Cherries are titheable. 2 *Gwill.* 530. 657.

CHICKENS are not titheable, if tithe is paid for the eggs. 1 *Roll. Abr.* 642.

CINQUEFOIL. The seed and stalk is to pay tithe as grass. 2 *Gwill.* 535.

CLAY is not titheable. 3 *Com. Dig.* 500.

CLOVER.—Clover seed is a small tithe, and as such is due to the Vicar. *Com. Rep.* 693. *Bunb.* 344. *S. C.*

Clover Grass is titheable as hay. 2 *Gwill.* 830. Both the first and second crop are titheable. 2 *Gwill.* 584. To be set out in cocks. 4 *Gwill.* 1489.

Clover and Vetches cut green and given to cattle of husbandry, pay no tithes. 2 *Gwill.* 679. But it was afterwards held that this depends upon the sufficiency of other seed. 4 *Gwill.* 1504.

Clover seed is not to pay tithe at the mill; but the tenth part of the stalk, &c. is to be set out in the field after it is severed from the ground. *Id.* 1615.

COALS pay no tithe of Common Right. 1 *Rol.* 637. 2 *Inst.* 651.

COLESEED, tho' sown in fields in a large quantity, is a small tithe. 2 *Gwill.* 533.

COLTS

COLTS pay tithes the same as calves. 1 *Roll. Abr.* 642.

COPPER pays no tithe of common right.

CONIES are titheable only by custom, for those only that are sold. 2 *Danv. Abr.* 583.

CORN pays a predial tithe. It is tithed by the tenth cock, heap, or sheaf; which, if the owner do not set out, he may be sued under the *stat.* 2 and 3 Edw. IV. c. 13. And it must be set out before the farmer removes his nine parts. *Bunb.* 186. If corn be sold standing, the vendee shall pay the tithes; but, if sold after severance, the vendor must. *Hard.* 380, 381. 2 *Gwill.* 516. 537. If the proprietor of tithes leave them on the land more than a reasonable time after they are set out, and after he has notice thereof, the owner of the land cannot justify turning in his cattle upon the land to depasture it, in the usual course of husbandry, whereby the cattle consume the tithes; but his remedy is either to bring an action, or to distrain the tithes as doing damage. 2 *Vent.* 48. 1 *Sid.* 283. *L. Raym.* 189. 8 *T. Rep.* 72. No tithes are due of stubbles of corn or fern, tho' mowed and used as fodder or manure. 4 *Gwill.* 1438. 2 *Inst.* 261, 652. 1 *Roll. Abr.* 640. *pl.* 14. There are various opinions, whether rakings of corn involuntarily scattered, are titheable; but the better opinion seems to be, that such rakings are not. *See* 1 *Roll. Abr.* 645. *pl.* 11. *Cro. Car.* 278, 475. *Freem.* 335. *Moor,* 278. 12 *Mod.* 235. 2 *Gwill.* 477. But if left covinously, and are of great value, they are. 2 *Gwill.* 447.

DEER are not titheable, being *ferœ naturæ,* wild by nature; though in parks, &c. they pay tithe by custom. Nor *fawns.* 2 *Inst.* 651.

DOVES, if kept in a dove-house, and not spent in the owner's house, but sold, are titheable. 1 *Vent.* 6. 12 *Mod.* 77. 1 *Roll. Abr.* 644, *Z. pl.* 5. 6.

DUCKS.

DUCKS. Tithes are not payable for a decoy of wild ducks, or other fowl taken in a decoy; nor for the eggs of tame ducks kept for the service of a decoy. 2 *Gwill.* 531.

EGGS pay tythes, where tithes are not paid for the young, except such as are wild by nature. 1 *Roll. Abr.* 636, 642. 2 *P. Wms.* 463. But no tithes are due of the eggs or young of any birds or fowls, which are kept only for pleasure. *Bro. Dism. pl.* 20.

FALLOW GROUND is not titheable for pasture in that year in which it lies fallow, unless it remains beyond the course of husbandry. 1 *Roll. Abr.* 642. 3 *Com. Dig.* 491.

FENNS, drained and cultivated, pay tithes. 1 *Roll. Rep.* 354. They are not within the Stat. of Edw. *Vide barren land.*

FERÆ NATURÆ.—Creatures of this kind are not titheable. 2 *Roll.* 458. 2 *Inst.* 651.

FISH, taken in the sea, or common or open rivers, or in a pond are titheable only by custom; even though they are in those rivers taken by one who has a several fishery; and the tithe is to be paid in money, and not the tenth fish; but fish in ponds and rivers, enclosed, ought to be set out as a tithe in kind. 2 *Danv. Abr.* 583, 4. *Noy.* 108. 1 *Roll. Abr.* 636. *Cro. Car.* 332. 1 *Lev.* 179. 2 *Gwill.* 616.

FLAGS are not titheable. 2 *Inst.* 651.

FLAX.—Every acre of hemp or flax sown shall pay yearly 5*s.* for tithe, and so proportionally, and no more. *Stat.* 11 and 12 W. III. c. 16. s. 81. 1 G. 2. c. 26. Flax is a small tithe. *M. S. Rep.* 72. *b. Wharton v. Liste. Trin.* 5. *W. and M.*

FOREST-LANDS shall pay no tithes while in the hands of the king; but, in the hands of a subject they shall. 1 *Roll. Abr.* 655. 3 *Cro.* 94. 2 *Gwill.* 486, 501.

