THE ECCLESIASTICAL LAW

OF THE

Church of England.

BY

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"Episcopatus unus, cujus a singulis in solidum pars tenetur."—*De Unit. Eccles. St. Cypr.*

"More especially we pray for the good estate of the Catholic Church."—*English Prayer Book.*

"Certain it is, that this kingdom hath been best governed, and peace and quiet preserved, when both parties, that is, when the justices of the temporal courts and the ecclesiastical judges, have kept themselves within their proper jurisdiction, without encroaching or usurping upon one another."—LORD COKE, 3 *Inst.* 321.

IN TWO VOLUMES.

VOL. II.

LONDON:

HENRY SWEET, 3, CHANCERY LANE;

STEVENS & SONS, 119, CHANCERY LANE;

Law Booksellers and Publishers.

1873.

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LONDON:
PRINTED BY C. ROWORTH AND SONS,
NEWTON STREET, W.C.

ECCLESIASTICAL LAW.

PART IV.

DISCIPLINE OF THE CHURCH.

CHAPTER I.

DISCIPLINE OVER THE LAITY.

Sources of the authority of the ecclesiastical courts.

In England the authority and power of the ecclesiastical courts as to the laity is founded on a principle, recognized by the unwritten common law, and in part by the statute law, that the ordinary ought in certain matters to administer justice over them *pro salute animæ*. The sentence pronounced by such courts could be enforced only by excommunication, that is, by depriving the person sentenced—according to the greater or less severity of the sentence—from the benefit and use of all or of certain rites of the church. The common and the statute law at different epochs of our history further enforced the sentence by temporal punishments of different kinds.

Extent of former jurisdiction.

It is unnecessary now to mention how much jurisdiction over really secular matters the ecclesiastical courts under colour of this principle obtained. Indeed, as every act of a Christian man may be said to have some reference to his duty towards God, it is difficult to say why, upon this principle, jurisdiction upon every subject should not be exercised by the spiritual court. The canon law founds the authority of the pope upon this principle, aided by passages of holy writ torn from their context, and misconstrued wilfully or misunderstood grossly (*a*).

Civil jurisdiction.

The jurisdiction over testaments was, perhaps, the most striking example of the application of this principle in England.

The office of Lord High Chancellor has long ceased to be holden by an ecclesiastic; and the important jurisdiction over questions of marriage and testamentary law, retained by the spiritual courts in England longer, I believe, than

(*a*) Phillimore on Inter. Law, vol. ii. pt. 8, chap. iii., iv.

in any other European country, was transferred to a purely lay tribunal in 1857 (*b*). And, practically speaking, all civil jurisdiction as to the laity, except such as relates to the fabric and ornaments of the church, the churchyard, and churchwardens, has ceased to be exercised by the spiritual court. They retain, however, their criminal jurisdiction over the laity within certain limits.

Criminal jurisdiction.

Every religious body must have some means of excluding from its membership those who transgress its rules and set at nought the terms of their communion with it. It must have the power of pronouncing that such persons are, partially or entirely, for a season or for ever, placed *out of its communion*, that is, *excommunicated.*

No Christian church can be lawfully compelled to admit to her rites and sacraments those who are by rightful authority pronounced unworthy of them.

The spiritual court in England exercises a jurisdiction in this matter founded, as it has been said, both on common and statute law.

Before the passing of any statute, criminal proceedings might be taken in the spiritual court against a layman for certain offences against religion or morality.

The Canons of 1603 dealt somewhat largely with the discipline of the laity. After the decision of Lord Hardwicke in *Croft* v. *Middleton* (*c*), it may perhaps be doubted whether all these canons could be enforced; though those which are declaratory of law received in this country, as well as those fortified by statute, are certainly in force, more especially with respect to churchwardens and other ecclesiastical officers. It is unnecessay to say that where these canons are in conflict with any statute, they are clearly inoperative.

The laity whom these canons affect may be classed under three heads.

I. Impugners of the law relating to the church.
II. Schismatics.
III. Offenders generally against religion, morality, and good order in church (*d*).

Impugners of the law relating to the Church.

I. With respect to the first category, the Canons are as follows:—

2. "*Impugners of the King's Supremacy censured.*

"Whosoever shall hereafter affirm, that the king's majesty hath not the same authority in causes ecclesiastical,

(*b*) By 20 & 21 Vict. c. 77, as to testamentary cases; and by 20 & 21 Vict. c. 85, as to matrimonial cases.

(*c*) 2 Atk. 650; Strh. 1056.

(*d*) These canons, of course, also affect the clergy guilty of the offences condemned by them.

that the godly kings had amongst the Jews and Christian emperors of the primitive church; or impeach in any part his regal supremacy in the said causes restored to the crown, and by the laws of this realm therein established; let him be excommunicated *ipso facto*, and not restored, but only by the archbishop, after his repentance, and public revocation of those his wicked errors."

3. "*The Church of England a true and Apostolical Church.*

"Whosoever shall hereafter affirm, that the Church of England, by law established under the king's majesty, is not a true and apostolical church, teaching and maintaining the doctrine of the apostles; let him be excommunicated *ipso facto*, and not restored, but only by the archbishop, after his repentance, and public revocation of this his wicked error."

4. "*Impugners of the Public Worship of God, established in the Church of England, censured.*

"Whosoever shall hereafter affirm, that the form of God's worship in the Church of England, established by law, and contained in the Book of Common Prayer and Administration of Sacraments, is a corrupt, superstitious, or unlawful worship of God, or containeth anything in it that is repugnant to the Scriptures; let him be excommunicated *ipso facto*, and not restored, but by the bishop of the place, or archbishop, after his repentance, and public revocation of such his wicked errors."

5. "*Impugners of the Articles of Religion, established in the Church of England, censured.*

"Whosoever shall hereafter affirm, that any of the nine and thirty articles agreed upon by the archbishops and bishops of both provinces, and the whole clergy, in the convocation holden at London, in the year of our Lord God one thousand five hundred sixty-two, for avoiding diversities of opinions, and for the establishing of consent touching true religion, are in any part superstitious or erroneous, or such as he may not with a good conscience subscribe unto; let him be excommunicated *ipso facto*, and not restored, but only by the archbishop, after his repentance, and public revocation of such his wicked errors."

6 "*Impugners of the Rites and Ceremonies, established in the Church of England, censured.*

"Whosoever shall hereafter affirm, that the rites and ceremonies of the Church of England by law established

Impugners of the law relating to the Church.

are wicked, antichristian, or superstitious, or such as, being commanded by lawful authority, men, who are zealously and godly affected, may not with any good conscience approve them, use them, or, as occasion requireth, subscribe unto them: let him be excommunicated *ipso facto*, and not restored until he repent, and publicly revoke such his wicked errors."

7. "*Impugners of the Government of the Church of England by Archbishops, Bishops, &c., censured.*

"Whosoever shall hereafter affirm, that the government of the Church of England under his majesty by archbishops, bishops, deans, archdeacons, and the rest that bear office in the same, is antichristian, or repugnant to the Word of God: let him be excommunicated *ipso facto*, and so continue until he repent, and publicly revoke such his wicked errors."

8. "*Impugners of the Form of Consecrating and Ordering Archbishops, Bishops, &c., in the Church of England, censured.*

"Whosoever shall hereafter affirm or teach, that the form and manner of making and consecrating bishops, priests, and deacons, containeth any thing in it that is repugnant to the Word of God, or that they who are made bishops, priests, or deacons, in that form, are not lawfully made, nor ought to be accounted, either by themselves or others, to be truly either bishops, priests, or deacons, until they have some other calling to those divine offices; let him be excommunicated *ipso facto*, not to be restored until he repent, and publicly revoke such his wicked errors."

Schismatics.

II. With respect to the second category, the Canons are as follows:—

9. "*Authors of Schism in the Church of England censured.*

"Whosoever shall hereafter separate themselves from the communion of saints, as it is approved by the apostles' rules, in the Church of England, and combine themselves together in a new brotherhood, accounting the Christians, who are conformable to the doctrine, government, rites, and ceremonies of the Church of England, to be profane, and unmeet for them to join with in Christian profession; let them be excommunicated *ipso facto*, and not restored, but by the archbishop, after their repentance, and public revocation of such their wicked errors."

10. "*Maintainers of Schismatics in the Church of England censured.*

"Whosoever shall hereafter affirm, that such ministers as refuse to subscribe to the form and manner of God's worship in the Church of England, prescribed in the Communion Book, and their adherents, may truly take unto them the name of another church not established by law, and dare presume to publish it, That this their pretended church hath of long time groaned under the burden of certain grievances imposed upon it, and upon the members thereof before mentioned, by the Church of England, and the Orders and Constitutions therein by law established; let them be excommunicated, and not restored until they repent, and publicly revoke such their wicked errors."

11. "*Maintainers of Conventicles censured.*

"Whosoever shall hereafter affirm or maintain, That there are within this realm other meetings. assemblies, or congregations of the king's born subjects than such as by the laws of this land are held and allowed, which may rightly challenge to themselves the name of true and lawful churches; let him be excommunicated, and not restored but by the archbishop, after his repentance and public revocation of such his wicked errors."

12. "*Maintainers of Constitutions made in Conventicles censured.*

"Whosoever shall hereafter affirm that it is lawful for any sort of ministers and lay persons, or of either of them, to join together and make rules, orders, or constitutions in causes ecclesiastical, without the king's authority, and shall submit themselves to be ruled and governed by them; let them be excommunicated *ipso facto*, and not be restored until they repent and publicly revoke those their wicked and anabaptistical errors."

110. "*Schismatics to be presented.*

"If the churchwardens, or questmen, or assistants, do or shall know any man within their parish, or elsewhere, that is a hinderer of the Word of God to be read or sincerely preached, or of the execution of these our constitutions, or a fautor of any usurped or foreign power, by the laws of this realm justly rejected and taken away, or a defender of Popish and erroneous doctrine; they shall detect and present the same to the bishop of the diocese, or ordinary of the place, to be censured and punished . . .

Schismatics.

according to such ecclesiastical laws as are prescribed in that behalf."

65. "*Ministers solemnly to denounce Recusants and Excommunicates.*

"All ordinaries shall, in their several jurisdictions, carefully see and give order that as well those who for obstinate refusing to frequent divine service established by public authority within this realm of England, as those also (especially of the better sort and condition) who for notorious contumacy or other notable crimes stand lawfully excommunicate (unless within three months immediately after the said sentence of excommunication pronounced against them they reform themselves and obtain the benefit of absolution), be every six months ensuing, as well in the parish church as in the cathedral church of the diocese in which they remain, by the minister openly, in time of divine service upon some Sunday, denounced and declared excommunicate (*d*), that others may be thereby both admonished to refrain their company and society, and excited the rather to procure out a writ *De excommunicato capiendo*, thereby to bring and reduce them into due order and obedience. Likewise the registrar of every ecclesiastical court shall yearly between Michaelmas and Christmas duly certify the archbishop of the province of all and singular the premises aforesaid."

66. "*Ministers to confer with Recusants.*

"Every minister being a preacher, and having any popish recusant or recusants in his parish, and thought fit by the bishop of the diocese, shall labour diligently with them from time to time, thereby to reclaim them from their errors. And if he be no preacher, or not such a preacher, then he shall procure, if he can possibly, some that are preachers so qualified, to take pains with them for that purpose. If he can procure none, then he shall inform the bishop of the diocese thereof, who shall not only appoint some neighbour preacher or preachers adjoining to take that labour upon them, but himself also, as his important affairs will permit him, shall use his best endeavour by instruction, persuasion, and all good means he can devise, to reclaim both them and all other within his diocese so affected."

These Canons, so far as they respect popish recusants, are so affected by subsequent legislation as to be inoperative.

(*d*) All publications, however, of this kind are now forbidden by statute. *Vide supra*, p. 1032.

Offenders against morality, &c.

III. With respect to the third category, the Canons, partly supported by the statute law, are as follows :—

Sins punishable by ordinary.

By Can. 109, "If any offend their brethren by adultery, whoredom, incest or drunkenness, or by swearing (*e*), ribaldry, usury, or any other uncleanness and wickedness of life, the churchwardens or questmen and sidemen in their next presentment to their ordinaries, shall present the same, that they may be punished by the severity of the laws, according to their deserts; and such notorious offenders shall not be admitted to the holy communion till they be reformed."

Anciently punishable in the leet.

In ancient times (according to Lord Coke) the king's courts, and especially the leets, had power to inquire of and punish fornication and adultery; and it appears often in the book of Domesday that the king had the fines assessed for those offences which were assessed in the king's courts, and could not be inflicted in the court christian (*f*).

No prohibition to the spiritual court.

By 13 Edw. 1, st. 4, called the statute of *Circumspectè agatis*, it is enacted as follows: "The king to his judges sendeth greeting. Use yourselves circumspectly in all matters concerning the Bishop of Norwich and his clergy; not punishing them if they hold plea in court christian of such things as be meer spiritual, that is to wit, of penance enjoined by prelates for deadly sin; as fornication, adultery and such like; for the which sometimes corporeal penance, and sometimes pecuniary, is enjoined, specially if a freeman be convict of such things. In all which cases the spiritual judge shall have power to take knowledge, notwithstanding the king's prohibition."

The Bishop of Norwich.]—The Bishop of *Norwich* is put here only for example; for the statute extends to all the bishops within this realm (*g*).

Fornication, Adultery, and such like.]—Here are two examples in particular of matters merely spiritual, which have no mixtures of the temporalities, for the correction of these offences *pro salute animæ* (*h*).

And such like.]—These are to be taken for offences of like nature as the two offences here particularly expressed be; as solicitation of any woman's chastity, which is lesser than these, and for incest, which is greater (*i*).

In the case of *Gallisand* v. *Rigaud*, in 1 Ann., it was agreed by the court that *solicitation of chastity* was of ecclesiastical cognizance, but yet that the prohibition

(*e*) Swearing is further punished by 19 Geo. 2, c. 21.

(*f*) 2 Inst. 488.

(*g*) 2 Inst. 487.

(*h*) Ibid. 488.

(*i*) Ibid.

Offenders against religion, morality, &c.

should stand, because the person had been convicted on an indictment for an assault upon the woman with intent to ravish her, and after that, the woman had sued an action of assault and battery against him for the same offence, which action was depending at the same time that the prosecution was in the spiritual court: for the force added to it, which is temporal, makes it cognizable by the temporal courts (*k*). It is, however, at least doubtful whether the ecclesiastical court might not have punished for the incontinence.

In the case of *Harris* v. *Hicks*, in 4 & 5 Will. 3, a prohibition was moved for to the ecclesiastical court, where a suit was for *incest*, in marrying his first wife's sister, suggesting that the said second wife was dead, and by his said wife he had a son, to whom an estate was descended as heir to his mother, and that notwithstanding that he had pleaded this matter, they went on to annul the marriage and bastardize the issue. And by the court: A prohibition shall go as to annulling the marriage or bastardizing the issue, but they may proceed to punish the incest (*l*).

Pecuniary.]—That is, in commutation of penance (*m*).

In the case of *Wheatley* v. *Fowler* in 1757 (*n*), Sir Geo. Lee enjoined penance on a methodist preacher for incontinence.

Limitation of suits.

By 27 Geo. 3, c. 44, no suit shall be brought in any ecclesiastical court for fornication or incontinence after the expiration of eight calendar months from the time when such offence shall have been committed; nor for fornication at any time after the parties shall have lawfully intermarried (*o*).

Returning to the Canons of 1603.—

Canons.

"112. *Non-communicants at Easter to be presented.*

"The minister, churchwardens, questmen, and assistants of every parish church and chapel, shall yearly within forty days after Easter, exhibit to the bishop or his chancellor the names and surnames of all the parishioners, as well men as women, which being of the age of sixteen years received not the communion at Easter before."

(*k*) Ld. Raym. 809; Gibs. 1085.

(*l*) 2 Salk. 548.

(*m*) 2 Inst. 489.

(*n*) 2 Lee's Rep. 376.

(*o*) But it was ruled, after much consideration, by the House of Lords (Lord Lyndhurst delivering the judgment), that this statute did not prevent the ordinary from purging the church of an incontinent clerk. *Vide post*, *Burgoyne* v. *Free*, 1 Add. 405; 2 Hagg. 406.

"111. *Disturbers of Divine Service to be presented.*

"In all visitations of bishops and archdeacons, the churchwardens, or questmen and sidemen shall truly and personally present the names of all those which behave themselves rudely and disorderly in the church, or which by untimely ringing of bells, by walking, talking, or other noise, shall hinder the minister or preacher."

Defamation and brawling.

With respect to the offences of defamation and brawling in church, the law has recently undergone a considerable change.

The act 18 & 19 Vict. c. 41, was introduced by the author of this work into parliament in 1855, and became law in that year; it was entitled "An Act for abolishing the Jurisdiction of the Ecclesiastical Courts of England and Wales in Suits for Defamation."

The preamble recited that "Whereas the jurisdiction of the ecclesiastical courts in suits for defamation has ceased to be the means of enforcing the spiritual discipline of the church, and has become grievous and oppressive to the subjects of this realm:" and it enacted as follows:—

Jurisdiction of ecclesiastical courts in England, &c., in suits for defamation abolished.

Sect. 1. "From and after the passing of this act it shall not be lawful for any ecclesiastical court in England or Wales to entertain or adjudicate upon any suit for or cause of defamation, any statute, law, canon, custom, or usage to the contrary notwithstanding."

Persons in custody for defamation under order of ecclesiastical courts to be discharged, but such order not to be made until costs are paid.

Sect. 2. "In the case of every person committed to gaol before the passing of this act under any writ *de contumace capiendo*, issued in consequence of any proceedings before any ecclesiastical court, in any cause or suit for defamation of character, the judge of the ecclesiastical court before whom such proceedings shall have been had shall make an order upon the officer in whose custody such person is for discharging such person out of custody, and such officer shall, on the receipt of such order, forthwith discharge such person; and it shall not be necessary for such person to take any oath of future obedience to his or her ordinary: provided always, that such order shall not be made unless the costs lawfully incurred in any such suit shall have been previously paid into the registry of such ecclesiastical court, or unless the person against whom such costs shall have been decreed shall have already suffered imprisonment for one month in consequence of nonpayment thereof."

In Ireland.

The jurisdiction of the Irish ecclesiastical courts in suits for defamation was taken away in 1860 by 23 & 24 Vict. c. 32.

Brawling.

This act also took away the jurisdiction of the ecclesiastical courts in England and Ireland in suits *against laymen* for brawling (*p*).

Blasphemy.

By 29 Car. 2, c. 9, the act for taking away the writ *de hæretico comburendo*, it is provided that (sect. 2) nothing in the act shall be construed to take away the jurisdiction of the ecclesiastical courts in cases of atheism, blasphemy, heresy or schism, but that they may proceed to punish the same by excommunication, &c. It may be doubtful how far their power in this respect has been taken away by the various toleration acts. Blasphemy is an offence punishable at common law and by statute, 9 Will. 3, c. 35. See the case of *James Nailer* (*q*), *Rex* v. *Curl* (*r*), *Rex* v. *Worlston* (*s*), *Rex* v. *Anart* (*t*), *Richard Bulton's case* in 1794, *Moxon's case* in the Queen's Bench, Trinity Term, 1841, *Gathercole's case* (*u*), case of a *Mr. Jones* at Paramatta, in New South Wales (*x*), and *Cowan* v. *Milbourn* (*y*), where a contract for blasphemous purposes was holden illegal and void.

Perjury.
Authority of ecclesiastical courts.

If perjury be committed in a temporal cause, it is punishable only in the temporal courts; but where it is committed in a spiritual cause, the spiritual judge has authority to inflict canonical punishment, and prohibition will not go (*z*).

For by the statute of *Circumspectè agatis*, 13 Edw. 1, st. 4, "For breaking an oath, it hath been granted that it shall be tried in a spiritual court, when money is not demanded, but a thing done for the punishment of sin; in which case the spiritual judge shall have power to take knowledge, notwithstanding the king's prohibition."

For although the case be spiritual, and the perjury is committed in the spiritual court, yet the judge there can only punish *pro salute animæ*; but the party grieved by such perjury must recover his damages at the common law (*a*).

In the statute of perjury, 5 Eliz. c. 9, s. 5, there is a proviso that the same shall not extend to any spiritual or ecclesiastical court; but such offender as shall be guilty of perjury, or subornation of perjury, shall and may be punished by such usual and ordinary laws as heretofore has been, and yet is used and frequented in the said ecclesiastical court.

(*p*) *Vide supra*, p. 940.
(*q*) 1 St. Tr. 802.
(*r*) Str. 788.
(*s*) Str. 834.
(*t*) Black. Rep. 395.
(*u*) 2 Lewin. C. C. 337.
(*x*) "The Daily News, April 17, 1871."
(*y*) L. R., 2 Ex. 230.
(*z*) Gibs. 1013; 1 Ought. 9; Keilw. 39 b, 7.
(*a*) Gibs. 1013.

In the statute 5 Eliz. c. 23, concerning the writ *De excommunicato capiendo*, perjury in the ecclesiastical court is specified as an offence (amongst others) for which a person may be excommunicated. And conviction of perjury, either in the temporal or ecclesiastical courts, is a cause of deprivation of benefice.

Perjury in ecclesiastical court. How punishable.

In the *Bishop of St. David's case* (*b*), in 11 Will. 3, it was said by Holt, C. J., it has been a question whether perjury in the spiritual court can be tried in the temporal; and in all the cases where it has been, the persons have been acquitted, and so it has been ended, but it is not yet settled.

In *Rex* v. *Lewis* (*c*), in 4 Geo. 1, an information was moved for against a clergyman, for perjury at his admission to a living, upon an affidavit that the presentation was simoniacal. But the court refused to grant it till he had been convicted of the simony.

There are, however, authorities to show that perjury in any court, not excepting courts ecclesiastical, may be punished by indictment or information in the temporal courts (*d*), but it must be at common law as it is aided by 2 Geo. 2, c. 25, and not upon the statute 5 Eliz. c. 9 (*e*).

Courts, procedure, censures.

The subjects of ecclesiastical courts, procedure and censures, applicable equally to laity and clergy, are considered more particularly with reference to the discipline of the clergy in the following chapters.

(*b*) Ld. Raym. 451.

(*c*) Str. 70. *Vide infra*, p. 1109.

(*d*) See *Rex* v. *Green*, 5 Mod. 348; 2 Rol. Abr. 257; 16 Vin. Abr. 313, 314.

(*e*) See on this subject Mr. Chitty's work on Criminal Law, vol. ii. ch. ix.

CHAPTER II.

DISCIPLINE OVER THE CLERGY.

Introductory.

Divisions of subject.

THE important subject of the discipline of the clergy may be properly treated of under the following heads:—

I. The offences which are the subject of ecclesiastical discipline.

II. The tribunals which exercise the jurisdiction.

III. The general mode of procedure in courts ecclesiastical.

IV. The nature of the censures inflicted by ecclesiastical discipline.

Offences.

