A

DISCOURSE

OF THE

Peerage & Juriſdiction

OF THE

LORDS SPIRITUAL

IN

PARLIAMENT.

Proving from the Fundamental Laws of the Land, the Teſtimony of the moſt Renowned Authors, and the Practice of all Ages.

THAT

They have no right in claiming any *Juriſdiction*

IN

Capital Matters.

Give unto Cæſar *the things which are* Cæſars, *and unto* God *the things which are* Gods, Matth. 22. ver. 21.

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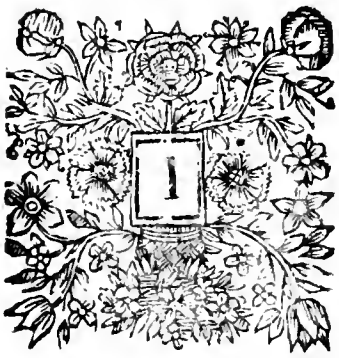
TO THE

READER.



IN this licentious Age, *and eſpecially at this Juncture of Time, when every impertinent* Scribler, *and ſeditious* Pamphleter, *hath free acceſs to the* Preſs, *it may be thought neither Prudent nor Honourable, for a Man of Sober and Serious Thoughts, to come into the* Field *and liſt himſelf among the* Unlearned Multitude *of* Writers *that are in theſe days. That Popular* Applauſe *which is generally expected from this* Method, *is a thing which I (more ambitious of being publickly uſeful then publickly known) never deſigned to purchaſe at that rate; and therefore is not the* Motive *that induced me to this* Undertaking. *I would have been glad, if any other of greater* Learning *and* Parts, *had done the* World *ſo much* Favour, *as to have made a* Perfect Diſquiſition *into this* Matter, *and to have diſcuſſed the* Point *according to the* Merits *of the* Cauſe; *for then I doubt not but the Reaſonableneſs of the* Houſe *of* Commons Diſſention *from the* Houſe *of* Lords, *would have appeared to all* Impartial *and* Diſ-intereſted Minds. *As for my own part, I confeſs that partly through the* Conſciouſneſs *of my own* Inability, *and partly through my* Unwillingneſs *to be concerned in a Thing of this* Weight, *I ſhould never have engaged my ſelf in it, if I judged it not neceſſary to vindicate thoſe* Perſons *that are* abuſed *with ſeveral* undecent *and* unjuſt Calumnies, *in a late* Book *intituled,* The Honours of the Lords Spiritual aſſerted, *&c. together with its* Preface.

To the Reader.

This, together with a Desire of Informing the World *in a Thing which is much talked of, but little understood, prevailed with me to omit nothing which might be Serviceable to my Country, and Conducive to the* Unity *and* Peace *of this* divided Kingdom; *especially when it is to be feared, there are too many such as the* Author *of the above-mentioned* Book, *who under the* Specious pretence *of* Loyalty *and* Affection *to the* Church, *do what in them lies to make the* Gap wider, *and* Distemper *more* Incurable. *That I may not seem to* injure him, *you may consider the Design of his* Discourse; *The Persons against whom he directs his* Preface, *are those who withstood the* Pretentions of the Bishops to Jurisdiction in Matters of Blood: *those are no other than that* Honourable Assembly, *those* Champions of the Protestant Religion, and the Liberties of the People of *England*, the House of Commons in the last Parliament. *To Revile the* Representatives *of the* Commons *of* England, *and in them* Virtually *the* Persons themselves *that are* Represented, *with such Scandalous Aspersions, and Opprobrious Reflections*; *as*, Being Favourers of the Rebellious Commotions in *Scotland*, Ill-natured, Censorious, Covetous, Self-seekers; *and which is worse than all this*, as being of the same Principles with those that threw down Episcopacy, took up Arms against their Native Soveraign, Plundred and Devested His Majesties most faithful Subjects of their Goods, Estates, and Lands, and embrewed their Violent, Wicked, and Rebellious Hands in his most Sacred Blood, &c. *I say, such Scurrilous and Satyrical Language thrown upon the very* Face of Authority, *doth ill-become the* Religion of a Christian, *and the* Honesty of a true English-man. *It is a known* Maxime *among Men of honest and sober Principles, and Lovers of the* English Nation, That Nothing can make us Happy or Miserable, but an Union or Division amongst our Selves: If there be a good Understanding betwixt Prince and People, nothing can make *England* miserable; but if there be Jealousies and Divisions, nothing can make it Happy. *Therefore whoever they are, that by* reciprocal Accusations, *and raising of* mutual Jealousies *of the* One's *good Will and Affection, and the Others Loyalty, especially in things that are false in themselves, deserve to be look't upon as inveterate Enemies to the* Peace *and* Happiness *of this* Kingdom: *And yet you may observe, that whosoever can give the* Court *the most* Satyrical Language, *expects to be reckoned the most* Zealous Patriot, &c. *And those*, forsooth, *who can with the greatest* Scurrility, *and the most* reproachful *Epithets, aspers the* House of Commons, *would be thought the* most Loyal Subjects: *But if* Integrity *and* Religion *it self be not quite banished from the* Conversation *of* Mortals, *both these sorts of* People *will fail of their*

Expecta-

Expectation. *I have read of two great Favourites of* Alexander *the Great*, Hepheſtion *and* Craterus; *one of them* (*ſaith my* Author) Alexandrum dilexit, *but the other* dilexit Regem: *It may be a Queſtion which of theſe was the better Subject, I ſhall not undertake to determine it, but ſhall leave it with an Obſervation of that Noble and truly Loyal* Courtier *Sir* Thomas Coventry, *Lord Keeper of the* Great Seal *to His late Majeſty, in a Caſe of the like nature:* Some (*ſaid he to the Houſe of Lords*) would have the Kings Prerogative rather Tall than Great, others *e contra*; ſome do love the King, rather than *Charles Stuart*; *others e contra*: (*but what his* Sentiments *were of* thoſe Matters, *you muſt gather from what he ſaid a little after*) None can be truly Loyal, but he that is a good Patriot; and none can be a good Patriot, but he that is truly Loyal. *The Intereſt of the King and People are ſo interwoven and linked together, that none can be truly ſaid to be a Lover of* One, *but he muſt be a Lover of* Both.

But to return to our Author, *I Proteſt I have peruſed the* whole Volume *with the greateſt* Impartiality *that can be*; *and except his* Sawcineſs *and* Ill-nature *againſt the* Houſe of Commons, *and* Gentlemen of the Long Robe, *I find nothing in the whole Book that deſerves any* Animadverſion: *It is evident from his* Method of Arguing, *and the* Medium's *he maketh uſe of to prove his* Aſſertion, *that he is altogether a Stranger to the very State of the* Controverſie; *and that notwithſtanding his Confidence in Aſſerting, his Book diſcovers more* Ignorance, *than his Preface doth* Petulancy: *And it is no wonder, for* Ignorance *and* Impudence *are generally Concomitant: And this is all that I think fit to ſay in Anſwer to him. The Reaſon why I ſubjoyn the following* Diſcourſe, *is, becauſe although I cannot perſwade my ſelf that he deſerves a* Refutation, *yet that* Truth *which he labours to darken with an* Impertinent Harangue, *deſerves to be* cleared *and* demonſtrated: *If any ſhall go about to* Attacque *this* Diſcourſe *with* Drollery, *or* Satyrical Invectives, *I decleare before-hand, I do not reckon my ſelf obliged to* Reply; *I do not think it a* Reputation *for* Men of Senſe *to* Combate at theſe Weapons; *But if Occaſion be, I ſhall ſend his* Anſwer *to the* Dung-Carts, *or* Oyſter-Boats, *from whence I doubt not, but he ſhall receive due* Correction *for his* Folly *and* Impudence; *but if he Aſſault it with* Reaſon *and* Sobriety, *he ſhall find a Defence agreeable. I muſt confeſs I am heartily ſorry at the Occaſion of this* Diſpute, *it hath unhappily fallen out at that Moment of Time, when above*

all

To the Reader.

a. things it was neceſſary for the Church *and* State *to* Confederate, *and joyn Hand in Hand, to the* Ruine *and* Confuſion *of the* Common Enemy, *and the Extirpation of that* Poyſonous Plant, *whoſe growth will quickly become fatal to both: but however, as it is hard on the one ſide, that any ſhould be compelled to lay down that which they ſuppoſe is their* Right; *ſo on the other ſide, it is a thing unreaſonable and of dangerous Conſequence, to admit of any Innovation, though it were in a Matter of far leſs Moment than this is: ſo that there is great Reaſon for both ſides to inſiſt upon it. If this* Enterpriſe *of mine be ſo ſucceſful, as to convince thoſe that are in the miſtake, then I compaſs my End, and am Satisfied; which that it may do, I refer you to the Conſideration of the following* Diſcourſe.

Farewell.

A

DISCOURSE

OF THE

Peerage and Juriſdiction of the *Lords Spiritual.*

AS the granting of large Immunities, Priviledges, and Poſſeſſions to the Church, doth well become the Piety and Religion of a Chriſtian Prince, or any other Supream Power; And as the robbing of the Church of any of its Juſt Rights, lawfully granted, is Sacriledge of the Higheſt Nature: So it is the Duty of all the Sons of the Church, upon all Occaſions, thankfully to acknowledge the Bounty and Munificence of their Pious Benefactors, and to forbear all unjuſt Claims and ambitious Pretenſions to things which were never granted: A failure in this is almoſt as great an Immorality (conſidering the Quality and Profeſſion of the Offenders) as the former. And it is doubtleſs not onely lawful, but commendable, for the perſons whoſe Right and Property is invaded in either caſe, to defend themſelves with all their power againſt the Invaders; otherwiſe we muſt condemn our Anceſtors, who defended the Kings Prerogative, and the Subjects Right, when it was encroached upon by Procurers of Citations and Proceſs of Proviſions and Reſervations of Benefices, Diſpenſations for Pluralities, *&c.* from the *Court of Rome*; and withſtood thoſe unreaſonable Demands of Abſolute Exemption from Secular Power made by the Clergy; and ſeveral other things about Marriages, Legitimation, *&c.* which they claimed by vertue of ſeveral Decretals of their Popes and Councils: I confeſs if there were either Statute-Law or Common-Law for the *Biſhops* Voting in Capital Caſes, I would be very far from arguing againſt it, for that were to call in queſtion their undoubted Right. But if there be any reaſon to make me believe they have no Right at all in that caſe, I hope it will be excuſable in me to make an Impartial Enquiry into the Thing.

If the *Spiritual Lords* have any right of Judicature in Capital Caſes, it muſt be either *Jure Divino*, or *Jure Humano*; if the former, it muſt be proved out of the *New Teſtament*, for there is no conſequence from the Authority and Juriſdiction of the *High Prieſt* under the Law to the Authority of *Biſhops* under the Goſpel, and that is the moſt generally received Opinion among the Proteſtant Divines, thoſe at leaſt who have liſted themſelves under the Banner of the *Proteſtant Religion*, in its defence againſt the exorbitant power and uſurpation of the *Biſhop of Rome*, who makes uſe of the ſame Argument for the Authority of his Holineſs *in Cathedra*: Becauſe whatſoever is alledged out of the *Old Teſtament*, is either part of the Moſaical method of adminiſtring Juſtice, proper onely to the Judaical Oeconomy; or elſe belonging to the Temporal Conſtitution of the Kingdom of *Iſrael* and *Judah*, which are no more binding to us, than thoſe Laws of theirs whereby each man recovered his right and property: or than the Laws of the *Syrians*, or any other Nation were binding to the *Jews*.

Thoſe Inſtances that are given of ſo great truſt repoſed in, and Honours conferred upon, Spiritual perſons by *Chriſtian Princes*, after the firſt three Centuries, can prove no more, but that ſo was the Conſtitution of the Government of thoſe Kingdoms; and it doth not follow that therefore it muſt be ſo in all other Kingdoms: for which cauſe it is evident, that the firſt Four Chapters of the Gentlemans Book, are altogether impertinent.

If the *Spiritual Lords* ground not their Claim upon *Divine Right*, then if they have any at all, it muſt be by *Humane Inſtitution*: My buſineſs is not to examine whether ſuch an Inſtitution were good and reaſonable, or not? That I leave to the

Conſideration of the Parliament, in whoſe Determination every true Subject ought heartily to acquieſs: but all that I have to do, is to examine whether or no there be ſuch a Limitation, and that is the point which I intend to inſiſt upon.

No Humane Inſtitution can do their Lordſhips any kindneſs in this, except the Laws of *England*, and thoſe are of two ſorts, either Statute-Law, or Common-Law: The former is not pretended to; the onely queſtion is about the latter: for that ſame Law which gives them power to ſit in the Houſe of Lords in any caſe, gives them power alſo to ſit in Capital Caſes, if they have any ſuch power; and that they have no ſuch power by the Common Law of *England*, is the *Probandum*.

Thoſe in whoſe power Originally it was at the firſt reduction of this Nation under Rules of Government to Inveſt Religious Perſons with *Honours*, *Juriſdictions* and *Privileges*; might by the ſame power have made them greater or leſſer than they did; and conſequently might at the firſt Inſtitution have limited the ſame *Juriſdiction*, &c. to ſuch and ſuch matters as they themſelves thought fit to intruſt them with, and not to others. If thoſe perſons that firſt conferred upon ſome of our Clergy-men that *Juriſdiction* which they now enjoy of Voting in the *High Court of Parliament*, had given it indefinitely in all Matters, and over all Cauſes, and they had exerciſed their Juriſdiction accordingly from time to time, then their right had been indubitable; but if this limitation had been made, that their *Juriſdiction* ſhall extend to all Cauſes, except ſuch as are Capital, and they never exerciſed any *Juriſdiction* in ſuch; then there cannot be any colour or ground of Claim. Now the *Common Law* is a general Cuſtom or Uſage in this Realm in all Ages practiſed and allowed beyond the memory of man; and becauſe there is no Record, nor any other undeniable Evidence of its commencement, it is therefore preſumed to have been a Law ever ſince there hath been any Government in this Nation: Seeing therefore that the *Juriſdiction* of the *Biſhops* in *Parliament*, is ſuppoſed to be as ancient as the Government it ſelf; If it can be proved that by the Common Law (*i.e.*) the continued practice of all Ages, the Tranſactions whereof are Recorded, the Clergy never did exerciſe *Juriſdiction* in Caſes of Blood: then inaſmuch as no Record maketh appear what time this Cuſtom did begin, we muſt of neceſſity preſume that their not Voting in Capital Caſes, is as ancient as their Voting in any Caſe; and conſequently that thoſe who firſt conferred upon them their *Juriſdiction* in *Parliament*, gave it with this limitation, that it ſhould not extend to Capital Caſes.

This being premiſed, I ſhall proceed to prove that by the Common Law of *England*, (if not by an *Act of Parliament*) the *Lords Spiritual* have no right to Vote in Capital Caſes: That will be done if I demonſtrate theſe two things;

1. That their Voting in Capital Caſes is contrary to the intent and meaning of *Magna Charta*.
2. That it is contrary to the known practice of all Ages until this day.

The firſt I ſhall prove from the Reaſon and Nature of the thing, and from Precedents.

By the 29th of *Magna Charta* it is ordained, that, *Nullus liber homo capiatur vel imprisonetur, &c. aut ut ligetur, aut exuletur, aut aliquo modo deſtruatur, nec ſuper eum ibimus, nec ſuper eum mittemus niſi per legale judicium parium ſuorum, &c.* And accordingly the Precept of the Lord High Steward to a Serjeant at Arms, is to ſummon, *Tot & talis Dominos Magnates, & proceres hujus Regni Angliæ prædicti R. Comites pares, &c. Co. 3. Inſt.* 28. Whence it is evident that every Judge muſt be a *Peer* (pares) to the Priſoner; and I do think it a very eaſie matter to prove that no *Spiritual Lord* as ſuch, is Inveſted with that *Parity* which is requiſite within the intent of *Magna Charta*, to conſtitute him a ſufficient Judge upon the life and death of a Temporal Lord: Before I enter upon the proof of this, it will be neceſſary to ſay ſomething of the Nature of their Peerage.