FOWLS,

FOWLS, as hens, geese, ducks, and turkeys, are to pay tithes in the eggs or the young, according to custom, but not both. 2 *P. Wms.* 463. The rule extends to all birds and fowls, except such as are wild by nature. *Moor*, 599. 1 *Roll. Abr.* 642, *pl.* 6. 2 *P. Wms.* 563. Or are kept only for pleasure. *Bro. Dism. pl.* 20. Of geese, ducks and swans, the tithes are usually paid in the young, if custom does not otherwise determine, and of turkeys and hens in the eggs. 3 *Com. Dig.* 497.

FRUIT, as apples, pears, plumbs, cherries, &c. pay tithes in kind when gathered; and ought to be set out according to the statute. 2 *Inst.* 621. And (where custom requires it) notice shall be given to the Vicar when gathered; and, if it be spoiled by reason of his not fetching it away in due time, he must bear the loss. Cherries in hedge-row in Buckinghamshire are titheable. *Bunb.* 283.

FRUIT-TREES, cut down and sold, are not titheable, if they have paid tithe-fruit that year before cut. 2 *Inst.* 621. But tithe shall be paid for fruit-trees sold out of a nursery, tho' the fruit pay tithes. 2 *Gwill.* 515.

FURZES, if sold, pay tithe; not if used for fuel in the house, or to make pens for sheep, or fences, &c. *Wood's Inst.* 166. But furze cut in one parish is not exempted from tithe by being employed for the purposes of husbandry in another parish. 3 *Gwill.* 1028.

GARDENS are titheable as lands, and therefore tithes in kind are due for all herbs, plants, and seeds, sown in them; but money is generally paid by custom or agreement.

GRAIN.—If a Parson has tithes of all grain, he shall have the tithes of seed of clover, tho' the Vicar has the tithes of the clover grass. *Skin.* 231.

GRASS

DUCKS. Tithes are not payment of the wild ducks, or other fowl taken. The Parson the eggs of tame ducks. If grass be sold decoy. 2 *Gwill.* 58[illegible] the tithe; if sold after

EGGS pay tythe [illegible] 1 *Roll. Abr.* 641, 5. the young, except [illegible] hay is to be paid, al- *Roll. Abr.* 636 [illegible] plough or pail, or sheep, are are due of the [illegible] such hay. *Cro. Jac.* 47. 1 *Roll.* which are k[illegible] *Mod.* 497. But no tithe is

FALLOW [illegible] upon the headlands of corn fields, that year [illegible] such headlands are not wider than is beyond [illegible] turn the horses and plough upon. 3 *Com* [illegible] *Abr.* 646. *pl.* 19. It is laid down in one FF [illegible] that, if a man cuts down grass, and, *Roll* [illegible] case, while it is in the swathes, carries it away and gives E[illegible] it to his plough cattle, not having sufficient suste- [illegible] for them otherwise, no tithe is due. 1 *Roll.* [illegible] *Abr.* 645. 2 *Anstr.* 451. In one case the Court of Exchequer seemed to be of opinion, that no tithe is due of vetches or clover, cut green, and given to cattle in husbandry. *Bunb.* 279. But, in another case, it was afterwards held, that the right to tithe of hay accrues upon mowing the grass; and that the subsequent application of it, while in grass, or when made into hay, shall not, although beasts of the plough or pail are fed with it, take away the right. 12 *Mod.* 498 —*See* AFTERMATH, *ante.*

GRAVEL pays no tithe of common right. Nor of common right are tithes payable for things parcel of the freehold: as quarries of stone. Nor coals, tin, chalk, lead, copper or other ore, clay, turf used for fire, flags, marle. 3 *Com. Dig.* 500. But a man may prescribe for tithes of some things for which no tithes are due of common right. 2 *Inst.* 664.

HAY is a predial great tithe. [*See* GRASS.] The tenth cock, not the tenth swathe, is to be set out and paid, after made into hay, by the custom of most places; and by custom generally, but not of common right, the parishioners shall make the grass cocks into hay for the Parson's tithe; but, if they are not obliged to make the tithe into hay, they may leave it in cocks, and the Parson must make it; for which purpose he may come on the ground, &c. 1 *Roll. Abr.* 643, 647, 650. 2 *P. Wms.* 523. 3 *Esp. Rep.* 31.

HEADLANDS.—See *Grass.*

HEMP.—See *Flax.*

HERBAGE.—See *Agistment.*

HERBS in gardens are small tithes. 3 *Com. Dig.* 49.

HONEY is a small tithe.—See *Bees.*

HOPS are a small tithe; titheable after they are gathered from the bind, and should be measured in baskets before being dried, and every tenth basket set out for the tithes. *Walton* v. *Tryon*, 5 *Bro. P. C.* 99. And it seems that a custom to set out the tithes by the tenth row if equal, and by the tenth hill, where the rows are unequal, leaving the binds uncut, and the poles standing, cannot be supported. 7 *T. Rep.* 86. Where the Parson hath tithe of hops, it shall be looked upon as usage, and that at the time of the endowment they were looked upon as great tithes, and that the Vicar never was endowed thereof. *MS. Rep.* 72. *Wharton* v. *Lisle per Eyre, Trin.* 5. *W. & M.*

HORSES.—See *Agistment.*

HOT-HOUSES.—Hil. 42 G. 3. decreed in Exchequer that fruits, &c. forced in hot-houses are not titheable.