I. The offences which are the subject of ecclesiastical discipline in the clergy are partly those which are also the subject of ecclesiastical discipline in the laity, partly other offences. They may be classified as follows:—

(1.) Offences against morality — including offences against the criminal law of the land:

(2.) Offences against religion—such as blasphemy, heresy, contravening the Thirty-nine Articles of Religion and depraving the Book of Common Prayer:

(3.) Offences against particular laws of the church in this country—more or less carrying into effect the general law of the church—such as (A) non-residence and plurality of benefices and simony, or (B) such as regard the performance of public worship, both as to the place and as to the manner, as to matters of ritual, and the Statutes of Uniformity:

(4.) Offences bringing scandal on the condition of the clerical *status*—(A) by the pursuit of certain secular employments, such as farming beyond the fixed limitation—trading and the like; (B) and generally by conduct unbecoming a clerk in holy orders, either in or out of church:

(5.) Offences against the authority of the ordinary—such as contumacy or disobedience to the lawful commands of the ordinary or of his court:

(6.) Offences relating to injuries done to the fabric or ornaments of the church, or to alterations of them without a faculty or proper licence from the ordinary:

(7.) Offences relating to the dilapidation of the house or buildings belonging to the benefice.

II. The tribunals which exercise the jurisdiction over the clergy.

Tribunals.

These, except in cases under the head (7), the law as to which is administered by the bishop and archbishop in person, are at the present time the following:—

(1.) A preliminary commission of inquiry issued by the bishop:

(2.) The bishop himself with certain assessors, or a judge delegated by the bishop with certain assessors:

(3.) The court of the archbishop, which exercises jurisdiction either in the first instance by letters of request, or as a court of appeal:

(4.) The last court of appeal, the Judicial Committee of the Privy Council, whose advice to the crown is usually enforced as a regular sentence by the means of an order in council:

(5.) The jurisdiction exercised by the ordinary in his visitation:

(6.) The jurisdiction of convocation (*c*) over persons, though apparently not without authority from statutes, may be considered as practically incapable of being put in force.

III. The general mode of procedure in courts ecclesiastical.

Procedure.

In every ecclesiastical court there are two modes of procedure—the civil and the criminal.

In criminal proceedings *the office of the judge is promoted*, the meaning of which is that inasmuch as all spiritual criminal jurisdiction is in the hands of the bishop or ordinary (*judex ordinarius*), his office or function is set in motion, whenever these proceedings are instituted. His permission must therefore be obtained, as will be seen, before the criminal suit can be commenced. The form of proceeding is by a recital of the offence charged, and the law violated by such offence, in a series of articles or counts. The object of all punishment inflicted by the ordinary—a

(*c*) See 1 H. H. 390; 1 Hawk. 4; Gibs. 353; *vide post*, Chapter on Convocation.

Procedure.

term which is applicable to the bishop or his court—is the promotion of the soul's health by the reformation of the life and moral conduct, or the irreligious and heretical opinion, of the guilty person. It is not unimportant to bear this object in mind, because it has laid in this country the foundation and furnished the limits of all coercive jurisdiction exercised by spiritual authority, as recognized, aided and enforced by the common law.

Censures.

IV. The nature of the censures.

These are various in their degrees of severity, but the same in kind.

(1.) *Simple admonition* to abstain for the future from the act or conduct censured. Disobedience, however, to this admonition assumes the grave character of contempt or contumacy, and is visited by a graver punishment:

(2.) *Penance:*

(3.) *Suspension;* relatively to cure of souls:

(*a*) Limited or not as to its subject,—as suspension from office alone, or from office and benefice, that is, from the discharge of spiritual functions alone, or from this discharge and from receiving the fruits or emoluments appertaining to it:

(*b*) Limited as to its duration from a short to a long period:

(*c*) Accompanied or not by an order that after the period of suspension has expired the offender be not re-admitted to his office or benefice until he produce a certificate signed by three clerks in holy orders of the diocese, that he is reformed in his moral conduct, *emendatus moribus*, such certificate to be approved of by his ordinary:

(4.) *Suspension—ab ingressu ecclesiæ:*

(5.) *Sequestration* of the profits of the benefice, either in some instances as a punishment *per se*, or as incidental to suspension from office and benefice:

(6.) *Deprivation*—that is necessarily from office and benefice—and is, according to the practice in this country, accompanied by a prohibition to officiate within the limits of the depriving authority:

(7.) *Excommunication:*

(1) Attended with civil penalties:

(2) Spiritual only:

(8.) *Degradation*—which consists in a formal removal of the insignia of dress and ornament which mark the office of a clerk—a sentence practically disused in this country since the Reformation; deprivation, as usually pronounced, or deposition, having in fact attained the same end:

(9.) *The withdrawal* by the ordinary *of his licence* to officiate in his diocese, previously granted to a curate or a person having no benefice therein:

(10.) The benefice becoming *ipso facto* void on the committal of certain offences.

Subjects of this Part.

In this Part the exercise of criminal jurisdiction over priests and deacons only is considered, the mode of proceeding against accused bishops or archbishops having been already treated of (*d*).

It may be that the offence committed is punishable by statute and by general ecclesiastical law, and is cognizable both by courts of common and ecclesiastical law, though *diverso intuitu*.

(*d*) *Vide supra*, pp. 81—92.

CHAPTER III.

OFFENCES OF THE CLERGY.

SECT. 1.—*Offences against Morality, &c.*
2.—*Offences against Religion.*
3.—*Simony.*
4.—*Farming and Trafficking.*
5.—*Non-Residence.*
6.—*Pluralities.*
7.—*Miscellaneous Subjects.*

SECT. 1.—*Offences against Morality, &c.*

Detailed exposition of offences against the law.

THE different heads under which the criminal offences of the clergy may be generally ranged have been already adverted to. It remains to make some more detailed mention of the law applicable to such offences.

Offences against morality and the criminal law.

First, as to offences against morality generally, and against the criminal law of the land in particular.

Besides the law contained in the general Canon Law and the English provincial constitutions, the 75th Canon of 1603 enacts that—

Shunning vicious excesses.

"No ecclesiastical persons shall at any time, other than for their honest necessities, resort to any tavern or alehouses, neither shall they board or lodge in any such places. Furthermore, they shall not give themselves to any base or servile labour, or to drinking, or riot, spending their time idly by day or by night, playing at dice, cards, or tables, or any other unlawful game. But at all times convenient, they shall hear or read somewhat of the holy Scriptures, or shall occupy themselves with some other honest study or exercise, always doing the things which shall appertain to honesty, and endeavouring to profit the church of God, having always in mind, that they ought to excel all others in purity of life, and should be examples to the people to live well and christianly, under pain of ecclesiastical censures to be inflicted with severity, according to the qualities of their offences."

Recreations.

Nevertheless, Lord Coke says, by the common law of the land, clergymen may use reasonable recreations, in order to make them fitter for the performance of their duty

and office. And albeit spiritual persons (he says) are prohibited, by the canon law, to hunt; yet by the common law they may use the recreation of hunting. And after the decease of every archbishop and bishop (amongst other things) the king, time out of mind, has had his kennel of hounds, or a composition for the same (*a*).

Bishop's will.

The foundation of which custom was this: it appears by many records, that by the law and custom of England, no bishop could make his will of his goods or chattels coming of his bishopric, without the king's licence. Whereupon the bishops, that they might freely make their wills, yielded to give to the king after their deceases respectively for ever six things: 1. Their best horse or palfrey, with bridle and saddle. 2. A cloak with a cape. 3. One cup with a cover. 4. One bason and ewer. 5. One ring of gold. 6. Their kennel of hounds (*b*).

Cases since Clergy Discipline Act.

Since the passing of the present Clergy Discipline Act (3 & 4 Vict. c. 86), various cases of clerks charged with immorality, including brawling (*c*) and drunkenness, have been tried. The number is not large, having regard to the increase of the clergy in modern times; but it is large relatively to cases of the same kind which happened during the interval between the reigns of Elizabeth and our present Queen. This result is also in great measure to be ascribed to the increased energy of discipline under the improved state of the ecclesiastical courts, and the introduction of *vivâ voce* evidence (*d*).

(*a*) 2 Inst. 309.

(*b*) Ibid. 338. The 74th Canon and a constitution of Abp. Stratford in 1343 (Lind. 122; Johns. Stratf.) on the decent apparel of the clergy may be here noticed.

(*c*) The act 23 & 24 Vict. c. 32, which has taken away the jurisdiction of the ecclesiastical courts over the laity for the offence of brawling, retains it for the discipline of the clergy.

(*d*) The following cases of offences of this class have found their way into the Reports:—

Burder v. *Hodgson* . .	3 Curteis, Eccl. Rep. 822; 4 Notes of Cases, 483.
Burder v. *Speer* . . .	1 Notes of Cases, 39.
Re Monckton . . .	3 Ibid. lv.
Brookes v. *Cresswell* . .	4 Ibid. 429; 5 Ibid. 544; 1 Robert. 606.
Trower v. *Hurst* . . .	4 Notes of Cases, 52.
Kitson v. *Loftus* . . .	4 Ibid. 323.
Clarke v. *H.* . . .	4 Ibid. 321; 1 Robert. 377.
Farnall v. *Craig* . .	5 Notes of Cases, 557; 6 Ibid. 682.
Bp. of Norwich v. *Berney* .	36 L. J., Eccl. 8.
Bp. of Lincoln v. *Day* .	4 Notes of Cases, 299.
Burder v. *Langley* . .	1 Ibid. 542.
Burder v. *Hale* . . .	6 Ibid. 611.
Burder v. *Pughe* . .	1 Jurist, N. S. 1178.
Hussey v. *Radcliffe* . .	5 Ibid. 1014.

SECT. 2.—*Offences against Religion.*

Offences against religion.

The second head of offences relate to blasphemy, heresy, contravention of the Thirty-nine Articles of Religion, and depraving the Book of Common Prayer.

Blasphemy.

1. With respect to Blasphemy.

The statute of 29 Car. 2, c. 9, which abolished the writ *de hæretico comburendo*, provides that the archbishop, bishops and judges of ecclesiastical courts may still inflict excommunication, deprivation, degradation, and other ecclesiastical censures for the offence of blasphemy.

The act 9 Will. 3, c. 35, as modified by 53 Geo. 3, c. 160, s. 2, provides civil penalties for depraving the Christian religion by words or writing. There are other statutes which have the same object (*e*).

Heresy.

2. As to Heresy.

Dr. Burn says, "Heresy is taken to be a false opinion repugnant to some point of doctrine clearly revealed in Scripture, and either absolutely essential to the Christian faith, or at least of most high importance" (*f*).

"But it is impossible to set down all the particular errors which may properly be called heretical, concerning which there are and always have been so many intricate disputes: however the following statute of 1 Eliz. c. 1, which erected the High Commission Court, having restrained the same from adjudging any points to be heretical, but such as are therein expressed; it hath been since generally holden, that although the High Commission Court was abolished by the statute of 16 Car. 1, c. 11, yet those rules will be good directions to ecclesiastical courts in relation to heresy" (*g*).

By which statute of 1 Eliz. c. 1, it is enacted as follows: Sect. 8, "All such jurisdictions, privileges, superiorities, pre-eminences, spiritual and ecclesiastical, as by any spiritual or ecclesiastical power or authority have heretofore been or may lawfully be exercised or used for the visitation of the ecclesiastical state and persons, and for reformation, order and correction of the same, and of all manner of heresies, schisms, abuses, offences, contempts, and enormi-

Bp. of Hereford v. *T——n* . 2 Robert. 595; 17 Jur. 190.
Horner v. *Jones* . . . 9 Jurist. 167.
Exp. Rose . . . . 17 Ibid. 180; 18 Q. B. 751.
Bp. of London v. *Bonwell* . 14 Moo. P. C. 395.
Burder v. *O'Neill* . . 9 Jur., N. S. 1109.
Bp. of Norwich v. *Pearse* . L. R., 2 Adm. & Eccl. 281.
Mouncey v. *Robinson* . . 37 L. J., Eccl. 8.

(*e*) *Vide supra*, p. 1084.

(*f*) 1 Haw. 3.

(*g*) 1 Haw. 4.

ties, shall for ever be united and annexed to the imperial crown of this realm."

And by sect. 17, now repealed, as aforesaid, "Such persons to whom the queen shall by letters patents under the great seal give authority to execute any jurisdiction spiritual shall not in any wise have power to adjudge any matter or cause to be heresy, but only such as heretofore have been adjudged to be heresy by the authority of the canonical Scriptures, or by some of the first four General Councils, or by any other General Council wherein the same was declared heresy by the express and plain words of the said canonical Scriptures, or such as hereafter shall be judged or determined to be heresy by the high court of parliament, with the assent of the clergy in the Convocation."

And this is the first boundary that was set to the extent of heresy as to the matter thereof, what only shall be adjudged heresy (*h*).

The ground of making which limitation was a retrospect to the times in which everything was adjudged heresy, that the Church of Rome thought fit to call by that name, how far soever in its own nature from being fundamental, or from being contrary to the Gospel and the ancient doctrine of the Catholic Church; such as speaking against pilgrimages, against the worship of images, against the necessity of auricular confessions, and the like (*i*).

Insomuch that the canon law reckons up eighty-eight different sorts of heresy (*k*).

The act indeed is not so particular and certain as might have been wished; for according to the inclination of the judge, possibly some would determine that to be heresy by the canonical Scriptures which is not at all heresy, nor contrary to the canonical Scriptures; but howsoever it brought heresy to a greater certainty than before (*l*).

Power of the ordinary.

The diocesan alone, as to ecclesiastical censures, may doubtless proceed to sentence heresy (*m*).

And so might he have done at common law, before any statute for heresy was made (*n*).

But it is said that no spiritual judge, who is not a bishop, has this power (*o*).

And it has been questioned, whether a conviction before the ordinary were a sufficient foundation, whereon to ground

(*h*) 1 H. H. 406.
(*i*) Gibs. 352.
(*k*) Ayl. Par. 290.
(*l*) 1 H. H. 407.
(*m*) 1 H. H. 392; 1 Haw. 4.
(*n*) 3 Inst. 39.
(*o*) 1 Haw. 4.

the writ *de hæretico comburendo,* as it is agreed that a conviction before the convocation was (*p*).

For, anciently, the temporal courts would not usually burn the offender without a sentence from a provincial synod (*q*).

Power of the temporal courts.

It is certain that a man cannot be proceeded against at the common law in a temporal court merely for heresy; yet if in maintenance of his errors he set up conventicles and raise factions, which may tend to the disturbance of the public peace, it seems that he might have been fined and imprisoned upon an indictment at the common law (*r*).

Also a temporal judge may incidentally take knowledge whether a tenet be heretical or not: as where one was committed by force of the statute of 2 Hen. 4, c. 15 (which is now repealed), for saying that he was not bound by the law of God to pay tithes to the curate; and another, for saying that though he was excommunicate before men, yet he was not so before God; the temporal courts, on an *habeas corpus* in the first case, and an action of false imprisonment in the other, adjudged neither of the points to be heresy within that statute; for the king's courts will examine all things which are ordained by statute (*s*).

But if a person be proceeded against as a heretic in the spiritual court *pro salute animæ,* and think himself aggrieved, his proper remedy seems to be, to bring his appeal to a higher ecclesiastical court, and not to move for a prohibition from a temporal one, which, as it seems to be agreed, cannot regularly determine or discuss what shall be called heresy (*t*).

How punishable.

There is no doubt but that, at the common law, one convicted of heresy, and refusing to abjure it, or falling into it again after he had abjured it, might be burned by force of the writ *de hæretico comburendo,* which was grantable out of chancery upon a certificate of such conviction; but it is said that he forfeited neither lands nor goods, because the proceedings against him were only *pro salute animæ.* But at this day, the said writ *de hæretico comburendo* is abolished by the statute 29 Car. 2, c. 9; and all the old statutes which gave a power to arrest or imprison persons for heresy, or introduced any forfeiture on that account, are repealed.

(*p*) 1 Haw. 4.
(*q*) 1 H. H. 392.
(*r*) 1 Haw. 4.
(*s*) 1 Haw. 4. See *Attorney-General* v. *Pearson,* 3 Meriv. 383—385.
(*t*) 1 Haw. 44.

By 29 Car. 2, c. 9, it is enacted as follows:—

Sect. 1. "The writ commonly called *breve de hæretico comburendo*, with all process and proceedings thereupon in order to the executing such writ, or following or depending thereupon, and all punishment by death, in pursuance of any ecclesiastical censures, shall be utterly taken away and abolished."

Writ *de hæretico comburendo* taken away.

Sect. 2. "Provided, that nothing in this act shall extend to take away or abridge the jurisdiction of protestant archbishops or bishops, or any *other* judges of any ecclesiastical courts, in case of atheism, blasphemy, heresy or schism, and other damnable doctrines and opinions; but that they may proceed to punish the same according to his majesty's ecclesiastical laws, by excommunication, deprivation, degradation, and other ecclesiastical censures, not extending to death, in such sort, and no other, as they might have done before the making of this act."

Ecclesiastical censures not taken away.

As they might have done before the making of this Act.] —Upon the abrogating of all the ancient statutes made against heretics, the cognizance of heresy and punishment of heretics returned into its ancient channel and bounds; and now belongs to the archbishop, as metropolitan of the province, and to every bishop within his own proper diocese, who are to punish only by ecclesiastical censures. And so (says Lord Coke) it was put in ure in all Queen Elizabeth's reign; and so it was resolved by the chief justice, chief baron, and two other of the judges upon consultation, in 9 Jac. 1, in the case of *Legate*, the heretic (*u*).

But as no person can be indicted or impeached for heresy before any temporal judge, or other that has temporal jurisdiction, so if a heretic be convicted of heresy, and recant, he may not be punished by the ecclesiastical law, as was resolved in 9 Jac. 1, in the case of *Nicholas Fuller* (*x*).

3. As to contravention of the Thirty-nine Articles.

By 13 Eliz. c. 12, s. 2, it is enacted that "If any person ecclesiastical, or which shall have ecclesiastical living, shall advisedly maintain or affirm any doctrine directly contrary or repugnant to any of the said articles, and being convented before the bishop of the diocese, or the ordinary, or before the Queen's Highness commissioners in causes ecclesiastical, shall persist therein, or not revoke his error, or after such revocation eftsoons affirm such untrue doctrine,

Contravention of Thirty-nine Articles.

Ecclesiastics maintaining doctrines contrary to the said articles shall be deprived.

(*u*) Gibs. 353; 2 Brownl. 41; 3 Inst. c. 5, of Heresy; 12 Rep. 93.

(*x*) Gibs. 353; 12 Rep. 44.

such maintaining or affirming and persisting, or such eftsoons affirming, shall be just cause to deprive such person of his ecclesiastical promotions; and it shall be lawful to the bishop of the diocese or the ordinary, or the said commissioners, to deprive such person so persisting, or lawfully convicted of such eftsoons affirming, and upon such sentence of deprivation pronounced, he shall be indeed deprived."

Pelling v. *Whiston.*

The case of *Pelling* v. *Whiston* (*y*), in 1712, is one of the most remarkable cases of proceedings for contravention of the Thirty-nine Articles in the last century.

King's Proctor v. *Stone.*

Since that time there has been the case of the *King's Proctor* v. *Stone*(*z*); and since that numerous other cases.

In the case of the *King's Proctor* v. *Stone* Lord Stowell said as follows:—

"This offence is laid under the statute 13 Eliz. c. 12, 'for advisedly maintaining or affirming doctrines directly 'contrary or repugnant to the articles of religion.' These articles are not the work of a dark age (as it has been represented); they are the production of men eminent for their erudition, and attachment to the purity of true religion. They were framed by the chief luminaries of the reformed church, with great care, in convocation, as containing fundamental truths deducible, in their judgment, from Scripture; and the legislature has adopted and established them, as the doctrines of our church, down to the present time.

"The purpose for which these articles were designed, is stated to be 'the avoiding the diversities of opinions, and 'the establishing of consent touching true religion.' It is quite repugnant, therefore, to this intention, and to all rational interpretation, to contend, as we have heard this day, that the construction of the articles should be left to the private persuasion of individuals, and that every one should be at liberty to preach doctrines contrary to those which the wisdom of the state, aided and instructed by the wisdom of the church, had adopted. It is the idlest of all conceits, that this is an obsolete act; it is in daily use, '*viridi observantiâ*,' and as much in force as any in the whole statute book, and repeatedly recommended to our attention by the injunctions of almost every sovereign who has held the sceptre of these realms. It is no business of mine, in this place, to vindicate the policy of any legislative act, but to enforce the observance of it. I cannot omit,

(*y*) Whiston's Case, published by himself, p. 147; 1 Comyn, Rep. 199; Gibs. 1007; Brodrick & Fremantle, 318.

(*z*) 1 Hagg. Consist. Rep. 424.

"however, to observe, that it is essential to the nature of every establishment, and necessary for the preservation of the interests of the laity, as well as of the clergy, that the preaching diversity of opinions shall not be fed out of the appointments of the established church; since the church itself would otherwise be overwhelmed with the variety of opinion, which must, in the great mass of human character, arise out of the infirmity of our common nature. For this purpose, it has been deemed expedient to the best interests of Christianity, that there should be an appointed liturgy, to which the offices of public worship should conform; and as to preaching, that it should be according to those doctrines which the state has adopted, as the rational expositions of the Christian faith. It is of the utmost importance that this system should be maintained. For what would be the state and condition of public worship, if every man was at liberty to preach, from the pulpit of the church, whatever doctrines he may think proper to hold? Miserable would be the condition of the laity if any such pretension could be maintained by the clergy.

"It is said, that Scripture alone is sufficient. But though the clergy of the Church of England have been always eminently distinguished for their learning and piety, there may yet be, in such a number of persons, weak and imprudent and fanciful individuals. And what would be the condition of the church, if such person might preach whatever doctrine he thinks proper to maintain? As the law now is, every one goes to his parochial church, with a certainty of not feeling any of his solemn opinions offended. If any person dissents, a remedy is provided by the mild and wise spirit of toleration which has prevailed in modern times, and which allows that he should join himself to persons of persuasions similar to his own. But that any clergyman should assume the liberty of inculcating his own private opinions, in direct opposition to the doctrines of the established church, in a place set apart for its own public worship, is not more contrary to the nature of a national church than to all honest and rational conduct. Nor is this restraint inconsistent with Christian liberty; for to what purpose is it directed, but to ensure, in the established church, that uniformity which tends to edification, leaving individuals to go elsewhere according to the private persuasions they may entertain? It is, therefore, a restraint essential to the security of the church, and it would be a gross contradiction to its fundamental purpose to say, that it is liable to the reproach of perse-

King's Proctor v. Stone.

"cution, if it does not pay its ministers for maintaining doctrines contrary to its own. I think myself bound at the same time to declare, that it is not the duty nor inclination of this court to be minute and rigid in applying proceedings of this nature, and that if any Article is really a subject of dubious interpretation, it would be highly improper, that this court should fix on one meaning, and prosecute all those who hold a contrary opinion regarding its interpretation. It is a very different thing, where the authority of the Articles is totally eluded, and the party deliberately declares the intention of teaching doctrines contrary to them."

Hodgson v. Oakeley.

In the case of *Hodgson* v. *Oakeley*, in 1845 (*a*), an unbeneficed clergyman being proceeded against under the general ecclesiastical law for "maintaining and affirming, contrary to the true usual literal meaning of the Articles of the Established Church, all Roman doctrine," and being convicted thereof, was inhibited from performing any ministerial duty whatever, within the province of Canterbury, until he should retract his errors.

It was holden, as the offence charged was for maintaining and affirming *all* Roman doctrine, not to be necessary to specify in the articles any doctrine in particular.

Heath v. Burder.