Their Peerage doth accrue either by the Inveſtiture of their Biſhopricks, *ipſo facto*, or by their Summons to Parliament; it is agreed by all Authors of greateſt Authority, that they are Parliamentary Lords immediately by their Inveſtiture and Induction into the Temporalities, which are held of the King *per Baroniam*, and are therefore

fore Lords of Parliament only *ratione tenuræ*; ſo is *Coke*, *Stamford*, *Selden*, and others: But they are not intituled to any more Honour or Juriſdiction by their Writs, for theſe two Reaſons: 1. Becauſe a *Summons* to Parliament cannot of its ſelf create a Baron, for then all the Kings Judges, Serjeants and Councel had been ennobled in divers Parliaments in the time of *Edw.* 1. in all of *Edw.* 2. and moſt of *Edw.* 3. for they had then the ſelf-ſame Writ that Earls and Barons had, yea and the Kings two Eſcheators had the ſame Writ, *Annis* 12. and 14 of *Edw.* 2. The firſt Summons extant upon Record is that of 49 *H.* 3. which is one joynt Summons to all the Lords and Judges; and is the ſame in ſubſtance with the Writ of Summons at this day, which is given to the Lords, and differs onely in matter of Form, *Anno* 23 *Edw.* 1. *Jun.* 23. The Writs are ſeveral, the only difference is in the Style, and the words following, (*viz.*) *Super arduis negotiis quibuſdam nos & Regnum noſtrum & vos cæteroſque Prelatos de eodem Regno tangentibus, &c.* To the Biſhops and other Clergy: To the Temporal Lords after the ſtyle the Writ runs, *Nos, &c. & vos cæteroſque proceres & magnates; &c. tangentibus, &c.* To the Judges it was, *Vos cæteroſque de conſilio noſtros, &c. tangentibus.* But in all theſe, the *Mandamus*, which is the moſt eſſential part of the Writ, is the very ſame; *viz. Vobis Mandamus ut, &c. perſonaliter interſitis ſuper dictis negotiis cum Rege & cæteris magnatibus & proceribus, &c. tractaturi, veſtrumque conſilium impenſuri*, &c. The ſame is the 27 of *Ed.* 1. and almoſt in all the time of *Edw.* 2. and from the 20th to the 49th year of *Edw.* 3. That which I infer from this, is, that either a Writ of its ſelf without the performance of other Ceremonies, as *Inveſtiture of Robes*, &c. cannot make a man Noble; or elſe the Judges in thoſe Four Kings Reigns having the ſame *Mandamus* in their Writs which the Earls and Barons had *verbatim*, and the ſame in ſubſtance with the *Mandamus* to Peers at this day, were all ennobled.

And further, There doth frequently occur in ancient Records and Writings a difference between *Barones majores*, and *Barones minores*; the firſt are called ſometimes *Barons*, and the other *Barons Peers*. That they both received their Writs and ſate in Parliament, is undeniable: The Nobility of the firſt was without doubt inheritable, but ſo was not the laſt, but were called *Barons Peers*, becauſe of the *parity* of their Revenue. Thus ſaith the *Modus tenendi Parliamentum*, (always allowed for Authentick before Mr. *Prynne*) *ſummoneri & venire debent omnes & ſinguli* Comites Barones *& eorum* pares *ſcilicet illi qui habent terras ad valentiam unius* Comitatus *integri*, viz. *Viginti feoda, &c. vel ad valentiam unius* Baroniæ, &c. *& nulli* minores *Laici ſummoneri debent, ſed ſi eorum præſentia neceſſaria vel utilis fuerit Rex ſolebat talibus breves mittere.* So that theſe *Baronum pares*, or *Barones minores*, becauſe of the Parity of their Revenue, were called or omitted *ad libitum*, though the *majores* ought to be ſummoned *de jure*; which proves a Writ of Summons to Parliament, doth not ennoble the Party, otherwiſe this Difference muſt fall to the ground. The Roll of 18 *Ed.* 3. *N.* 35. Is that the Cauſe of Summons was declared in the preſence of the King and divers Lords there named, *& autres Barones, & Banneretes. Chevaliers de Comites, Citizens & Burgeis, &c.* So 46 of *Ed.* 3. *N.* 7. the Roll is, *Dukes, Earls, Barons and Banncrets:* And in many of the Parliament Rolls of *Ed.* 2. it occurs by the *Prelates, Earls, Barons, and other Grandees*; by which it is evident, that anciently there ſate in the Houſe of Lords ſometimes ſome that were under the Degree of a Baron, and they could not be Lords by Inheritance, becauſe a *Barony* is the loweſt Degree of Inheritable Nobility; but they could not be there preſent without their Writs: It doth therefore follow, that a Writ, together with an Appearance in obedience to it, doth not Ennoble the Party. *Note*, That anciently the King by his Letters could have diſcharged any Banneret from ſerving in the Lower Houſe; becauſe, if he pleaſed, he might upon occaſions have ſummoned him to ſerve in the Houſe of Lords; and that is apparent from a Record in the 7th of *Rich.* 2. *R.* 42. *dorſo.* Sir *Tho. Camoys* was choſen one of the Knights of the Shire for *Surrey*, and his Father and Grandfather had been ſummoned to ſeveral Parliaments before: the King diſcharged this Gentleman from ſerving in the Houſe of Commons, becauſe *Ipſe* (ſaith the Record) *& quam plures Anteceſſores ſui* Banneretti *fuerunt*:

Nos

Nos animadvertentes quod hujuſmodi Banneretti *ante hæc tempora in* Milites Comitatus *eligi minime conſueverant, &c.* If this *Cimoys* had been reputed a *Baron*, the Country would never have choſe him; and if he had been really a *Baron*, the King would never have diſcharged him becauſe he was a *Banneret*, but becauſe he was a *Baron*.

Another Reaſon for this may be gathered out of the Patent of *John Beauchamp* of *Holt*, the words of which are theſe: —*Sciatis quod pro bonis & gratuitis ſervitiis, quæ dilectus & fidelis Miles noſter* Johannes *de* Beauchamp, *de* Holt, *ſeneſchallus hoſpitii noſtri, nobis impendit, ac loco per ipſum tempore coronationis noſtræ hucuſque impenſis, & quem pro Nobis tenere poterit in futurum in noſtris conſiliis & parliamentis, nec non, &c. ipſum* Johannem *in unum* Parium & Baronum *Regni noſtri Angliæ præfecimus, volentes quod idem* Johannes *& hæredes maſculi de corpore ſuo exeuntes ſtatum* Baronis *obtineant, ac Domini de* Beauchamp & Barones *de* Kideminſter *nuncupentur, in cujus, &c. T. Rege apud* Wodeſtock, 10. *Oct.* It is probable that he was created *Baron* before he received this Patent, becauſe the Patent wants the words of Creation; *Ipſum Johannem præfecimus*: but it is not ſaid, *per præſentes præficimus*; and therefore the Patent running in the *preterperfect tenſe* could have no other operation but only to Record a thing which was paſt: but he was not Created by Writ before the Patent, becauſe it is dated *Oct.* 10. and he received no Writ till the *Decem.* following: Wherefore ſeeing that undoubtedly he was a Baron before he received either Patent or Writ; for the Patent, which is Matter of Record, ſaith, *Ipſum præfecimus*; it follows, that before this time a Baron hath been created without a Writ, which could be no otherwiſe then by the performance of a Ceremony, as *Inveſtiture of Robes*, &c. and this Patent was only an entring of the Creation, *being a tranſitory thing* upon Record.

2. Admitting that *Barons* have been created by Writs, yet *Prelates* are not created *Barons* by their Writs, becauſe there is a difference between a Writ ſent to a perſon that hath no right *ex debito juſtitiæ* to demand it; and a Writ ſent to one that was a Lord of Parliament before, and ought *de jure* to have been ſummoned. The former, together with the perſons obedience, may perhaps make him a Baron: but the latter *I conceive* doth not make any addition to, or enlargement of, their precedent Honour, but only ſummons them to exerciſe their Juriſdiction, and put that power which they have in execution, and that is only *reducere potentiam in actum*, otherwiſe every Lord would be newly created at every Parliament; every one to whom the Honour is entailed, would have a Fee-ſimple, for a Writ will make a man a Peer in Fee without the word (Heirs) and every Lord Biſhop, L. Keeper, L. Treaſurer, L. Privy Seal, would be as ſuch Inheritable Peers, or at leaſt for life, which are both falſe; for after Regradation their Peerage is ended: Wherefore it being certain that all the Lords both Spiritual and Temporal ought to be ſummoned to every Parliament, the Summons muſt of neceſſity have reſpect to that *Right* which doth entitle them to demand them.

The Inference which I draw from all this, is, That the Lords Spiritual having no Peerage upon the account of their Writs, cannot claim any at all, except it be *Jure Epiſcopatus*, (that is) *ratione terrarum quas tenent per Baroniam*. So that now I come to the next point; *viz.* Whether ſuch whoſe Peerage is *ratione tenuræ*, and dies either with the determinarion of his Eſtate in the Land, or the diſſolution of the Tenure, be a competent Judge of one whoſe blood is ennobled in caſe of life and death, within the meaning and intent of *Magna Charta*, which enacts that every one ſhall be tryed *per legale judicium parium ſuorum*. The *Negative* I hope effectually to prove from theſe following Reaſons:

1. Every ones *Peerage* ought to be meaſured and proportioned according to the limits and extent of that *ratione cujus* he is a *Peer*; he that is a *Peer*, not only upon the account of his Poſſeſſions, but alſo upon the account of the quality and nobility of his Blood, hath a right of Judicature and Legiſlation both in thoſe things that regulate Mens Eſtates and Properties, and alſo in thoſe things that concern Life and Death; but he that hath no *Peerage* but what is *prædial* or *feudal*, and not *perſonal*,

ſonal a *Peerage* accruing by vertue of his Tenure and Poſſeſſions, and not the Nobility of his Blood, can have no Juriſdiction but ſuch as is agreeable to the nature of his Peerage; that is, ſuch as ſhall extend to matters of Property and Poſſeſſion, but not to matters or Blood; for as to this he is no more a Peer (*i. e. Par*) to a Temporal Lord, than any private Gentleman, and therefore hath no more Juriſdiction; for it is Parity that makes a man capable of Juriſdiction within the Statute: This is confirmed by the Authority of that Learned Antiquary, Mr. *John Selden*, in the firſt Edition of his *Titles of Honour*, a Volume in *Quarto*, 347, (which I the rather cite, becauſe it was Printed in King *James* his time, and therefore not liable to exception) his words are theſe; *A Biſhop ſhall not be tried by* Peers *in Capital Crimes, becauſe theſe are perſonal, and his being a* Baron, *is* Ratione Tenuræ, *and not of perſonal Nobility.* So it is in Br. Abr. Tit. Enqueſt 99. *Although in an Action for Land,* &c. *a Biſhop ſhall have Knights in his Jury, as other Lords, yet when he is tryed for his life* (it's ſaid) *he ſhall not have Knights in his Jury:* By Which Book it is evident, that a Biſhop is a *Peer* not in reſpect of his Perſon, but of his Poſſeſſions.

2. The whole Statute of *Magna Charta* is a Grant or rather a Confirmation of the Priviledges and Liberties of the Subjects of *England*; and it is to be ſuppoſed that the enjoyment of every of thoſe Priviledges that are there granted, is a great advantage and happineſs to the Subject: but wherein the advantage of a mans being tryed *per Pares* doth lie, is a Point worth the Conſideration: I conceive it to be this, When thoſe are to be Judges, who may be under the ſame Circumſtances with the Priſoner, and when by their Judgment the Priſoner can loſe nothing but what his Judges, if they be under his Circumſtances may loſe alſo; he may expect that they will not give Judgment but upon Mature Deliberation, and that the Conſideration that it may be their own caſe will deter them from giving a raſh judgment againſt a man that is innocent, or not apparently guilty: Whereas if a mans Life and Fortune, his Honour, the Inheritable Quality of his Blood, his Name and Reputation, and whatſoever may be comfortable in this World, were diſpoſable at the will and pleaſure of inferiour perſons, who have not every of theſe themſelves, and conſequently know not the true value and worth of them, nor the importance of the matter that is judicially before them; it may be preſumed that they will not be ſo careful and concerned in the Cauſe; and it is to be feared they will be too ready to give an inconſiderate and raſh judgment. This I take to be the onely benefit of a mans being tryed by his Peers, which is very ſignificantly expreſſed in the Statute *De Proditionibus*. 25 *Ed.* 3. *cap.* 2. in theſe words; *Et de ceo ſoit proveablement attaint de overt fait per gents de lour condition*, &c. But to apply this to our preſent deſign, let us conſider what a Temporal Lord loſeth by an Attainder; In the firſt place he loſeth his Life, his Eſtate real and perſonal: If that were all, a Gentleman might be his Peer; but there is ſomething more, he forfeits his Nobility, which is irrecoverable, being quite extinguiſhed; the inheritable quality of his Blood is thereby corrupted, the Houſe of Lords themſelves ſuffer with him, for they loſe a Member for ever: But a Biſhop forfeits nothing but what he hath in his Natural Capacity, and if he be conſidered as ſuch, he is no Peer; if he be conſidered as a Biſhop, *i. e.* As holding Lands of ſuch a Value in the Right of his Biſhoprick of the King, he is a Peer, but his Peerage is in no danger through his Attainder; the ſucceſſion (which he is ſuppoſed to be as tender of as a Natural perſon is of his Poſterity) is not thereby tainted; for his Peerage, together with all his Poſterity and Land, *Ratione cujus* he is a Peer, go to the Succeſſor without any reſtauration; (ſee *Stamford* 187. 6.) and ſo the Houſe of Lords loſe never a Member: How then can Biſhops, having no Nobility which they can loſe, and conſequently not being *Gents de lour condition*, be fit Judges upon the Life and Death of Noble-men? And upon what grounds can more Juſtice be expected from ſuch than from honeſt ſubſtantial Freeholders?

If this do not pleaſe, let any of the moſt violent Maintainers of this pretended Temporally-ſpiritual Juriſdiction give a rational account, wherein the advantage of a mans being tryed by his *Peers*, doth conſiſt; and let him make appear that the Lords Temporal are any Sharers of this Priviledge when they are tryed by *Biſhops*, and I am

ſatisfied; but till then, he muſt give me leave to conclude, that this Juriſdiction which is pretended to, is an abuſe of the Statute of *Magna Charta*, and therefore a violence offered to the Liberties of the Subjects of *England*.