HOUSES

HOUSES for dwelling are not properly tithcable. A modus may be paid for houses in lieu of tithes of the land upon which they are built; and many cities and boroughs have a custom to pay a *modus* for their houses. 11 *Rep.* 16. 2 *Inst.* 659. 2 *Gwill.* 630.

LAMBS and KIDS are small tithes, and pay a tithe as calves; but, if lambs are yeaned in one parish, and do not tarry there thirty days, no tithe is due to the Parson of that place. If there be a custom that the parishioners, having six lambs or under, shall pay so much for every lamb; and, if he have above that number, then to pay the seventh, it is good. 3 *Cro.* 403. Tithe of lambs is not due of common right unless there be ten. 1 *L. Raym.* 677. The usual time of tithing lambs is when they can live without the dam, and when the occupier weans his own lambs and not before. *Bunb.* 133. 2 *Gwill.* 530. The first of August and not the first of May, is the proper time to set forth tithe Lambs. 2 *Gwill.* 630.

LEAD may pay tithes by custom, as it does in some counties; but it doth not without it. 2 *Inst.* 651. *Het.* 14.

LIME and LIMEKILNS are titheable only by custom. 1 *Rqll.* 637, 642.

LOPS and TOPS.—Vide *Trees.*

MADDER is now titheable in kind. It was liable for twenty-eight years only to a *modus* of 5s. but the statutes for that purpose are now expired. *Stat.* 31 Geo. II. c. 12. 5 Geo. III. c. 2.

MARL is not titheable of Common Right. 2 *Inst.* 651.

MAST of *oak* and *beech* pays tithes, in the same circumstances as *acorns*.

MILK

MILK is a small tithe, and is titheable where no tithes are paid for cheese all the year round, except when custom over-rules; and it is payable by every tenth meal's milk, and not the tenth of every meal's milk. 2 *Gwill.* 527, 618, 826. And not the fifth meal of the evening, but the whole milk of the tenth day. 3 *Gwill.* 1101, 1110, 1200. And it was formerly held, that it was to be brought to the house of the Parson, &c. in which particular this tithe differs from all others, which must be fetched by the receiver. But this is only where there is a special custom; and it seems now decided, that the tithe of milk is by setting out every tenth morning and evening's meal in clean vessels belonging to the owner of the milk, and leaving the same therein till the vessels are again wanted by the owner; and, if not fetched away by the Parson prior to that time, the owner is at liberty to *throw it on the ground;* and in the intermediate time the owner is not answerable for any accident that may happen to it. *Ambler* 72. In some places they pay tithe-cheese for milk; and in others some small rate, according to custom. *Cro. Eliz.* 609. 2 *Danv. Abrid.* 596.

MILLS.—Tithes are payable of all mills not as ancient as 9 Ed. 2. but such ancient mills are discharged by *articuli cleri*, c. 5. 1 *Gwill.* 130 *in not.* The court will presume mills to be ancient mills, if there be no evidence of their corn having paid tithe. 1 *Gwill.* 644. A fulling mill, paper mill, iron mill, tin mill, &c. pay no tithe, because they are things invented for the ease of man's labor. 1 *Gwill.* 354, 357. Corn ground at a newly erected mill for the purpose of distillation, by a person not resident in the parish where the mill is worked, is not titheable.

titheable. 3 *Gwill.* 794. The tithe of corn ground in a horse malt mill, is a personal tithe, and due only where it had been paid 40 years before; and not payable by the tenth toll dish of the corn ground, but by a tenth part of the clear profit, over and above all incidental charges of rent, &c. 1 *Bro. Par. Cas.* 157. 4 *Gwill.* 1460. It is now settled that tithes of all mills are personal tithes; and only a tenth part of the clear profit, deducting all charges and expences, is payable as tithes. *Bro. P. C.* & 2 *P. Wms.* 463.

MINES.—See *Chalk.*

NURSERIES of trees, &c. shall pay tithes, if the owner digs them up and makes profit of them by selling them. 2 *Dunc. Agric. Case.* 1 *Co.* 3rd. 2 *Jon.* 416. *Gulb.* 451. 2 *Gwill.* 504. 515. And, if he pulls them up himself and sells them, he shall pay the tithe; but if *he* sells them altogether to another, *the buyer* shall pay the tithe. *Hardres.* 380. and if some yield fruit and others not, those which yield fruit, shall not exempt those which yield none, when they are all sold together. 2 *Gwill.* 515.

OAK-TREES.—See *Trees.*

ORCHARDS pay tithes, both for the fruit they produce, and the grass or grain, if any be sown or cut therein. 2 *Inst.* 652.

ORE. Tithe ore is not due, but by particular custom. 2 *Gwill.* 535.