In the case of *Heath* v. *Burder*, in 1862 (*b*), it was holden by the Privy Council, affirming the decision of the Court of Arches, that the statute 13 Eliz. c. 12, s. 2, being eminently a penal statute, in proceeding under it against a beneficed clergyman by articles for maintaining and affirming doctrines contrary and repugnant to the Thirty-nine Articles, and in derogation and depraving of the Book of Common Prayer, it is not sufficient to plead various passages extracted from the defendant's work as separately, or collectively, containing doctrines contrary to the Thirty-nine Articles; but such of the Thirty-nine Articles as it is alleged are contravened must be specifically pleaded, together with a specification of the unsound doctrine or heresy which the passages extracted are alleged to maintain.

That, however, if a single distinct passage complained of contains a plain meaning which can admit of no doubt, it may perhaps be sufficient to set it out and state that it is directly contrary or repugnant to such one or more of the Thirty-nine Articles as are conceived to be opposed to it.

That the statute is positive in its prohibition, and for-

(*a*) 1 Robert. 322; 4 Notes of Cases, 180.

(*b*) 15 Moo. P. C. 1.

bids the promulgation of any doctrine contradicting the Articles.

That it is immaterial for the purposes of the statute, whether the unsound doctrines are preached or published in a book.

That in this case, articles being exhibited against a clergyman by his diocesan for "advisedly maintaining or affirming any doctrines contrary or repugnant to the Articles of Religion," it was the duty of the court to ascertain first, on the ordinary principles of construction, what is the true meaning of the Articles alleged to be infringed; secondly, what was the fair interpretation of the language used by the accused; and, lastly, whether by his language he has or has not put forward doctrine which contradicts the Thirty-nine Articles.

That the word "advisedly" in the statute is not limited in its operation to those who avowedly reject the Articles, but is used simply to show that the act complained of is the deliberate act of the accused, and not a casual expression dropped inadvertently.

That it is not necessary, in order to bring a beneficed clergyman within the operation of the statute, that he should have propounded any intelligible heterodox doctrine. It is sufficient if what he has propounded be directly repugnant to the doctrine laid down in the Articles.

That, unless a clergyman convicted under the statute expressly and unreservedly revoke his errors, the court has no discretion, but must pronounce sentence of deprivation; and that it is no part of the duty of either the promoter's counsel, or the court itself, to formulate the revocation; such revocation must be expressly and unreservedly made by the party proceeded against.

And the clerk was deprived under the statute.

"Essays and Reviews" cases.

In the cases of *Williams* v. *The Bishop of Salisbury* and *Wilson* v. *Fendall* (c), the "Essays and Reviews" cases, in 1863, the Privy Council held, that the proceedings being of a criminal nature, it is necessary that the accusation should be stated with precision and distinctness in the pleadings.

The articles of charge must (1) distinctly state the opinions which the clerk has advisedly maintained, and must set forth the passages of the work in which those opinions are stated; and (2) such articles must specify the doctrines of the church which the opinions of the clerk are alleged to contravene, and the particular Arti-

(c) 2 Moo., N. S. 375.

"Essays and Reviews" cases.

cles of Religion and the Formularies which contain such doctrines.

The accuser is for the purpose of the charge confined to the charges which are included and set out in the articles of charge, as the matter of accusation; but it is competent to the accused party to explain from the rest of his work, from whence the passages libelled are extracted, the sense or meaning of any passage or word that is challenged by the accuser.

With respect to the legal tests of doctrine of the Church of England, by the application of which the Judicial Committee, as the Appellate Court, is to try the soundness of the passages libelled, it is the province of that court, on the one hand, to ascertain the true construction of the Articles of Religion and Formularies referred to in each charge, according to the legal rules for the interpretation of statutes and written instruments; and on the other hand, to ascertain the plain grammatical meaning of the passages which are charged as being contrary to, or inconsistent with, the doctrines of the church.

Matters of doctrine, in which the church has prescribed no rule, may be discussed without penal consequences; and no rule is to be ascribed to the church which is not found expressly and distinctly stated, or which is not plainly involved in, or to be collected from the written law of the church.

In the eleventh Article of Religion, it is laid down, that "we are accounted righteous before God only for the merits of our Lord and Saviour Jesus Christ by faith, and not for our own works or deservings;" but as the article was wholly silent as to the merits of Jesus Christ being transferred to us, and asserts only that we are justified for the merits of Jesus our Saviour by faith, and by faith alone, it is not penal in a clergyman to speak of merit by transfer as a "fiction," however unseemly that word may be when used in connection with such a subject.

In one of the articles it was charged that it was a contradiction of the Church of England, as laid down in the sixth and twentieth Articles of Religion, the *Nicene* Creed, and in the Ordination Service of Priests, to affirm that any part of the Canonical Books of the Old or New Testament, upon any subject whatever, however unconnected with religious faith or moral duty, was not written under the inspiration of the Holy Spirit; and the tribunal held (*dissentientibus* the Archbishops of Canterbury and York), that the charge that every part of the Scriptures was written under the inspiration of the Holy Spirit was not established, as it was not to be found either in the sixth

or twentieth Articles of Religion, the Formularies, the Service for the Ordering of Priests, or the *Nicene* Creed.

It is not competent to a clergyman of the Church of England to teach or suggest that a hope may be entertained of a state of things contrary to what the church expressly teaches or declares will be the case.

An article setting forth extracts of a review of a work that a clergyman of the Church of England had reviewed, charging that he had therein advisedly declared, that after this life there would be no judgment of God, awarding either eternal happiness or eternal misery, contrary to the three creeds, the absolution, the Catechism, and the burial and commination service, was holden not to be established by the passages of the work pleaded.

It is not penal for a clergyman to express a hope of the ultimate pardon of the wicked.

And the tribunal, reversing the judgment of the Court of Arches, dismissed the suits.

Noble v. *Voysey.*

In the case of *Noble* v. *Voysey* (*d*), in 1871, it was holden that in charges against a clergyman for maintaining and promulgating doctrines contrary to, and inconsistent with, divers of the Thirty-nine Articles of Religion, the Judicial Committee is not compelled, as in cases affecting the right to property, to affix a definite meaning to any given Article, where such Article is really a subject of dubious interpretation. It is, however, very different where the authority of the Articles is totally eluded, and the party deliberately declares the intention of teaching doctrines contrary to them. It is not requisite in such case that the contradiction of the Articles should be a contradiction *totidem verbis;* it is sufficient if the opinions published or promulgated be repugnant to, or inconsistent with, their clear construction.

It is not competent for any clergyman, of his own mere will, not founding himself upon any critical inquiry, but simply upon his own taste and judgment, to assert that whole passages of some of the canonical books are without any authority whatever, as being contrary to the teaching of Christ as contained in others of the canonical books.

The articles of charge were for having printed, published and set forth certain volumes of sermons, in which the defendant advisedly maintained and affirmed doctrines directly contrary or repugnant to, and inconsistent with divers of the Thirty-nine Articles of Religion and Formularies of the Church of England, the alleged errors being: (1) Concerning the reconciliation of God to man by the

(*d*) L. R., 3 P. C. App. 357; 7 Moo. P. C., N. S. 167.

Noble v. *Voysey.*

sacrifice or propitiation of our Lord Jesus Christ, and as to the necessity of such reconciliation; (2) As to the incarnate Godhead of our Lord, and the doctrine of the Holy Trinity; (3) As to the authority of the Scriptures or Holy Writ. These articles were admitted and sustained. And the several errors and doctrines so charged to have been maintained and affirmed were holden to be sufficiently proved by the incriminated passages extracted from the said sermons, and set forth in the articles of charge as being respectively repugnant to and inconsistent with the several Articles of Religion to which they were pleaded as contrary to and opposed, without reference to the Formularies of the Church to which they were also pleaded to be repugnant and inconsistent. Sentence of deprivation was pronounced against the clerk, unless, within a week from the delivery of the judgment, he should expressly and unreservedly retract the several errors in which he had so offended; which he refused to do.

Ditcher v. *Denison, Sheppard* v. *Bennett.*

The cases of *Ditcher* v. *Denison* and *Sheppard* v. *Bennett* have been already mentioned (*c*). I will only add here that the sentence in *Sheppard* v. *Bennett* has, since the former pages were written, been affirmed by the Privy Council.

Depraving Prayer Book.

4. As to depraving the Book of Common Prayer.

The various enactments against this offence are to be found in 2 & 3 Edw. 6, c. 1, ss. 2, 3; 1 Eliz. c. 2, ss. 2, 3; and Canon 6 of 1603, already set forth (*d*).

Sanders v. *Head.*

The case of *Sanders* v. *Head* (*e*), in 1843, was one where articles against a clergyman for openly affirming and maintaining positions in derogation of and depraving the Book of Common Prayer were sustained. *Cawdry's Case* (*f*), so often referred to in this book, was of this kind.

SECT. 3.—*Simony.*

1. By the Canon Law.
2. By Statute 31 Eliz. c. 6, and herein as to Resignation Bonds.
3. Punishable in Ecclesiastical Court.
4. Statutes of William III. and Anne.

1. *By the Canon Law.*

Simoniacus is he who makes a corrupt contract; and *simoniacè promotus* is he who is promoted upon such contract, although he was not privy to it himself.

(*c*) Pp. 689—693, *supra.*
(*d*) *Vide supra*, pp. 957, 1077.
(*e*) 3 Curt. Eccl. Rep. 45; 2 Notes of Cases, 355.
(*f*) 5 Co. 1.

According to the canon law, the most general division of simony is into (*g*), 1. Mental; 2. Conventional; 3. Real. The first being where the advantage stipulated for is future, the latter where it precedes the appointment to the benefice.

Judgment in *Dean of York's case.*

The following sketch of the origin of simony and of the penalties incident to it under the canon law, is taken from Dr. Phillimore's very learned judgment in the case of *The Dean of York* (*h*). "It deduced its appellation from the rebuke given by the Apostle St. Peter to the individual whose name it has stamped with infamy, and rendered execrable to posterity, for his attempt to barter money for spiritual gifts. 'Let thy money perish with thee, because thou hast thought that the gift of God might be purchased with money' (*i*).

"Accordingly, from the very commencement of the Christian era simony has been stigmatized as the greatest of offences, denounced as such by all the memorable councils of the church, and treated in the body of the canon law as a crime in comparison of which all other crimes sink into insignificance,—*pro nihilo æstimanda sunt.*

"Simony was prohibited in one shape by the second canon of the Council of Chalcedon, in another by the third Council of Lateran (1179), and by all the expounders of the canon law who flourished between these periods, which I mention the rather because these councils and the fourth Council of Lateran (1215) have frequently been recognized by the temporal courts as forming an integral part of the ecclesiastical laws of England.

"It is very true, that by the Council of Chalcedon the sale of holy orders and of inferior offices is specified as the object of condemnation and punishment; in the early period of Christianity simony was necessarily limited to these objects—the teachers of the Gospel were poor and incapable of possessing benefices; for it was not till a much later period that the Church of Christ was admitted to have a place in the *Collegia licita* of the empire.

"But it by no means follows that, because, by the ancient canons of the church, simony is more especially designated in connection with the purchase and sale of holy orders, whereas in the canons of the later ages little mention is heard of this, and they are wholly directed

(*g*) Dict. de Droit Canonique, par Durand de Maillane, tom. iv. p. 503.

(*h*) This judgment was the subject of a prohibition by the Court of Queen's Bench; but the question of simony, as will be seen below, was not raised before that court.

(*i*) See 3 Inst. 153.

By the canon law.

Judgment in *Dean of York's case.*

"against simony in the collation and provision of benefices:—that therefore the church attaches a different notion to simony now from that which the canons applied to it, or thought the crime of simony more odious then than she does at this day. The view of the ancients and moderns has been invariably the same, and that the former have principally inveighed against simony of the one description, the latter against simony of the other description, arises not from any different view taken by the church as to the nature of the offence, but from the change of discipline which change of times and manners has rendered necessary.

"'Semper enim ecclesiæ scopus in condemnatione turpis criminis fuit, ut omnis in electione ministrorum ecclesiæ caveretur venalitas, nec in electione illorum munera sed merita attenderentur. Quod ut obtineretur prioribus ecclesiæ sæculis, præcipuè invigilandum fuit ut à sacris ordinibus omnis venalitas arceretur: posterioribus verè temporibus non tam contra simoniacas ordinationes, quam simoniacas beneficiorum provisiones agendum fuit: utpote quod jam priores raræ—posteriores verè frequentiores, nec minus perniciosæ, evasissent ob mutatam lapsu temporis disciplinam.'

"Alexander II., who occupied the papal chair in the middle of the eleventh century, applied the provisions of the second canon of the Council of Chalcedon to those who trafficked in the purchase and sale of benefices, and his epistle to the clergy and people of Lucca is to be found in the body of the canon law in the Epistles of Gratian (*k*).

"'Si quis divinorum præceptorum et animarum salutis immemor, beneficium ecclesiæ iniquâ cupiditate ductus vendere vel emere temerario ausu præsumpserit, sicut in Chalcedonensi Consilio definitum est, gradûs sui periculo eum subjacere decernimus, nec ministrare possit ecclesiæ quam pecuniâ venalem fieri concupivit.'

"Cœlestus II., who was pope in the twelfth century, lays down the law in these words: 'Si quis in ecclesiâ ordinationem vel promotionem per pecuniam acquisiverit, acquisitâ prorsus careat dignitate.'

"And in the Extravagantes (*l*) we find: 'Qui dignitates ecclesiasticas simoniacè acquisiverit—illis sit ipso jure privatus et in futurum inhabilis ad eas et quamvis alias obtinendas.'

"And again: 'Qui quomodolibet simoniam commiserit dando vel recipiendo ordines vel beneficiorum præsentationes excommunicatus habeatur.'

(*k*) X. Causæ 1, qu. 3, c. 9. (*l*) Extr. Pauli 2.

"The eighth article of the third (*m*) Council of Lateran forbids even the gift or promise of the next presentation to any ecclesiastical benefice. It is headed thus: 'Ne ecclesiastica beneficia alicui promittantur antequam vacent.' And then proceeds to enact: 'Nulla ecclesiastica ministeria seu etiam beneficia, vel ecclesiæ, alicui tribuantur seu promittantur antequam vacent.' Words express against any promise whatsoever connected with the expectation of a vacancy.

"The third (*n*) title of the fifth book of the Decretals is devoted to the subject of simony. The commentator in the gloss introduces the subject by stating, that having dealt with accusers and calumniators, it remains to look at the crimes with which persons may be charged, amongst which simony obtains the first place. The first chapter is headed, 'De simoniâ, et ne aliquid pro spiritualibus exigatur vel promittatur.'

"And Lancelottus, the most concise and perspicuous of commentators, in discussing the text, gives this definition: 'Simonia nihil aliud est quam studiosa voluntas sive cupiditas emendi vel vendendi spiritualia vel spiritualibus annexa' (*o*).

"And again: 'Contrahitur ergo simonia cum quis sacra quodammodo in commercium deducit.' And in another passage: 'Simonia est dare pecuniam pro vicariatu vel alia administratione rerum spiritualium.'

"The principles which have governed these decisions of the Catholic Church (I mean the Church of Christ) have always been 'Gratis accepistis, gratis date.' And the only point to be ascertained has been 'num quovis modo per temporalia ad canonicatum perveniatur, id solum sufficere judicans ut non gratis et per consequens simoniacè pervenire censeatur.' And again: 'Impudentissimum proinde prætextum detestamur, qui de solo proventu reque temporariâ canonicatûs se pacisci, cum ea spiritualia tam arcto sit annexa vinculo ut non magis ab eâ develli queat quam in homine vivo manente corpus a suâ animâ.'

"It is clear that the purchase or sale of the reversion of a benefice—for whether a benefice or a dignity is immaterial—was simoniacal; because, to use the language of an eminent canonist, 'cum enim exceranda simonia sit episcopatum vendi, similitèr æstimandum de ceteris beneficiis, quæ veluti membra et portiones quædam sunt episcopatûs.'

"It may be proved, also, by abundant citations from the canon law, that even the purchase of the reversion of

(*m*) A.D. 1179. (*n*) Lib. 5, tit. 3, c. 749.
(*o*) Instit. Can. l. 3, t. 3.

By the canon law.

Judgment in *Dean of York's case.*

"a benefice by a father, though the son was kept in ignorance of it, was simoniacal on the part of the son (*p*).

"Authorities upon this subject might be multiplied *ad infinitum;* but I would especially refer to the Commentaries of Van Espen (*q*) on this head, which will be found in his seven chapters *De simoniâ circà beneficia,* as well on account of the deservedly high reputation of the author as of the learned industry with which he has discussed and exhausted all that can be brought to bear on this subject. I would refer also to the *Vetus et Nova Ecclesiæ Disciplina* of Thomassin (*r*).

"The question of simony, and the opinions of the Gallican Church respecting it, are also ably treated in the excellent and useful work of Durand de Maillane (*s*), and in the well known Dictionary of Denisart (*t*): both the one and the other establish and confirm the doctrine which I have laid down.

"Throughout the whole body of the canon law, whether we look to the text or to the commentators, the technical distinctions between immediate and reversionary possession are unknown. The prohibition is distinct and explicit, and is unequivocally opposed to all traffic of any description concerning 'spiritualia, vel spiritualibus annexa.'

"No fact can be better established than that the Church of England, in her transition from the errors of Popery to the purer doctrines of the reformed religion, retained much of the discipline of the Roman Catholic Church, and above all, that she retained inviolate all the laws which had been

(*p*) An anecdote is related of Manguin, Bishop of Nismes, who appeared at the Council of Rheims, in 1094, at which Leo IX. presided in person, and confessed that his bishopric had been purchased for him by his parents *se tamen ignorante,* and stated that he was ready to resign it in the hands of the pope and council, as he preferred surrendering the functions to retaining it at the hazard of his soul, and laid his crozier at the feet of the pope: but as the simony had been committed without his privity or consent, he was required to take his oath of the fact; another crozier was put into his hands, and he was reinstated in his episcopal functions.

So where a prebendary discovered that his father had purchased his stall for him when in his minority, he being ignorant of the fact, on arriving at years of discretion he resigned it into the hands of the superior of the convent. The chapter re-elected him, but placed him last in the choir: he appealed to the pontiff (Clement III.) to be reinstated in his old place, who enjoined him to be content, adding, *ratione primæ receptionis nihil audeas in ipsâ ecclesiâ vindicare.*

(*q*) Van Espen, Juris Univ. Eccles. pars 2, tit. 3.

(*r*) Thomassin, vol. iii. (fol. edit.), published at Leyden, 1705.

(*s*) Dictionnaire de Droit Canonique, par Durand de Maillane, tom. iv. p. 503.

(*t*) Denisart, vol. iii.

"so long inculcated by the Gregorian Code and the canonical jurists against simony. Simony abounded in the middle ages, and laws were accumulated on laws to repress and coerce it; happily with us the crime has been less prevalent: but still the ancient laws are the same, they have undergone no change, they are still a part and parcel of the ecclesiastical jurisprudence of England. The third Council of Lateran (*u*) is clear and express, and this Council of Lateran, as well as the fourth (*x*), is embodied in our laws.

"Lyndwood (*y*), our own canonist, whose authority is unquestionable, lays it down in his Provincials,—under the head of *Ne quis Ecclesiam nomine dotalitatis transferat, vel pro præsentatione aliquid accipiat*,—'Nulli liceat ecclesiam nomine dotalitatis ad aliquem transferre, vel pro præsentatione alicujus personæ pecuniam, vel aliquod aliud emolumentum, pacto interveniente, recipere. Quod si quis fecerit, et in jure convictus vel confessus fuerit, ipsum, tam regiâ quam nostrâ freti auctoritate, patronatu ejusdem ecclesiæ in perpetuum privari volumus.'

"And Ayliffe thus defines simony:—'Simony, according to the canonists, is defined to be a deliberate act, or a premeditated will and desire of selling such things as are spiritual, or of anything annexed unto spirituals, by giving something of a temporal nature for the purchase thereof; or in other terms it is defined to be a commutation of a thing spiritual or annexed unto spirituals, by giving something that is temporal.'

"By the Injunctions (*z*) published successively by Edw. VI. in 1547, and by Queen Elizabeth in 1559, it is thus provided: 'To avoid the detestable sin of simony, because buying and selling of benefices is execrable before God, therefore all such persons as buy any benefices or come to them by fraud and deceit shall be deprived thereof and made incapable at any time after to receive any spiritual preferment, and such as sell them or by any colour bestow them for their own gain and profit shall lose their right and title to the patronage.' Afterwards in the Constitutions and Canons Ecclesiastical, agreed upon in the Synod of London in 1603, and confirmed by the king's authority under the great seal of England—canons not in any way binding on the laity, but obligatory on the clergy—the fortieth of these canons has an

(*u*) A.D. 1179.

(*x*) A.D. 1215.

(*y*) Lib. v. tit. 7; see too pp. 107, 281; Degge, p. 1, c. 5.

(*z*) See also Reformatio Legum, f. 29, 6.

"essential and immediate bearing on the point at issue. No one who is at all conversant with the legal writings and commentaries of the canonists, can read this fortieth canon without being convinced that it is deeply imbued with the soundest principles of the canon law on the subject of simony: and as it is universally binding on the clergy, and professes to expound the discipline of the Church of England on this point, it becomes the bounden duty of every ecclesiastical jurisdiction, however constituted, to give force to the due execution of this law to the fullest effect" (*a*).

The oath against simony by Canon 40.

By Can. 40 of 1603, "To avoid the detestable sin of simony, because buying and selling of spiritual and ecclesiastical functions, offices, promotions, dignities and livings is execrable before God, therefore the archbishop and all and every bishop or bishops, or any other person or persons having authority to admit, institute, collate, instal, or to confirm the election of any archbishop, bishop, or other person or persons, to any spiritual or ecclesiastical function, dignity, promotion, title, office, jurisdiction, place, or benefice with cure, or without cure, or to any ecclesiastical living whatsoever, shall before every such admission, institution, collation, installation or confirmation of election, respectively minister to every person hereafter to be admitted, instituted, collated, installed or confirmed, in or to any archbishopric, bishopric, or other spiritual or ecclesiastical function, dignity, promotion, title, office, jurisdiction, place, or benefice with cure or without cure, or in or to any ecclesiastical living whatsoever, this oath in manner and form following, the same to be taken by every one whom it concerneth, in his own person, and not by a proctor:—

"*I, N. N., do swear, that I have made no simoniacal payment, contract, or promise, directly or indirectly, by myself, or by any other to my knowledge or with my consent, to any person or persons whatsoever, for or concerning the procuring and obtaining of this ecclesiastical dignity, place, preferment, office, or living* [respectively and particularly naming the same, whereunto he is to be admitted, instituted, collated, installed or confirmed], *nor will at any time hereafter perform or satisfy any such kind of payment, contract or promise made by any other*

(*a*) *Dean of York's case*, 27—36, published 1841. See also section 8 of 31 Eliz. c. 6, to show that the general ecclesiastical law is not affected by the statute law on this subject.

without my knowledge or consent. So help me God through Jesus Christ."

And this oath, whether interpreted by the plain tenour of it, or according to the language of former oaths, or the notions of the catholic church concerning simony, is against *all* promises whatsoever (*b*).

Therefore, though a person comes not within the statute of 31 Eliz. c. 6, hereafter following, by promising *money, reward, gift, profit, or benefit,* yet he becomes guilty of perjury if he takes this oath after any promise of what kind soever (*c*).

Declaration substituted for oath.

By 28 & 29 Vict. c. 122, s. 2, a declaration against simony was substituted for this oath, and a new Canon was passed by Convocation substantially the same as the old one, save as to the declaration in lieu of the oath (*d*).

Case of *Rex* v. *Lewis*.