3. That Biſhops are not *Peers* in that ſenſe the Queſtion is above ſtated in, becauſe they muſt not themſelves be tryed by *Peers* in *Parliament*: If their *Parity* be not ſufficient to intitle them to demand a Tryal by Temporal Lords, then they cannot be *Peers*, ſo as to be Judges upon the Tryal of Temporal Lords: but if they be really *Peers* to all intents and purpoſes, then we charge all our Anceſtors with a groſs Violation of the Subjects Priviledges granted by *Magna charta*; for every Biſhop is *Subditus Regis*, a Subject of this Realm, and ought of Right to have the benefit of a Subjects Priviledge of being tryed by his Peers: But ſeeing by the conſtant practiſe in former Ages, even in thoſe times when the Tyranny of ambitious Prelates, and the Influence of Popiſh Uſurpers, did ſwell to ſo great a height; when the poor credulous affrighted Laity, were glad for fear of being delivered Priſoners *In manus & cuſtodiam Prælati*, and ſecluded from the Society and Converſation of Mankind, to truckle at the Feet of the domineering Clergy, and condeſcend to almoſt all their Demands, however unreaſonable or unjuſt they were; inſomuch, that Innovations in favour of them were eaſily allowed, and new acquiſitions of Honour and Power eaſily obtained. I ſay, if in thoſe times the Honour of being Tryed by Peers hath been denied to them, it may well be inferred that they had no Right; for if it were a thing which they had any colour of pretenſion to, is it reaſonable to ſuppoſe that they quietly without reluctancy would reſign it? when we have Records and Hiſtories full of their Clamours for breach of *Magna Charta*, of their Contentions with their Liege Lord and Sovereign in things that were againſt the known and eſtabliſhed Laws of the Kingdom, tending to the diminution of the Kings Prerogative, the hindring of the Execution of Juſtice upon Malefactors, and the diſpoſſeſſing and injurious Expulſion of the Subject from his juſt and hereditary Right, where they had no reaſon in the world for it, onely that they were inflamed with indignation, that the Native Courage and inbred Generoſity of Mind that was in our Anceſtors, not enduring themſelves to be trod upon, nor their Necks to be laid under a Yoke of Tyranny and Uſurpation; did obſtruct the unſufferable growth of that Power and Dominion which their own Pride and Ambition, together with the example and ſucceſs of their Brethren in other Countries, had ſpurr'd them on to. Theſe things are well enough known to all people, whoſe Eyes are opened, and therefore I ſhall not inſiſt upon them; but ſhall prove that Biſhops ought not to be tryed by Temporal Lords: and for that I have the Suffrage of all Learned men, My Lord *Coke* in the Third Inſtitutes, Fol. 30. is expreſs in the Point, *Spiritual Lords ſhall not be tryed by Peers*. *Stamford* in his Pleas of the Crown, *Lib.* 3. *cap.* 1. *De Trial per les Peers*, ſaith, That the Statute of *Magna Charta*, and 20 *H.* 6. *cap.* 9. Which gives Dutcheſſes, Counteſſes, and Baronneſſes the ſame Priviledge that their Husbands have; *Nad eſte miſe in ure de entender a un Eveſque ou Abbe coment que ils uſoient le noſme des Seignior de Parliament, car ils nont cel noſme d' Eveſque ou Abbe ratione Nobilitatis ſed ratione Baroniæ que ad lieu in Parlement in reſpect de lour Nobilitie, ejus in reſpect de lour ſeſſion, &c. Car auncient Baronies annexes a lour Dignities & accordant a ceo il ad eſte uſes & reſidents dont l'un fuit in temps le Roy H.8. &c.* Of the ſame Opinion, and for the ſame Reaſon is *Selden*, *ubi ſupra*; We find the ſame agreed by Juſtice *Holland* 22 *E.* 3. *fol.* 579, 112. and *Elſynge* in his *ancient Method of holding Parliaments*, *fol.* 141. And the Book which I above cited, *Br. Tit. Enqueſt* 99. 27 *H.*8. in the Biſhop of *Rocheſter's* Caſe, it is reſolved, That when a *Biſhop* is to be tryed for Treaſon, it is not neceſſary that he have Knights in his Jury, although he ſhall have that Priviledge in a Tryal for his Land; which proves that his Peerage is more for the Priviledge of the Lands and Poſſeſſions of the Biſhoprick, then the Perſon of the Biſhop: as you may further ſee if you compare this Book with *Plowd.* 117. *Br. Tit. Tryal* 142. and *Fitz. Cor.* 115. And I dare affirm there is not any one Lawyer or Antiquary of Note that diſagrees from this: But before I go from this, I ſhall ſtrengthen theſe Authorities by Precedents.

I ſhall

I shall begin with *Adam de Orleton*, or *Torleton* Bishop of *Hereford*, who in the 1st of *Ed.* 2. was accused while he was sitting in Parliament, of Conspiring with *Roger Mortimer* Earl of *March*, and aiding him with Horse and Arms in open Rebellion; whereupon he was ordered to the Barr of the House of Lords; he made no Answer to those Crimes that were laid to his charge, only that he was *Suffragan* to the *Archbishop* of *Canterbury*, who was his direct Judge under the *Pope*, and without his leave and the consent of his Fellow-Bishops he would not answer: Now although the Statute of *Articuli Cleri* restraining the benefit of Clergy to *Edw.* 3, was made but eight years before this, yet the rest of the Clergy in that disorderly time (observe the Humility, Obedience, and Loyalty of our Spiritual Fathers in those days) had the impudence in the presence of the King, to pull him violently from the Barr and deliver him to the Archbishop: The King was enraged at this Insolence, and gave special Order to apprehend him again, which was done, and was arraigned upon an Indictment at the *Kings-Bench-Bar*, and upon the Question, *How he will be tryed?* He said, *Quod ipse est Episcopus Herefordensis ad voluntatem Dei & Summi Pontificis, & quod materia prædict' Articulor' sibi imposit' adeo ardua est quod ipse non debet in Curia hac super prædictis Articul' impositi respondere nec inde respondere potest absque offensu Divino & Sanctæ Ecclesiæ.* Hereupon Day is given over, and after some Continuances, the Record goes on thus; *Et præceptum est Vic' Comit' Hereford quod venire faciat coram Domino Rege*, &c. *tot & tales*, &c. *ad inquirendum prout mores est*, &c. And a Common Jury is returned, which find him Guilty, and his Goods and Lands are seised into the Kings Hands, and after Conviction, he is delivered unto the Archbishop, to the end (I suppose) that he should be Degraded; for in this Case being High-Treason there could be no *Purgation*. See the Record of his Attainder, Hill. 17 *E.* 2. *Coram Rege*, Rot. 87. Dors' *Co. 3. Inst.* 30. *Fuller's Ch. Hist. fol.* 167. *Tho. Walsingham, fol.* 199. It appears by the Record it self, and all the Histories of those times, what Artifices were used, and with what Industry every Stone was turned by the Clergy, to keep the Bishop from the Justice of the Nation; and is it to be supposed, that they would wave their *Jus Paritatis*, if they had it? We have a world of Complaints in *Walsingham*, and other old Monks, against the whole Proceeding, but not one word of any Injury done to their Peerage.

Baker 124. *Co.* 2. *Inst.* 624.

The next Precedent is in *Trin.* 30 *E.* 3. Rot. 11. *John de Isle* Brother to *Thomas Hen* Bishop of *Ely*, was Indicted in *Huntington*, that he with divers others, *per assensum & procurationem Episcopi prædict'* 28 *E.* 3. *Die Lunæ post Festum Sancti Jacobi*, burnt the House of the Lady *Wake*, at by *Sommersham in Comitat. prædicti, & quod prædict' Tho. Episcopus sciens prædict' combustionem per prædict' servientes fuos esse factam, dictos servientes apud* Sommersham *prædict' postea receptavit*, &c. And also it was found before the Justices and Coroners, that 29 *E.* 3. the said Bishop was guilty *de assensu* of the Murder of one *William Holme*, slain by *Ralph Carlesse* and *Walter Repton*, called *little Watt*, upon Malice conceived against *Holme*, because he followed the Suit of the Lady *Wake*; the Principals were attainted by Owtlawry, the Bishop was Arraigned, and upon question, how he would be tryed? He answered, *Quod ipse est membrum* Domini Papæ, *& quod ipse ab ordinario suo viz. venerabili Patre Domino* Simone Archiepiscopo Cant. *Angliæ Primat respondere non potest, & super hæc Dominus* Archiepiscopus *præsens hic in Curia petit quod dictus Episcopus* Elyensis, *de felloniis prædictis sibi impositis hic coram* Laico Judice *non cogatur respondere; & ut sciatur inde rei veritas per inquisitionem Patriæ præcept' est Vicecom'* &c. *Ad quem diem*, &c. *Jurat' trial*, &c. *dicunt super Sacramentum suum quod idem* Episcopus *est in nullo culpabilis; sed dicunt quod idem* Episcopus *post feloniam factam ipsos servientes receptavit sciens ipsos feloniam fecisse*, &c. *Et super hæc prædict'* Archiepiscopus *præsens in Cur' petit ipsum tanquam Membrum Ecclesiæ sibi liberari, & ei liberatur custodiend' prout decet.* Here is a Bishop Indicted, Arraigned, Tryed by a Common Jury, and Convicted as accessory to several Felonies, as burning of a House, and killing a Man, both before and after the Felonies committed: And it is observable, the Jurors were tryed as appears by this Record, and that proves the Bishop had his

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Challenges to them at his Tryal: And is it not very ſtrange that they ſhould proceed at this Rate againſt a *Peer of the Realm*, over whom they had no Juriſdiction, and a Biſhop too, at ſuch a time when the Clergy were the onely men about Court; as *Simon Langham* Archbiſhop of *Canterbury*, Lord Chancellor; *William* [illegible] Archdeacon of *Lincoln*, keeper of the Privy Seal; *David Wi*[illegible] Parſon of [illegible], Maſter of the Rolls; ten Beneficed Prieſts, Maſters of the [illegible]; *Robert Vfford* Dean of S. *Martins le grand*, Chief Chamberlain of the [illegible], Receiver and Keeper of the Kings Treaſure and Jewels; *William Aſkby* Archdeacon of [illegible], Chancellour of the *Exchequer*; *William Dighton* Prebendary of S. *Martins*, Clerk of the Privy Seal; *Richard Chefterfield* Prebend of S. [illegible], treaſurer of the Kings Houſe; *Henry Snatch* Parſon of *Oundell*, Maſter of the Kings Wardrobe; *John Newnham* Parſon of *Leigh-ſharton*, one of the Chamberlains of the *Exchequer*; *John Rowſby* Parſon of *Hanwell*, Surveyor and Controller of the Kings Works; *Thomas Brittingham* Parſon of *Aſby*, Treaſurer to the King for the part of *Guiſnes*, and the Marches of *Calice*; *John Trevs* a Prieſt, Treaſurer of *Ireland*. Theſe I have ſpecified here, becauſe when any Examples are put of Juſtice had againſt Eccleſiaſtical Malefactors, there are a ſort of people who preſently cry out, *Their wings were clipt: They were under contempt and hated by the Laity*, &c. But what Credit is to be given to them, may be gathered from what hath been ſaid.

Thomas Merles Biſhop of *Carliſle*, was in the 2 *H.* 4. Indicted of Conſpiring with *Iſſland* Earl of *Kent*, and the Dukes of *Exceter* and *Surrey*, and the Duke of *Aumerle*, *Montacute* Earl of *Salisbury*, *Spencer* Earl of *Glocester*, and others, to kill the King: he was thereupon Arraigned before *Thomas* Earl of *Warwick*, and other Juſtices of *Oyer* and *Terminer*, in *Middleſex*, and Tryed by a Common Jury, and found Guilty; afterward the Record was removed to the *Kings Bench*, and the Biſhop put into the *Marſhalſea*, and afterward he is brought to the Bar, and being asked, if he had any thing to ſhew why Judgment ſhould not be given on him, he pleads his Pardon, and it is allowed: *See the Record of his Attainder*, *Hill.* 2 *H.* 4. *Coram Rege*, *Rot.* 6. *Co.* 2. *Inſt* 636. 3. *Inſt.* 30.

But to come ſomewhat nearer our times; *Fiſher* Biſhop of *Rocheſter* is Indicted, Arraigned and Tryed by a Common Jury, for ſpeaking Treaſonable Words againſt an Act of Parliament made the 26 of *H.* 8. making the King Head of the Church, and abolishing the Authority of the *Pope* of *Rome*; and was Condemned at the *Kings Bench*, and Executed, *Br. Tit. Tryal* 142. *Inqueſt* 99. 27 *H.* 8.

The laſt that I shall name, is that Holy and Renowned *Martyr*, Archbiſhop *Cranmer*, who was Tryed with Lady *Jane Gray*, and her Husband Lord *Guilford*, and two younger Sons of the Duke of *Northumberland*, *Ambroſe* and *Henry*, at *Guild-Hall*, before the Lord Mayor and Judges, the Third Day of *Nov.* in the Firſt Year of Queen *Mary*'s Reign, 1553. Where they were all found Guilty, and Condemned of High Treaſon. None of theſe were Executed upon this Judgment, except Lady *Jane* Gray and her Husband, who upon a Second Miſcarriage of her Father the Duke of *Suffolk*, in joyning with Sir *Thomas Wyat* to oppoſe King *Philip*'s Landing, were Executed in the *Tower* the 12th of *Febr.* following: On the 20th of *April* following, *Cranmer*, *Ridley*, and *Latimer*, were adjudged Hereticks at *Oxford*, and Degraded by Commiſſion from the *Pope*, and a little after Cardinal *Poole* ſucceeded *Cranmer*, who was burnt as a Heretick 14th of *Febr.* 1556. All this is known to thoſe that are acquainted with the Tranſactions of thoſe times; and therefore it is evident both from the Authority of Learned Men, and the Practice of all Ages in all times, that Biſhops have been Tryed by Common Juries: And ſure it was not without ground that ſo Grave and Judicious an Author as *Camden*, ſhould ſay, That the Spiritual Lords enjoy all the Priviledges that Temporal Lords do, ſaving only the Buſineſs of Tryal by Peers.

Having thus proved what I before aſſerted concerning the Tryal of Lords Spiritual; I ſhall in the next place conſider the Anſwers that are generally made to theſe Arguments and Authorities. Thoſe I obſerve to be principally two:

1. They

1. They will very well agree with thoſe Authors that ſay, Biſhops are not to be Tryed by Peers; but then (ſay they) it was not for want of Peerage, but becauſe they would not be put to anſwer for any Capital Crime before Lay-Judges.

2. They ſay, that if it happened that at any time a Biſhop was Tryed by Lay-men and by Common Juries, then they were firſt Degraded.

If there were no more to be ſaid for this, the very reading of the fore-mentioned Precedents would eaſily make appear the weakneſs of theſe Objections; for it appears by the very Records, that their Priviledge of Clergy was inſiſted upon, and that with a great deal of Zeal and Fervency; inſomuch that the Paſſage of the Biſhop of *Hereford*, is a thing taken notice of in a ſpecial manner by all the moſt Famous Hiſtorians of this Nation; and it is generally agreed, that about Fourteen Biſhops came with their Croſſes erected to the place of Judgment, threatning all people with Excommunication that offered to oppoſe them in that which they intended; and yet we find that he was not delivered till after he was found Guilty: And it's manifeſt from all the other Precedents, that they were found Guilty, and moſt of them Condemned to die upon the Verdict of Twelve Lay-men. But as to the buſineſs of Deprivation, you may obſerve, that throughout the whole Records they are named Biſhops, as *Epiſcopus Herefordenſis*, *Elienſis* and *Roffenſis*, which could not be if they were Degraded; for then theſe Titles were not rightful additions in Law. And although it being evident that ſo it was *de facto*, is a ſufficient Anſwer to the Objections; yet for more abundant ſatisfaction, I ſhall be ſomewhat more large in this, and ſhall ſhew that ſo it ought to be *de jure*.

In handling this Point, I ſhall conſider theſe following Particulars:

1. To whom this *Privilegium Clericale*, or Exemption from Temporal Juriſdiction, ought to have been allowed?

2. I ſhall conſider ſomewhat of the Nature of this Exemption and Immunity, and how far they were exempted from Secular Power.

3. I ſhall examine in what Caſes it was allowed, and in what, not.

4. At what time.

5. Upon what account it was that Clergy-men were delivered to their Ordinaries in thoſe Caſes where the benefit of Clergy was not allowed.

And laſtly, I ſhall ſhew at what time regularly they were Degraded.

I. As for the firſt, It was generally allowed to all within Holy Orders, whether Secular, or Regular, and in an equal Degree to all ſuch, not reſpecting Superiority, or Inferiority: The poor Country-Parſon had as good and as large a Right to it, as my Lord Biſhop. This is proved, firſt, From the Canons that gave this Immunity; the firſt (I think) were made by Pope *Gaius*, and thoſe run; *Clericus coram Judice Seculari Judicari non debet nec aliquid contra ipſum fieri, per quod ad periculum mortis vel ad mutilationem membrorum valeat pervenire*, &c. See *Lindwood Tit. de foro compet. c. contingit. Polichro. lib.* 4. *c.* 24. *of Pope* Gaius, *and* Onuphrius *in his Comment upon* Platina, *in the life of that Pope.* Therefore ſeeing he cannot take any advantage of theſe Canons, except as *Clericus*, and muſt claim it by the ſame Name that inferiour Prieſts do, he muſt have it in the ſame Degree. But that which is a great deal ſtronger than the Conſtruction of Canons, is the Confirmation that is made by our Acts of Parliament; this Priviledge is granted to all that are *Clerici*, or *Clerks* in French, and *Clergy-men* in Engliſh; and to all ſuch indefinitely without diſtinction, or reſpect of the ſeveral Ranks and Degrees of men within Holy Orders: So you will find it in *Marlebridge c.* 28. *Weſt.* 1. *c.*2. *Art. Cler. c.*15. 25 *E.*3. *c.*4, & 5. 4 *H.* 4. *c.* 3. and the reſt. So that without all queſtion, a Biſhop can pretend to no more Priviledge than any other Clerk *cauſa qua ſupra.* This I thought fit to obſerve firſt, becauſe that every Authority and Precedent that I ſhall bring of an inferiour Prieſt, is as ſtrong for my purpoſe, as if it were of a Biſhop.