PARKS are titheable by custom for the deer and herbage; and, when disparked and converted into tillage, they shall pay tithes in kind. The tithes of parks may be part certain and part casual; and 2s. a year, and the third shoulder of every deer, hath been paid as tithe for a park. 1 *Roll. Rep.* 176. *Hob.* 37, 40.

PARTRIDGES and PHEASANTS, as they are *ferœ*

ferœ naturæ, yield no tithes of eggs or young. 1 *Roll. Abr.* 636.

PEASE, if gathered to sell or feed hogs, pay tithes; but not green pease spent in the house. 1 *Roll. Abr.* 647. Tithes of beans and pease whether sown in the fields or gardens, are great tithes, and do not fall under the denomination of tithes of gardens, technically called, *decima hortorum*. 5 *Bro. P. C.* 493. The tithes of pease must be set out as *soon as* they come into proper divisions or parcels, so as to let the tenth be seen and judged of, and husbanded. 4 *Gwill.* 1504.

PIGEONS pay tithes when sold; and this holds good if they lodge in holes about the house, as well as in a dove-house; and, if spent in the house, they may be titheable by custom, but not of common right. 2 *Danv. Abrid.* 583, 1 *Rol.* 642. *l.* 43. The Vicar is entitled to the tenth of the value if sold.

PIGS are titheable as calves. *Ibid.* And the tithe belongs to the Parson where the sow is kept, tho' she farrows in another parish. 2 *Gwill.* 607.

POLLARDS.—See *Trees*.

POTATOES.—These being in their nature a small tithe, sowing of them in greater quantities makes no alteration. 2 *Atk.* 364. *Com. Rep.* 639. They must be tithed on the spot before they are removed. 3 *Gwill.* 1110.

QUARRIES *of Stone*, &c. are not subject to pay tithes, because they are part of the inheritance; and tithes ought to be collateral to the land, and distinct from it. 1 *Roll. Abr.* 644.

RABBITS.—See *Conies*.

RAKINGS OF CORN.—See *Corn*.

SAFFRON pays a predial and small tithe. 1 *Cro.* 467.

SALT

SALT is not titheable but by custom only. 1 *Bunb.* 10.

SEEDS of clover, rye grass, saintfoin, and other grass seeds, herbs, hemp, &c. are small tithes. 3 *Gwill.* 926. But tithes shall not be paid of seeds of herbs and plants where it has been paid of the herbs or plants themselves; nor *è contra*. 3 *Com. Dig.* 408. *As to the seed of Clover see Grain.*

SHEEP.—A tithe is paid for sheep, lambs, and wool; and therefore they pay no tithe for their feeding. [*See* AGISTMENT.] If sheep are in the parish all the year, they are to pay tithe-wool to the Parson; but, if removed from one parish to another, (without fraud,) the Parson of each parish is to have tithe *pro rata*, where they remain thirty days in a parish; and, if they are fed in one parish, and brought into another to be shorn, the same tithing is to be observed. 1 *Roll. Abr.* 642, 647, 3 *Cro.* 237. It seems now the rule is, that tithe of wool shall be paid where the sheep are shorn, and agistment-tithes in other parishes, where they have been depastured. *Shaw's Law of Tithes.* The time for paying tithes of sheep is at shearing; the tithe of wool is satisfaction for pasturage for the year past. *Ambl.* 149. If after shearing the occupier depastures sheep, and sell them before shearing time comes again, he must pay tithe for such pasturage. *Ibid.*

STONE in quarries pay no tithe of common right. 1 *Roll.* 637. *l.* 5. *Cro. El.* 277. 2 *Inst.* 651, 3 *Seld.* 1201. 2 *Lev.* 79.

STUBBLE.—See *Corn.*

TARES, VETCHES, CLOVER, &c. are titheable; but, if they are cut down green, and given to the cattle of the plough, where there is not a sufficient pasture in the parish, no tithe shall be paid for them.

them. 1 *Cro.* 139. *Bunb.* 279. They are a great tithe whether green or ripe, and belong to the Rector. *Bunb.* 279. *in not.*

TEAZLES are small tithes. 2 *Gwill.* 564.

TILES are no yearly increase, and not titheable. 2 *Inst.* 651. 2 *Mod.* 77.

TIN pays no tithe of common right. 1 *Rol.* 637. *l.* 12. 2 *Inst.* 651.

TOBACCO is a small tithe.

TREES.—Wood is, *de jure* a great tithe. Timber-trees, such as oaks, ashes, and elms, and in some places beech, &c. above the age of twenty years, were discharged of tithes by the common law, before the *Stat.* 45 Edw. III. c. 3; and the reason is, because such trees are employed to build houses; and houses, when built, are not only fixed to, but part of, the freehold. Loppings of timber trees, which timber trees are above twenty years pay no tithes, for, the branch is privileged as well as the body of the tree, although used for firing; and the roots of such trees are exempted as parcel of the inheritance. Trees, cut for plough-bote, cart-bote, &c. shall not pay tithes, although they are no timber; but all trees, not fit for timber, and not put to those uses, pay tithes. 1 *Roll. Abr.* 650. *Cro. Elix.* 447, 499. Coppice-wood, which has been usually felled for firing, of whatever age it is, is always titheable. *Sid.* 300. 1 *Lev.* 189. And all germins, which spring from the roots of trees that have been felled, are titheable. *Walton* v. *Tryon, Mich.* 25 Geo. II. *Godb.* 175. *Bro. Dism. pl.* 14. 11 *Rep.* 4. If, when the wood of coppice is felled, some trees growing therein, which are of the age of twenty years, and have never been lopped, are lopped, and these loppings are promiscuously bound up in faggots with the coppice-wood, tithe must be paid