In the case of *Rex* v. *Lewis* (*e*), in 4 Geo. 1, an information was moved for against a clergyman for perjury at his admission to a living, upon an affidavit that the presentation was simoniacal. But the court refused to grant it till he had been convicted of the simony.

Case of *Goldham* v. *Edwards*.

To a declaration by A., an incoming, against B., an outgoing incumbent, for dilapidations to the rectory house and premises, B. pleaded that A., being rector of C., and B. incumbent of D., it was agreed between them, with the consent of their respective patrons and diocesans, that they should exchange their respective livings, and "that A. should not call upon B. to pay for the repairs in the declaration mentioned, or for any or either of them:"—the court held, upon motion for judgment *non obstante veredicto* on this plea, that it did not *necessarily* disclose a simoniacal contract: and that the court was bound to put the same construction upon the plea when brought before it on the demurrer (*f*). This case seems to have set at rest the doubt expressed by the court in the earlier case of *Downes* v. *Craig* (*g*).

Case of *Sweet* v. *Meredith*.

"A contract by the owner of the advowson of a rectory, such owner not being the incumbent of the rectory, for the sale of the advowson, with a stipulation for the payment by him to the purchaser of interest on the purchase-money until a vacancy, is not simoniacal; and the specific performance of such a contract was accordingly decreed" (*h*).

(*b*) Gibs. 802.

(*c*) Ibid.

(*d*) *Vide supra*, Canon at length, p. 467.

(*e*) Str. 70; *vide supra*, p. 1085.

(*f*) *Goldham* v. *Edwards* (1855), 16 Comm. Ben. 437; 17 ib. 141.

(*g*) 9 Mee. & Wel. 166.

(*h*) *Sweet* v. *Meredith* (1862), 3 Giff. 310; 31 L. J., N. S. (Cha.) 817.

2. *By* 31 *Eliz. c.* 6, *and herein as to Resignation Bonds.*

By 31 Eliz. c. 6.

By 31 Eliz. c. 6, s. 4 (*h*), "For the avoiding of simony and corruption in presentations, collations and donations of and to benefices, dignities, prebends, and other livings and promotions ecclesiastical, and in admissions, institutions, and inductions to the same," it is enacted, that "If any person or persons, bodies politic and corporate, shall or do, for any sum of money, reward, gift, profit or benefit, directly or indirectly, or for or by reason of any promise, agreement, grant, bond, covenant, or other assurance of or for any sum of money, reward, gift, profit, or benefit whatsoever, directly or indirectly, present or collate any person to any benefice with cure of souls, dignity, prebend, or living ecclesiastical, or give or bestow the same for or in respect of any such corrupt cause or consideration, every such presentation, collation, gift and bestowing, and every admission, institution, investiture and induction thereupon, shall be utterly void, frustrate, and of none effect in law; and it shall be lawful for the queen, her heirs and successors, to present, collate unto, or give, or bestow, every such benefice, dignity, prebend and living ecclesiastical for that one time or turn only; and all and every person or persons, bodies politic and corporate, that shall give or take any such sum of money, reward, gift, or benefit, directly or indirectly, or that shall take or make any such promise, grant, bond, covenant, or other assurance, shall forfeit and lose the double value of one year's profit of every such benefice, dignity, prebend, and living ecclesiastical; and the person so corruptly taking, procuring, seeking or accepting any such benefice, dignity, prebend, or living, shall thereupon and from thenceforth be adjudged a disabled person in law to have or enjoy the same benefice, dignity, prebend, or living ecclesiastical" (*i*).

Simoniacal presentations void.

Corrupt institution.

Sect. 5. "And if any person shall for any sum of money, reward, gift, profit, or commodity whatsoever, directly or indirectly (other than for usual and lawful fees), or for or by reason of any promise, agreement, grant, covenant, bond or other assurance of or for any sum of money, reward, gift, profit, or benefit whatsoever, directly or indirectly, admit, institute, instal, induct, invest or place any person in or to any benefice with cure of souls, dignity, prebend, or other ecclesiastical living, every such person

(*h*) See the remarks of Lord Mansfield and Wilmot, J., on the public utility of the statutes forbidding simony, 3 Burr. 1514.

(*i*) See 3 Inst. 153; *Smith* v. *Shelbourn*, Hob. 165.

so offending shall forfeit and lose the double value of one year's profit of every such benefice, dignity, prebend, and living ecclesiastical; and thereupon, immediately from and after the investing, installation or induction thereof had, the same benefice, dignity, prebend and living ecclesiastical shall be eftsoons merely void, and the patron or person to whom the advowson, gift, presentation or collation shall by law appertain, shall and may by virtue of this act present or collate unto, give and dispose of the same benefice, dignity, prebend, or living ecclesiastical, in such sort to all intents and purposes, as if the party so admitted, instituted, installed, invested, inducted, or placed, had been or were naturally dead."

Sect. 6. "Provided, that no title to confer or present by lapse shall accrue upon any avoidance mentioned in this act, but after six months next after notice given of such avoidance by the ordinary to the patron."

Corrupt resignation.

Sect. 7. "And if any incumbent of any benefice with cure of souls shall corruptly resign (*k*) or exchange the same, or corruptly take for or in respect of the resigning or exchanging the same, directly or indirectly, any pension, sum of money, or benefice whatsoever, as well the giver as the taker of any such pension, sum of money, or other benefice corruptly, shall lose double the value of the sum so given, taken, or had; the one moiety as well thereof, as of the forfeiture of the double value of one year's profit before mentioned, to be to the queen, and the other to him that will sue for the same in any of her majesty's courts of record."

This act not to affect power of ecclesiastical court.

Sect. 8. "Provided always, that this act, or any thing therein contained, shall not in anywise extend to take away or restrain any punishment, pain or penalty limited, prescribed or inflicted by the laws ecclesiastical, for any the offences before in this act mentioned; but that the same shall remain in force, and may be put in due execution, as it might be before the making of this act; this act or anything therein contained to the contrary thereof in anywise notwithstanding."

Corrupt ordination.

Sect. 9. "And moreover, if any person shall receive or take any money, fee or reward, or any other profit, directly or indirectly, or shall take any promise, agreement, covenant, bond, or other assurance, to receive or have any money, fee, reward, or any other profit, directly or indirectly, either to himself or to any other of his friends (all ordinary and lawful fees only excepted), for or to procure

(*k*) *Young* v. *Jones*, E. T. 1782, 4 Bl. Com, 62, ed. Chr. n. 8.

31 Eliz. c. 6. Corrupt ordination.

the ordaining or making of any minister (*l*), or giving of any orders, or licence to preach, he shall for every such offence forfeit the sum of 40*l*., and the party so corruptly ordained or made minister, or taking orders, shall forfeit the sum of 10*l*.; and if at any time within seven years next after such corrupt entering into the ministry or receiving of orders, he shall accept or take any benefice, living, or promotion ecclesiastical, then immediately from and after the induction, investing or installation thereof or thereunto had, the same shall be eftsoons merely void, and the patron shall present, collate unto, give and dispose of the same, as if the party so inducted, invested or installed had been naturally dead; the one moiety of all which forfeitures shall be to the queen, and the other to him that will sue in any of her majesty's courts of record."

Simony is mentioned in this act.

For avoiding of Simony.]—Almost all the authors who have treated of this subject, and even the learned judges in delivering their resolutions in cases of simony, have asserted that there is no word of *simony* in this act; and from thence a conclusion had been drawn in favour of the ecclesiastical jurisdiction, that the temporal courts have nothing to do with simony as such, or to define what shall be deemed simony and what not, but only to take cognizance of the particular corrupt contracts therein specified. Which consequence, although deducible perhaps from other premises, yet does not follow from the aforesaid observation; for it is plain here is the word simony; and the mistake seems to have happened from this short preamble being inadvertently printed at the end of the foregoing section, treating entirely of a different subject, so as to have been overlooked by the first person who made the observation, whom others have followed without examination.

Donations.]—For the like reason only (as it seems) a doubt was made in the case of *Bawderock* v. *Mackallar* (*m*), in 2 Car. 1, whether this statute extends to donatives.

If any Person or Persons.]—If one who has no right, present by usurpation, and does it by reason of any corrupt contract or agreement, that presentation and the induction thereupon are hereby void; for this statute extends to all patrons, as well by wrong as by right. In like manner, if when a church is void, the void turn is purchased, although the grant of a void turn, as being

(*l*) See too *Kircudbright* v. *Kircudbright*, 8 Ves. 53.
(*m*) Cro. Car. 330.

a thing in action, is of itself void, and the purchaser's presentee comes in *quasi per usurpationem;* yet because it is by means of a simoniacal contract, it is as much simony as if the grant had not been void (*n*).

Sale of next presentation or advowson, church being void.

That the sale of an advowson or of a next presentation, the church being void, is simoniacal, is a confirmed maxim of the common law (*o*). If a benefice be sold while an action is pending for removing the clerk of a person who has usurped the right of patronage, and such action be successful, the sale is simoniacal, for the church was *never full* of the clerk of the usurper (*p*). And it was holden by the Exchequer Chamber, reversing the decision of the Court of Common Pleas, that the sale of the advowson of a living, the incumbency whereof was then voidable under the old law against pluralities, was simoniacal (*q*). But it is always now holden, that the sale of the next presentation of a living, the church being full, is valid, except where a clergyman is the purchaser (*r*). It was formerly supposed that if the incumbent be in a *dying* state, the sale was simoniacal (*s*); but the decision of the House of Lords, in the case of *Fox* v. *The Bishop of Chester*, has established that such sale is valid while the incumbent is alive and the church full. Chief Justice Best delivered the opinion of the judges (reversing that of the Court of King's Bench (*t*)) in this important case (*u*):—

Case of *Fox* v. *Bishop of Chester*.—Decision of the House of Lords, that as long as the incumbent is alive, the sale of the next presentation to a layman is a valid.

"My lords, the question which your lordships have been pleased to put to the judges in this case is, 'Whether, upon the whole of the matters stated or referred to in the special verdict, the right to present to the rectory or parish church of Wilmslow, upon the death of the Reverend Joseph Bradshaw, was by law vested in Edward Vigor Fox, the plaintiff in error.' The judges who heard the argument at your lordships' bar are unanimously of opinion, that upon the whole matters stated or referred to

(*n*) 1 Inst. 120; 3 Inst. 153; Cro. Eliz. 789.

(*o*) Per Lord Hardwicke, in *Grey* v. *Hesketh*, Amb. 268; *Bishop of Lincoln* v. *Wolferstan*, 1 Bla. Rep. 490; 2 Wils. 174; 3 Burr. 1512; *Leak* v. *Coventry*, Cro. Eliz. 611; from which cases it would appear that if a patron sells the fee-simple of an advowson after the avoidance, neither he nor his vendee can have a *quare impedit.*

(*p*) *Walker* v. *Hammersley*, Skin. 90.

(*q*) *Alston* v. *Atlay*, 7 Ad. & El. 311; 6 Nev. & Man. 686.

(*r*) *Vide infra*, p. 1141.

(*s*) Cro. Eliz. 685; *Smith* v. *Shelbourn*, Hobart, 165; *Benedict Winchcombe* v. *Bishop of Winchester*, Moor. 916; *Smith* v. *Shelbourn*, 2 W. Bla. 1052; 19 Vin. Ab. 458.

(*t*) 2 B. & C. 635.

(*u*) 6 Bing. Rep. 16—22.

Fox v. Bishop of Chester.

As long as incumbent alive, sale of presentation to layman valid.

"in the special verdict, the right to present to the rectory or parish church of Wilmslow, upon the death of the Reverend Joseph Bradshaw, was by law vested in Edward Vigor Fox, the plaintiff in error.

"The patronage of churches was at first yielded by the bishops to the lords of manors who founded or endowed them, and annexed them to the manors in which the churches were situate. By the grant of a manor, the advowson appendant to it passes to the grantee; many of these advowsons have since been severed from the manors to which they were appendant. Although advowsons, when *in gross*, as these which are separated from the manors to which they belonged are called, are a species of spiritual trusts, yet they have been said by Lord Kenyon and other judges to be trusts connected with interests; and they certainly do not lose the temporal character which originally belonged to them, but may be sold either in perpetuity, or for the next or any number of avoidances. If the perpetual advowson be sold when the church is void, the next presentation will not pass; and if the next avoidance only be sold after the death of the incumbent, the sale is altogether void. It may be wise to carry the restraint on the sale of this species of property still further, and to say the next avoidance shall in no case be sold. Undoubtedly much simony is indirectly committed by the sale of next presentations. If it be proper to prevent the giving of money for a presentation, it seems equally proper to prevent the sale of that which gives the immediate right to present. But the courts of law have never thought that they were authorized to go this length; and even in cases where the purchaser of the next presentation seemed to bring a party nearer to simony than in any other, it was found necessary to have the aid of the legislature to prevent such purchases. A clergyman might buy a next presentation, and present himself before the passing of the statute of the 12 Anne, c. 12 (*v*). The preamble to the second section of that statute states that 'some of the clergy have procured preferments for themselves by buying ecclesiastical livings.' And then the section provides, that if any one shall either directly or indirectly take or procure the next avoidance for money, reward, gift, profit or benefit, or shall be presented or collated (which words limit the operation of the act to clergymen), that it shall be deemed simoniacal.

"It seems to me that if the terms of the statute of

(*v*) 13 Ann. c. 11, in "The Statutes Revised."

"Elizabeth could be extended by equity, the case of a clergyman buying a presentation with the intention of presenting himself might have been reached without any other act of parliament. If such a case as that were not within the statute of Elizabeth, the case, on which your lordships have desired our opinion, cannot be affected by that statute. The church, in the present case, was full; no clergyman was privy to the agreement; and the living was not intended by the plaintiff in error, at the time he bought the presentation, for the clerk that he afterwards presented. But I would observe, that persons have recovered who appeared to be dying. The special verdict only states that the incumbent, at the time of the sale, was afflicted with a mortal disease, so that he was then in extreme danger of his life; and his life was thereby greatly dispaired of; and that he was so afflicted with such mortal disease, and in extreme danger of his life, and his life was and continued to be greatly dispaired of until his death, which happened at half-past eleven at night of the day on which the sale was completed. Many who are afflicted with mortal diseases, and are from such diseases thought to be in imminent danger of dying, live for a considerable time; and the effect of the diseases are sometimes so far suspended, that the persons so afflicted become again capable of performing the duties belonging to their stations in life.

"If this conveyance was void, it must have been void at the time it was executed, and would remain void into whatever hands and under whatever circumstances the right of presentation might have passed. Now, if this incumbent had been restored to apparent health, and the vendee had sold the presentation to another person, ignorant of the circumstances under which the first sale was made, it would be most unjust to hold that the second sale was void; and yet this would be the necessary consequence of a decision that the sale was simoniacal. *Whilst the law permits the next presentation of livings to be sold during the lives of the incumbents, as long as the incumbent is alive the sale is good.* Every one who purchases a next presentation contemplates the death of the incumbent. If this contemplation made the sale void, no sale of a next avoidance could be good. *If the death of the incumbent, and the prospect of using the presentation may be contemplated, the time when the death is to happen cannot be material.*

"This case has been compared by the counsel for the

Fox
v.
Bishop of Chester.

As long as incumbent alive, sale of presentation to layman valid.

"defendant in error to those of contemplation of bankruptcy. But a party is not permitted to do an act in contemplation of bankruptcy which is injurious to creditors. A transfer of goods or payment of money in contemplation of bankruptcy, was, before the 6 Geo. 4, void. By that act such a transfer or payment is an act of bankruptcy, because such transactions are direct frauds on the creditors of the bankrupt. But the death of an incumbent may be contemplated, and the purchasing of the next avoidance, in consequence of such contemplation, is no fraud upon any one. The cases, therefore, have no resemblance to each other. The making the legality of the transaction to depend on the state of the incumbent's health would give occasion to much expensive litigation, and, probably, to much false swearing, and would keep churches for a long time void.

"The affairs of men are best regulated by broad rules, such as exclude all subtle disputes, all doubtful, unsatisfactory inquiries. *It would be difficult to establish a rule that should settle what degree of probability of the approaching death of an incumbent should prevent the sale of the avoidance of a benefice, and more difficult to ascertain by evidence when an incumbent was within that degree.* I submit to your lordships that the most convenient rule is that which I conceive the law has already established, namely, that *the right to sell the presentation continues as long as the incumbent is in existence.*

"The judgment of the court below is, according to the words of the chief justice, 'founded on the language of the 31 Eliz. c. 6, and the well-known principle of law, that the provisions of an act of parliament shall not be evaded by shift or contrivance.' The words of the fifth section of the act are, 'If any person shall, for any sum of money, reward, gift, profit or benefit, directly or indirectly, or for or by reason of any promise, agreement, grant, bond, covenant, or other assurance of or for any sum of money, reward, gift, profit or benefit whatsoever, directly or indirectly present or collate any person to any benefice, or give or bestow *the same* for or in respect of any such corrupt cause or consideration.' This clause applies only to the person presenting to the living. If he has received no reward or promise of reward, the presentation is not affected by the terms of the act. The plaintiff in error, who made the presentation, received no reward, nor had any expectation of reward, for making this presentation. I agree, that if some other person had received a reward

"for the plaintiff in error, and was to account to him for it, —if the plaintiff in error was not the real purchaser of the avoidance, but the person presented, or some one in his behalf, these and many other things might be considered as frauds on the act, and have avoided the contract. But such things should have been shown by the pleadings, and found by the jury. All that appears on this record is, that the plaintiff in error bought the next avoidance of a living that was full; and that, without any corrupt consideration, he used the right of presentation which he had purchased. All this he had a right to do. There is no circumstance found that shows this is a fraud on the act, unless it be a fraud on the act to buy the presentation to a living which the seller and buyer expect will soon become vacant. Presentations are bought and sold every day with this expectation.

"There is no legal authority to support the judgment of the court, except a short loose note in Winch's Reports of Hutton, saying what used to be done in Chancery; on the other hand, the case of *Barrett* v. *Glubb* is directly opposed to the judgment of the Court of King's Bench. It was thought that case had not the weight of a judicial decision because it was not acted upon. But it was acted upon. Lord Bathurst decreed the conveyance of the advowson which included the next presentation, and gave the purchaser and his clerk their costs. The seller must have acquiesced in this decision, or he would have prosecuted his *quare impedit;* and if the Common Pleas had retained the opinion that they had certified to the chancellor, he might have carried it by bill of exceptions to the King's Bench. When the chancellor decreed a conveyance, without doubt it was such a conveyance as gave the purchaser a legal title from a time before the death of the incumbent, by making the assignment take effect from the date of the contract to assign; there was, therefore, no occasion for any injunction, as was supposed by the King's Bench. The question, by the conveyance decreed, was fairly raised for another court of law, if the party had not completely acquiesced in the judgment of the Common Pleas, confirmed by that of the chancellor. There are no other cases in the books which bear much on the question proposed to us by your lordships. For the reasons given in support of the judges' answer to that question I only am responsible."

Purchase for son.

It is to be observed, that the clause in the statute is general, "If *any* person or persons," and makes no allowance in the case of father and son, more than in the case of other persons; and that, therefore, the notion that a

31 Eliz. c. 6. Purchase for son.

purchase of the next avoidance when the incumbent is sick and ready to die, and the son's privity to that purchase, is less simony in the case of a son than it would be in the case of any other person, has no foundation in the act. Neither is the reason, that a father is bound by nature to provide for his son, good to the aforesaid purpose; for a man is bound by nature also to provide for himself, and so might as well purchase for himself (*x*).

So if a father, in consideration of a clerk's marrying his daughter, covenants with the clerk's father, that he will procure the clerk to be presented, admitted, instituted, and inducted into such a church upon the next avoidance thereof; this is a simoniacal contract (*y*); otherwise, if the covenant is independent of the consideration (*z*).

Without knowledge of presentee.

Directly or indirectly.]—Simony may be committed, and yet neither the patron nor the incumbent be privy to it, or knowing of it. Thus in a writ of error to reverse a judgment, whereby the king had recovered in a *quare impedit*, upon a title of simony, which was, that a friend of the patron had agreed to give so much money to one (who was not the patron), to procure the said person to be presented, who was presented according to that agreement; it was assigned for error, that it did not appear that either patron or parson were knowing of this agreement. But by the court, the parson was simoniacally promoted; and a case was mentioned, where the parson of St. Clement's was ousted, by reason that a friend had given money to a page belonging to the Earl of Exeter, to endeavour to procure the presentation, and neither the earl nor the parson knew anything of it (*a*).

Construction of statute as to resignation bonds.

It has been seen that 31 Eliz. c. 6, s. 4, renders void the presentation or collation to a living for any "*bond, covenant or other assurance of or for any sum of money, reward, gift, profit, or benefit whatsoever.*" The bond and assurance here mentioned is for *money, reward, gift, profit or benefit;* for instance, a promise of the presentee to his patron to forbear trying a suit for tithes (*b*); so also a covenant to marry a particular person (*c*); any transaction of this kind constitutes a corrupt and simoniacal bargain, the nature of which cannot be altered by the inten-

(*x*) Wats. c. 5; Gibs. 798; see 2 Bla. Com. 280.

(*y*) Wats. c. 5; Litt. Rep. 177.

(*z*) *Byrte* v. *Manning*, Cro. Car. 425.

(*a*) Wats. c. 5; *Rex* v. *Trussel*, 1 Siderf. 329; 2 Keb. 204; Cro. Eliz. 789; Comyn's Digest, title Eglise; 1 Brownl. 153; 3 Lev. 337; *quære aliter* as to advowsons in fee, *Basset* v. *Glubb*, 2 Blac. R. 1052.

(*b*) *Rex* v. *Bishop of Oxford*, 7 East. 600.

(*c*) Cro. Car. 425; Degge, 47.

tion of the contracting party to make an innocent or praiseworthy use of a contract in its essence illegal (*d*). But a way was found very early to defeat the intention of this act, by *general bonds of resignation*, whereby the presentee obliged himself to resign and void the benefice, within a certain time after warning to be given to him, or else indefinitely, whenever the patron should require it (*e*).

Peele v. *Earl of Carlisle.*

And these bonds have been allowed both in law and equity: thus in the case of *Peele* v. *The Earl of Carlisle*, in 6 Geo. 1, in the King's Bench (*f*), in an action of debt upon a bond, conditioned to resign a benefice, the court refused to let the defendant's counsel argue the validity of such bonds, they having been so often established even in a court of equity; and that also, where the condition is general, and not barely to resign to a particular person.

Peele v. *Capel.*

So in 9 Geo. 1, in Chancery, *Peele* v. *Capel* (*g*). Capel on presenting Peele to a living, took a bond from him to resign when the patron's nephew came of age, for whom the living was designed. When the nephew was of age, instead of requiring a resignation, it was agreed between them all, that Peele should continue to hold the living, paying 30*l*. a year to the nephew. Peele makes the payment for seven years, but refusing to pay any more, the patron puts the bond in suit; and then Peele comes into this court for an injunction, and to have back his 30*l*. a year. On hearing, the Lord Chancellor granted the injunction, not (as he said) upon account of any defect in the bond itself, which he held good, but on account of the ill use that had been made of it; and as to the money, it being paid upon a simoniacal contract, he left the plaintiff to go to law for it.

Durston v. *Sandys.*

So in the case of *Durston* v. *Sandys*, in 1686 (*h*), the defendant, upon his presenting the plaintiff to a parsonage, took a bond of him to resign: which (as the reporter says) though in itself lawful, yet the patron making an ill use of it, viz. to prevent the incumbent from demanding tithes in kind, the court awarded a perpetual injunction against the bond.