II. As for the ſecond Point, I ſhall not need to be very large upon it, but ſhall obſerve one thing which will be ſerviceable to my preſent purpoſe, and that is this: That every Temporal Magiſtrate and Judge of this Kingdom, hath, and in all times ever had, by the Common Law, Juriſdiction over every Subject in the ſame Degree

of Nobility that was reſident within the Verge and local extent of his Juriſdiction: This Power and Authority of his being Univerſal, he was never bound to take notice of the Priviledges and Immunities of any particular Orders and Societies of Men, if they themſelves would not take advantage of it; ſo that this ſame *Previlegium Clericale* was no abſolute exemption from Secular Authority, ſo as to make all Proceedings before a Secular Judge, to be *Coram non Judice*: but the end and deſign of it was, that when any Clergy-man was Arraigned as a Malefactor before a Secular Judge, then in ſome Caſes, before he ſuffered the puniſhment that was due by Law, he was delivered to his Ordinary to make his Purgation; if he could, then his Ordinary diſcharged him; but if he could not, then he was Degraded and ſent back to the Temporal Magiſtrate to ſuffer puniſhment according to his Demerits. That the Proceedings of a Secular Judge upon one within Holy Orders, are not *Coram non Judice*, might be proved both out of Civilians and Canoniſts; but that would not be much to the purpoſe if I ſhould, and therefore I ſhall forbear; only ſhall take notice of a Paſſage in Dr. *Ridley's View of the Civil and Eccleſiaſtical Law*, pag. 86. *If a Clerk* (ſays he) *be firſt Arreſted by his Spiritual Judge, and found guilty, he ſhall be Degraded and delivered over to the Temporal power; but if he be firſt Arreſted by the Secular Magiſtrate, and Tryed, and found Guilty, he ſhall be delivered to the Biſhop to be deprived, and then delivered back to puniſhment.* The ſame in effect he ſaith *p.* 158. whereby he doth allow, that according to the Eccleſiaſtical Law, the Temporal Judges were allowed to have Juriſdiction over men within Holy Orders: But let him or any of the Civilians or Canoniſts ſay what they will, it's no great matter; we muſt conſider what the Law of *England* ſaith in this caſe: for the Canons never were in force in *England* any further than they were voluntarily received, and ſo tranſmitted as a common Uſage or Cuſtom to Poſterity by Tradition, and ſo became part of the Common Law; or elſe were confirmed by Act of Parliament, and ſo became part of our Statute-Law, of which more hereafter. And that by the Law of *England* the Proceedings againſt Eccleſiaſtical Perſons before a Secular Judge, are not *coram non Judice*, I prove by theſe Caſes: An Appeal of Robbery was brought againſt a Monk, who was tryed and acquitted; upon this the Abbot and the Monk brought a Writ of Conſpiracy againſt divers who procured and abetted the ſaid Appeal: whereupon the Defendants appear, and go to Tryal; but the Abbot and Monk get a Verdict and Judgment to recover 1000 Marks damages, *Co.* 2. *Inſt.* 638. But it is certain, that a Writ of Conſpiracy cannot lye except the Plaintiff had been *Legitimo modo acquietatus*, and that he could not be, if the whole Proceedings upon the Appeal had been *Coram non Judice*. So if at the Common Law a Clergy-man had been Indicted of Felony, and had confeſſed the Fact in Court, he could not have had the benefit of his Clergy, becauſe the end of granting it, was, that he might make his Purgation before the Spiritual Judge, but that he could not after he had confeſſed the Fact in Court. *Co. ubi ſupra, Stamford* 124. And yet no Confeſſion *coram non Judice* is concluſive. All which doth evidently prove, That the allowance of thoſe Canons which gave the firſt birth to this Immunity, did not trench to the prejudice of Temporal Judges, ſo as to bar them of that Juriſdiction which they have over every Subject by the Common Law: And the Nature of it will further appear, if we take into conſideration the Third Particular, which is this:

III. In what Caſes the benefit of Clergy was allowable, and in what not; This Immunity was allowed in *England* long before any Statute was made for its confirmation; it was allowed onely in ſuch caſes as were judged reaſonable, but never in full ſatisfaction to the demands of the Clergy: *Kellaway* 7 *H.* 8. 181. *b.* But the Clergy (as their Cuſtom then was) were willing to improve any Conceſſion to their beſt advantage, according to the Common Proverb, *When they had got an Inch, they would take an Ell.* And to that end did with a great deal of fervency and zeal (no doubt) inſiſt upon their Priviledge as an abſolute Exemption from all Temporal Juriſdiction, to all intents and purpoſes, extending to all Crimes and Offences whatſoever, and thundring out Excommunications, and ſuch like Maledictions, forced ſome people for quietneſs ſake to comply with them, (as appears by *Bracton*, *lib.*

lib. fol. 123.) to the great incouragement of all ſorts of Villanies and Outrages, and conſequently to the grievous oppreſſion and vexation of the Subject: for this aſſurance, or at leaſt hopes of Impunity, let looſe the Reigns of Rapine and Violence, and was the moſt effectual courſe that could be taken for the diſſolution of any Government, and the utter deſolation and ruine of any Country whatſoever. To give a check to this exorbitant Licentiouſneſs, ſtrict care is taken by the Judges and Magiſtrates, that Juſtice be duly executed, and Offenders legally puniſhed; and therefore the *Privilegium Clericale* not to be allowed in any Caſe otherwiſe then according to the ancient Cuſtom: Hence were the ſeeds of Envy and of a very laſting Diſcord between Church and State ſown; nothing but Animoſities, Rancour, Revenge and Hatred, is the Subject of the Hiſtory of thoſe times, eſpecially the time of *Thomas Beckett*: Bulls, Citations, Excommunications, on the one ſide, and ſeiſing of Temporalities, Impriſonment and Baniſhment, on the other ſide, were the Complements that people were entertained with in thoſe days: Theſe Differences grew to ſuch a height, that although through a formal Reconciliation, both Parties ſeemed to be pacified; yet the Root of the Matter remaining untouched, the Fewds break forth, and the Matter muſt be decided by Act of Parliament: And ſo I ſhall by the conſtruction of theſe old Statutes, and other Precedents, give a direct Anſwer to the Queſtion.

Vide Parliam. held at Clarendon. 11 H. 2.

1. It is undeniable, that *Privilegium Clericale* was never allowed to any that were Guilty of *Crimen læſæ Majeſtatis*: The firſt Statute that we find among the Printed Statutes, which doth directly ſpeak of it, is *Weſtm.* 1. *c.* 2. which is declarative of the Common Law by the expreſs words of the Statute, *Solonque le Cuſtom avant ces heures uſe*, but ſaith not one word of Treaſon, only allows the Priviledge in Caſes of Felony, *Si Clearke ſoit priſe pur rette de Felony.* Wherefore this Statute being in the Affirmative, determines nothing concerning Treaſon, but leaves that as it was before at the Common Law. Not long after the Clergy renewed their Complaints, and among the reſt, complain that Secular Judges have paſſed Judgment of Death upon men within Holy Orders, and claim their Priviledge abſolutely and generally in Articles ſeveral, which they preſented to the King in Parliament. To this they receive Anſwer by the Statute commonly called *Articuli Cleri*, in theſe words: *Clericus ad Eccleſiam confugiens pro Felonia pro Immunitate Eccleſiaſtica obtinenda*, &c. *gaudebit Libertate Eccleſiaſtica, juxta laudabilem conſuetudinem Regni hactenus uſitatam.* This being an Anſwer much like the former, did not ſufficiently anſwer their Deſires, expreſſing only Felony; nor on the other ſide did it hinder the Temporal Judges from proceeding againſt them, as againſt Lay-men in Caſes of High Treaſon, as they had done always before: Wherefore they do afterwards, *viz.* in the 25th of *E.* 3. make a grievous Complaint, that the Kings Judges had given Judgment of High Treaſon againſt *Houby* and *Cibthorp*, Prieſts, and ſeveral other Religious Perſons, whereby they were Hanged, Drawn and Quartered, to the great Diſhononr of the Church, *&c.* To this they have a direct Anſwer by the Statutes of 25 *E.* 3. *c.* 4, & 5. Whereby (reciting their Complaint) it is Enacted and Declared, that all Clergy-men Convicted for Treaſon or Felony againſt any other Perſon than the Kings Majeſty, ſhall enjoy the Liberties of the Holy Church, *&c.* and from henceforward (but never before) the benefit of Clergy was allowed in Petit Treaſon, till by 23, & 25, & 32 *H.* 8. it was taken away; but High Treaſon is excepted out of that Statute of *E.* 3. and therefore was ever ſince puniſhed without the allowance of Clergy as it was before: And accordingly the Abbot of *Muſſenden* was Condemned to be Hanged, Drawn and Quartered, *Pro contrafactione & reſectione legalis monetæ Angliæ, Mich. coram Rege* 31 *E.* 3. *Rot.* 55. And it is taken for a General Rule, *Trin.* 21 *E.* 3. *coram Rege, Rot.* 173. *Quod privilegium Clericale non competit ſeditioſo equitanti cum Armis*, &c. Thus I have ſhewn that in the Caſes of *Orleton*, *Merkes*, *Fiſher*, and *Cranmer*, the benefit of Clergy could not be allowed by the Law of *England*, they being Caſes of High Treaſon.

But in Caſes of Felony, the benefit of Clergy was always allowed, till it was taken away in Caſes of Murder *ex malitia præcogitata*, Poyſoning, Burglary, Robbery, *&c.*

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by the 1 & 6 *Edw. 6. cap.* 12. & *cap.* 10. This is ſufficient for this Point.

IV. The Fourth Queſtion, At what time the benefit of Clergy ought to be pleaded or demanded? comes to be examined. I conceive, that the common practice both before and after the Statute of *Weſtm.* 1. was to deliver them to the Ordinary after Conviction, and therefore they would not ſuffer them to demand it before: My Reaſon is, becauſe the Statute of *Weſtm.* ſaith thus; *Si Clearke ſoit priſe pur rette de felony, & ſi il ſoit per l' Ordinarie demand, il luy ſoit livere ſolonque la privilege de Saint Eccl'* &c. *ſolonque le cuſtom avant ſes heures uſe.* This Statute grants no new Priviledge, but confirms only that which they had before: And as for the time of allowing the Priviledge, the words of the Statute are ſo ambiguous, that it is very hard to determine the Queſtion from thence; only the Statute refers it to the Cuſtom of the former Ages: for the Priviledge of the Holy Church is to be allowed *ſolonque le cuſtom*, &c. Now all the Judges of *England* did after this Statute determine, that they would not deliver any Priſoner to the Ordinary till he was firſt Indicted, and alſo thereupon Arraigned, and till it was Inquired by an Inqueſt upon his Arraignment, whether he were *Guilty* or not *Guilty*; if not Guilty, then he was diſcharged without any more ado; but if Guilty, his Goods and Chattels, Lands and Tenements were forfeited, and his Body delivered to the Ordinary: So ſaith *Britton*, cap. 4. f. 11. *Si Clearke encoupe de felony allegga Clergie, & ſoit per l' Ordinarie demand, donque ſerra enquiſe comment il eſt miſcreue* (*i. culpable*) *& ſil eſt trovenient miſcreue donque il alera quite. Et ſil ſoit & trove miſcreue, ſes Chateux ſerroient taxes, & ſes terres priſes in mayne le Roy, & ſon corps deliver al Ordinarie.* The ſame you will find in the *Mirr. c.* 3. *Co. 2. Inſt.* 164. in his Expoſition upon that Statute; and *Stamford* 131. And this we muſt ſuppoſe to have been the practice before the Statute; becauſe the Statute appoints the ancient Cuſtom to be obſerved, and there were none that knew the ancient Cuſtom ſo well as the Judges of thoſe times; and therefore this determination of the Judges was either according to the Cuſtom *avant ſes heures uſe* (as the Statute ſpeaks) or elſe it was not according to Law: but that is abſurd, eſpecially ſeeing it was not only one reſolution, but the conſtant practice ever ſince; for in the Record of all Indictments of Clergy-men, if they refuſed to anſwer, but pleaded their *Privilegium Clericale*, and were demanded by their Ordinary; the Record is entred —*Sed ut ſciatur qualis ei liberari deberat*, (i. whether Guilty or not Guilty) *inquiratur inde rei veritas per patriam.* And in the Year-Books we have multitudes of Caſes that do prove it, as you may ſee in the Margent; the ſame is proved by the fore-mentioned Record of the Biſhop of *Ely*, 30 *E.* 3. And there is a like Caſe, 40 *E.* 3. *Fitz. Tit. Cor.* 91. And the Statute of 25 E. 3. *c.* 4. ſaith expreſly, That all Clergy-men Convict of Treaſon and Felony, &c. Which intimates that Clergy was not to be allowed till after Conviction. And ſo I have anſwered what ever they can object againſt the above-cited Authorities and Precedents from the benefit of Clergy; and therefore ſhall now briefly conſider the two laſt Particulars.

Fitz. Tit. Cor. pl. 41. 8 *E.* 2. 1 *E.* 2. 386. 19 *E.* 2. 233.

V. In the fifth place I am to conſider, Upon what account it was that Clergy-men were delivered to their Ordinaries, in thoſe Caſes where the benefit of Clergy was not allowed: The delivering of a Clerk Convict to his Ordinary, could be only for theſe ends, either that he might make his Purgation before his Spiritual Judge, or that the Ordinary might Degrade him, and then deliver him over to the Secular Power, to be puniſhed according to Law as a Lay-man, leſt Scandal and Indignity ſhould be put upon the Church: The former is onely in Caſes where Clergy is allowed; for where there is no Clergy, there can be no Purgation: The latter is, where no Clergy can be allowed.: The former is *de Jure*, and cannot be denied. I do not mean *Jure Canonico*, but is a Cuſtom which hath been allowed time out of mind, and confirmed by ſeveral Acts of Parliament; and for that reaſon only, I ſay, it is *de Jure*. The latter is, *de Gratia*, and Arbitrary; for our Judges have had ſuch an Honour and Eſteem for the Dignity of a Prieſt, that they uſually did deliver them to the Biſhop to be Degraded, before the Sentence of Law was executed upon them. So it is in all Caſes of High

Vide Co. 2. Inſt. 636.

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Treaſon, for there being no room for Purgation, the Judges are not at all obliged to deliver him, but out of favour they were wont to do it, to the end he might be Degraded; and if that Cuſtom were ſtill obſerved, there were no great harm in it: yet in *Trin.* 24. *H.S.* in *Spelmans* Reports we have a Caſe of one *George Nobles* a Prieſt, who was Convicted at the Gaol-delivery of *Newgate*, of Clipping the Kings Coin; and by the Reſolution of all the Judges, they paſſed Sentence of Death upon him before any Degradation, and he was accordingly Executed in his Canonical Veſtments. In a Record upon the Parliament, *Roll* 21 E. 1. *Rot.* 9. it is to be found, that one *Walter de Berton* was Convicted of Counterfeiting the great Seal; but the Record ſaith, *Qui convictus traditur Epiſcopo Sarum qui eum petiit ut Clericum ſuum ſed ſub pena*, &c. *& ſub forma qua decet quia videtur Concilio quod in tali caſu non admittenda eſt purgatio.* Here it appears a perſon Convicted was delivered to his Ordinary in caſe where there could be no Purgation, and ſo no benefit of Clergy; and therefore it is evident that it was to the end he ſhould be Degraded, and upon that the Delivery is with a *Subpœna*, which can be underſtood no otherwiſe but that he ſhould re-deliver him.