paid of the whole; because, it would be very difficult to separate the titheable wood from that which is not so; and the owner ought to suffer for his folly in mixing them. *Walton* v. *Tryon* and *Bunb.* 98. Tithes are in general due of ash, beech, birch, hornbeam, hazel, holly, willow, sallow, alder, elder, maple, and whitethorn trees, (and of fruit-trees, *see* FRUIT-TREES,) of whatsoever age they are; because, these are not timber. *Plowd.* 470. *Cro. Eliz.* 477. 1 *Cro. Jac.* 190. 1 *Roll. Abr.* 640. *pl.* 5, 6. *Brownl.* 94. But if the wood of any of these trees is used in a particular part of the country, where timber is scarce, in building and repairing, no tithe is due of such wood, (if of the age of twenty years,) in that part of the country. *Hob.* 289. *Brownl.* 24. If a timber tree be lopped before it is 20 years old, and afterwards be lopped every 10 or 7 years, tithes shall be paid of such lops. 2 *Gwill.* 833. Tithe is due of wood made into charcoal. *Id.* 577. Tithes is due of broom made into bavins; and of the lops and tops of old timber pollards, and of wood growing in hedge rows. *Id.* 542. But it is said the lops and tops of old pollard oaks and ashes are exempt from tithe. *Ambl.* 139. It is laid down in several old books, that, if a timber-tree, after it is of the age of twenty years, decays, so as to be unfit to be used in building, no tithe is due of the wood of this tree, because it was once privileged. 11 *Rep.* 48; *Cro. Eliz.* 477. *Cro. Jac.* 100. 1 *Roll. Abr.* 480, *pl.* 2. But since Stat. 45. Ed. 3. 3. no tithes ought to be paid of great trees of the age of 20, 30, or 40 years, and if they are demanded of such trees, a prohibition goes. As of oak, ash, elm, of above 20 years growth, for they are timber, throughout the whole kingdom.

So

So of beech, maple, &c. or other trees in a country where they are used for timber. 1 *Rol.* 640. *l.* 30. *Mo.* 541. *Noy.* 30. 2 *Rol.* 83. Tho' oaks, &c. of above 20 years, are decayed, and only fit for fuel. *Mo.* 541. *Cro. El.* 477. So if oaks, &c. are topped within the age of 20 years, and afterwards the lops are suffered to grow above 20 years, no tithes are demanded of these lops, for they are timber. 1 *Rol.* 640. *l.* 7. 2. *Leo.* 79. So if oaks, &c. of above 20 years be topped or lopped, usually within 20 years, no tithes are due for the tops or lops. 1 *Rol.* 640. 15. *Semb.* 2 *Cro.* 100. *Cro. El.* 477, 8. *Mo.* 908. *Godb.* 175. Nor for the trunks of oaks, &c. after 20 years, tho' become rotten. 1 *Rol.* 640. *l.* 20. 11 *Co.* 48. *a.* 81. *a.* Nor for the germin of such timber-trees, which grow *de radicibus et stipitibus*, after the tree is cut down. 1. *Rol.* 640. *l.* 20. 11 *Co.* 48. *b.* Nor for the bark of such trees; for it is privileged in respect of the tree. 1 *Rol.* 640. *l.* 35. 11 *Co.* 49. *a.* Nor for a small quantity of underwood, put in faggots with the lops of oaks, &c. 2 *Leo.* 79. *Cro. El.* 347. Nor for roots, or stubs of trees, or underwood cut, for which tithes were paid; if they be rooted up before new germins grow. 1 *Rol.* 637. *l.* 35. *Mar.* 58. 64. Nor for the wood of fruit trees, cut the same year in which the tithe was paid for the fruit. 2 *Inst.* 621. Nor for wood used for fences. *Mo.* 917. 1 *Rol.* 644. *l.* 40. 2 *Inst.* 652. Nor for wood for burning of bricks for repairing the house of the parishioner. *Cod. Ju. Eccl.* 708. 1 *Rol.* 645. *l.* 10. Nor for dotards, used for fuel. *Mo.* 908. Nor for wood for necessaries in the house, and for fences by which the Parson has *uberiores decimas*. 1 *Sid.* 447. Nor for broom, furze, &c. used for firing in the house

of the parishioner. *Cro. El.* 609. *Mo.* 909. 1 *Rol.* 644. *b.* 43. Tithes of underwood shall be paid by him who cuts it. So tithes of a nursery of plants shall be paid by him who pulls them up. *Hard.* 380.—Vide *Nursery.*

TURPS used for fuel are part of the soil, and tithe-free. 2 *Inst.* 651. 1 *Rol.* 636. *l.* 10.