Hesketh v. *Grey.*

And in the case of *Hesketh* v. *Grey*, in the King's Bench, in 28 Geo. 2, which was a case out of Chancery:—Debt upon a bond. Upon oyer of the condition, it appeared that the obligor had been presented to the living of Staining by the obligee, and had agreed to deliver it up into the hands of the ordinary, within three months after the

(*d*) 2 B. & C. 659.
(*e*) Gibs. 799, 800.
(*f*) Str. 227.
(*g*) Str. 534.
(*h*) 1 Vern. 411.

Resignation bonds.
Hesketh v. Grey.

expiration of five years, at the request of the plaintiff, his heirs or assigns, or upon proper notice in writing, so that a new presentation might be made. And after this recital of the agreement, the condition was, that if the defendant did deliver up into the hands of the ordinary the said living, so as that the same might become void, then the obligation to be void. The defendant pleaded, that he did offer to resign absolutely the living, and that he delivered the resignation to the ordinary that he might accept the same, and the plaintiff make a new presentation, but that the ordinary refused to accept it. He pleaded further, that the agreement was corrupt; and that the bond was taken to keep the defendant in awe, and therefore also corrupt and void. Ryder, Chief Justice, delivered the resolution of the court: "The averring in the plea, that the agreement was corrupt, will not make it so; but it should set forth what sort of corruption, that the court may judge whether simoniacal or not. As to the point, whether a general bond of resignation is good, we are all of opinion it is. It was determined in the case of *Lord Carlisle* v. *Peele*. But every simoniacal contract is void, where it is secured only by promise. Otherwise it is when a bond is given for the performance of such a contract, when the condition does not express the agreement, but is only a condition for payment of money, because we cannot go out of the written condition to vacate the obligation, and also because a specialty does not want a consideration to support it, as a promise depending only upon simple contract does. It has been objected, that these kinds of bonds, when the contract appears upon the face of the condition to be for a general resignation upon request, are void: indeed, it does look so; but the law is otherwise. And as to the other objection, we are all of opinion that the plea in bar is bad, because it is not averred that the bishop has accepted this resignation, and for these reasons: 1. Because, without the acceptance of the ordinary, the resignation is not complete, and the patron can have no benefit of such a resignation. 2. Because the defendant has undertaken for the acceptance of the bishop, as that is necessary to make a complete resignation, which he has by the condition of his bond agreed to do. 3. Because the plea does not contain a sufficient excuse for the bishop's non-acceptance of the resignation: for the defendant has undertaken that the bishop shall do it, or if he does not he will make a satisfaction by paying money or the like to the party who is injured thereby; and this is reasonable, and is the law in such cases, when the obligor undertakes for the act of a

"stranger. The ordinary is a judicial officer, and is intrusted with a judicial power to accept or refuse resignations as he thinks proper." And judgment was given for the plaintiff.

Ordinary judicial officer with power to accept and refuse resignation.

Grey afterwards applied to the Court of Chancery for an injunction. The proceedings are thus reported (*i*): Plaintiff was presented to the living of Steyning by the defendant, and previous thereto gave a general bond of resignation after the end of six years, on three months' request: action sued at law, and judgment recovered on the bond. Bill by plaintiff for an injunction, and *inter alia* for a discovery whether defendant had not sold the advowson since the end of the six years, with a promise of procuring an immediate resignation. Defendant demurred to the discovery, as tending to subject him to the penalties of the statute against simony. Lord Hardwicke, C., was of opinion that the sale of an advowson during a vacancy is not within the statute of simony as sale of the next presentation is (*k*); but it is void by the common law. These sorts of bonds are held good at law, and so they are in equity, unless an ill use is attempted to be made of them, in which case this court will interfere (*l*). The question then is, whether the sale of his advowson under these circumstances, attended with an immediate resignation, is an abuse? It seems to be an evasion of the statute: perhaps if more money had been given by reason of the vacancy, it might be within the statute. It desires discovery; and he overruled the demurrer. It was suggested in the bill, and made a defence at law, that the bishop had refused to accept the resignation. His lordship approved the conduct of the bishop in case he was informed the advowson was sold to be attended with an immediate resignation. And he also expressed himself of the same opinion with the judges in the King's Bench, that the bishop's refusal to accept the resignation was no excuse for the incumbent's not resigning; for that he had undertaken to resign, which implies both resignation and acceptance, without which the resignation is not complete (*m*).

Ffytche's case, 1780.

In the case of *The Bishop of London* v. *Ffytche*, in 1780, the rectory of the parish church of Woodham Walter in Essex, in the diocese of London, becoming vacant, Mr. Ffytche presented his clerk, the Reverend John Eyre, to the bishop for institution. The bishop being informed that the said John Eyre had given his patron a bond in a large penalty to resign the said rectory at any time upon

(*i*) *Grey* v. *Hesketh*, Ambler, 268.

(*k*) See Cro. Eliz. 788; Moore, 914.

(*l*) 1 Vern. 411.

(*m*) *Lamb's case*, 5 Co. 23.

Resignation bonds. *Ffytche's case.*

his request, and the said John Eyre acknowledging that he had given such a bond, the bishop refused to institute him to the living.

Whereupon Mr. Ffytche brought a *quare impedit* (*n*) against the bishop in the Court of Common Pleas, and obtained judgment against him. Upon which the bishop appealed to the Court of King's Bench, and that court also gave judgment in affirmance of the judgment in the Court of Common Pleas. Upon this the bishop appealed to the House of Lords; where, upon debate, the lords ordered several questions to be put to the judges; who differing in opinion, they were directed to deliver their opinions *seriatim*, with their reasons. The questions were twelve in number; but divers of them going only to matter of form, the true substantial inquiry was, whether an agreement made between an incumbent and patron, whereby the incumbent undertakes to avoid the benefice at the request of the patron, be not an agreement for a benefit to the said patron within the statute of 31 Eliz. c. 6, so as by reason of such agreement such presentation shall be void?

The case is memorable, both in a historical and a legal point of view. It was the last time in which the bishops spoke and voted as judges in the House of Peers; and their votes, with the aid of Lord Thurlow, reversed by a bare majority the sentences of the Courts in Westminster Hall. Nevertheless this judgment has been approved of by all lawyers of repute since it was delivered.

Lord Thurlow (speaking last) argued at large against the validity of these bonds, and among other particulars observed, that one thing which struck him was, that ever since the establishment of the Church of England, this ecclesiastical office was an office *for* life. It is not competent to the bishop to give it for any less time than for life. And it never was competent to a bishop of any European Church that ever he heard of (and he had made inquiries) to give it for any less estate than an estate for life. The incumbent therefore derives entirely under and from the bishop an estate for life, grounded upon the original constitution of the office, and consequently invariable

(*n*) Upon this quare impedit the bishop filed a bill to discover whether the clerk presented to him by Mr. Ffytche had not given a general bond of resignation, in order to set up that bond as a defence at law for having refused him institution. To this bill the defendant demurred; 1st, on account of the legality of such bond; 2nd, that the discovery was immaterial; but the demurrer was overruled. 1 Bro. 96.

by law. If that be the constitution of the office, by what rule or principle can it be justified at common law, that such an officer should give a bond to his patron in order to hold the living for a less term than for life. In the argument of this cause, a question was asked, with respect to a bond given by a *judge* to resign his office of judge: what was the answer? The bond would be given to the king; and if given to the king, it would be void, because it would render the judges dependent upon the king, instead of being independent, as the statute of King William expresses it, *quamdiu se bene gesserint*. A *Master in Chancery* is an officer appointed for life: suppose the Chancellor has the appointment of it; suppose such Master gives a bond to resign when called upon, would that bond be good at common law? No; because it is not only contrary to the constitution of his office, but because the public has an interest in the independence of that officer, as being appointed for life, and a public law officer; his place is independent, it is whilst he behaves himself well in that office; if he is an officer for life, how can any private man whatsoever, because it is his province to appoint him, take upon him to render that officer's situation such as the law said it should not be. And in the conclusion he moved, that the judgments of the Courts of Common Pleas and King's Bench in this cause be reversed. Which was determined accordingly, upon a division, nineteen against eighteen (*o*).

One of the questions proposed to the judges was, whether the ordinary is bound to accept a resignation? To which the answer of most of them was, that this being an entire new case, and not made a question of in the courts below, nor ever argued at their lordships' bar, they begged leave for the present to decline answering it (*p*).

Resignation bonds good in special circumstances.

Since this case, a bond given to the patron by an incumbent on presentation to reside on the living, or to resign to the ordinary, if he did not return to it within one month after notice, and also not to commit waste, was adjudged to be good; for the condition was not, as in Ffytche's case, to secure an unqualified resignation, but to enforce the performance of moral, legal, and religious duties (*q*). And in a subsequent case, the condition of a bond appearing to be to reside, to keep the buildings on the living in repair,

(*o*) The case was printed by T. Cunningham, Esq. The speeches of the judges and of the Bps. of Salisbury, Llandaff and Bangor are there given at length; see Phillimore's edition of Burn, title "Simony."

(*p*) *Vide supra*, p. 520.

(*q*) *Bagshaw* v. *Bossley*, 4 T. R. 78.

Resignation bonds good in special circumstances.

and to resign after one month's notice, in order that the patron's son, a youth of fourteen years of age, might be presented to the benefice, it was declared by the Court of King's Bench to be legal, without argument; this case not being precisely similar to Ffytche's, and the court understanding that both parties intended to appeal to the House of Lords (*r*). But the case does not appear to have gone further. Yet if the bond is general for resignation, some special reason must be shown to require a resignation, or the Court of Chancery will not suffer it to be put in suit: for otherwise, simony would be committed without the possibility of proof or punishment (*s*).

Particular resignation bonds.

The decision in Ffytche's case was however only considered to have established the illegality of *general* resignation bonds, and it was still supposed that bonds *in favour of specified persons* were legal. This doctrine was however completely overthrown by the decision of the House of Lords in *Fletcher* v. *Sondes*, which reversed that of the Court of Queen's Bench (*t*). All the judges, with the exception of Bayley, J., Holroyd, J., and Littledale, J., delivered their opinions at length: three (Best, C. J., Burrough and Gaselee, Js.) held the bond legal; six (Abbott, C. J., Alexander, C. B., Graham, B., Parke, J., Garrow, B., Hullock, B.) and the Lord Chancellor (Eldon) held a contrary opinion. The decision of the House of Lords was delivered by the Lord Chancellor on April 9th, 1827, as follows (*u*):

Fletcher v. *Lord Sondes.*

A bond for resigning a living in favour of one of two brothers of the patron, is void.

"Having gone through all the circumstances of the case, he said, the question now for the consideration of their lordships was, whether this was a bond on which the party was entitled to sue; and in coming to a conclusion on this subject their lordships should consider themselves as judges in a court of justice, and his duty was not to state the case on any other ground than that which was warranted by law. He had not the slightest hesitation in saying, that before the decision given in the case of *The Bishop of London* v. *Ffytche*, this bond would have been held legal, but he was of opinion that it came within the principle which governed that decision. It had been argued by counsel at the bar that this bond could not be considered simoniacal, as the condition of the resignation was the presentation of a particular person, and that the obligee might see, and the bishop take care that on the resigna-

(*r*) *Partridge* v. *Whiston*, 4 T. R. 359.

(*s*) Treat. of Eq. by Fonb. 5th ed. 230, 231, with the cases there cited.

(*t*) 5 B. & A. 835.

(*u*) 3 Bing. Rep. 598.

"tion, no other person should be presented but the Rev. Henry Watson, the brother of Lord Sondes. Now, if the resignation were conditional, it would cease to be a resignation at all, and after an incumbent had resigned, was there any law upon earth which could compel a patron to present any particular person? It had already been decided in several instances, that a resignation, to be good, must be *purè et absque conditione,* otherwise the law said it was no resignation, or it was void. True it was, that two or three eminent persons were adverse to the decision in the case of *The Bishop of London* v. *Ffytche,* among whom was Lord Kenyon, to whose opinion in legal matters he paid the highest respect, and it was consequently urged, that that decision should govern no other case except such as was strictly in point, but his lordship thought that there was nothing in the present case which should take it out of the rule by which that decision was governed. *The Bishop of London* v. *Ffytche,* was a bond of general resignation, and if the incumbent resigned in the present case, could not the patron present whom he pleased? How then did it differ from a bond of general resignation? It had been urged, that if this bond should be judged simoniacal, the incumbent and the patron would be subject to heavy penalties, but it was their lordships' business not to attend to anything but to the subject proposed for their consideration. How could they with propriety pronounce against the law to avoid the consequences of an illegal act? When he looked to the cases in the books, which were advanced in support of this judgment, he should say they were not well considered. One of them said, that a bond of resignation might be made in favour of a brother; another said in favour of a cousin or a near relation. But he would ask, what had the condition or relationship of the person in whose favour the bond was made to do with the question? That ought to be left out of consideration. Could a patron take a bond in favour of himself? If not, he could not take it in favour of any man on account of relationship, for no man is more nearly related to a patron than himself; and, if he could take such a bond, it would in construction of law be the same as a general bond of resignation, for it was evident he could present whom he pleased after. But, again, it was said, that it could not be held simoniacal, unless it appeared that some benefit could be derived from it. Might not such a bond be made covertly in consideration of money, in this manner;—when the time for resignation arrived, the patron might say to the clergyman, 'If you pay me a certain sum of money, I

Resignation bonds. *Fletcher v. Lord Sondes.*

"will allow you to hold your living longer.' Could not such a thing be easily effected? He had no doubt but that this decision would come by surprise, and bear harshly on many patrons and clergymen, but he was not one of those who would hesitate to indemnify those who had hitherto committed themselves by such bonds, whether patrons or incumbents, provided that were done without touching on the general principles of the ecclesiastical laws of the country, some of which, it should be admitted, were severe. On the grounds before mentioned, he did not see how he could do otherwise than adjudge this a simoniacal contract: now, therefore, after the most profound consideration, he would move their lordships, that the judgment in the court below be reversed.

"Judgment reversed accordingly.

"The Archbishop of Canterbury entirely concurred in the opinion of the lord chancellor, which was agreeable to that of the majority of the judges; but he had to implore their lordships' attention to this circumstance, that a large number, both of patrons and incumbents, had exposed themselves to severe penalties. His grace trusted, that however erroneously they had thus committed themselves, that House would afford them protection. He held in his hands a bill containing such restrictions as would protect bonds of this nature heretofore made, and exempt the parties from the penalties above alluded to; with their lordships' permission he would move that it should be now read *pro formâ*, and on the second reading he would explain its provisions."

7 & 8 Geo. 4, c. 25.

This bill became 7 & 8 Geo. 4, c. 25, which enacted, that no presentation to any spiritual office made before 9th of April, 1827, shall be void on account of any agreement to resign when another person specially named shall become qualified to take the same; that persons making such agreement should not be subject to any penalty on account thereof, and that all such made before 9th April, 1827, should be valid and effectual in law. The object of this act was strictly retrospective, but in the following

9 Geo. 4, c. 94.

year the statute of 9 Geo. 4, c. 94, was passed, intituled "An Act for rendering valid Bonds, Covenants, and other Assurances for the Resignation of Ecclesiastical Preferments, in certain specified cases:" it governs all future transactions of this description:—

Engagements entered into for the resignation of any benefice upon

"'Whereas it is expedient that certain bonds, covenants, 'and other assurances for the resignation of ecclesiastical 'preferments, should be rendered valid in the cases and 'subject to the limitations hereinafter specified;' Be it

enacted, &c., That every engagement by promise, grant, agreement, or covenant, which shall be really and *bonâ fide* made, given, or entered into at any time after the passing of this act, for the resignation of any spiritual office, being a benefice with cure of souls, dignity, prebend, or living ecclesiastical, to the intent or purpose, to be manifested by the terms of such engagement, that any one person whosoever, to be specially named and described therein, or one or two persons to be specially named and described therein, being such persons as are hereinafter mentioned, shall be presented, collated, nominated, or appointed to such spiritual office, or that the same shall be given or bestowed to or upon him, shall be good, valid, and effectual in the law to all intents and purposes whatsoever, and the performance of the same may also be enforced in equity: provided always, that such engagement shall be so entered into before the presentation, nomination, collation, or appointment of the party so entering into the same as aforesaid."

notice or request to be valid.

Proviso.

Sect. 2. "Where two persons shall be so specially named and described in such engagement, each of them shall be, either by blood or marriage, an uncle, son, grandson, brother, nephew, or grand nephew of the patron or of one of the patrons of such spiritual office, not being merely a trustee or trustees of the patronage of the same, or of the person or one of the persons for whom the patron or patrons shall be a trustee or trustees, or of the person or one of the persons by whose direction such presentation, collation, gift, or bestowing shall be intended to be made, or of any married woman whose husband in her right shall be the patron or one of the patrons of such spiritual office, or of any other person in whose right such presentation, collation, gift, or bestowing shall be intended to be made."

Relationship of such persons.

Sect. 3. "No presentation, collation, gift, or bestowing to or of any such spiritual office of or upon any spiritual person, to be made after the passing of this act, nor any admission, institution, investiture, or induction thereupon, shall be void, frustrate, or of no effect in law for or by reason of any such engagement so to be made, given, or entered into by such spiritual person, or any other person or persons, to or with the patron or patrons of such spiritual office, or to or with any other person or persons, for the resignation of the same as aforesaid; and that it shall not be lawful for the king's most excellent majesty, his heir or successors, for or by reason of any such engagements as aforesaid, to present or collate unto, or give or bestow such spiritual office; and that such spiritual person,

No presentation to any spiritual office shall be void by reason of such agreement to resign.

Persons making such

agreement not to be liable to penalty.

and patron or patrons, or other person or persons respectively, shall not be liable to any pains, penalty, forfeitures, loss, or disability, nor to any prosecution or other proceeding, civil, criminal, or penal, in any court, ecclesiastical or temporal, for or by reason of his, her or their having made, given, or entered into, or accepted or taken such engagement as aforesaid; and that every such presentation or collation, or gift or bestowing, to be made after the passing of this act, and every admission, institution, investiture, and induction thereupon, shall be as valid and effectual in the law to all intents and purposes whatsoever as if such engagement had not been made, given, or entered into, or accepted or taken; anything in the act 31 Eliz. c. 6 to the contrary in anywise notwithstanding."

Such presentations to be valid.

Not to extend to any engagements, unless the deed be deposited within two months with the registrar of the diocese or peculiar jurisdiction wherein the benefice is situated.

Sect. 4. "Nothing in this act shall extend to the case of any such engagement as aforesaid, unless one part of the deed, instrument, or writing by which such engagement shall be made, given, or entered into, shall, within the space of two calendar months next after the date thereof, be deposited in the office of the registrar of the diocese wherein the benefice with cure of souls, dignity, prebend, or living ecclesiastical, for the resignation whereof such engagement shall be made, given, or entered into as aforesaid, shall be locally situate, except as to such benefices with cure of souls, dignities, prebends, or livings ecclesiastical, as are under the peculiar jurisdiction of any archbishop or bishop, in which case such document as aforesaid shall be deposited in the office of the registrar of that peculiar jurisdiction to which any such benefice with cure of souls, dignity, prebend, or living ecclesiastical, shall be subject; and such registrars shall respectively deposit and preserve the same, and shall give and sign a certificate of such deposit thereof; and every such deed, instrument or writing shall be produced at all proper and usual hours at such registry to every person applying to inspect the same; and an office copy of each such deed, instrument, or writing, certified under the hand of the registrar (and which office copy so certified the registrar shall in all cases grant to every person who shall apply for the same), shall in all cases be admitted and allowed as legal evidence thereof in all courts whatsoever; and every such registrar shall be entitled to the sum of two shillings, and no more, for so depositing as aforesaid such deed, instrument, or writing, and so as aforesaid certifying such deposit thereof; and the sum of one shilling, and no more, for each search to be made for the same; and the sum of sixpence, and no more, over and besides the stamp duty,

Deed to be open to inspection; and a certified copy to be admitted as evidence.

Fees to registrar.

if any, for each folio of seventy-two words of each such office copy so certified as aforesaid."

Sect. 5. "Every resignation to be made in pursuance of any such engagement as aforesaid shall refer to the engagement in pursuance of which it is made, and state the name of the person for whose benefit it is made; and that it shall not be lawful for the ordinary to refuse such resignation, unless upon good and sufficient cause to be shown for that purpose; and that such resignation shall not be valid or effectual, except for the purpose of allowing the person for whose benefit it shall be so made to be presented, collated, nominated, or appointed to the spiritual office thereby resigned, and shall be absolutely null and void unless such person shall be presented, collated, nominated, or appointed as aforesaid within six calendar months next after notice of such resignation shall have been given to the patron or patrons of such spiritual office."

Resignation to state the engagement, and name of person for whom made.

Resignation to be void unless the person be presented within six months.

Sect. 6. "Provided also, that nothing in this act shall extend to any case where the presentation, collation, gift, or bestowing to or of any such spiritual office as aforesaid shall be made by the king's most excellent majesty, his heirs or successors, in right of his crown or of his duchy of Lancaster; or by any archbishop, bishop, or other ecclesiastical person, in right of his archbishopric, bishopric, or other ecclesiastical living, office, or dignity; or by any other body politic or corporate, whether aggregate or sole, or by any other person or persons, in right of any office or dignity; or by any company, or any feoffees or trustees for charitable or other public purposes; or by any other person or persons not entitled to the patronage of such spiritual office as private property."

Nothing herein to extend to presentations made by the king, &c.

To return to the statute 31 Eliz. c. 6. It enacts that all presentations, &c.—

31 Eliz. c. 6.

Shall be utterly void, frustrate, and of none effect in Law.]—Before this act, they were only voidable by deprivation; but hereby they are made void without any deprivation, or sentence declaratory in the ecclesiastical court, as was adjudged in the case of *Hickcock* v. *Hickcock*; so as the parishioners may deny their tithes, and allege in the spiritual court that he came in by simony. But Hutton said, there was no remedy for the tithes which a simoniacal incumbent had actually received (*x*). Parishioners, in an action for treble damages, may plead him no parson, because of the simony (*y*). But in an action for

Simoniacal presentation void, not voidable.

(*x*) 1 Inst. 120; Gibs. 800; 1 Litt. Rep. 177.

(*y*) Hob. 168; March, 84.

31 Eliz. c. 6. Construction of.

use and occupation, by an incumbent against a tenant of the glebe lands, the defendant cannot give evidence of a simoniacal presentation of the plaintiff in order to avoid his title, because having occupied by the licence of his landlord, he cannot afterwards, in such an action, dispute his title (*z*).

But here is to be observed a diversity between a presentation or collation, made by a rightful patron and an usurper. For in case of the rightful patron, who corruptly presents or collates, by the express letter of this act the king shall present; but when one usurps, and corruptly presents or collates, there the king shall not present, but the rightful patron; for the branch that gives the king power to present, is only intended where the rightful patron is in fault; but where he is in no fault, there the corrupt act and wrong of the usurper shall not prejudice his title (*a*).

And it shall be lawful for the Queen to present for that one Time or Turn only.]—In this particular the penalty of simony which was by the canon law, with regard to the patron, is somewhat mitigated, the canons which had been made both at home and abroad (when they speak of this loss of patronage) making it perpetual (*b*). But because patronage in England is accounted a temporal matter, and corrupt patrons were not to be reached by the ecclesiastical laws (which could only touch the incumbent); therefore, for the more effectual discouragement of simony, by affecting the patron also, this statute was made (*c*).