VI. As to the laſt point, at what time they ought to be Degraded, may be determined partly from what hath been ſaid already; for the end of Degradation, is only to prevent that Scandal and Irreverence which would otherwiſe be thrown upon that honourable Profeſſion, which all ſober and true Chriſtians are very tender of: And certainly there cannot regularly be any Deprivation or Degradation before Conviction; for no Clerk can be Deprived or Degraded of any Benefice or Dignity, except upon full Evidence he be found ſuch and ſuch a perſon as is uncapable of enjoying it. And as a Biſhop cannot refuſe a Clerk preſented, except there be ſpecial cauſe for it, as *criminoſus*, &c. ſo neither can he deprive one that is already Inducted without ſpecial cauſe; and in any Court of Record the Cauſe muſt be ſpecially pleaded, becauſe it is Traverſable, *Co. lib.* 5. 2. *part. fol.* 58. *Specots* Caſe. Suppoſe then that any Eccleſiaſtical Perſon is Arreſted for Treaſon, the Ordinary cannot deprive him, except he firſt paſs Sentence upon him, that he is *criminoſus*; but he cannot paſs Sentence of Deprivation upon him, while he is under the Cuſtody of the Temporal Magiſtrate, and before he is delivered to him: for it is the greateſt piece of Injuſtice in the World, to Condemn a man before he be heard: indeed our Law allows that in caſe of Outlawry, but that is when he may appear, and yet after Five ſolemn Proclamations, will not; but it is againſt the Law of Reaſon, and the Laws of all Nations, to Condemn a man that is abſent, when at the ſame time they know he cannot appear; and therefore no Clerk can be deprived till he be delivered by the Temporal Judge: and I have already proved that there can be no Delivery till after Conviction; ſo that it doth neceſſarily follow, that there can be no Deprivation till after Conviction; and for further confirmation, ſee *Ridley, ubi ſupra, Bracton. lib.* 3. *fol.* 123. *Clericus, Ordinario traditus ſi in purgatione defecerit, degradari debet, Fleta lib.* 6. *c.* 36. *Degradare poteſt Epiſcopus criminum convictos.* Whereby it appears, firſt, That before Degradation, they muſt be allowed the benefit of making their Purgation, if they can, and that they have not except they be preſent when they are Condemned. 2ly, That they muſt be *Traditi* or *Convicti* before Deprivation.

The Caſe of a Biſhop ſeems parallel to the Caſe of any other Clerk; for the King is Patron of all the Archbiſhopricks and Biſhopricks of *England*, they being all of his and his Progenitors Foundation: They muſt either therefore be Donative or Eligible; before King *John*'s time they were Donative, *per traditionem Annuli & Paſtoralis baculi:* But he by his Charter 15. *Jan. Anno Regni* 17. granted that they ſhould be Eligible, and therefore were made to be in the nature of Advowſons preſentable: when therefore the King did nominate or preſent ſuch a perſon to the Biſhoprick, that perſon could not be refuſed without ſome ſpecial cauſe of refuſal; but if it did appear that he was either Infamous, Irreligious, Schiſmatick, Heretick, Miſcreant, Infidel, *mere laicus*, &c. I conceive he might well be refuſed; or elſe to what purpoſe iſſued forth the *Conge d'eſtier*? What ſignified King *John*'s making them Eligible? And therefore there being the ſame Reaſon and Law of Degradation or Depriva-

tion after actual Inveſtiture, that there is of refuſal before: I infer there can be no Deprivation of a Biſhop without Cauſe, and that Cauſe cannot be adjudged to be in him before he be heard, and have the Juſtice to defend himſelf as well as he can, allowed him; and conſequently no Deprivation till after delivery out of the hands of the Secular Power, which is in no caſe till after Conviction. Theſe Particulars explained and proved, will ſatisfie all thoſe whoſe Sentiments are regulated according to the Standard of Reaſon, that there is no ſtrength in any of thoſe Objections which ſome ignorant people do ſo much inſiſt upon.

Having thus by the Rules of Law, the Authority of the moſt Renowned Authors, and Variety of Precedents, proved, That a Biſhop is no Peer, in reſpect to a Temporal Lord, within the intent and meaning of the 29th of *Magna Charta*: It doth naturally follow, that he hath no Right to claim any Juriſdiction or Right of Judicature upon the Life and Death of a Temporal Lord; for otherwiſe he might ſuffer Death or Baniſhment, or Impriſonment, by the Judgment of thoſe who are not his Peers, contrary to the Fundamental Laws of *England*, and the Liberties of every Subject. And thus I conclude the firſt Point.

The ſecond Point that I offered to demonſtrate, is, That the Biſhops Votings in Capital Caſes, is contrary to the practice of all Ages untill this day.

In the firſt place, Let us examine how it was before the Reign of *Henry* the Second: It muſt not be expected that this ſhould be proved from the Records and Journals upon the Parliament Rolls, for their Antiquity will not reach ſo high as to do any conſiderable Service in this matter; but I ſhall give the ſame proof for this, that any man can give for Tryals by Juries before *Magna Charta*; that is, an Act of Parliament making Recognition of ſeveral ancient Cuſtoms practiſed beyond the Memory of thoſe that then lived; and that I hope will be ſufficient Evidence: The Statute that I mean, was made at that Great Parliament which was held at *Clarendon*, the 10, & 11 of *H.*2. *Anno Dom.* 1164. In the Preamble it is, *Recognizantur Advice conſuetudines*, which proves it is declarative of the Common Law. The Eleventh Article runs in this manner, *Archiepiſcopi, Epiſcopi, & univerſa perſona* (holding any Eccleſiaſtical Dignity) *qui de Rege tenent in Capite, habeant poſſeſſiones ſuas de Rege ſicut Baroniam, & inde reſpondeant Juſticiariis & Miniſtris Regis, & ſequantur & faciant omnes conſuetudines Regias, & ſicut cæteri Barones debeant intereſſe judiciis curiæ Regis cum Baronibus quouſque perveniatur ad diminutionem membrorum vel ad mortem.* Here is their Juriſdiction expreſly limited, that it ſhall not extend *ad diminutionem membrorum vel ad mortem.* And this Act of Parliament is declarative of the Common Law, as appears by the Preamble, and the conſtruction of moſt Authors that mention it. *In this* (ſaith *Doderidge*) *certain Recapitulations are made of the Kings Prerogative and his Peoples Right, then ſought to be infringed by the Pope and his Clergy.* So ſaith my Lord *Cook*, 2. *Inſt.* 631. and *Selden, Titles of Honour*, 582. Seeing therefore there can be no time aſſigned when this ancient Cuſtom which is here recapitulated, was not, conſequently this limitation muſt be ſuppoſed to be as ancient as their ſitting in the Houſe of Lords: But to prove that this Conſtitution of *Clarendon* (as ſome call it) is an Act of Parliament; *Matthew Paris* ſaith, *Præſentibus etiam Archiepiſcopis, Epiſcopis, Abbatibus, Prioribus, Comitibus, Baronibus & Proceribus Regni. Roger* of *Hoveden* ſaith expreſly, that *Clerus & Populus Regni* were then aſſembled, and ſo mentions it as a full Parliament. *Goldaſtus Conſtit. Imper. Tom.* 3. 347. ſaith, There were added to the Clergy, *Nobiliores & Antiquiores Regni. Fitz Stephens* calls it, *Generale Concilium.* And laſtly, our Common Lawyers do take it for granted and undiſputable. My Lord *Cook in* 2. *Inſt.* 631, and 638. calls it, *The great Parliament that was held at* Clarendon: So *Bracton, lib.* 3. *f.* 136. And this very Article above-mentioned is in all the ſaid Authors; and likewiſe in *Roger* of *Wendover*: but that which is moſt conſiderable, is, that we have *Gervaſius Dorobernienſis*, an Author that lived in that Age, and a Perſon within Holy Orders too, reckoning this very Article among the Laws that were made at that Parliament, in the 68. *Page* of his Book. But admitting it were no Parliament, but only a great Councel of Peers; yet that is as well for my purpoſe, becauſe that the

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Proceedings of ſuch a Council are Matters of Record, and therefore a Recognition or Declaration of ancient Cuſtoms, and of the Common Law made in ſuch a Council, is as undeniable proof, as if it were a Declaratory Act of Parliament; for the force of ſuch an Act is only in point of Evidence, and doth not Enact or Conſtitute any new Law. But as there is no queſtion but that it is an Act of Parliament, the Aſſembly being *a Generale*, or *Commune Concilium*, which is always underſtood of *the Parliament*, *Co. Inſt.* 110. *a.* So except it can be proved this Statute was repealed, I have made good my Aſſertion, without ſaying any more; for admitting that it had not been ſo frequently practiſed, as I in his proper place ſhall make appear it was; yet ſtill it is valid and a ſtanding Law: for no Statute loſeth its force by *Non-uſer*, *Co.* 1. *Inſt.* 114. although Common Law, or particular Cuſtoms, may.

But this Statute we find was afterward confirmed: for ſaith *Roger de Hoveden* a Monk, p. 30. It was Ordained in a Councel at *Weſtm.* That no Clergy-man ſhould *Agitare Judicium*, &c. and he that did, was to be deprived of his Dignity and Orders.

That theſe Conſtitutions were punctually obſerved in after Ages, is the next thing to be proved: And the firſt that I ſhall mention, is the Judgment againſt the *Spencers*, 15 *E.* 2. The Lords Spiritual did withdraw, as in right they ought. Theſe *Spencers* were men that were great Favourites of that King; for they had ſucceeded *Peter Gaveſton* both in the Kings Favour, and in Places of Profit and Truſt about Court: and although the Lords had then prevailed with the King to conſent to an Act of Parliament for their Baniſhment, yet afterward the Tide turned, the *Spencers* were called again to Court, and their Enemies ſeverally proſecuted; whereupon the greateſt part of them departed from Court, and through the Intereſts which the *Spencers* had with the remaining Lords, the Judgment which ſtood upon Record againſt them was reverſed for ſeveral Errors; one of which was, *The abſence of the Prelates:* but notwithſtanding this, the Judgment is afterward Affirmed by an Act of Parliament, in the firſt year of the ſucceeding King: *Vide* 1 *E.* 3. *c.* 1, & 2.

And that the Abſence of the Prelates is no cauſe of Reverſing a Judgment, ſee the Caſe of the Earl of *Saliſbury*; who in the 2 of *H.* 5. petitioned the Houſe of Lords to Reverſe a Judgment that was given againſt the Earl his Father, *An.* 2 *H.* 4. and Aſſigns for Error, That the Lords Spiritual were abſent: The Caſe was very much Debated, and at laſt it was adjudged no Error; and accordingly the Judgment was Affirmed. But of this I ſhall have occaſion to treat more at large by and by: See *Cotton*, 539.

Anno 4 *E.* 3. In the Parliament at *Wincheſter*, *Die Lunæ poſt Feſtum Sanct.* Gregorii, The Earl of *Kent* was brought before the *Counts*, *Barons & autres Grandees & Nobles*, *in meſme le Parliament*, &c. for Treaſon, *derſ. clauſ. n.* 38.

Anno eodem, in the Parliament at *Weſtm. poſt Feſtum Sanctæ Katherinæ*; The Articles of Treaſon being read againſt *Mortimer* Earl of *March*, That he had procured the Death of the late King, and had under-hand-dealing with the *Scots* at *Stanhope Park*, and had been too familiar with the Queen-Mother, by whom ſhe was thought to have been with Child, &c. The King charged *Les Counts*, & *Barons*, *les Peers de ſon Royaume*, to give Judgment: And then it follows, that Judgment was given *Per les dits Counts & Barons les Peers de Royaume*, *come Judges du Parliament*.

Ibid. The King commanded *Les dits Counts & Barons*, *Peers*, &c. to give Judgment on *Simon de Bereford*.

Ibid. The King commanded the ſame againſt ſeveral others, and accordingly *John Matravers* was judged *Per les Peers*, *Counts*, & *Barons*, *aſſembles in Parliament*. And ſo were Four others in the ſame Parliament, all for Treaſon; and not one word of the Prelates, either when the Articles were read, or when Judgment was given: For it is certain, they are never ſpoken of in any Record, but either by the Name of *Archiepiſcopi*, *Epiſcopi*, &c. or *Prelati*, or ſome ſuch Name which doth diſtinguiſh them from the Laity; and if they be ſpoken of, they are always firſt named and put before *Les Counts & Barons*; as at this day, the Records are Entred by the *Lords Spiritual and Temporal*, &c. And for theſe two Reaſons they could not be comprehended

headed under the General words, *Et autres Grandees & Nobles.*

Anno 6 *E.* 3. *Post Festum Sancti Gregorii*; The Parliament were commanded to consult of the keeping of the Peace, and punishments for the Breakers thereof; and the Prelates departed *Par ceo que il ne attinet pas a eux Conseiler de garder de la Paix ne de chastisement de tels Malefactors:* Yet afterward they came and gave their Assent to an Act of Parliament for this purpose: The reason of which shall be considered in another place, where we shall discourse of their Voting in Bills of Attainder. By this Record it is evident, That the Prelates have no Judicial Power over any Personal Crimes, which are not Parliamentary; which doth very much Fortifie the Foundation and Ground of my whole Discourse.

Anno 1 *R.* 2. The Commons prayed that such as gave up *Forth*, &c. *puissent estre a respondre a cest Parliament & solonque lour desert sortment punis per agard des Seigniors & Barons.* And thereupon several were brought before the Lords in Parliament, which must be understood of the Temporal Lords onely, because the Spiritual Lords are never intended in any Case to be mentioned, except they be specially named.

Anno 11 *R.* 2. Divers Matters of Treason were to be Treated of, and several Lords to be Tryed; and therefore the Spirituality did absent themselves from the whole Parliament: but before their departure, the Archbishop of *Canterbury*, in the Name of Himself, and all the Clergy of his Province, made this following Protestation:

Quod Archiepiscopum Cantuariensem qui pro tempore fuit, nec non cæteros suos Suffraganeos Confratres, Co-episcopos, Abbates & Priores aliosque Prelatos quoscunque Baroniam de Domino Rege tenentes, in Parliamento Regis ut Pares personaliter interesse pertinet, ibidemque de Regni negotiis & aliis ibi tractari consuetis cum cæteris dicti Regni Paribus & aliis consulere, ordinare, statuere, definire ac cætera facere, quæ Parliamenti tempore ibid. intenditur facien'. Quia in præsenti Parliamento agitur de nonnullis materiis in quibus non licet nobis juxta Sacrorum Canonum instituta quomodolibet interesse: Non intendimus nec volumus, sicuti de jure non possumus nec debemus: Ad hæc insuper protestamur & nostrum quilibet protestatur, quod propter hujusmodi absentiam non intendimus nec volumus, nec nostrum aliquis intendat nec velit quod processus habiti & habendi in prædict' Parliamento super materiis aut edictis in quibus non possumus, nec debemus (ut præmittitur) interesse quantum ad nos & nostrum quemlibet attinet futuris temporibus quomodolibet impugnentur, infirmentur, seu etiam revocentur. This was read in full Parliament, and inrolled at the Request of the Prelates: And the like was made by the Bishops of *Durham* and *Carlisle*: *Cotton* 322. *Co.* 2. *Inst.* 586.

From this Record you may observe:

1. That the Lords Spiritual do acknowledge that they have no Right to be present in Cases of Blood, *Nec possumus, nec de jure debemus.*

2. You may observe that they did accordingly absent themselves, and did thereby yield Obedience to the Parliament at *Clarendon*, and the Constitution at *Westm.* mentioned in *Roger Hoved.*, *H.* 2. That Clergy-men should not *Agitare judicium Sanguinis*; though they pretended it was in Obedience to the Canons of the Church.

3. You may observe that they did not stay in the House till they came to the final Question *Guilty* or *Not guilty*, but departed at the first beginning of the Business, *Quæ agitur de quibusdam rebus in quibus non licet nobis interesse.* These short Remarks I leave upon it at present, but shall take it more narrowly into consideration, when I come to answer their Objections, and shall go on with Precedents.