TURNIPS are reckoned among predial small tithes, and the tithes of them shall be paid as often as they are sowed, though twice or more on the same land and in the same year. So if eaten off the land by sheep or barren cattle. *Bunb.* 10. So if drawn and eaten by milch cows or sheep. *Bunb.* 314. 2 *Gwill.* 593, 606. And tho' the sheep paid tithe of wool. 2 *Gwill.* 665. The tithe is also payable by the occupier of the land, and not by the owner of the beasts. 3 *Gwill.* 859. The tithe of turnips must be set out in heaps, where the quantity is sufficient to admit it. *Id.* 945. Tithe is due of turnips, tho' sown after corn is cleared, and fed with sheep and barren cattle, and tythes of lambs and wool had been before rendered. *Bunb.* 314.

TURKEYS.—See *Fowls.*

UNDERWOOD is titheable, though the tithe is not of annual payment; and is set out, while standing, by the tenth acre, pole, or perch; or, when cut down, by the tenth faggot or billet, as custom directs; and, if he who fells the wood does not set out the tithe, he is liable to treble damages by *Stat.* 2 and 3 Edw. VI. c. 13. But, if the underwood is used for firing in a house of husbandry, or to burn brick to repair the house, or for hedging and fencing the lands in the same parish, it may be discharged from tithe. 2 *Inst.* 642, 643, 652. *Hob.* 250. 2 *Danv. Abr.* 597.

WARRENS.—See *Conies.*

WASTE GROUND, whereon cattle feed, is liable to the payment of tithes. 2 *Danv. Abrid.*—Vide *Barren Land.*

WAX is a small tithe.—See *Honey.*

WHEAT, is by the common law titheable in the sheaf. 3 *Gwill.* 966. 4 *Gwill.* 1504.

WOAD, growing in the nature of a herb, is a predial small tithe. *Hutt.* 77. *Cro. Car.* 28.

WOOD [*See* TREES] is generally esteemed to be a great tithe. If *wood-grounds* have likewise timber-trees growing on them, and consist for the most part of such trees, the timber-trees shall privilege the other wood; but, if the wood is the greatest part, then it must pay tithes for the whole. 13 *Rep.* 13. If wood be cut to make hop-poles, where the Parson hath tithe-hops, no tithe shall be paid. *Hughes' Abr.* 689. *Bunb.* 20, 73. Wood ought to be bound up by the occupier, before the tithe is set out. 2 *Gwill.* 581. Tithe wood must be set out by the owner or occupier upon the land, at the time of falling. 2 *Gwill.* 830.—Vide *Trees.*

WOOL is a mixed small tithe, paid when clipped; one fleece in ten, or, in some places, one in seven, is given to the Parson. If there is under 10 pounds of wool at the shearing, a reasonable consideration shall be paid, because the tithes are due of common right; and, if less than 10 fleeces, they shall be divided into 10 parts, or an allowance be otherwise made. All sheep killed, and sheep which die, pay tithe-wool; and neck-wool, cut off for the benefit of the wool, but not if it is to preserve the sheep from vermin, brambles, &c. 1 *Roll. Abr.* 645. *pl.* 14, 16. Also the wool of lambs shorn at Midsummer, though tithe was paid for the lambs

at *Mark-tide*, is titheable. 1 *Roll. Abr.* 646, 647. 2 *Inst.* 652. *Burn.* 90.

WAX is a small tithe. 2 *Inst.* 649.

YEARLINGS. Tithes shall be paid for the agistment of yearlings, being a new increase. 2 *Gwill.* 629.

YOUNG of animals are a small tithe, and no tithe is due for their pasture, where reared to be used for husbandry or the pail. *Cro. Eliz.* 476. But if such young beasts are sold before they come to such perfection as to be fit for husbandry, or to give milk, tithe is payable. *Hetl.* 86.

INDEX,

TO THE

DIRECTIONS TO CHURCH-WARDENS.

ABSENTEES, bound by majority at vestry, 32, 33, 49.
Account to be taken of Church Goods, 94.
Accounts, when to be rendered, 87, 88, and *in not.*
——— disputes about, 88.
——— exceptions to, 89.
——— vouchers in support of, 89.
——— as to Church Goods, 92, 94.
——— of money once passed, cannot be controverted, except for fraud, 92.
——— not so as to goods, 93.
——— Spiritual Court, no jurisdiction to settle, 88, *in not.*
——— may compel them to account, 94, *in not.*
——— refusing to account, 92, *in not.*
——— fraud in, 92.
——— how allowed, 92, *in not.*
Actions, for the goods of the Church, in whose name to be brought, 78, 83, 84, 85.
——— in what cases they will lie at the Church-warden's suit, and where not. ibid, and 79, *in not.*
——— limitation of, 37.
Additions, in the Church, by whose consent to be made, 31-36.
——— in the Chancel, 36.
Agreements, made by Church-wardens, 29, and *in not.*
Arrests in Church or Church-Yard, 16, *in not.*
Aisle of the Church, 28, 68, *in not.*
——— burial in, 76.
Altar Rails, 36, 38, 39.
Appeal against Church Rate, 57, 58, *in not.*
Articles, book of 1, *in not.*
Arms, coats of, 66.
Atchievements, 66, 7.