And every Person . . . . that shall take or make any such Promise.]—So that the penalty (as it seems) is incurred by such promise, though the patron should afterwards present the clerk gratis (*d*).

Shall forfeit and lose the Double Value of One Year's Profit.]—And this double value shall be accounted, according to the true value as the same may be letten, and shall be tried by a jury, and not according to the valuation in the king's books (*e*).

And the Person so corruptly taking, procuring, seeking or accepting.]—It was said by Tanfield, Chief Baron, in *Calvert and Kitchyn's case*, that if a clerk *seeks* to obtain a presentation by money, although afterwards the patron

(*z*) *Cooke* v. *Loxsley*, 5 T. Rep. 4.

(*a*) 3 Inst. 153.

(*b*) "Qui emit jus patronatûs, ut possit præsentare filium vel nepotem seu quem vult, eo privari debet." 8 X. 3, 18, 6.

(*c*) Gibs. 801.

(*d*) Ibid.

(*e*) 3 Inst. 154.

present him gratis, yet this simoniacal attempt has disabled him to take that benefice (*f*).

Be adjudged a disabled Person in Law, to have or enjoy the same Benefice.]—Many of the ancient canons of the church make *deposition* the punishment of simony, whether in bishops or presbyters; others make it *deprivation*. But the civil and canon law observe a difference in point of penalty between a person guilty of simony and a person simoniacally promoted. If the clerk himself is privy or party to the simony, he is to be deprived of that, and for ever disabled to accept any other; but if he is only simoniacally promoted by simony between two other persons, whereunto he was not privy, he is deprivable by reason of the corruption, but not disabled to take any other. In like manner, according to this statute, if the presentee was not privy to the simony, though the church is become void by the simony, yet he is not disabled from being presented again; for a man cannot be said to be *corruptly taking*, who is not privy to the corrupt agreement. But a presentee who was privy to the simony, is a person disabled to enjoy the same benefice during life, nor can the king or any other dispense with the disability (*g*).

Case of *Rex* v. *Bishop of Oxford.*

In *Rex* v. *The Bishop of Oxford* (*h*), a rule was obtained, calling on the bishop to show cause why a writ of *mandamus* should not issue, commanding him to license the Reverend Isaac Knipe, clerk, to officiate as chaplain or curate of the church or chapel of Piddington. The chapel was endowed by deed in 1428, whereby it was provided that the curate should receive all the small tithes, and be appointed by the inhabitants. In 1797 an act passed for inclosing certain lands in the township of Piddington, which left the right of the curate as to tithes on the same footing as it stood previous to the passing of the act. In 1801, upon a vacancy, the inhabitants appointed and presented a curate upon an agreement signed by him and the principal inhabitants, whereby he admitted that a certain sum of money therein specified was the *immemorial* money payment to the curate out of the lands of the township. It was holden by the Court of King's Bench, that this agreement, entered into for the purpose of restraining the curate from asserting his claim to the small tithes by due course of law, and furnishing evidence against his successors, was *simoniacal*, and the presentation made thereon void.

Case of *Greenwood* v. *Woodham.*

"In debt for penalties under 31 Eliz. c. 6, for a simo-

(*f*) Gibs. 801.

(*g*) Ibid.; 2 Hawk. 396; 12 Co. 101.

(*h*) 7 East's Rep. 600.

31 Eliz. c. 6. Construction of.

niacal contract to present, the declaration alleged a contract by the clerk to buy the advowson if he were presented to the living, and a presentation in pursuance of such contract, it was holden that proof of presentation was essential to the action, and that for that purpose it was not enough to show that the defendant prepared a presentation and tendered it to the bishop's secretary, which never was in fact used or acted upon, the clerk having been afterwards instituted on his own petition as equitable owner of the advowson" (*i*).

Admit, institute, install, induct.]—The reason of this clause, Lord Coke tells us (for, he says, he was of that parliament, and observed the proceedings therein) was to avoid hasty and precipitate admissions and institutions to the prejudice of them that had right to present, by putting them to a *quare impedit;* and it is presumed that no such haste or precipitation is used but for a corrupt end and purpose (*k*).

Immediately after the Investing, Installation or Induction.]—Albeit the church is full by institution, against all but the king: yet the church becomes not void by this branch of the act until after induction (*l*).

Shall not in anywise extend to take away or restrain any Punishment, Pain or Penalty, limited, prescribed or inflicted by the Laws Ecclesiastical.]—So far are the ancient ecclesiastical laws against simony, and the power of the spiritual court in the execution of those laws, from being superseded by this act, that hereby they are expressly confirmed. And all promises and contracts of what kind soever being forbidden, and by consequence punishable by the laws ecclesiastical, it follows that it could not be the intention of the legislators to make this statute the rule and measure of simony, but only to check and restrain it in the most notorious instances (*m*).

Which consideration seems fully to warrant Bishop Stillingfleet's observation, that this statute does not abrogate the ecclesiastical laws as to simony, but only enacts some particular penalties on some more remarkable simoniacal acts, as to benefices and orders; but does not go about to repeal any ecclesiastical laws about simony, or to determine the nature and bounds of it; and also the observation of Archbishop Wake, that this act is not privative of the jurisdiction of the church, or its constitutions, but accumulative; that it leaves to the church all the authority which

(*i*) *Greenwood* v. *Woodham* (1841), 2 Moody & Robinson, 363.

(*k*) 3 Inst. 155.

(*l*) Ibid.

(*m*) Gibs. 801.

it had before; only whereas before these crimes were inquirable and punishable by the ecclesiastical judge alone, they may now in some cases specified in this statute, be brought before the civil magistrate also (*n*).

3. *Punishable in Ecclesiastical Court.*

In *Baker* v. *Rogers* (*o*) it was said, "It appertains to the spiritual court to determine simony, and not to this court (Common Pleas) to meddle therewith; and in *Risby* v. *Wentworth* (*p*), the court agreed, on application for a prohibition, that *simony might be more aptly tried in the spiritual court;* and a consultation was awarded.

And therefore still the ecclesiastical court may proceed against a simonist *pro salute animæ*, and upon examination and evidence deprive him for that cause; and this, although he was not privy to the contract; for there are no accessories in simony. And when the spiritual court has so sentenced the simony, the temporal court ought to give credence thereto, and ought not to dispute whether it be error or not. For the temporal court cannot take cognizance of their proceedings herein, whether they be lawful or not; which is the reason that in the temporal court it suffices to plead a sentence out of the spiritual court briefly, without showing the manner thereof, and of their proceedings (*q*). And though it has been said that in the spiritual court they ought not to intermeddle to divest the freehold, which is in the incumbent after induction; it is true, indeed, they cannot alter the freehold, but they by their proceeding meddle only with the manner of obtaining the presentment, which by consequence only divests the freehold from the simonist by the dissolution of his estate, when his admission and institution are voided, and therefore may proceed; or rather the church being made void by act of parliament, he who pretends to be incumbent thereof has no freehold therein: so depriving of him cannot be said to divest any freehold from him. However, it is best that not any of the articles to be examined upon in this case, be such as may expressly draw the right and title of the benefice into question, lest occasion be taken from thence to bring a prohibition (*r*).

The first reported case of a proceeding in the eccle-

(*n*) Gibs. 798.
(*o*) Cro. Eliz. 78.
(*p*) Ibid. 642.
(*q*) 2 Bulst. 182; Freem. 84.
(*r*) Wats. c. 5.

Case of *Dobie* v. *Masters.*

The ecclesiastical courts have jurisdiction to try questions of simony.

siastical court is that of the office of the judge promoted by *Dobie* v. *Masters* (*s*).

Phillimore moved the court in the behalf of Alexander Dobie, of the parish of Saint Clement's Danes, to allow the office of the judge to be promoted against the Rev. John Whalley Masters, rector of Chorley in Lancashire, in a cause of simony; and to permit a citation to be taken out against him for having purchased the immediate possession of the vicarage of Saint Nicholas, in the castle of Carisbrook, in the Isle of Wight.

He stated that there could be no doubt as to the jurisdiction of the court on a question of this description; for that the statute of 31 Eliz. c. 6, specially guarded against taking away the right of the spiritual courts, and that subsequent to the passing of that act many dicta were to be found in books and adjudged cases which seemed to countenance the idea that the ecclesiastical court was a more suitable forum on questions of simony than the temporal courts. *Risby* v. *Wentworth* (*t*), 40th of Elizabeth; *Baker* v. *Rogers* (*u*); in both which cases prohibitions had been refused.

In *Boyle* v. *Boyle* (*x*), Pollexfen, J., in pointing out that the spiritual courts might have jurisdiction in some respects over the same subject-matter as the temporal courts, used this illustration: "So, after a man is found no simonist in this court, the ecclesiastical court may very well examine the same matter. No doubt exists on this point in any of the writers who have treated on the subject:

(*s*) 3 Phill. 171.

(*t*) Prohibition upon a sale for tithes; and grounds his prohibition upon the statute of 31st of Elizabeth, supposing that the said parson had committed simony in coming to the parsonage; and thereby the church was void, and the tithes not appertaining unto him. And it was agreed, *per curiam*, Glanville *absente*, that a prohibition lay not; for the simony might more aptly be tried in the spiritual court. Cro. Eliz. 642.

(*u*) All the court held that the prohibition lay not: for as to the first, although the presentee came in *quasi per usurpationem*, yet because it is by means of a simoniacal contract which is the cause thereof (for otherwise it is to be intended that he would not have permitted that presentment), it was held that it was as well a simony as if the grant had not been void. And, as to the second, they held it to be simony; for there be not any accessories in simony; but all are principals therein, as well as in trespass; and it appertains to the spiritual court to determine it, and not to this court to meddle therewith. And when the spiritual court hath so sentenced it, this court ought to give credence thereto, and ought not to dispute whether it be error or not, &c. &c. &c. Cro. Eliz. 789.

(*x*) *Boyle* v. *Boyle* was a case in which a prohibition was moved for to the spiritual court in a cause of jactitation of marriage. Com. 72.

Degge (*y*), Bishop Gibson (*z*), and the author of Watson's (*a*) Incumbent. The books of practice, too, are clear and explicit. In Clarke's Praxis the mode of proceeding is pointed out: 'Si (*b*) clericus commisit simoniam in obtinendo beneficium ecclesiasticum, potest sive ex officio judicis, sive ad instantiam partis conveniri ac juxta sanctiones canonicas puniri, sic etiam laici participes ejusdem criminis.'"

This passage has been adopted by Oughton to its full extent (*c*).

Sir John Nicholl said the authorities were satisfactory with respect to the principle; but directed a search to be made for any cases which might have been decided in the ecclesiastical courts.

Phillimore cited the case of the office of the judge promoted by *Lucy* v. *The Bishop of St. David's* (*d*), in which the delegates were unanimously of opinion that the ecclesiastical court was fully competent to try the question; and finally affirmed the sentence of the inferior court, by which the bishop had been found guilty of simony.

Per curiam.—Let the citation issue.

Case of *Whish and Woollatt* v. *Hesse.*

But this cause never came to a decision. In the case of *Whish and Woollatt* v. *Hesse* (clerk), in 1832, in a criminal proceeding of a like description, Sir J. Nicholl said, "It is a crime of no light character: not only by the ecclesiastical law, but by the common law, it is held to be a crime most highly odious, and especially in a clergyman; since, as Lord Coke observes, it involves the crime of perjury." "Simony is odious in the eye of the common law."

(*y*) The fourth paragraph (of the 31st of Elizabeth) preserves the ecclesiastical jurisdiction, that they may proceed judicially to censure the parties for their corruption in buying and selling church preferments. Wherein, as should seem, the ecclesiastical laws, in some circumstances, are more severe than this statute; for by that law, as I take it, he that is convicted of simony is after incapacitated not only to that living, but to all other church preferments: but of this be informed by the canonist. Degge, p. 61.

(*z*) Gibson, 798—801.

(*a*) Wats. c. 5.

(*b*) Clarke's Praxis, tit. 132.

(*c*) Oughton, vol. i. tit. 4.

(*d*) Deleg. Feb. 22, 1699. The court was composed of a full commission, consisting of several temporal and ecclesiastical peers, besides common law judges and civilians. Treby, Chief Justice of the Common Pleas; Ward, Chief Baron of the Exchequer; and Sir Charles Hedges, Judge of the Admiralty, were of the number.

The suit was originally promoted before the Archbishop of Canterbury (Tennison), in a court held at Lambeth, before the archbishop in person, assisted by six suffragan bishops. Ld. Raym. 447, 539, 545, 817; 2 Warn. 656; Gibs. 1006. Bishop Burnet has also given an account of the trial and deprivation of this bishop, vol. ii. 226, and again 250. *Vide supra*, pp. 83—90.

Case of *Whish and Woollatt* v. *Hesse.*
Jurisdiction of ecclesiastical courts.

"It is the more odious because it is ever accompanied by perjury, for the presentee is sworn to commit no simony" (*e*). "Simony hath always, by the law of God and of the land, been accounted a great offence" (*f*). "And it is very well known that every clergyman takes a solemn oath before his diocesan that there has been nothing promised to be done or to be undertaken by or for him, and that he will not perform any such promise made without his knowledge. Such is the magnitude of the offence charged. The consequences of simony are also very serious: under the statute of Elizabeth the living is void. The presentation devolves to the crown, and the guilty presentee is incapacitated, and liable to a penalty of two years' full value of the living" (*g*). But in this case the court holding, first, that the clerk proceeded against had not been proved to be privy to having made or confirmed any simoniacal contract, secondly, that no criminal contract had been established, dismissed him from the suit, and condemned his prosecutor in costs. It was thought to have been intimated in the course of the suit that an ecclesiastical court cannot proceed to deprivation in a criminal suit against a clerk who is *simoniacè promotus,* without his privity or subsequent confirmation.

Case of *The Bishop of St. David's.*

Dr. Watson was promoted to the see of St. David's in 1687. Archbishop Tillotson had visited the diocese of St. David's, and in right of his visitatorial power suspended the bishop: he, notwithstanding this, collated; whereupon the archbishop cited him before him: he appeared and submitted. Archbishop Tennison, on the death of Tillotson, succeeded to the see of Canterbury.

Afterwards one Lucy instituted proceedings against the bishop for simony, or, as it is expressed in the citation, *propter simoniam sive crimen simoniacæ pravitatis.* The bishop was deprived, and appealed to the Delegates; pending the appeal, Sir Bartholomew Shower applied for a prohibition on behalf of the bishop. The case is reported (*h*) under the name of *The Bishop of St. David's* v. *Lucy.* The first objection raised was as to the jurisdiction; and Holt, C. J., said, that the admitting that point of jurisdiction to be disputed, would be to admit the dispute of fundamentals.

The counsel then moved that the matters were of temporal conusance, and not conusable by the archbishop,—that the contract amounted only to a temporal contract; but the whole court was of opinion, that though it was a

(*e*) 3 Inst. 156.
(*f*) Cro. Car. 353.
(*g*) 3 Hagg. 693.
(*h*) *Vide supra,* pp. 83—90; Ld. Raym. Rep. 447.

contract it was a simoniacal contract, and then it will be examinable in the spiritual court; not whether the contract ought to be performed or not, but to punish the party by ecclesiastical censures: this was proper before the statute of Elizabeth, and it was saved by the statute. That the common law takes no notice of any simony but that which the statute enjoins; and the statute has not defined simony in any manner as to say what shall be simony and what not by the ecclesiastical law.

Another argument for the prohibition was, that the charge was for taking excessive fees, which was punishable by indictment at common law; to this it was answered by the counsel, that these offences by the canon law, and in the spiritual court, were simony, *quod fuit concessum per totam curiam.*

Other objections were urged: but the court said, that the distinction which would answer almost all the objections was this, that as to that which relates to the office of bishop, and against his duty as a bishop, the spiritual court may proceed against him to deprive him, but not punish him as for a temporal offence; and cited *Sir John Savage's case* (*i*), and *Cawdry's case* (*j*), where, upon a special verdict found, it appeared that Cawdry was deprived by the high commissioners for preaching against the common prayer; and though there was other punishment appointed by the statute, and not deprivation till the second offence, yet it was held that they might well proceed by *their own law*, and deprive him; it being against the duty of his office as a minister, and they having sworn to purge their body of all scandalous members.

The Bishop of St. David's afterwards applied for a prohibition against the Delegates, which was refused.

After the denial of the prohibition he petitioned the chancellor for a writ of error, which was at first granted; but the lords of parliament were of opinion that a writ of error would not lie in the case; and the sentence of deprivation against the bishop was carried into execution (*k*).

The tenor of the sentence was: "Propter diversa crimina et excessus, et præsertim crimen simoniæ sive simoniacæ pravitatis."

One charge was his appointing a clergyman to a living "turpis lucri, et proprii quæstûs causâ, intervenientibus fraude, pacto, et simoniacâ pravitate." And the transactions were described in the sentence to be "contrà sacros canones et leges in Ecclesiâ Anglicanâ receptas."

(*i*) Keilw. 194.
(*j*) 5 Co. 1.
(*k*) State Trials, vol. xiv. 443.

Dean of York's case.

In the year 1840, the Archbishop of York instituted a visitation of the Cathedral Church of York, and appointed Dr. Phillimore his commissary for the purpose of carrying it into execution. Among other *presentments* made to the commissary was one charging the dean with selling the presentations to the vicarages in his patronage. The learned commissary observed:

Judgment of commissary.

"I wish to be clearly and distinctly understood, as holding the statute law to have no possible application to this case. Simony is not an offence at common law, but by the canon law; and till the statute of Elizabeth (l) the temporal courts had no cognizance of or jurisdiction over it, and now they have only such jurisdiction as the limitations of that statute, and a subsequent statute of the 12th Anne (m), have conferred on them.

"I do not sit here to expound or to interpret the law of the temporal courts,—I have no authority to do so,—nor if I had authority to do so, am I competent to the task. I studiously and anxiously throw out of my consideration the statutes to which I have referred, passed principally with a view to make the laity, and, in some instances, the clergy, liable to temporal punishment. Again, I place equally out of consideration any law against simony which may be applicable to the laity. Lay patrons are happily without the sphere of the ecclesiastical jurisdiction; I say happily, because this circumstance enables me to steer clear of all questions intermixed with technicalities, and embarrassed by questions of property, which partake of no sacred character, and can have no bearing on that law which is applicable to spiritual persons alone, who hold their property in trust for the performance of holy services to which the Church of England has consecrated them. This distinction between those matters which affect the clergy and laity severally, and still more the distinction between the administration of the temporal and ecclesiastical laws, is upheld and sanctioned by the highest authority, and is of the very essence of the constitutional law of this realm. It is clearly recognized by the statute of the 29 Hen. 8, c. 12, which passed at the dawn of the Reformation."

The learned commissary then cited *Cawdry's case*(n), in which Lord Coke, treating of the ecclesiastical laws, follows the words of this statute, the cases in Croke's Reports, already cited, and proceeded—

"In the same spirit, Lord Chief Justice Holt, in the

(l) 31 Eliz. c. 2.

(m) 13 Ann. c. 11, in "The Statutes Revised."

(n) 5 Co. 1.

memorable case of *The Bishop of St. David's* v. *Lucy* (o), expounds the different operation of the ecclesiastical and temporal law, and the necessity of maintaining and upholding each of them distinct and inviolate.

"'Simony is an offence by the canon law, of which the 'common law does not take notice to punish it, for there is 'not a word of simony in the statute (p) of Elizabeth, but of 'buying and selling. Then it would be very unjust if eccle-'siastical persons might offend against the ecclesiastical duty 'in such instances, of which the common law cannot take 'notice to punish them, and yet the King's Bench should 'prohibit the spiritual court from inflicting punishment 'according to their law. The clergy are subject to a law 'different from that to which laymen are subject, for they 'are subject to obey the canons; for the convocation of the 'clergy may make laws to bind all the clerks, but not the 'lay people. And if the clergy do not conform them-'selves, it will be cause of deprivation (q). Resolved by 'all the judges of England. And by such authority were 'the *canons of the year* 1603 *made, which make simony so 'great an offence.* And the said canons have been always 'received. And many of the ancient canons are as old 'as any law that we have at this time.'"

This chain of authorities was closed by this extract from Blackstone's Commentaries (r):—"'Corporations, being composed of individuals subject to human frailties, are liable, as well as private persons, to deviate from the ends of their institution, and for that reason the law has provided proper persons to visit, inquire into, and correct all irregularities that arise in such corporations, either sole or aggregate, and whether ecclesiastical, civil, or eleemosynary. With regard to all ecclesiastical corporations, the ordinary is *their visitor, so constituted by the canon laws, and from them derived to us.*'"

Why annulled by Court of Queen's Bench.

The Court of Queen's Bench subsequently annulled this judgment on the ground that the visitor had exceeded his powers, and that he ought to have proceeded under 3 & 4 Vict. c. 86 (s). But they expressed no opinion whatever on the question of simony. It was afterwards intended to proceed *de novo* against the dean under the 3 & 4 Vict. c. 86, and the opinion of the attorney-general, Sir John (afterwards Lord) Campbell, was taken as to whether the dean, being a spiritual person, was not guilty of simony in selling the next presentation to livings in his gift.

"I am of opinion that it will be proper in this case to

(o) Ld. Raym. 449.

(p) That is, not in the *enacting* part of the statute.

(q) 2 Cro. 37.

(r) Vol. i. p. 480.

(s) *Vide infra.*

Dean of York's case.

institute proceedings under 3 & 4 Vict. c. 86. I conceive that for a spiritual person to sell the next presentation of a living which he holds by right of his benefice, whether voidable or not, is simony by the canon law; and I think that the dean's letter, coupled with the evidence of John Singleton, makes out such a case of simony. No reasonable man can doubt that the advance of the 100*l.* was the consideration for the grant of the next presentation, whatever colour one of the parties may try to give it. The presentation of Taylor was, I think, an offence within the two years, although the agreement to present might be beyond the two years.

(Signed) "J. CAMPBELL."

"Temple, 21st June, 1841."

3 & 4 Vict. c. 113.

These sales of presentations in *The Dean of York's case* took place before 3 & 4 Vict. c. 113, which enacts by sect. 42,

Spiritual person not to sell or assign any right of patronage.

"That it shall not be lawful for any spiritual person to sell or assign any patronage or presentation belonging to him by virtue of any dignity or spiritual office held by him, and that every such sale or assignment shall be null and void to all intents and purposes" (*t*).

4. *Statutes of William III. and Anne.*

After death of the person simoniacally promoted, offence of simony not to injure innocent clerk or patron.

By 1 Will. & M. c. 16, ss. 1 and 2, "Whereas it hath often happened, that persons simoniac or simoniacally promoted to benefices or ecclesiastical livings, have enjoyed the benefit of such livings many years, and sometimes all their life-time, by reason of the secret carriage of such simoniacal dealing, and after the death of such simoniac person, another person, innocent of such crime, and worthy of such preferment, being presented or promoted by any other patron innocent also of that simoniacal contract, have been troubled and removed upon pretence of lapse or otherwise, to the prejudice of the innocent patron in reversion, and of his clerk, whereby the guilty goeth away with the profit of his crime, and the innocent succeeding patron and his clerk are punished, contrary to all reason and good conscience;" for prevention thereof it is enacted,

(*t*) This section has been construed to take away the ancient "Options" of the archbishop. *Vide supra*, p. 92. Special provision has been made by 9 & 10 Vict. c. 88, and 32 & 33 Vict. c. 94, ss. 12, 13, that assignments by spiritual persons of their rights of patronage, in order to facilitate the formation of new parishes under the Church Building and New Parishes Acts, shall not be holden simoniacal or within the prohibitions of this section. By 19 & 20 Vict. c. 104, s. 21, restrictions are placed on the sale of patronage in new parishes for thirty years.