In the Reign of *H.* 4. The Earl of *Northumberland* was suspected to have been privy to the Rebellion of his Son *Hotspur*, who joyned with *Mortimer* Earl of *March*, and *Owen Glendour* of *Wales*, in open Rebellion. In the 5 of *H.* 4. he came and presented himself to the King and Parliament, and Protested his Innocency, and challenged his *Jus Parietatis*, and Right of Tryal by his Peers: Whereupon the Lords (saith the Record) made Protestation, that the Judgment belonged unto them onely, &c. The Petition being read before the King and the said Lords, as Peers of Parliament, unto whom such Judgments do of Right belong, considering, &c. Adjudged that

that it was neither Treason, nor Felony, &c. This was the first Process that was made again the Earl; but it doth not evidently appear whether they were present or absent at the Roll being Lords indefinitely; yet it is most probable that it is meant Temporal Lords onely. 1. If the Spiritual Lords had been present, they would have been named by a special Name, as they are in all other Rolls. 2. We find the Lords Temporal in other Cases of Life and Death, claiming the same Jurisdiction as belonging to them onely exclusively of the Clergy. *Anno* 4 E. 3. Judgment was given *Per les Contes & Barons, les Peers de le Roy unis, come Judges del Parliament.*

But I shall leave this, and come to the Process which Issued forth against him afterward, for the Earl being acquitted, returns home, and within a very little time hath a considerable Army in the Field, together with the Archbishop of *York*, Lord *Bardolfe*, and others; but their Army soon Disbanding, the Earl of *Westmerland* comes with a considerable Strength for the King, and takes all the Lords Prisoners, except *Northumberland* and *Bardolfe*, who fled into *Scotland*: Whereupon 7 *Hen.* 4. *Rot. Processus coram Domino Rege in Parliamento*, &c. The King commanded the Lords Temporal Peers of his Realm to advise what Process to make, and what Judgment to render against the Earl of *Northumberland*, and the Lord *Bardolfe*; and then the Record goes on thus: *And then the said Lords Advised thereon, and Reported their Opinion to the King.* ——*The said Lords Peers of the Realm, by the Assent of the King, Ordained that Proclamations should be made for the said Earl of* Northumberland, *and Lord* Bardolfe *to appear, or else to stand Convicted of High Treason by the Award of the Peers in Parliament.*

The King did further demand the Opinion of the said Lords Temporal, touching the Archbishop of York.——*Unto which the Lords Temporal said*, &c.

By Advice of the said Lords Temporal, the Returns of the former Proclamations *were made at the Parliament-Door, for the said Earl and Lord to appear.*

By Advice of the said Lords Temporal, with Assent of the King, the former Proclamations were examined. ——*The said Lords Temporal considered of the Errors therein*, &c.

By the said Lords Temporal, with Assent of the King, by their Authority new Proclamations were granted. ——*Whereupon the said Lords Temporal then being in the same Parliament, by Advice and Consent of our Lord the King, and by their Authority in Parliament, Awarded the said Earl of* Northumberland, *and the Lord* Bardolfe, *not appearing upon their Summons, to stand Convicted of High Treason*, &c.

Here we see all was done by the Temporal Lords, from the first beginning of the Process until the Judgment, and yet it is said to be Awarded by the Peers in Parliament, although the Spiritual Lords are not so much as once mentioned, and consequently were not present at any time whilst that Matter of Treason was handling.

To Enumerate all the Instances of this Nature, and to Transcribe all the Records of Attainders in Parliament, where the Names of the Lords Spiritual are left out, which infers of necessity that they were absent; would swell out this Treatise into a greater Bulk than either I intend, or then is in its self convenient. These are sufficient to prove that Obedience was yielded to those Laws and Constitutions of this Land, which were made for this purpose. I will mention one Precedent more, and that is the Earl of *Strafford's* Case, 16 *Caroli*: *The Bishops declined their Suffrages on the Tryal of the Earl of* Strafford, *according to the provision of the Canon Law, and the constant practice to this day:* (says *Baker*, 478) and therefore withdrew: But they desired a Protestation that their Absence should not prejudice them of that, nor of any other Priviledge competent to them, as the Lords Spiritual in Parliament, might be entred; which was done accordingly.

It may be objected That this is not to be made use of as a Precedent: That (I answer) is true as to the Matter of the Charge, and the Nature of the Crime that he was Impeached for; no man must by colour of that Act be Adjudged a Traytor, that doth those things which the Earl of *Strafford* did: but as to the course of Proceedings, and all other Circumstances of the Method, it is well enough; for nothing was done in that but what was warranted by Precedents and constant practice in Parliament:

And this Difference doth appear from the *Proceſs* in the Bill of Attainder, for that is no more but this: *That no Judge or Judges ſhall hereafter interpret any Act or Acts to be Treaſon, in any other manner, than he or they ſhould or ought to have done before the making of this Act; and any thing contained in this Act to the contrary notwithſtanding.* So that the *Proceſs* extends only to the Crimes, but not at all to their manner of proceeding.

From the conſideration of theſe things, That Allegation which is made by ſome, that they were wont to ſit till the final Queſtion, *Guilty* or *Not-guilty*; were put, will plainly appear to be altogether groundleſs: Becauſe

Firſt, If they have not Parity ſufficient to Entitle them to any Juriſdiction in Caſes of Life and Death, as I have endeavoured to ſhew that they have not, in the former part of my Diſcourſe; then it is evident, that they cannot exerciſe any Judicial Power at all, neither in things præliminary to the Judgment, the Judgment it ſelf, nor in things ſubſequent to the Judgment: all which do fall within the Conuſance of Judicial Power, and do belong to the Office, Power, and Juriſdiction of a Judge. For ſo ſaith *Magna Charta*, *Nemo imprisonetur*, &c. *Neſi per legale judicium parium ſuorum*, and yet Impriſonment is a thing præliminary to Judgment: The Office of a Judge is to hear firſt, and then determine, *Oyer* and *Terminer*; but if any man be not duly qualified to be a Judge, then he hath as little power to hear the Cauſe, or Act any thing in it, as to determine it.

Secondly, The Conſtitution of *Clarendon*, ſaith, *Debent intereſſe Judiciis Curiæ Domini Regis quouſque perveniatur ad diminutionem Membrorum vel ad mortem.* This muſt either be underſtood to comprehend all precedent and præliminary things, which do relate or tend *ad diminutionem Membrorum*, &c. Or elſe if we take the words ſtrictly and literally, we muſt underſtand the meaning of that great Aſſembly to be onely for the Exemption of Prelates from doing the Office of Executioners; which is Non-ſenſe: By *Diminutio*, &c. therefore or *Mors*, we muſt underſtand things conducing and tending *ad diminutionem*, &c. or *ad mortem*. The Conſtitution at *Weſtminſter* is much plainer, *Non debent agitare judicium ſanguinis*; the meaning is plainly this, That they ought not to exerciſe any Judicial Power in Caſes of Blood: But a man may exerciſe Judicial Power *agitare Judicium*; or do the Office of a Judge in a great many things that are both precedent and ſubſequent to the Judgment; as Awarding of Proceſs, receiving the Charge, *&c.* Therefore the Biſhops ought not to have any præliminary Vote which hath any tendency or relation to a Judgment of Death.

Thirdly, When ever the Clergy, in Obedience to theſe Conſtitutions, did withdraw, they left the whole Management of the Buſineſs from the beginning to the end to the Lords Temporal, as appears from the Entry of the Records: ſo it is 4 E. 3. in the Earl of *Kents* Caſe; he was brought before the *Comes* and *Barons*, &c. for Treaſon: In the ſame year the Articles were read againſt *Mortimer*, and the King charged *Les Comts & Barons*, to give Judgment upon the ſaid Articles. The ſame was in the Caſe of *Simon* de *Bereford*, *Matravers*, and others in that year: 11 *R.* 2. the Prelates departed from the Houſe at the firſt Motion about the Appeals, and did not ſtay ſo much as till the Articles were read. In the Earl of *Northumberlands* Caſe, it appears, they had not ſo much as one Vote from the beginning to the end of the whole Proceedings, and the ſole Management of the Caſe was by the Award and Judgment of the Lords Temporal. In the 21 of *R.* 2. the Prelates gave their Opinions generally, that Pardons were revocable, but after they had done, they departed the Houſe, and would not conſent ſo far to the Death of a man, as to give a particular Vote, when the Queſtion was put, Whether the Pardons of the Duke of *Glouceſter*, and the Earls of *Arundel* and *Warwick* were revokable? *Baker* 161.

And indeed if they ſhould have been permitted to Vote about their Anſwers, *&c.* it would quite fruſtrate and elude the Deſign of the Prohibition; for ſomewhat or other might happen to be put to the Vote in their preſence, concerning the Anſwer, Replication, *&c.* or concerning the Form and Method of Judicature, upon which the whole Buſineſs would depend; and by the Voices of the Spiritual Lords that Vote it, might

might paſs againſt the major part of the Temporal Lords, and ſo the whole Buſineſs loſt, and the Expectation of Juſtice fruſtrated; ſo that it is highly reaſonable, that if they be abſent at all, they ſhould be abſent, *Dum de hujuſmodi materiis agitur.*

Having thus by Reaſon and Authority eſtabliſhed the Truth of thoſe Propoſitions which I at firſt laid down, I ſhall now examine the Strength of thoſe Arguments, whereby my Adverſaries do ſupport themſelves, and maintain the Juriſdiction of the Lords Spiritual in Capital Caſes.

And 1. Their Grand Objection is, That they never abſented themſelves when Capital Caſes were Debated, upon any other account, then becauſe they were prohibited by the Laws of the Holy Church, to conſent to the Death of any man: And accordingly they made their Proteſtation, 11 *R.* 2. when they departed the Houſe, *Juxta Sacrorum Canonum inſtituta non licet nobis intereſſe*, &c. And ſuch a voluntary Departure for Conſcience-ſake (ſay they) leſt they ſhould concern themſelves in the Effuſion of Innocent Blood, could neither conclude themſelves nor their Succeſſors from claiming their Right to be preſent by the Fundamental Law of the Land, as Peers of Parliament. Here lies their Strength, and therefore a ſolid Refutation of this will remove all manner of Scruple, and diſcover the vanity of their pretenſions to any Juriſdiction of this kind: Therefore in anſwer to this, I ſhall offer theſe following Conſiderations:

1. What-ever was the Reaſon that induced them to abſent themſelves when ſuch Matters came to be Debated; yet it is manifeſt from what hath been ſaid, that there was an Act of Parliament (to which they were obliged to give Obedience, as well as the Canons of the Church) that did expreſly prohibit them to exerciſe Juriſdiction in thoſe Caſes: and although they did ſay that their Departure was in Obedience to the Canons of the Church, yet without doubt we ought to conſtrue their Departure to be alſo in Obedience to the Laws of the Land: For the Caſe at the moſt favourable Repreſentation, is no more than this; The ſame thing is both prohibited by the Law of God, and the Law of Man; thoſe who forbear from the thing prohibited, do ſay they do it, becauſe they are ſo commanded by the Law of God, and ſay no more: In this Caſe we cannot conſtrue, that either the Law of Man doth loſe its force and obligatory Power, or that thoſe perſons who ſaid they forbore from the thing prohibited in Obedience to the Law of God, did either not obey, or diſobey the Law of Man; I mean, *In foro humano.* If then the Prelates in former times did give Obedience to the Laws and Conſtitutions of this Nation in this particular; much more ought their Succeſſors, whoſe Principle is ſtrict Obedience to the Government of the Kingdom and perfect ſubmiſſion to the Higher Powers. The truth is, it was a happy thing that in the days of their Predecenors, the Law of the Church, and the Law of the Land did ſo well agree in this particular; and if you would conſider the Humors and Principles of the Men, you would not wonder ſo much at their Non-acknowledgment of the Laws of the Nation, when they could ſecure themſelves againſt the Compulſion of them and Puniſhment inflicted by them, without making any ſuch acknowledgment. It is not ſtrange that thoſe men, whoſe Zeal for Religion was ſeen moſt in their Contentions and Wranglings with the Civil Power; and who thought that Obſtinacy and Diſobedience to Regal Authority, and the Laws and Conſtitution of the Government, where they thwarted the Ambition and Grandeur of the *Pope* and his Clergy, was the moſt certain way to merit Canonization; and that *Beckett* and *Stratford*, and the reſt of that Rebellious and Diſobedient Tribe, were the mightieſt Saints that ever lived upon Earth. It is not ſtrange that thoſe Men that would trample all Humane Laws under their Feet, if diſſonant to the Canons of the Church, ſhould pretend, that when the Canons of the Chuch did agree with the Laws of the Land, they yielded Obedience to the Canons of the Church, without taking notice of the Laws of the Land. And indeed it was an extraordinary *Specimen* of Candor and Modeſty, that they did with ſo fair a pretence ſave themſelves from the inconvenience of acknowledging the Temporal Power in the limitation of their Honour and Juriſdiction, which they were never known to be very forward to do: But God be thanked the times are turned, we have reaſon to expect

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more Humility and Loyalty from our now Spiritual Fathers, whose Principles do not allow them in the least Oppoſition to lawful Authority, and who it is to be hoped will never inſiſt upon any thing, except they think that by the Law of the Land it is their Right.

Secondly, Although they pretended that their departure from the Houſe during the Debates of Capital Matters, was in Obedience to the Canons of the Church; yet it is more than probable, that the conſideration of the Law of *England* by which they were compellable to depart, whether there had been any ſuch Canons in force, or not, was the ſtrongeſt Reaſon why they did with-draw, and that for theſe two Reaſons:

1. Becauſe it is obſervable, That if thoſe in whoſe power it was to diſpenſe with their Diſobedience to the Laws of the Land, did at any time give way to their Preſence or Conſent, that they ſhould exerciſe Judicial Power in thoſe Caſes, then the Lords Spiritual uſed generally to make bold with the Canons of the Church, at leaſt *ex tacito*: How then can it be ſuppoſed, that at other times when there was no ſuch Licence or Diſpenſation, their Departure was onely becauſe of the Canons of the Church? That Record of 21 *R.* 2. where they did conſent to Conſtitute a Proxy, who ſhould in their Name agree, or diſagree to any Judgments of Death that ſhould be given in that Parliament, is very conſiderable for this Point: for in that Caſe they gave Authority to another to do a thing which was unlawfull for them to do themſelves, and it was done, becauſe the King and Parliament being the Fountain of Law, and having power *in actu ſecundo*, or more, to diſpenſe with any Law, at leaſt ſuch as come not within the Cognizance of any other Court beſide themſelves, did give them leave ſo to do: whereas without doubt, the paſſing Sentence of Death upon a man by Proxy, was as great a Violation of the Canons of the Church, as if they had been perſonally preſent, and had paſſed Judgment themſelves: For can any man rationally ſuppoſe, that the Clergy were ſo tender Conſcienced, that they ſhould not agree to the Effuſion of any mans Blood themſelves, and yet that their Conſciences would allow them to Authorize another in their Name and Place, and by their Authority to conſent to it? As if it were not the ſame thing in point of Conſcience for me to kill a man, as it is to procure another to do it: And ſo in point of Law, that which I am prohibited to do my ſelf, I am alſo prohibited to impower another to do; becauſe that which a mans Servant, Procurator, or Attorney, doth by the Command, and by vertue of the Authority of the Maſter, is in Judgment of Law and Conſcience interpretatively the Act of the Maſter himſelf: And the Conſtituting a Proxy in their Names to give Judgment of Death by vertue of an Inſtrument under their Hands and Seals, will further appear to be a breach of the Canons, if you conſider the Letter of the Canon made, *Anno* 1222. in the Reign of *H.* 3. which you may find among the *Conſtitutiones Archiepiſcopi* Stephani in *Lyndwood*, *f.* 148. ——*Authoritate quoque Concilii diſtrictius inhibemus ne quis Clericus beneficiatus aut in Sacris Ordinibus conſtitutus litteras pro pœna ſanguinis infligendâ ſcribere vel dictare preſumat, vel ubi Judicium ſanguinis tractatur, vel exercetur interſit.* From this Canon I conclude, That Clergy-men ought neither to be preſent themſelves, nor depute others *per litteras*, to be preſent *pro pœna ſanguinis infligendâ*. We have likewiſe a very pertinent Obſervation upon this Matter in an ancient MS. Chronicl. *in libro Hubbeſſe*, which hath written very largely of this Parliament that was held 21 *R.* 2. wherein the Prelates are blamed for that Opinion which they gave generally touching the Revocation of Pardons, becauſe the conſequence thereof was the Death of thoſe to whoſe Pardons were Revoked: *Dederunt ergo locum* (ſaith the Book) *Prelati Judicio ſanguinis in hoc facto. Ita quod dubitatur a pluribus ſi non incurrerent in culpam hanc per agitatio memorato, unde contigit quod propter iſtud minus peccatum incurrerunt illud Majus peccatum conſequenter, ut locum perſonam conſtituerunt Procuratorem pro eiſdem, qui illorum vice conſentiret adjudicium ſanguinis dandum in dicto Parliamento ſi neceſſe foret & occaſio emerſiſſet*, &c. So that upon the whole Matter, it is irrational to think that their departure from the Houſe ever before this, was meerly in reſpect of the Canons; when we ſee that the full offer of the King and

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Parliament to admit them to the exercise of Jurisdiction for that time, was by them kindly accepted with a *Non obstante* to the Canons of the Church. It is true, the giving Judgment of Death by Proxy, was as great a violation of the Laws of *England*, as of the Canons of the Church: yet inasmuch as *Consensus tollit errorem*, it was for that time well enough.