Behaviour at Church, 7, and *in not.* 17.
Bells, of the Church, 18, 27, 46.
——— ringing, 98.
Benefice, sequestration of, 99, 101.
Bishop, the judge of what should be in the Church, 67.
——— his power as to pews, 71.

Boundaries, of parishes, 47, 48.
Burial place, 75.
——— in the Church, ibid. and 24, *in not.*
——— in the aisle, ibid. and 76.
Burglary in the Church, 86.
Burying in the Church, 20, *in not.*

Chancel, 36, 70, *in not.* 74.
Chancery, how far it will aid the ecclesiastical jurisdiction, 47.
Chapel of Ease, 23, *in notis* and 58 *in notis.*
Chimes, 27, 36.
Chapelry, inhabitants of, liable to repairs of Mother Church, 28.
Choice of Church-wardens, in whom, 39.
Churches, origin of, 1 *in not.* what 1 *not.*
——— fabrick of, 28.
——— freehold of the, 20.
——— attendance at, 4, 10.
——— behaviour at, 7, *et in not.*
——— falling down, 26, *in not.*
——— pulling down, 26, *in not.*
——— profaning, 16.
——— additions to, 31, 36.
——— repairs of, 23, &c.
——— goods of 85, 91.
——— utensils of, 26 and 83.
——— ornaments of, 27, 31, 34, 66.
——— nuisance in, 36.
——— trespasses in or against, 82, 83.
——— damage done to, 82, &c.
——— furniture of, damaged or removed, 84.
——— legacies to, 85.
——— vacancy of, 100.
——— windows of, 67.
——— seats, 68.
——— lands of, 79, 82.
——— what a Parish Church, 1, *in not.* and 59, *in not.*
——— how privileged, 16, and *in not.*
——— way, 24, 25.
——— new ones in London, 41.
——— consolidated, 60.
——— by statute, 60.
——— by common law, *ibid.*
——— reasons for, 62.
——— who may consolidate, 61.
Churches, union of, 60. *Vide Consolidation of Churches.*
Church-wardens, what, 1.

Church-wardens, who they must be, 43.
———— exemptions, 41, 42, 43.
———— how and when chosen 39, and *in not* 40.
———— de facto, 83, *in not.*
———— their oath, 45.
———— refusing to swear, 45, *in not.*
———— refusing to swear them, 45.
———— have no authority till sworn, 44.
———— are lay persons, 1, *in not.*
———— their duty as to civil governments, 194, *in not.*
———— old ones remain 'till new ones chosen, 44, and *in not.*
———— Deputy, 45.
———— indiscretion of, 30.
———— punishment of, 18, *in not.* 44, *in not.* and 89 to 94, and *in not.*
———— their indemnity, 19, 30.
———— removal, 18, *in not.*
———— how far a corporation, 29, 78, 82, 83.
———— are overseers of the poor, 19.
———— commitment of, 20, *in not.*
———— accounting, 87, &c. to 94.
———— action by, 78, and *in not.* 84, and *in not.* 85.
———— action against, 18.
———— fraud by, 90, 92, 93.
———— in London, 82.
Church-ways, 24, 25.
Church-yard, 21, 24, 25, 26, 28, 29, 31, 36.
———— soil of, 20, 26.
———— pasture of, 26.
———— private door into, 24.
———— fences of, 28, and *in not.*
———— trees of, 26.
———— fairs and markets not to be kept in, 16.
Clergymen, their duty, 15.
———— abusing, 17.
———— their authority, 20, *in not.*
Clock, 36.
Coats of arms, 66.
Communion table, 36, 39.
Consent, of the parishioners, 32, 33, 38, 49.
Consolidation of Churches, 60.
———— by statute, *ibid.*
———— by common law, 61.
———— reasons for, 62.

Consolidation of Churches, who may consolidate, 61.
Curate, 16.
——— perpetual, 59, *in not.*
Custom, as to choice of Church-wardens, 39, 40.
——— as to collecting rates, 49, *in not.*
——— how far it affects the affairs of the Church, 34 *in not.* and 41.
——— as to making rates, 48, 59.
——— of London, 21, 71, 82.

Damages, to the Church, &c. 83—85.
Demeanour at Church, 9.
Deputy Church-warden, 45.
Dial, 36.
Disbursements, by Church-wardens, 88, &c.
Disturbance in Churches, 7.
Dissenters, 5, 11.
Dissenting Ministers, 12.
——— keeping school, 12.
Drunkenness, presentable, 2, *in not.*

Evidence of parishioners, 93, *in not.*
Exceptions to rate, 47, 57.
Excommunicated persons, 8.
Exemptions, from serving the office of Church-wardens, 41, 42, 43, and *in not.*
Exemptions from Rates, 58
Expenditures, by Church-wardens, 89.

Fabric, of the Church and Church-yard, 26—30.
Faculty, for pews, &c. 68—72.
——— for ornaments, 34, *in not.*
——— may be transferred with the messuage, 79, *in not.*
——— for exchanging pews, 70, *in not.*
Fame, common, a caution concerning, 2, *in not.*
Fences, of the Church-yard, 28.
Fixtures, to the Church, 27, 28.
Frauds, by Church-wardens, 30, 90—93.
——— Evidences of, 90, 91.
Furniture of the Church, damaged or removed, 83—85.