"that after the death of the person so simoniacally promoted, the offence or contract of simony shall, neither by way of title in pleading, or in evidence to a jury, or otherwise, be alleged or pleaded to the prejudice of any other patron innocent of simony, or of his clerk by him presented or promoted, upon pretence of lapse to the crown, or to the metropolitan, or otherwise; unless the person simoniac or simoniacally promoted, or his patron, was convicted of such offence at the common law, or in some ecclesiastical court, in the life-time of the person simoniac or simoniacally promoted or presented."

Bonâ fide leases.

Sect. 2. "No lease really and *bonâ fide* made by any person simoniac or simoniacally promoted to any deanery, prebend, or parsonage, or other ecclesiastical benefice or dignity, for good and valuable consideration, to any tenant or person not being privy to or having notice of such simony, shall be impeached or avoided for or by reason of such simony, but shall be good and effectual in law, the said simony notwithstanding."

A clergyman may not purchase the next presentation.

By 13 Anne, c. 11, s. 2, "Whereas some of the clergy have procured preferments for themselves by buying ecclesiastical livings, and others have been thereby discouraged," it is enacted, that "If any person shall, for any sum of money, reward, gift, profit, or advantage, directly or indirectly, or for or by reason of any promise, agreement, grant, bond, covenant or other assurance of or for any sum of money, reward, gift, profit, or benefit whatsoever, directly or indirectly, in his own name or in the name of any other person, take, procure, or accept the next avoidance of or presentation to any benefice with cure of souls, dignity, prebend, or living ecclesiastical, and shall be presented or collated thereupon, every such presentation or collation, and every admission, institution, investiture, and induction upon the same, shall be utterly void, frustrate, and of none effect in law, and such agreement shall be deemed a simoniacal contract, and it shall be lawful for the queen, her heirs and successors, to present or collate unto, or give or bestow every such benefice, dignity, prebend, and living ecclesiastical, for that one time or turn only; and the person so corruptly taking, procuring or accepting any such benefice, dignity, prebend or living, shall thereupon and from thenceforth be adjuged a disabled person in law to have and enjoy the same, and shall also be subject to any punishment, pain or penalty, limited, prescribed or inflicted by the laws ecclesiastical, in like manner as if such corrupt agreement had been made, after such benefice, dignity, prebend, or living ecclesiastical had become vacant;

any law or statute to the contrary in any wise notwithstanding."

Case of *Lee* v. *Merest.*

"In a criminal suit instituted in the Court of Arches against a clerk in holy orders by the secretary to the Bishop of Worcester, it was proved that the defendant had been guilty of simony, by reason of his having corruptly and simoniacally obtained presentation and institution to his vicarage, and also of conduct unbecoming a clergyman in unlawfully threatening a certain person to publish a libel upon him with the intent of extorting money. The court founding its sentence, in respect of the offence of simony, upon the general ecclesiastical as well as statute law, pronounced that the defendant was a disabled person in law to have the vicarage, and that his presentation thereto, and his admission and institution thereupon, were void and frustrate, and of no effect in law; and having regard to all the circumstances of the case, the offence of misconduct as well as that of simony, it further pronounced upon him a sentence of deprivation from the ministry and from the performance of all clerical functions whatsoever in the province of Canterbury, and condemned him in the costs of the suit. And it directed the registrar to apprise the queen's proctor of the sentence in order that her Majesty might exercise her right of presentation to the vacant benefice given by the statute" (*t*).

SECT. 4.—*Farming and Trafficking.*

Restraints under 1 & 2 Vict. c. 106.

The restraints imposed by the law on the farming and trafficking of the clergy are now ordered and enforced under the provisions of 1 & 2 Vict. c. 106 (*u*).

Spiritual persons not to take to farm for occupation above eighty acres, without consent of the bishop, and then not be-

Sect. 28. "It shall not be lawful for any spiritual person holding any cathedral preferment or benefice, or any curacy or lectureship, or who shall be licensed or otherwise allowed to perform the duties of any ecclesiastical office whatever, to take to farm for occupation by himself, by lease, grant, words, or otherwise, for term of life or of years, or at will, any lands exceeding eighty acres in the whole, for the

(*t*) *Lee* v. *Merest* (1869), 39 L. J., Eccl. 52.

(*u*) Before this, and under the general law, trafficking by beneficed clergymen was so illegal as to make all contracts entered into by them or by partnerships of which they were members void. See *Hall* v. *Franklin*, 3 Mee. & W. 259. Acts have been passed with the express object of validating these contracts, 1 Vict. c. 10, and 4 Vict. c. 14. See, however, now, 1 & 2 Vict. c. 106, s. 31, *infra*.

purpose of occupying or using or cultivating the same, without the permission in writing of the bishop of the diocese specially given for that purpose under his hand; and every such permission to any spiritual person to take to farm for the purpose aforesaid any greater quantity of land than eighty acres, shall specify the number of years, not exceeding seven, for which such permission is given; and every such spiritual person who shall without such permission so take to farm any greater quantity of land than eighty acres, shall forfeit for every acre of land above eighty acres so taken to farm the sum of forty shillings for each year during or in which he shall so occupy, use or cultivate such land contrary to the provision aforesaid."

yond seven years, under penalty of 40*s.* per acre.

Sect. 29. "It shall not be lawful for any spiritual person holding any such cathedral preferment, benefice, curacy, or lectureship, or who shall be licensed or allowed to perform such duties as aforesaid, by himself or by any other for him or to his use, to engage in or carry on any trade or dealing for gain or profit, or to deal in any goods, wares or merchandize, unless in any case in which such trading or dealing shall have been or shall be carried on by or on behalf of any number of partners exceeding the number of six, or in any case in which any trade or dealing, or any share in any trade or dealing, shall have devolved or shall devolve upon any spiritual person, or upon any other person for him or to his use, under or by virtue of any devise, bequest, inheritance, intestacy, settlement, marriage, bankruptcy, or insolvency; but in none of the foregoing excepted cases shall it be lawful for such spiritual person to act as a director or managing partner, or to carry on such trade or dealing as aforesaid in person."

No spiritual person beneficed or performing ecclesiastical duty shall engage in trade, or buy to sell again for profit or gain.

Sect. 30. "Nothing herein-before contained shall subject to any penalty or forfeiture any spiritual person for keeping a school or seminary, or acting as a schoolmaster or tutor or instructor, or being in any manner concerned or engaged in giving instruction or education for profit or reward, or for buying or selling or doing any other thing in relation to the management of any such school, seminary, or employment, or to any spiritual person whatever, for the buying of any goods, wares or merchandizes, or articles of any description, which shall without fraud be bought with intent at the buying thereof to be used by the spiritual person buying the same for his family or in his household, and after the buying of any such goods, wares or merchandizes, or articles, selling the same again or any parts thereof which such person may not want or choose to keep, although the same shall be sold at an advanced price beyond that

Not to extend to spiritual persons engaged in keeping schools or as tutors, &c. in respect of any thing done or any buying or selling in such employment; or to selling any thing *bonâ fide* bought for the use of the family, or to being a manager, &c. in any benefit

or life or fire assurance society; or buying and selling cattle, &c. for the use of his own lands, &c.

which may have been given for the same; or for disposing of any books or other works to or by means of any bookseller or publisher; or for being a manager, director, partner, or shareholder in any benefit society, or fire or life assurance society, by whatever name or designation such society may have been constituted; or for any buying or selling again for gain or profit, of any cattle or corn or other articles necessary or convenient to be bought, sold, kept, or maintained by any spiritual person, or any other person for him or to his use, for the occupation, manuring, improving, pasturage, or profit of any glebe, demesne lands, or other lands or hereditaments which may be lawfully held and occupied, possessed or enjoyed by such spiritual person, or any other for him or to his use; or for selling any minerals the produce of mines situated on his own lands; so nevertheless that no such spiritual person shall buy or sell any cattle or corn or other articles as aforesaid in person in any market, fair, or place of public sale" (*x*).

Sect. 5.—*Non-Residence.*

Sources of the law.

The law as to residence, so far as it relates to the parochial clergy, is now also mainly governed by the statute 1 & 2 Vict. c. 106 (*y*). But it is expedient to preserve some notice of the previous law. It may be considered as follows:—

1. By Canon Law.
2. Privileged Persons.
3. Excuses for Non-Residence.

By Canon law.

The ancient law of the Church upon this important subject, and its restoration by the Council of Trent, are thus emphatically stated by Van Espen (*z*): "Nihil adeo vocationi clericali oppositum, nihil ecclesiæ magis probrosum et laicis scandalosum esse quam otiosam ac inertem clericorum vitam ratione et experientiâ compertum est. Hinc *jam pridem sollicita fuit ecclesia ne quis in clerum assumeretur nisi certo loco ascriberetur*, ubi functionibus ordini suo convenientibus occuparetur et vitam clerico dignam institueret. Disciplinam hanc canone sexto Con-

(*x*) It is expressly provided, that this act shall not affect any powers the bishop may now have "by statute, canon, usage or otherwise howsoever." See section 132.

(*y*) As to the residence of bishops, *vide supra*, pp. 61, 62. As to the residence of deans and canons, *vide supra*, pp. 161, 164, 218.

(*z*) Van Espen, Jus Canon. pt. i. t. 11, De Personis.

cilii Chalcedonensis probatam sed temporum injuriâ penè collapsam, restauratam volens *Synodus Tridentina inhærendo vestigiis dicti concilii* statuit ut nullus in posterum ordinatur qui illi ecclesiæ aut pio loco pro cujus necessitate aut validitate assumitur non adscribatur ubi suis fungitur muneribus nec incertis vagetur sedibus." Sess. 23, cap. 16, De Resid.

Residence by canon.

Otho. "The bishop shall provide, that in every church there shall be one resident, who shall take care of the cure of souls, and exercise himself profitably and honestly in performing divine service and administration of the sacraments" (*a*).

The rule of the ancient canon law was, that if a clergyman deserted his church or prebend without just and necessary cause, and especially without the consent of the diocesan, he should be deprived. And agreeably hereunto was the practice in this realm; for though sometimes the bishop proceeded only to sequestration or other censures of an inferior nature, yet the more frequent punishment was deprivation (*b*).

Residence by the common law.

Regularly, personal residence is required of ecclesiastical persons upon their cures; and to that end, by the common law, if he that has a benefice with cure be chosen to an office of bailiff, or beadle, or the like secular office, he may have the king's writ for his discharge (*c*).

For the intendment of the common law is, that a clerk is resident upon his cure; insomuch that in an action of debt brought against J. S., rector of D., the defendant pleading that he was demurrant and conversant at B. in another county, the plea was overruled; for since the defendant denied not that he was rector of the church of D., he shall be deemed by law to be demurrant and conversant there for the cure of souls (*d*).

Privileged persons.

The acts 21 Hen. 8, c. 13 (*e*), 25 Hen. 8, c. 16, 28 Hen. 8,

(*a*) Athon, 36. See Can. 47 of 1603.

(*b*) Gibs. 827.

(*c*) 2 Inst. 625; and *vide supra*, pp. 621—624.

(*d*) Ibid.

(*e*) 4 Co. 117. It may be useful to preserve the authorities, both judicial and from text writers, cited in the edition of Dr. Burn (published before the enactment of 57 Geo. 3, c. 99), upon the legal construction of this statute of Henry the Eighth. They were as follows: as to the meaning of "dignity," Gibson's Codex, 886; *Boughton* v. *Gousley*, Cro. Eliz. 663: of "benefice," 4 T. R. 665: of "personal residence, &c." *Sands* v. *Pinner*, Cro. Eliz. 898; Gibs. 886; 13 Eliz. c. 20; 2 Brownl. 54; Lord Mansfield's decision in *Low* v. *Ibbetson*, Burr. 2722; *Wilkinson* v. *Clerk*, ib.; *Garland* v. *Burton*, Str. 1103; *Leigh* v. *Kent*, 3 T. R. 362; Bull.

c. 13, and 57 Geo. 3, c. 99, contained provisions for exempting from residence the chaplains of certain distinguished persons. These acts, however, have all now been repealed.

Hospitality to be kept by non-residents.

Peecham. "We do decree, that rectors who do not make personal residence in their churches, and who have no vicars, shall exhibit the grace of hospitality by their stewards according to the ability of the church, so that at least the extreme necessity of the poor parishioners be relieved; and they who come there, and in their passage preach the word of God, may receive necessary sustenance, that the churches be not justly forsaken of the preachers through the violence of want, for the workman is worthy of his meat, and no man is obliged to warfare at his own cost."

Who do not make Personal Residence.]—That is, although they be licensed to non-residence by their bishops or others to whom it appertains. For if they be non-resident without licence, they are not only bound to the observance of this constitution, but otherwise may be proceeded against according to law (*f*).

And who have no Vicars.]—This intimates that they who have vicars in their benefices, are excused from personal residence; and this may be well admitted, where the parish church is annexed to a prebend or dignity, for then the principal is excused by the vicar from personal residence, and the reason is, because he is bound to reside in his greater benefice. But this reason (says Lindwood) does not hold where in a church there is a rector and vicar, which church does not depend on any other church, wherefore he who has such church is not excused from residence by the vicar which he has there; nor does it make against this, if it be alleged, that such rector has not the cure of souls, but the vicar; for habitually, and in propriety, the cure of souls is in the principal rector; and in the vicar only, as to the exercise and effect thereof (*g*).

Who come there, and in their passage preach the Word of God.]—This constitution was made by Peecham, in favour of his own brethren, the friars, who travelled under the pretence of preaching. Lindwood here bears hard upon them for sauntering up and down in the parishes where

N. P. 196: of "procuring dispensation at Rome or elsewhere," Gibs. 887: of "chaplains to any of the spiritual or temporal lords of parliament," Bishop Sherlock's Charge in the year 1759, p. 9.

(*f*) Lind. 132.

(*g*) Ibid.

they preached, and begging the people's alms after they had received what was sufficient at the parsonage house (*h*).

Preach the Word of God.]—That is, if they be licensed and lawfully sent to preach (*i*).

Excuses for non-residence before 1 & 2 Vict. c. 106.

It may be well to mention some of the excuses for non-residence which were holden to exempt the party alleging them from the penalties imposed by the 10th section of 57 Geo. 3, c. 99:—Total want of health has been holden a sufficient excuse for an absence of twenty years (*k*), but the want of a parsonage-house did not excuse the incumbent's residing out of the parish (*l*), nor a sequestration upon a *fieri facias* of a benefice with cure (*m*). The non-residence on one benefice under a licence from the diocesan thereof was holden not equivalent to actual residence thereon, so as to excuse the incumbent's non-residence on another benefice: therefore a bishop's retrospective certificate that he would have granted a licence for non-residence because the incumbent was performing the duties of another benefice, within two miles of which he lived by licence from another diocesan, not being allowed by the archbishop, was void, but good with the archbishop's certificate, though granted after 1st July, 1814 (*n*). If a clergyman who had two livings resided within one of the parishes wherein there was no house of residence, it was a sufficient residence there to exempt him without licence from the bishop from penalties for not residing on the other benefice (*o*). A private statute annexed the rectory of H. to the deanery of Windsor, and recited that the necessary residence on the deanery, and the dean's attendance on her Majesty as registrar of the Order of the Garter, would oblige him to be often absent from H., and the statute compelled him to appoint a stipendiary curate constantly resident at H.; and it appeared that this, without more, conferred an excuse for non-residence at H., although in the subsequent act of 43 Geo. 3, c. 84, imposing residence on all benefices not therein excepted, this

(*h*) Johns. Pecch.; Lind. 133.

(*i*) The following cases refer to actions brought under 13 Eliz. c. 20, as to leases by non-resident incumbents:—*Doe* d. *Crisp* v. *Barber*, 2 T. R. 749; S. P., *Doe* d. *Rogers* v. *Mears*, Cowp. 129; Lofft, 602; *Frogmorton* d. *Fleming* v. *Scott*, 2 East, 467; *Graham* v. *Peat*, 1 East, 244.

(*k*) *Scammell* v. *Willett*, 3 Esp. 29, per J. Buller.

(*l*) *Wilkinson* (*qui tam action*) v. *Allott*, Cowp. 429.

(*m*) *Doe* d. *Rogers* v. *Mears*, Cowp. 129; Lofft, 602.

(*n*) *Wright* v. *Flamark*, 6 Taunt. 52; 1 Marsh. 368.

(*o*) *Wynn* v. *Smithies*, 6 Taunt. 198; 1 Marsh. 549.

is not enumerated as a ground of exemption or of licence (*p*). It seems to have been doubtful whether a clergyman was wilfully absent from his benefice during the time he was in custody for debt, under an arrest made while he was residing out of his parish (*q*).

Licence for non-residence.

Where a licence for non-residence had been obtained previously to the 14th of July, 1814, pursuant to 54 Geo. 3, c. 54, but the allowance by the archbishop required by 43 Geo. 3, c. 84, s. 20, had not been obtained till after that period, the licence, when ratified, was valid from the time when it was originally granted (*r*). A licence of non-residence on a benefice within an archbishop's peculiar locally situated in another diocese, need not be registered in the registry of the diocese, but ought to be registered in the registry of the archbishop (*s*). A licence to an incumbent to absent himself from a living may be revoked under peculiar circumstances (*t*).

Duty of non-resident to have curate.

By Can. 47 of 1603, "Every beneficed man licensed by the laws of this realm, upon urgent occasions of other service, not to reside upon his benefice, shall cause his cure to be supplied by a curate that is a sufficient and licensed preacher, if the worth of the benefice will bear it. But whosoever hath two benefices shall maintain a preacher licensed in the benefice where he doth not reside, except he preach himself at both of them usually."

Conditions under old law.

By the old faculty of dispensation a pluralist was required "in that benefice, from which he shall happen to be most absent, to preach thirteen sermons every year, and to exercise hospitality for two months yearly; and for that time, according to the fruits and profits thereof, as much as in him lieth to support and relieve the needy inhabitants of that parish, especially the poor and needy" (*u*).

(*p*) *Wright* v. *Legge*, 6 Taunt. 48.

(*q*) *Vaux* v. *Vollans*, 1 Nev. & M. 307; 4 B. & Ad. 205.

(*r*) *Wright* v. *Lamb*, 1 Marsh. 392; 5 Taunt. 807; see also *Wynn* v. *Kay*, 1 Marsh. 387; 6 Taunt. 48.

(*s*) *Wynn* v. *Moore*, 5 Taunt. 757.

(*t*) *Bagshaw* v. *Bopley*, 4 T. R. 78.

(*u*) Some of the leading cases of actions at common law as to non-residence are:—*Whitehead* v. *Wynn*, 5 M. & S. 427; 2 Chit. 420; *Bevan (qui tam)* v. *Williams*, 3 T. R. 635; *Still* v. *Coleridge*, Forrest, 117; *Cathcart* v. *Hardy* (in error), 2 M. & S. 534; but compare this with *S. C.*, 5 Taunt. 2.

For the practice of the common law courts on this action, see *Wright* v. *Legge*, 6 Taunt. 48; *Vaux* v. *Vollans*, 4 B. & Ad. 525; 1 Nev & M. 307; *Balls* v. *Attwood*, 1 H. Bl. 546; *Leigh* v. *Kent*, 3 T. R. 362; *Wright* v. *Lloyd*, 5 Taunt. 304; *Wright* v. *Whalley*, 5 Taunt. 305; *Wynn* v. *Budd*, 5 Taunt. 629.

The offence of non-residence is now, under 1 & 2 Vict. c. 106, restrained in three ways:—1. By monition and sequestration of the benefice, to be treated of in the following chapter, on Procedure under this Act. 2. By the infliction of penalties. 3. By the compulsory appointment of a curate.

Under 1 & 2 Vict. c. 106.

As to the infliction of penalties, sect. 32 provides, "That every spiritual person holding any benefice shall keep residence on his benefice, and in the house of residence (if any) belonging thereto; and if any such person shall, without any such licence or exemption as is in this act allowed for that purpose, or unless he shall be resident at some other benefice of which he may be possessed, absent himself from such benefice, or from such house of residence, if any, for any period exceeding the space of three months together, or to be accounted at several times in any one year, he shall, when such absence shall exceed three months and not exceed six months, forfeit one-third part of the annual value of the benefice from which he shall so absent himself; and when such absence shall exceed six months and not exceed eight months, one-half part of such annual value; and when such absence shall exceed eight months, two-third parts of such annual value; and when such absence shall have been for the whole of the year, three-fourth parts of such annual value."

Penalties for non-residence on incumbent not having a licence or exemption, unless he be resident on another benefice.

This statute however allows non-residence in certain specified instances.

Sect. 33. "It shall be lawful for any bishop, upon application in writing by any spiritual person holding any benefice within his diocese whereon there shall be no house or no fit house of residence, by licence under his hand and seal, to be registered in the registry of the diocese, which the registrar is hereby required to do, to permit such person to reside in some fit and convenient house, although not belonging to such benefice, such house to be particularly described and specified in such licence, and for a certain time to be therein also specified, not exceeding the period by this act limited, and from time to time, as such bishop may think fit, to renew such licence; and every such house shall be a legal house of residence for such specified time to all intents and purposes: provided always, that no such licence shall be granted to such spiritual person to reside in any house unless it be within three miles of the church or chapel of such benefice; nor in case such church or chapel be in any city, or market or borough town, unless such house be within two miles of such church or chapel."

Licence to reside out of the usual house, if unfit.

1 & 2 Vict. c. 106.

Houses purchased by governors of Queen Anne's bounty to be deemed residences.

Sect. 34. "And whereas the governors of the bounty of Queen Anne have purchased, built, or procured, and may hereafter purchase, build, or procure, by way of benefaction or donation to poor benefices, houses not situate within the parishes or places wherein such benefices lie, but so near thereto as to be sufficiently convenient and suitable for the residence of the officiating ministers thereof; be it therefore enacted, that such houses, having been previously approved by the bishop of the diocese, by writing under his hand and seal duly registered in the registry of the diocese, shall be deemed the houses of residence belonging to such benefices to all intents and purposes whatsoever."

Vicar or perpetual curate may reside in rectory house.

Sect. 35. "In all cases of rectories having vicarages endowed or perpetual curacies the residence of the vicar or perpetual curate in the rectory house of such benefice shall be deemed a legal residence to all intents and purposes whatever; provided that the house belonging to the vicarage or perpetual curacy be kept in proper repair to the satisfaction of the bishop of the diocese."

By sect. 36, the widow of any spiritual person may continue in the house of residence for two months after his decease.

By sect. 37, certain persons appointed to offices before this act were made exempt from penalties for non-residence.

Privileges for temporary non-residence.