2. This is further illustrated, If you observe that in those Cases to which the Prohibition of the Law did not extend, they made no scruple of Sitting and Voting, although their Voting in those Cases was against the Canons of the Church. This may be instanced in the Cases of Bills of Attainder: for although the Canons do prohibit them from Voting in such Cases, as much as any Case whatsoever; inasmuch as in passing the Bill, they Vote, That the Person is Guilty, and shall stand actually Attainted of High Treason, and shall be deemed and adjudged a Traytor, and shall suffer as in Cases of High Treason, *&c.* yet they do generally Vote, because that the Prohibition of the Law doth not extend to Voting in Bills of Attainder, seeing that is not *Agitare judicium*, but onely *Legis Lationem*, what they do in that Case is not Judicially, but onely the exercise of their Legislative Power; otherwise the House of Commons would make themselves Judges, and would challenge a Judicial Power in the Tryal of any Lord, seeing in passing Bills of Attainder they do every whit as much as the Bishops; for they Vote that he is Guilty, *&c.* and that he shall be adjudged a Traytor, *&c.* And the Act of Parliament runs, *Be it Enacted by the King, the Lords Spiritual and Temporal, and Commons in Parliament assembled.* For these two Reasons I think it very improbable, that the Canons was the onely cause why the Prelates did depart the House when Capital Cases were Debated: But that the weakness of their Objection may further appear; I answer,

Thirdly, Although we should admit that the Canons of the Church were the first occasion of the beginning of this Custom among us, and that those Histories and Chronicles which inform us after this manner, do say true, yet this is no Argument against the validity of a standing Custom, the Commencemant of which is not upon Record: for Histories and Chronicles are not Matters of Record, neither are they in Law such strong and undeniable proof of the beginning of any usage, as to make it no Custom; neither are the Canons of the Church Matters of Record; and therefore cannot prove that there was no such Custom before the making of those Canons. Seeing then it is without doubt that there was a Custom that the Prelates should not exercise Jurisdiction in Capital Cases, and there is no Record that doth mention the time when it did begin, nor any time when it could be said, There never was such an Usage; it must of necessity be supposed that it is as ancient as the Government it self, and part of the Fundamental Contract of the Nation, whereby their Jurisdiction was originally limited that it should not extend to such and such Cases. So that I do not argue from the validity or invalidity of those Canons, nor from any Construction that may be made upon the Letter of the Canons, but insist upon it as part of the Common Law of *England*, and do absolutely deny that it had its Original and Force from any Authority that the Pope of *Rome* with or without his Council, or a Convocation of the Clergy in *England* had, to impose Laws upon us; but affirm, that its force and obligatory Power did solely arise from the voluntary reception, approbation, and usage allowed by the People of *England*, which being by them transmitted to Posterity, is a thing reputed to have been used and practised time out of mind, and is thereupon ranked among the Common Laws of this Kingdom; which are no more but general Usages or Customs of general Concernment to the whole Nation in things of Temporal Conisance, first upon reasonable Considerations by consent allowed, and then transmitted as a Tradition to Posterity, by whom they are supposed to have been in ure ever since it was a Nation: But this matter of Judicature in Capital Cases is a point of Temporal Jurisdiction in a Temporal Court; *viz.* The High Court of Parliament, and therefore of Temporal Conisance: the departure of the Clergy when such Cases came to be Debated, hath also been an interrupted practice for many Ages together; yea and most strictly observed in the first Ages, whose Transactions are Recorded (as hath been already proved) and it is impossible by Re-

cord to trace it to its first Original: Therefore it agreeing with every part of the definition of Common Law, is part of the Common Law it self, and doth consequently bind all subjects to its Observation as a standing Law, not alterable any way, but the same way it at first took its force, that is, by general consent, according to the *Maxime* laid down by my Lord *Cook*, in his 1. *Inst.* 115. *b. Whatsoever was at the Common Law, and is not ousted or taken away by any Statute, remaineth still.*

And although this Practice that was enjoyned by these Canons, was here allowed and observed, yet that observation was not out of respect to the Canons as such; but as they did command such things as were judged rational: and it had been the same case if the Custom had begun in *England* in imitation of other Countries, as it is upon the account of the Canons: For though the Bishops of *Rome* claiming an universal and absolute Power of Legislation, *in ordine ad Spiritualia*, over all Christendom, took advantage of every Opportunity that offered it self for the obtaining of this Right, which they pretended was *Jure divino*, and in Right of their Vicarship due; yet knowing that Princes would not so easily part with the Jewels of their Crowns, in suffering their People to be in Subjection to the Laws and Constitutions of any foreign Prince, in things which either directly or indirectly did affect their Temporal Possessions, they thought it necessary to manage their Business with all imaginable artifice and cunning, by bringing the Laity to the humour by degrees; and accordingly did at first collect certain Rules and Directions for the Government of the Clergy onely, which were called *Decreta*, first published in *England* during King *Stephens* Reign (as some do think, though others reckon it was long before) but never throughly observed in *England*, *Kellaway*. 7 *H.* 8. 184. But having got a small incouragement by the reception of these Rules in many Countries, they thought they might venture a little further, and then would have the Laity as well as the Clergy, to give Obedience to their Edicts: but that must be first in some inconsiderable indifferent things; as Abstinence from Meats, *&c.* and did not style them with the Lordly Name of *Leges*, but with a great deal of Meekness and Humility, and the Complement of *Servus servorum Dei*, did offer to their Consideration certain *Rogationes*; whence the Abstinence-week before *Whitesunday* was called *Rogation-week*, as *Marsilius Pat. lib. Defensor. pacis*, 2 *part.* 23. observes; Christians having out of Piety and Honour for his Holiness, yielded Obedience to these same *Rogations*, they made bold to proceed one step further; that is, They together with their Councils made certain *Orders* or *Decretals* about Temporal Matters, (but *in ordine ad Spiritualia* too) when these came first into *England*: See *Matthew Paris*, 423. To these *Decretals* Obedience was required from Prince and People, and all Contumacious and Obstinate Delinquents were most severely Anathematized: The *Decretals* were such as these, That any Clergy-man that was grieved by a Judgment or Sentence in the *Court-Christian*, or any other Court Ecclesiastical within this Realm, might be relieved by an Appeal from *Rome*; That no Lay-man should have the Disposition of any Ecclesiastical Preferment, nor the Presentation to a Church; That he shall not Marry within such and such Degrees; That Children born before Espousals, be legitimate; That the Clergy should be absolutely exempted from Secular Power, *&c.* Yet these *Decretals* met with very little respect in *England*, *France*, or any other part of *Christendom*, except *Peter's* Patrimony in *Demesne*, the *Popes* own Territories, called by the Canonists *Patria Obedientiæ*. For in *England* (to wave any discourse of the Laws and Customs of other Countries) in stead of being received and observed according to Expectation, they were stoutly opposed by the Judges and Magistrates, as derogating from the Soveraignty and Prerogative of the King, and tending to the detriment of the Rights and Properties of his Subjects: And in Confirmation of this, several Acts of Parliament were made to curb the Insolence of those usurping *Popes*, and to punish the audacious Enterprises of those factious and disloyal Subjects, who did presume to attempt to controll the Judgments that were given in the Kings Courts by Process from the *Pope*; or to procure Provisions and Reservations of Benefices by *Bulls* or *Breve's* from *Rome*: See 27 *E.* 3. *c.* 1. 48 *E.* 3. *c.* 1. 25 *E* 3. *c.* 22. 16 *R.* 2. *c.* 5. whereby such Suers of Appeals, and Procurers of Bulls

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and Proceſs from *Rome*, for the purpoſes aforeſaid, are made liable to the Penalties of a *Præmunire*, whereby the Body of the Offendor is to be Impriſoned during the Kings Pleaſure, his Goods forfeited. and his Lands ſeiſed into the Kings Hands, ſo long as the Offendor liveth. How far the Benefit of Clergy was allowed, I have already ſhewn; And as for the Matter of Legitimation, you may ſee the Statute of *Merton*, *c.* 9. *Et rogaverunt omnes Epiſcopi Magnates ut conſentirent, quod nati ante matrimonium eſſent legitimi, ſicut illi qui nati ſunt poſt matrimonium quantum ad ſucceſſionem hæreditariam, quia Eccleſiaſtales habet pro legitimis. Et omnes Comites & Barones reſponderunt quod nolunt* Angliæ *leges mutare, quæ hucuſque uſitatæ & approbatæ ſunt:* Vide 18 E. 4. 30. *a.* All which Statutes are Declarative of the Common Law, and therefore do prove that the People of *England* were never obliged to allow of any Decrees of Councils or Canons of the Church, further than they judged it fit and convenient ſo to do; which Arbitrary Reception, together with a Tranſmiſſion to Poſterity, did of it ſelf make it one of the Laws of *England*, which continues in force (though the Councils or Convocations ſhould afterward repeal their Decrees) till they be altered by Act of Parliament, *Co.* 5. *Cawdries Caſe* 9. *Davies Reports* 70, 71. *the caſe of Commendam:* And the Preamble to the Statute of Diſpenſations and Faculties, made 25 *Hen.* 8. *c.* 21. which runs in this manner: *Whereas this his Majeſties Realm, recogniſing no Superiour under God, but onely his Majeſty, hath been and is free from ſubjection to any mans Laws, but onely ſuch as have been deviſed, made, and ordained within this Realm, for the wealth of the ſame, or to ſuch other as by ſufferance of the King and his Progenitors, the People of this Realm have taken at their free liberty by their own conſent to be uſed among them, and have bound themſelves by long Uſe and Cuſtom to the obſervance of the ſame, not as to the obſervance of the Laws of any foreign Prince, Potentate, or Prelate, but as to the cuſtomed and ancient Laws of this Realm, originally eſtabliſhed as Laws of the ſame, by the ſaid Sufferance, Conſents and Cuſtoms, and none otherwiſe.* And ſo it is in *Co. Rep.* 5. 2. *part. fol.* 31. *All Canons, Conſtitutions, Ordinances, Synods, Provincials,* &c. *are in force that have been by general Conſent and Cuſtom within the Realm allowed, and ſo may by general conſent be corrected, enlarged, explained or abrogated.* Seeing therefore it is evident from what hath been already ſaid, that thoſe Canons and Conſtitutions of the Church concerning Judicature in Matters of Blood, have not onely been practiſed and allowed in this Nation ſucceſſively for ſeveral Ages together, beyond all time of Memory, but alſo ratified and confirmed by Act of Parliament; it follows, that they have the force of Laws of *England*, and are not alterable without an Act of Parliament; as the twelve Tables of *Athens* did really become, and were properly called *Jus civile Romanum*, after they were voluntarily received and allowed at *Rome*: And as the ſame may be inſtanced in ſome parallel Caſes among our ſelves, as the Priviledge of Clergy, Pluralities, and Diſpenſations, *&c.* which were parts of the Common Law of *England*, although they became ſuch no otherwiſe then by the Nations reception and obſervation of the Canons of the Church.

Laſtly, I am not apt to believe that this Cuſtom was taken up upon the account of the Canons of the Church, but rather becauſe it was a thing agreeable to the Conſtitution of the Government, the Reaſon and Rules of the Common Law, and the Nature of their Juriſdiction and Honour, being meerly prædial or feudal; and that becauſe upon a ſtrict ſearch it will be found of ancienter date than any of the Canons of the Church; for the firſt Canon that I find in *Linwood* is that which was made *An.* 1222. and is among the reſt of the Conſtitutions of Archbiſhop *Stephen* in theſe words; *Preſenti decreto ſtatuimus ne Clerici beneficiati aut in Sacris Ordinibus conſtituti villarum Procuratores admittantur, videlicet ut ſint Seneſchalli, aut Ballivæ talium adminiſtrationum, occaſione quarum laicis in reddendis rationibus obligentur, nec Juriſdictiones exerceant ſeculares præſertim illas quibus* Judicium Sanguinis *eſt annexum Authoritate quoque Concilii diſtrictius inhibemus ne quis Clericus beneficiatus vel in Sacris Ordinibus conſtitutus litteras pro pœna* Sanguinis *infligenda ſcribere vel dictare preſumat, vel ubi* Judicium Sanguinis *exercetur interſit:* *Linwood*,

[illegible], 13. Which Conſtitution was made above fifty years after the Parliament at *Carendon*, which confirms this Cuſtom, and calls it one of the *Avitæ conſuetudines*. Theſe Particulars well conſidered, will give a very ſatisfactory Anſwer to their Objection, and therefore I need not ſay any more.

But it is further objected, That the Clergy in their Proteſtation which they made 1 *R.* 2. do declare, *Quod ipſos perſonaliter intereſſe pertinet*, (and ſo they did in ſome Proteſtations which were made afterward) and after all they do inſert this Clauſe, *Nec volumus nec intendimus quod proceſſus habiti & habendi*, &c. *futuris temporibus quomodolibet impugnentur, infirmentur, ſeu revocentur.* From this they argue, otherwiſe all the Proceedings of the Houſe of Lords in the abſence of the Clergy, are invalid and reverſable, or elſe to what purpoſe is this Clauſe: And the Lords Temporal giving leave that this Proteſtation ſhould be entred upon Record, did implicitely aſſent to what the Clergy alledged therein.

To this I anſwer, That a Proteſtation in its ſelf is no argument of any Right neither doth the permiſſion and allowance of any Proteſtation, yield that right which the Proteſter is deſirous to ſave, but only ſaves the right which the party had before, if he had any; and if none, then the making that *Salvo* could give him none; for the outmoſt that a Proteſtation can do, is to anticipate a Concluſion, or Eſtoppel; *i. e.* to provide that the doing of any ſuch Act as is Contained in the Proteſtation, ſhall not be conſtructed to the Prejudice of the Party; ſo as to Barr or Conclude him from Claiming afterward that which *in rei veritate* is his right. So that this Proteſtation of the Clergy is no Argument of their Right to be preſent and to Vote in Capital Matters; and that chiefly for theſe two Reaſons: 1. By the Roll we find that the Clergy did not only depart when Capital Caſes were to be debated, but alſo in all other Caſes that were done that Seſſion; becauſe there were many Matters of Treaſon to be handled, therefore they abſented from the Parliament altogether: ſo it is in Sir. *Rob. Cotton's Abr.* 322. So that this Proteſtation may very well be ſuppoſed to have been made with reſpect to thoſe other Matters which were not Capital, where they had an undoubted Right to be preſent, and therefore ſuch a Proteſtation might be very Proper; and not to have any reſpect to thoſe Caſes which were Capital, eſpecially ſeeing they did alwaies in ſuch Caſes Abſent themſelves in former times without making any Proteſtation. 2. Admitting that the Clergy did intend that Capital Caſes, as well as others which were not Capital, ſhould be within the *Salvo* of their Proteſtation; yet nothing can be inferred from thence, but that they themſelves ſaid they had Right to be preſent, and what then? Muſt it of neceſſity follow that they had Right becauſe they Claimed it? If that Conſequence had been allowed to be good, I am afraid the Crown of *England* had been Incorporated long ago into the Triple Crown.