Gates of the Church-ways, 24.
Gallery, new, 34.
Glebes out of the parish, 50.
——— exempt from rates, 50, 58.

Glebes, terriers of, 94.
Goods of the Church, 79, 82, 83, 85, 86, 91.

Hamlet, 59.
Hat, Church-wardens may take it off in Church, 7, *in not.*
Hatchments, see Atchievements.

Impropriator, how far liable to rates, 50, *in not.*
Indemnity of Church-wardens, 19, 30.
Inventory of utensils, 27.
Isle of the Church, 28, 68.

Keys, of Church Chests, 91, 96, 97.
—— indiscretion of Church-wardens, 30.

Lands, given to the use of the Church, 79, &c.
——— to what such gifts extend, 81.
Lease of the Church yard, 80, *in not.*
Legacies, to the Church, 85.
Licence of the Ordinary, necessary for additions in the Church, 87, 66.
——— of school-masters, 18.
Light house, not liable to rates, 54, *in not.*
Limitation, as to restoring things omitted or let down, 37.
——— of actions, 37.
London, Customs of, vide customs.
Lord's-day, 9, 10, 11.
Lutherans, German, within the toleration act, 5, *in not.*

Majority of votes, binds absentees, 32, 33.
Mandamus, in what cases it will lie, 40, *in not.* and 44, 48, *in not.*
——— return of, *ibid.*
Memorandums of resolutions at vestry, 33, and 49, *in not.*
Ministers, their duty, 2, 15.
——— abusing, 17.
——— may present, if Church-wardens neglect, 3, *in not.*
Minutes, of vestry resolutions, 33, 49, and *in not.*
Monuments, 66.
Mother-church, 58, 59, *in notis.*

Notice, of Vestries, how given, 31 and *in not.*

Oath of Church-wardens, 45.
——— its obligation, *ibid.*
——— caution as to, 90, 91.

Ordinary, see Bishop.
Organ, 34, *in not.*
Ornaments of the Church, 27, *in not.* 31, *in not.* 34, *in not.* 66.
——————— faculty for, 34, *in not.*
——— superstitious, 66.
Out-setter, cannot be a Church-warden, 43.
——— how far chargeable to rates, 54.

Parish, what, 1, *in not.*
——— in several counties, 47, 76.
Pasture of the Church-yard, 26.
Pennons, 67.
Perambulation of the parish, 47, 48.
Pews, 67, &c.
—— by prescription, 68, 72.
—— by faculty, 71.
—— who has the ordering them, 71.
——————— in London, 75.
—— how to be built, 72, 73.
—— by whom to be repaired, 32, 72.
—— to whom materials of, belong, 73.
—— in the Chancel, 74, and *in not.*
—— possession of, how far a title, 69, 70, *in not.*
—— disturbance of enjoyment, 72, and *in not.*
Pictures, superstitious, 66.
Popish utensils, 27.
Preaching, 14, 15.
Presentments, 2.
——— when to be made, 87.
——— Register's charge for, 3, *in not.*
——— what to be presented, 14, 15.
Prescription, what, 37, 41.
——— to be exempt from rates, 58.
——— pews claimed by, 68—72.
Prohibition against suits in the spiritual court, 70, *in not.* 88, *in not.* 92, *in not.*

Quakers, 57, and *in not.*
Questmen, what, 45, *in not.*

Rails to the Communion table, 36, 39.
Rate, Church-wardens, 46.
—— how made, 48, 49, and *in not.*
——— assessed, 53, 57.
——— recovered, 47, and *in not.*
—— *not good* to reimburse, 38, *in not.*

Rate, neglecting to make, 51.
——————— collect, 51, 52.
—— customs relating to, 48, 59.
—— exceptions to, 47, 57.
—— exemptions, 58.
—— a personal tax, 53.
—— who liable, 57.
—— out-setters, how far liable to, 54.
—— Parson or Vicar, how far liable to, 50.
—— impropriator, 50, *in not.*
—— paupers excused from, 51.
—— prescription of exemption, 58.
—— arrears of, 52.
—— how far not good, 38.
Receipts, for money laid out where necessary, 88.
Recusants presentable, 6, *in notis.*
Register books, 95, &c.
——————— copy of, for the Bishop's Registry, 97.
Repairs, of Church and Church-yard, 23, &c.
——— how anciently done, 22.
——— of pews, 72, *in not.*
Resolutions of vestrys, 33, and *in not.* and 49 *in not.*
Restoring things omitted or neglected, 36, 37.
Robbery of the Church, 86, and *in not.*

Schedule of utensils, 27.
School-masters, 12, 13.
Seats in the Church, see pews.
—— if fixed, a part of the fabric, 30.
—— repair of, 67.
—— regulation of, 67.
Select Vestries, 32, *in not.* 48, *in not.*
Stiles, of Church-ways, 24, 25.
Sequestration of benefice, 99, 101.
Sequestrators, their duty, 99.
Sidesmen, 45, 102.
Superstitious decorations, 66.
Suspension, 102
Striking in Church or Church-yard, 8, *in not.*
Synods, 104.
Soil of the Church-yard, 20, 26.
Spiritual court, its jurisdiction as to Church-wardens, 94.
Sunday, 9, 10, 11.