As for that Clauſe of the Proteſtation for the Validity of all ſuch Tranſactions as ſhould happen to paſs in their Abſence, I muſt confeſs I do not think it was to very much purpoſe. 1. Becauſe that without any *Proviſo* the Proceedings of the Houſe of Lords in their Abſence, had certainly been valid enough, as I ſhall prove anon. 2. If they had not been good, this Clauſe could not have helped them; becauſe wherever the Aſſent and agreement of any perſon or perſons is Requiſite for the perfection of a thing, it is neceſſary that that thing to which the Aſſent is Requiſite, be *in eſſe* at the time of the Aſſent made; for otherwiſe it is an Aſſent to nothing, and that is as much as no Aſſent at all: If therefore the Aſſent of the Prelates be indiſpenſably neceſſary to the perfection of every Judgment and Bill that paſſeth the Houſe of Lords; Such a precedent Aſſent to all that ſhall Paſs, during their Abſence in General, which is an Aſſent to they do not know what themſelves, will not amount to a ſufficient agreement; The Reaſon is, becauſe the Law of *England* doth preſume that in all private Tranſactions between Party and Party, and much more in things of Publick concernment and of ſo great moment, as Making of Laws and Giving Judgment of Death uppon Peers of the Realm, whatſoever a Man doth is upon Rational Inducements, and that the Conveniency and Advantage which he expects

pects will Accrue thereby, is the Motive that prevails with him to agree to the thing; and therefore all ſuch Agreements as are made at a venture, when the party agreeing knows not what it is he agrees to, (as when a man agreeth to a thing before it be in *eſſe*) are rejected in Law as Irrational and Inconſiderate: So if a Tenant comes and ſay to his Lord, *I agree to all Grants which you ſhall hereafter make of the Manor, or any part of it*; Surely this without a Subſequent Agreement to every particular Graat, will not amount to an Attornement. And at the Common Law, Licences for Alienation, granted to Tenants, were alwaies ſpecial; and a general Licence to all Alienations which the Tenant ſhould afterward make, was void. And if ſuch an agreement of the Lords Spiritual, as is before deſcribed, be ſufficient to perfect any Judgment or Bill which ſhall paſs the Houſe of Lords; then they may as well ſay that the whole Houſe of Lords may depart from Parliament, and agree before-hand in the ſame manner to every Bill which ſhall paſs the Houſe of Commons, and theſe with the Royal Aſſent ſhall be good Laws; eſpecially if it be, as they ſay, that the Clergy is one of the Three Eſtates of *Parliament*.

But then you will demand, Why ſhould the Houſe of Lords ſuffer theſe things to be entred upon the Roll, if they did not think that their Claims were legal? *&c.* To this it may be anſwered, That the Roll is only a Regiſter or Narrative of all the Matters of Fact that paſſed in the Houſe of Lords, and although the entring of a Paſſage upon the Roll makes it ſo Authentick, that the Matter of Fact (*viz.* that there was certainly ſuch a paſſage) is undeniable; yet it doth not follow that every thing that is entred upon the Roll, is good Authority for Matter of Law, except it appear by the Roll that it was taken for Law by the Vote and Reſolution of the Houſe; and therefore although the Houſe of Lords did ſuffer this Proteſtation to be entred upon the Roll, yet it doth not follow that they did allow that every thing that the Proteſtors ſaid was true, but only allowed it to be true, that the Proteſtors did ſay ſo. And beſides the Entring of a Proteſtation is a thing which is always reckoned the beſt Expedient for reconciling of Differences when begun, or preventing of them before they are begun; or at leaſt for diverting them till a more ſeaſonable time, when the putting of the Matter to a Tryal would either prove dangerous, or expenſive of more time, than the urgency of other more important Affairs, then to be managed would allow: and therefore the Requeſt of Entring their Proteſtation, is never upon any account whatſoever, denied to thoſe who have not a mind to be concluded by the then Proceedings; and if there be any thing contained in the Proteſtation that is of an ill Complexion in the Judgment of the Houſe, either as tending to the Diminution of the Kings Prerogative, the Authority of Parliament, or otherwiſe Vilifying the Conſtitution of the Government; the Proteſtation is allowed to be Entred firſt, and the Proteſtors puniſhed for it when they have done. We find in the Reign of *Rich.* 2. two Bills paſſed the Houſe of Commons, the one againſt *Proviſors*, the other againſt *Procurers* of Proceſs from the Court of *Rome*; theſe Bills were violently oppoſed by the Clergy in the Houſe of Lords, but notwithſtanding the Bills paſſed the Houſe, the Clergy in a great Rage depart the Houſe, and Proteſt againſt the Bills, as abridging the Authority and Priviledges of the Holy Church; which the Lords ſuffered to be entred, and yet did not agree to thoſe Allegations of the Clergy; for the Royal Aſſent was given, and they were always accounted good and firm Laws, 13 *R.* 2. *c.* 2, and *c.* 3. We find alſo that in the time of his late Majeſty, Twelve Biſhops departed the Houſe, and Proteſted againſt all Orders, Laws, Votes, *&c.* that ſhould be made in their Abſence, which Proteſtation at their Requeſt was entred upon the Journal, and yet it was ſo far againſt the Senſe of the Houſe, that they Voted it prejudicial to the Government, and deſtructive of the very Being of Parliaments; for which ſome of them were put into the *Tower*: This I mention, to ſhew that although the Matter of Proteſtation do extreamly thwart the Genius and Diſpoſition of the whole Houſe, yet the Requeſt of having it entred, is never denied.

In the next place, I shall consider the Roll of 21 *Rich.* 2. where the first Petition that the Commons made that Parliament to the King, was; *For that divers Judgments were heretofore undone, for that the Clergy were not present, the Commons prayed the King, that the Clergy would appoint some to be their Common Proctor, with sufficient Authority thereunto.——The Prelates therefore being severally examined, appointed Sir* Thomas de la Pereie *their Proctor to Assent, as by their Instrument appeareth.* Thus was the Practise of Constituting Proxies begun.

It is apparent to all men of Common Sense, That if the Clergy were forbidden to give Judgment of Death by any Law or Rules whatsoever, that Law was violated by their Constituting a Proxy, as much as if they had been personally present: Whether or no their Personal Presence was prohibited by the Law of *England* at this time, I leave to the Judicious Reader to determine from what hath been said before: If they were prohibited, then certainly this Petition of the Commons was unwarrantable, and contrary to Law. It is not impossible that the House of Commons being but fallible, men spurred on by too precipitant a Zeal and Eagerness for the accomplishment of a Business, should by endeavouring to make sure work, fall inconsiderately into another extream, and through the want of due Examination of Precedents, become guilty of a mistake. I shall not trouble my self much in discoursing about the possibility of the thing, for I shall make appear, that it was actually so in our Case: For, 1. That which was the ground of the Petition of the Commons; *viz. That divers Judgments have been heretofore undone*, &c. was a palpable mistake *de facto*: It is true, the two Judgments that were given against the two *Spencers*, 15 *E.* 2. were reversed for this cause, through the great favour and interest that they then had at Court: And there is no question, but these two Judgments were the ground of the Commons Petition made 21 *R.* 2. for there are no other Judgements to be found that were ever reversed for this cause; but how well their Petition was grounded you may learn from 1. *E.* 3. *c.* 1. Where this same Judgment is declared in Parliament to be good, and that the aforesaid reversal was null and void; and the two *Spencers* upon this Affirmance of the Judgment were Executed. I suppose if the forwardness and Zeal of the Commons had given them time to search the Records with so much diligence that they might have found this, they had not said; *For that divers Judgments have been heretofore undone*, &c. 2. That in point of Law the absence of the Prelates makes not a Judgment erronious, besides the Authority of that Record, 1 *E.* 3. is further proved: 1. From the Earl of *Salisbury*'s Case, 2 *H.* 5. who petitioned that the Judgment that was given against his Father might be Reversed, and Assigns for Errour, that it was not with the Assent of the Lords Spiritual, who are Peers of the Realm: the House of Lords upon Debate resolved, that it was not Errour, and therefore the Judgment was good. 2ly, If the Consent of the Clergy be absolutely necessary to every Judgment that passeth the House of Lords, then consequently it must be necessary to every Act of Parliament: There can no manner of Difference be Assigned between the two Cases as to this Matter, for their Power and Jurisdiction in Legislation, is every whit as ample as their Power of Judicature; and therefore their Concurrence is equally necessary in both Cases. But it is a thing of dangerous Consequence to Assert, that an Act of Parliament cannot be made without the Consent of the Clergy, for it will make some of the best Laws that ever were made in *England* before the Reformation, and which have ever been to this day accounted firm and established Laws, of no force at all. Most of the Statutes of *Mortmain* were made against the will of the Clergy, and their Dissent is recorded. The Statute *De Asportatis Religiosorum*, is Enacted by the King, *De Concilio, Comitum, Baronum, Magnatum, Procerum, & Regni sui Comitatuum in Parliamento*, &c. and yet proved by my Lord *Cook* in his Exposition of this Statute to be a good Law, from the Testimony of many Records and Acts of Parliament that recite this Statute. The Statute of 3 *Rich.* 2. *c.* 3. was made against the Clergy, for the ill disposition of Dignities, Offices, Canonries, Prebends, and Parsonages, and other Ecclesiastical Preferments, upon lewd and licencious

ious perſons, to the Scandal of Religion, and the neglect of Divine Service, &c. The Clergy being ſomewhat diſpleaſed that any ſhould undertake to reform them, t the firſt reading of the Bill departed, but notwithſtanding the Bill paſt, and is ſaid o be Enacted by the King, Nobles of the Land, and the Commons, leaving out the Clergy: And yet this hath been allowed for an eſtabliſhed Law by all the Judges. See Roll 3 *R.* 2. *n.* 38. —40. The Statute of 7 *R.* 2. *c.* 12. was made to impower Juſtices of Peace to enquire of ſeveral grievous Extortions committed by the Biſhops and their Officers, to the great grievance and oppreſſion of the Kings Liege People, &c. The bringing in of this Bill offended the Clergy more than the former, inſomuch that they left the Houſe in a great Huff, Proteſting againſt the Bill as injurious to the Franchiſes and Juriſdiction of the Church, yet notwithſtanding it paſſed into a Law.

The Clergy were abſent all the Parliament that was held 11 *R.* 2. and yet divers good and profitable Laws were made that Parliament never queſtioned for their Validity, but always put in uſe, as 11 *R.* 2. *c.* 7. about Merchants, *c.* 8. concerning the granting of Annuities, *c.* 9. concerning new Impoſitions, *c.* 11. of Aſſizes; and ſeveral others made in the abſence of the Clergy. I might for this enumerate all the Statutes of *Proviſors* and the Statutes of *Premunire*, for Suers of Appeals, and other Proceſs from *Rome*, as 25 *E.* 3. *c.* 1. and 22. where the Names of the Clergy are left out: and 13 *Rich.* 2. *c.* 2. and *c.* 3. where they were ſo far from Aſſenting, that they entred Proteſtations againſt them, becauſe they abridged the Popes Authority, as is before obſerved: And the 16 *R.* 2. *c.* 5. paſſed againſt the will of the whole Clergy. And ſo the Statute that was made in the ſame year about the Queens Marriage, without the Kings Conſent, was made without the Concurrence of the Clergy; for their Aſſent to it was ſpecial in this manner: *So far as it is agreeable to the Law of God and the Holy Church.* Which being conditional and under a Reſtraint, was according to the Courſe of Parliaments accounted as no Aſſent at all, and ſo it was ſpecially Entred; and yet none did ever queſtion the Strength and Force of this Act.

Theſe Statutes being allowed by the Judges of *England* as Good and Authentick Laws, although they were not agreed to by the Lords Spiritual, do prove that the Concurrence of the Lords Spiritual is no more neceſſary to the Eſſence and Perfection of an Act of Parliament, than the Concurrence of as many Temporal Lords.

Upon the whole Matter, it appears to have been a very ſtrange and unaccountable over-ſight in the Houſe of Commons at that time, that they ſhould be the firſt Introducers of an Innovation upon ſo falſe a Ground as theirs was. But however this Practice being built upon ſo ſandy a Foundation, it ſeems had no long continuance; for there doth not occur in any Author, nor in the Abridgments of the Records, any mention of more than Two Proxies; the firſt was Sir *Thomas* de la *Percie*, the ſecond was Sir *William* de la *Scroope*, who immediately ſucceeded him in this his New Office: But ſeeing it is raſh to Aſſert a Negative in a Matter of Fact, it will be very ſatisfactory if any will inform us of any more, and that may eaſily be done, if there were any; becauſe none can act as a Proxy, except his Procuratorſhip be Entred upon the Roll.

Moſt of thoſe Records that are Cited in the behalf of the Spiritual Lords, are either ſuch as were in thoſe times when the Clergy put in Proxies, as all thoſe that are upon or after the 21 *Rich.* 2. and about the beginning of *Hen.* 4. Such is the Caſe of the Earl of *Arundel*; for it appears by the Record, that the Conſtitution of the Proxy was in *N.* 9. and the Arraignment of the Earl was not till *N.* 15, or 16. and therefore after the Proxy; ſo that there was reaſon that the Records ſhould be Entred *by the King, Biſhops, and Lords*, ſeeing the Biſhops Deputy was preſent; but it is no Argument of their perſonal preſence: Or elſe they are Caſes of Bills of Attainder, and that is not much to our purpoſe; for thoſe will as well prove that the Houſe of Commons have ſate Judicially upon Matters of Life and Death. A Bill

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of Attainder is reckoned the ſtrongeſt way, becauſe there is a Concurrence of all the Three Eſtates, of both the Judicial and Legiſlative Power; and that is neceſſary for making a Forfeiture of all manner of Rights, Titles, and Intereſts, which otherwiſe are not Forfeitable: And if at any time there was an opportunity for the Clergy to tranſgreſs the Laws both Eccleſiaſtical and Civil (I mean the Statutes and Cuſtoms of this Realm) which was connived at by the reſt of the Lords and Commons, I hope that will not be accounted a Precedent to overthrow a Cuſtom of ſo Ancient a Date, and ſo agreeable to the Fundamental Conſtitution of the Government, and the Grounds and Reaſons of the Common Law, and alſo Confirmed by an Act of Parliament: So by degrees the whole Method and Courſe of Parliamentary Proceedings may be altered, and the very Being and Foundation of Parliaments ſhaken. So we ſhould have had the Lords refuſal to Sequeſter the Earl of *Derby* from Parliament, a Precedent; if they had not afterward acknowledged it to have been an Errour. We may find in many Caſes the Lords Diſpenſing with *Magna Charta*: 4 *E.* 3. *n.* 6. They paſſed Judgment of Death upon ſeveral Commoners: 15 *E.* 3. We find ſeveral Particulars enumerated, wherein the Commons complained of Breaches of *Magna Charta*, and we are not ſure that all theſe particular Caſes were remedied, and therefore muſt theſe ſtand all for Precedents? At this Rate there are few Points of Law perhaps that will eſcape Doubt and Controverſie: for we ſhall have ſome of the Lords pretend they can transfer their Honours, and ſo are able to make the Kings Enemies his Councellors, becauſe in *Dancourts* Caſe, 4. *Inſt.* 126. one Branch of the Family ſate in the Houſe by vertue of a Grant from the other Branch of the Family, from the Raign of *E.* 2. to *H.* 6. And the Earldom of *Cheſter* was firſt granted 17 *H.* 3. and transferred 39 *H.* 3. And upon theſe Precedents there was an Attempt in the Lord *Fitz-Walter's* Caſe to make a Baron by Tranſlation of intereſt. Admitting therefore that Once or Twice, or ſuch a matter, the Biſhops have Voted in Capital Caſes, yet they cannot Controul an Antient and well eſtabliſhed Cuſtom, though I am not apt to believe there are many ſuch Caſes: However it was a very pleaſant humour of a Gentleman that wrote lately of this matter and cited a Precedent in the Raign of *R.* 2. Of the Earl of *Arundel* and *Wardor*, whereas there was no ſuch Lord as *Arundel* and *Wardor* Created till King *James* his time, *Vide pen. ult.* ſo *p.* 30. He cites the Caſe of the Earl of *Salisbury*, who in his Petition ſays the Prelates are Peers in Parliament, and aſſigns for Error that they were Abſent when Judgment was given againſt his Father; and this is a good Precedent to prove the Prelates right to Vote in Capital Caſes as Peers in Parliament: Whereas the Petition was diſallowed, and the Judgment affirmed by the reſolution of the whole Houſe. Such a way of arguing deſerves ſome ſpecial animadverſion. But I ſhall ſuperſede any further Conſideration of the matter, and ſhall conclude that without an Act of Parliament the Biſhops can have no right to Vote in Capital Caſes, which if this preſent Parliament ſhall think fit to make, it behoves all true Subjects to agree thereto.

FINIS.