Sect. 38. "No spiritual person being dean of any cathedral or collegiate church, during such time as he shall reside upon his deanery, and no spiritual person having or holding any professorship or any public readership in either of the said universities, while actually resident within the precincts of the university, and reading lectures therein (provided always, that a certificate under the hand of the vice-chancellor or warden of the university, stating the fact of such residence, and of the due performance of such duties, shall in every such case be transmitted to the bishop of the diocese wherein the benefice held by such spiritual person is situate within six weeks after the thirty-first day of December in each year); and no spiritual person serving as chaplain of the queen's or king's most excellent majesty, or of the queen dowager, or of any of the queen's or king's children, brethren, or sisters, during so long as he shall actually attend in the discharge of his duty as such chaplain in the household to which he shall belong; and no chaplain of any archbishop or bishop, whilst actually attending in the discharge of his duty as such chaplain; and no spiritual person actually serving as chaplain of the House of Com-

mons, or as clerk of the queen's or king's closet, or as a deputy clerk thereof, while any such person shall be actuallly attending and performing the functions of his office; and no spiritual person serving as chancellor or vicar-general or commissary of any diocese, whilst exercising the duties of his office; or as archdeacon, while upon his visitation, or otherwise engaged in the exercise of his archidiaconal functions; or as dean or subdean, or priest or reader, in any of the queen's or king's royal chapels at St. James's or Whitehall, or as reader in the queen's or king's private chapels at Windsor or elsewhere, or as preacher in any of the Inns of Court, or at the Rolls, whilst actually performing the duty of any such office respectively; and no spiritual person, being provost of Eton College, or warden of Winchester College, or master of the Charter House, or principal of Saint David's College, or principal of King's College, London, during the time for which he may be required to reside and shall actually reside therein respectively, shall be liable to any of the penalties or forfeitures in this act contained for or on account of non-residence on any benefice for the time in any year during which he shall be so as aforesaid resident, engaged, or performing duties, as the case may be, but every such spiritual person shall, with respect to residence on a benefice under this act, be entitled to account the time in any year during which he shall be so as aforesaid resident, engaged, or performing duties, as the case may be, as if he had legally resided during the same time on some other benefice; any thing in this act contained to the contrary notwithstanding."

Performance of cathedral duties, &c. may be accounted as residence under certain restrictions.

Sect. 39. "It shall be lawful for any spiritual person, being prebendary, canon, priest vicar, vicar choral, or minor canon in any cathedral or collegiate church, or being a fellow of one of the said colleges of Eton or Winchester, who shall reside and perform the duties of such office during the period for which he shall be required to reside and perform such duties by the charter or statutes of such cathedral or collegiate church or college, as the case may be, to account such residence as if he had resided on some benefice: provided always, that nothing herein contained shall be construed to permit or allow any such prebendary, canon, priest vicar, vicar choral, minor canon, or fellow, to be absent from any benefice on account of such residence and performance of duty for more than five months altogether in any one year, including the time of such residence on his prebend, canonry, vicarage, or fellow-

1 & 2 Vict. c. 106.

ship: provided also, that it shall be lawful for any spiritual person having or holding any such office in any cathedral or collegiate church or college in which the year for the purposes of residence is accounted to commence at any other period than the first of January, and who may keep the periods of residence required for two successive years at such cathedral or collegiate church or college, in whole or in part, between the first of January and the thirty-first of December in any one year, to account such residence, although exceeding five months in the year, as reckoned from the first of January to the thirty-first of December, as if he had resided on some benefice, anything in this act contained to the contrary notwithstanding."

Existing rights as to exemptions and licences preserved.

Sect. 40. "Provided always, that every spiritual person being in possession of any benefice at the time of the passing of this act, and entitled by the law previously in force to exemption from residence, or to apply for a licence for non-residence, shall, as to every such benefice, but not as to any after-taken benefice, be entitled to the same exemption from residence, and to the same capacity of applying for and obtaining a licence for non-residence, and to the same right of appeal, in case of refusal or revocation of a licence, to which he was entitled before the time of the passing of this act: and every bishop and other person empowered before the passing of this act to grant such licence to such spiritual person shall have the like power after the passing thereof, anything hereinbefore contained to the contrary notwithstanding."

If house of residence not kept in repair, the incumbent to be liable to the penalties for non-residence.

Sect. 41. "Provided also, and be it enacted, that every spiritual person having any house of residence upon his benefice, who shall not reside therein, shall, during such period or periods of non-residence, whether the same shall be for the whole or part of any year, keep such house of residence in good and sufficient repair; and in every such case it shall be lawful for the bishop to cause a survey of such house of residence to be made by some competent person, the costs of which, in case the house shall be found to be out of repair, shall be borne by such spiritual person; and if the surveyor shall report that such house of residence is out of repair, it shall be lawful for the bishop to issue his monition to the incumbent to put the same in repair, according to such survey and report, a copy of which shall be annexed to the monition; and every such non-resident spiritual person who shall not keep such house of residence in repair, and who shall not, upon such monition, and within one month after service of such monition,

show cause to the contrary to the satisfaction of the bishop, or put such house in repair within the space of ten months, to the satisfaction of such bishop, shall be liable to all the penalties for non-residence imposed by this act during the period of such house of residence remaining out of repair, and until the same shall have been put in repair."

As to licences for non-residence it is enacted as follows:—

Every petition for licence for non-residence to be in writing, and to state certain particulars.

Sect. 42. "Every spiritual person applying for a licence for non-residence shall present to the bishop a petition signed by himself, or by some person approved by the bishop in that behalf, and shall state therein whether such spiritual person intends to perform the duty of his benefice in person, and in that case where and at what distance from the church or chapel of such benefice he intends to reside; and if he intends to employ a curate such petition shall state what salary he proposes to give to such curate, and whether the curate proposes to reside or not to reside in the parish in which such benefice is situate: and if the curate intends to reside therein, then whether in the house of residence belonging to such benefice, or in some and what other house; and if he does not intend to reside in the parish, then such petition shall state at what distance therefrom, and at what place, such curate intends to reside, and whether such curate serves any other and what parish as incumbent or curate, or has any and what cathedral preferment, and any and what benefice, or officiates in any other and what church or chapel; and such petition shall also state the annual value and the population of the benefice in respect of which any licence for non-residence shall be applied for, and the number of churches or chapels, if more than one, upon such benefice, and the date of the admission of such spiritual person to the said benefice; and it shall not be lawful for the bishop to grant any such licence unless such petition shall contain a statement of the several particulars aforesaid; and every such petition shall be filed in the registry of the diocese by the registrar thereof, and shall be open to inspection, and copies thereof made, with the leave in writing of the bishop."

Bishop may grant licences for non-residence in certain enumerated cases.

Sect. 43. "It shall be lawful for the bishop, upon such petition being presented to him, and upon such proofs being adduced as to any facts stated in any such petition as he may think necessary and shall require, to grant, in such cases as are hereinafter enumerated, in which he shall think fit to grant the same, a licence in writing under his

1 & 2 Vict. c. 106.

hand for such spiritual person to reside out of the proper house of residence of his benefice, or out of the limits of his benefice, or out of the limits prescribed by this act, for the purpose of exempting such person from any pecuniary penalty in respect of any non-residence thereon; which licence shall express the cause of granting the same licence (that is to say), to any spiritual person who shall be prevented from residing in the proper house of residence, or within the limits of such benefice, or within the limits prescribed by this act, by any incapacity of mind or body; and also for a period not exceeding six months to any spiritual person on account of the dangerous illness of his wife or child making part of his family, and residing with him as such; but that no such licence on account of the illness of a wife or child shall be renewed save with the allowance of the archbishop of the province previously signified under his hand in pursuance of a recommendation in writing from the bishop, setting forth the circumstances, proofs and reasons which induce him to make such recommendation; and also to any spiritual person having or holding any benefice wherein there shall be no house of residence, or where the house of residence shall be unfit for the residence of such spiritual person, such unfitness not being occasioned by any negligence, default or other misconduct of such spiritual person, and such spiritual person keeping such house of residence, if any, and the buildings belonging thereto, in good and sufficient repair and condition to the satisfaction of the bishop, and a certificate under the hand of two neighbouring incumbents, countersigned by the rural dean, if any, that no house convenient for the residence of such spiritual person can be obtained within the parish, or within the limits prescribed by this act, being first produced to the bishop; and also to grant to any spiritual person holding any benefice, and occupying in the same parish any mansion or messuage whereof he shall be the owner, a licence to reside in such mansion or messuage, such spiritual person keeping the house of residence and other buildings belonging thereto in good and sufficient repair and condition, and producing to the bishop proof to his satisfaction at the time of granting every such licence of such good and sufficient repair and condition: provided always, that any such spiritual person, within one month after refusal of any such licence, may appeal to the archbishop of the province, who shall confirm such refusal, or direct the bishop to grant a licence under this act, as shall seem to the said archbishop just and proper."

Appeal to archbishop in case of refusal.

Sect. 44. "It shall be lawful for any bishop, in any case not hereinbefore enumerated, in which such bishop shall think it expedient, to grant to any spiritual person holding any benefice within his diocese a licence to reside out of the limits of such benefice: provided always, that in every such case the nature and special circumstances thereof, and the reasons that have induced such bishop to grant such licence, shall be forthwith transmitted to the archbishop of the province, who shall forthwith proceed therein as hereinafter provided in cases of appeal, and shall allow or disallow such licence in the whole or in part, or make any alteration therein, as to the period for which the same may have been granted or otherwise; and no such licence shall be valid unless it shall have been so allowed by such archbishop, such allowance thereof being signified by the signing thereof by such archbishop: provided also, that it shall not be necessary in such licence to specify the cause of granting the same."

In cases not enumerated bishops may grant licences to reside out of limits of benefice, subject to allowance by the archbishop.

Sect. 45. "During the vacancy of any see the power of granting licences of non-residence under this act, subject to the regulations herein contained, shall be exercised by the guardian of the spiritualities of the diocese; or in case the bishop of any diocese shall be disabled from exercising in person the functions of his office, such power shall be exercised by the person or persons lawfully empowered to exercise his general jurisdiction in the diocese: provided always, that no licence granted by any other than the bishop shall be valid until the archbishop of the province shall have signified his approbation of the grant of such licence by signing the same."

By whom licences may be granted while a see is vacant, &c.

Sect. 46. "No licence for non-residence granted under this act or under the said hereinbefore second-recited act shall continue in force after the 31st day of December in the year next after the year in which such licence shall have been or shall be granted."

Duration of licences.

Sect. 47. "Every person obtaining any licence of non-residence shall pay for the same to the secretary or officer of the bishop, or other person granting the same, the sum of ten shillings, over and above the stamp-duty chargeable thereon, and no more, and also the sum of three shillings, and no more, to the registrar of the diocese, and shall also pay the sum of five shillings to the secretary of the archbishop when any such licence shall have been signed by such archbishop."

Fee for licence.

Sect. 48. "No licence of non-residence shall become void by the death or removal of the bishop granting the

Licences not to be void by the death or

1 & 2 Vict. c. 106. removal of the grantor.

same, but the same shall be and remain valid notwithstanding any such death or removal, unless the same shall be revoked as hereinafter mentioned."

Licences may be revoked.

Sect. 49. "It shall be lawful for any archbishop or bishop who shall have granted any licence of non-residence as aforesaid, or for any successor of any such archbishop or bishop, after having given such incumbent sufficient opportunity of showing reason to the contrary, in any case in which there may appear to such archbishop or bishop good cause for revoking the same, by an instrument in writing under his hand to revoke any such licence: provided always, that any such incumbent may, within one month after service upon him of such revocation, if by a bishop, appeal to the archbishop of the province, who shall confirm or annul such revocation as to him shall appear just and proper."

Copies of licences or revocations to be filed in the registry of the diocese, and a list kept for inspection; and copies transmitted to churchwardens, and publicly read at the first visitation.

Sect. 50. "Every bishop who shall grant or revoke any licence of non-residence under this act shall and he is hereby required, within one month after the grant or revocation of such licence, to cause a copy of every such licence or revocation to be filed in the registry of his diocese; and an alphabetical list of such licences and revocations shall be made out by the registrar of such diocese, and entered in a book, and kept for the inspection of all persons, upon payment of three shillings, and no more; and a copy of every such licence, and a statement in writing of the grounds of exemption, shall be transmitted by the spiritual person to whom such licence shall have been granted, or who may be exempted from residence, to the churchwardens or chapelwardens of the parish or place to which the same relates, within one month after the grant of such licence, or of his taking advantage of such exemption, as the case may be; and every bishop revoking any such licence shall cause a copy of such revocation to be transmitted, within one month after the revocation thereof, to the churchwardens or chapelwardens of the parish or place to which it relates: which copies of licences and revocation, and statements of exemption, shall be by such churchwardens or chapelwardens deposited in the parish chest, and shall likewise be produced by them, and publicly read by the registrar or other officer, at the visitation of the ecclesiastical district within which such benefice shall be locally situate next succeeding the receipt thereof; and every spiritual person who shall neglect so to transmit a copy of such licence or statement of exemption, as hereby required, shall lose all benefit of such licence, and until he

shall have transmitted such statement, shall not be entitled to the benefit of such exemption: provided always, that in case the archbishop of the province shall on appeal to him annul the revocation of any such licence, the bishop by whom such revocation shall have been made shall, immediately on receiving notice from the archbishop that he has annulled the same, order, by writing under his hand, that the copies of such revocation shall be forthwith withdrawn from the said registry and parish chest, and that the same shall not be produced and read at the visitation, and that such revocation shall be erased from the list of revocations in the said registry; which order shall be binding on the registrar and churchwardens respectively to whom the same shall be addressed."

List of licences allowed by the archbishop, or granted in his own diocese, to be annually transmitted to her Majesty in council, who may revoke licences, &c.

Sect. 51. "Every archbishop who shall in his own diocese grant any licence of non-residence, or who shall approve and allow, in manner directed by this act, any such licence in any case not enumerated in this act, or any renewal of a licence in the case of the dangerous illness of the wife or child of any spiritual person, shall annually in the month of January in each year transmit to her Majesty in council a list of all licences or renewals so granted or allowed by such archbishop respectively in the year ending on the last day of December preceding such month of January, and shall in every such list specify the reasons which have induced him to grant or allow each such licence or renewal, together with the reasons transmitted to him by the bishops for granting or recommending each such licence in their respective dioceses; and it shall be lawful for her Majesty in council, by an order made for that purpose, to revoke and annul any such licence; and if her Majesty in council shall think fit so to do, such order shall be transmitted to the archbishop who shall have granted or approved and allowed such licence or renewal, who shall thereupon cause a copy of every such order to be transmitted to the bishop of the diocese in which such licence shall have been granted; and such bishop shall cause a copy of the mandatory part of the order to be filed in the registry of such diocese, and a like copy to be delivered to the churchwardens or chapelwardens of the parish or place to which the same relates, in manner hereinbefore directed as to revocation of licences; and every such archbishop shall cause a copy of the mandatory part of every such order made in relation to any such licence granted by him in his own diocese to be in like manner filed in the registry

1 & 2 Vict. c. 106.

of his diocese, and a like copy also to be delivered to the churchwardens or chapelwardens of the parish or place to which such licence shall relate in manner before mentioned: provided always, that after such licence shall have been so revoked by her Majesty in council, the same shall nevertheless, in all questions that shall have arisen or may hereafter arise touching the non-residence of the spiritual person to whom the same shall have been granted, between the time at which the same was granted or approved and allowed, and the time of the revocation thereof being so filed in the registry, be deemed and taken to have been valid."

Licence, although revoked, to be deemed valid between the grant and revocation.

Annual questions.

For the purposes of this act certain questions are annually to be put by the bishop to the incumbent. As to these it is provided as follows:—

Incumbents to answer questions transmitted to them by bishop.

Sect. 52. "It shall be lawful for each bishop, and he is hereby required to transmit, some time in the month of January in each year, to every spiritual person holding any benefice within his diocese or jurisdiction, the questions contained in the first schedule to this act, for the purpose of better enabling the several bishops to make the returns hereinafter mentioned; and every spiritual person to whom such questions shall be so transmitted shall, within three weeks from the day on which the same shall be delivered to him, or to the officiating minister of the benefice for the time being, make and transmit to the bishop full and specific answers thereto, such answers being signed by such spiritual person."

Schedule of questions.

The first Schedule is as follows:—

"QUESTIONS to be annually transmitted by each bishop to every spiritual person holding any benefice within his diocese or jurisdiction.

1. What is the name of your benefice?
2. In what county?
3. Name of incumbent, and date of admission?
4. Is there a glebe house belonging to your benefice?
5. Were you resident in the glebe house, or, there being no glebe house, or none fit for your residence, were you resident in any and what house appointed by the bishop in his licence, during the last year, for the term prescribed by law?
6. Being non-resident, were you performing the duties of your parish for the said time? If so, state where you resided, and at what distance from the church or chapel.
7. Were you in the last year serving any other church

or chapel in the neighbourhood as incumbent? If so, state the name thereof, and the distance from the above-named church or chapel; and when and for how long you served the same.

8. Were you serving any other church or chapel in the neighbourhood as curate? If so, state the name thereof, and the distance from your own church or chapel; and when and for how long you served the same.
9. What are the services in your church? Is a sermon or lecture given at every or which of such services?
10. Were these services duly performed last year? If not, for what reason?
11. What are the services in your chapel or chapels, if any? Is a sermon or lecture given at every or which of such services?
12. Were these services duly performed last year? If not, for what reason?
13. Have you any assistant curate or curates? If so, state his or their names; also whether he or they is or are licensed, and the amount of his or their stipend or respective stipends.
14. If you were non-resident, were you so by licence?
15. If non-resident by licence, state the ground of licence, and the time when it will expire?
16. If non-resident without licence, were you so by exemption?
17. If non-resident by exemption, state the ground of exemption, and whether such exemption was claimed for the whole year, or during what part thereof.
18. If you were non-resident, and did not perform the duties of your benefice, what ecclesiastical duties, if any, were you performing, and where do you now reside?

OBSERVE: The foregoing questions are to be answered by every incumbent, whether resident or not.

Further questions to be answered, in addition to the foregoing, in case the incumbent be non-resident.

19. What is the name of your curate?
20. Does he reside in the glebe house?
21. Does he pay any and what rent or consideration for the use of the glebe house? or is any deduction made on account thereof from the stipend assigned to him in his licence?
22. If not resident in the glebe house, does he reside in the parish?

1 & 2 Vict. c. 106. Schedule of questions.

23. If not resident in the parish, where does he reside, and at what distance from your church or chapel?
24. Does he serve any other church or chapel as incumbent? If so, state the name thereof, and the distance from your own church or chapel.
25. Does he serve any other church or chapel as curate? If so, state the name thereof, and the distance from your own church or chapel.
26. Is he licensed?
27. What is his salary from you?
28. Has he from you any other allowances or emoluments? State what, and the average value thereof respectively.
29. What is the gross and what is the net annual value of your benefice?

N.B. All the questions have reference to the year immediately preceding that in which they are transmitted."

Annual return to be made to her Majesty in council of residents and non-residents, &c.

By sect. 53, "On and before the 25th day of March, in every year, a return shall be made to her Majesty in council, by every bishop, of the name of every benefice within his diocese or jurisdiction, and the names of the several spiritual persons holding the same respectively who shall have resided thereon; and also the names of the several spiritual persons who, by reason of any exemption under or by virtue of this act, or by reason of any licence granted by such bishop, shall not have resided on their respective benefices; and also the names of all spiritual persons, not having any such exemption or licence, who shall not have resided on their respective benefices, so far as the bishop is informed thereof; and also the substance of the answers received in all cases to the questions so transmitted as aforesaid."

Curates of non-residents.

The law as to the curates of non-residents is contained in the chapter on Curates (z). The two following cases, however, relating to particular instances where incumbents are non-resident within the act, so as to be liable to the appointment of curates by the bishop, ought to be noticed here.

Sharpe v. *Bluck.*

Upon section 75 (a) the case of *Sharpe* v. *Bluck* (b) was thus:

To avowry by a rector for cattle taken as a distress for arrears of a rent-charge in lieu of tithe on land of which the plaintiff was tenant, plaintiff pleaded in bar,

(z) *Vide supra*, pp. 565—574.
(a) See p. 565.
(b) 10 Ad. & El., N. S. 280 (1847).

that the bishop of the diocese had, under stat. 1 & 2 Vict. c. 106, s. 75, appointed a curate to perform the duties of the rectory at a stipend; that defendant was at that time absent from the rectory, and had not resided thereon for nine months in the year next preceding, *to wit, the year commencing on the* 20*th March*, 1842, but had for a period exceeding three months, to wit, &c., *in the course of the year aforesaid,* absented himself, &c.; that the curate complained to the bishop of non-payment of the stipend, whereupon the bishop summoned defendant, and, on his non-appearance, determined summarily, and adjudged 75*l.* to be due; that defendant not paying, the bishop issued a monition, requiring him to pay, in default of which a sequestration would issue; that defendant was served with the monition, but did not pay, and the bishop thereupon issued a sequestration under the seal of his Consistorial Court, empowering a sequestrator, whom the bishop appointed, to levy the 75*l.* on the profits, rent-charges, &c. of the rectory; and that the sum now distrained for was demanded of plaintiff by the sequestrator, and paid by plaintiff to prevent his distraining. On demurrer to the plea in this case, it was holden, that the proceedings to sequestration under stat. 1 & 2 Vict. c. 106, s. 83, were not authorized by the statute, because the power to appoint a stipendiary curate is given by sect. 75 only when an incumbent, under the circumstances there described, *is absent for a period exceeding three months altogether, or to be accounted at several times in the course of any one year;* and by sect. 120, the year is to be reckoned from 1st January to 31st December; and therefore, that for want of jurisdiction in the bishop to sequester, the payment under such sequestration did not discharge the plaintiff, who claimed in replevin, from paying his tithe rent-charge to the incumbent.

The case of *Daniel* v. *Morton* (*c*) has been decided on sect. 83 (*d*).

Daniel v. *Morton*

The Bishop of N., within which diocese were the perpetual curacy of W. and the rectory of C., addressed an instrument to D., the perpetual curate of W., under the episcopal seal, setting forth that he, the Bishop, did, by these presents, "unite, annex and incorporate the aforesaid rectory of C., with all its rights, members, and appurtenances, to and with the aforesaid perpetual curacy of W., during your incumbency on the same, and so long as you shall be perpetual curate there, and no longer, by our ordi-

(*c*) 16 Ad. & El., N. S. 198 (1850).

(*d*) See p. 569.

Daniel v. Morton.

nary authority, and as much as in us lies, and the laws and statutes of this realm do permit, and not otherwise; so that you, the aforesaid rectory of C., with the aforesaid perpetual curacy of W., may, as one benefice, so long as you are perpetual curate of the said perpetual curacy of W., retain, and the fruits," &c., "of both the said benefices (the burdens and charges due on the same being by you sustained) receive, convert, and apply to your own use, freely and lawfully, any ecclesiastical ordinance to the contrary notwithstanding. Provided, nevertheless, that you have and keep a sufficient curate, licensed and approved by our ordinary authority, to instruct and teach the people of the parish in which you shall not reside; and provided also that, if you shall at any time hereafter be collated or instituted to any other benefice whatsoever, that then our union shall be null and void to all intents and purposes in the law, as if the same had never been granted." The court held that, assuming that the bishop had power to unite the two benefices into one, without the assent of the crown, chapter or patron (as to which *quære*), the instrument, on the whole, did not show an intention to effect such a union. That therefore (W. and C. being fifty miles from each other) D., while resident at C., was non-resident at W. within stat. 1 & 2 Vict. c. 106; and the bishop might, under sect. 83, while D. was receiving the profits of both livings, appoint a stipend to the curate of W., and enforce the payment by monition and sequestration of W.

Ex parte Bartlett.

It appears from the case of *Ex parte Bartlett* (*e*) that an incumbent detained in prison as a punishment for a temporal offence may nevertheless be ordered to reside, and may be proceeded against for non-residence.

SECT. 6.—*Pluralities* (*f*).

Restraints by Council of Lateran.

By a canon made in the council of Lateran, holden under Pope Innocent III. in the year of our Lord 1215, it is ordained, that whosoever shall take any benefice with cure of souls, if he shall before have obtained a like benefice, shall *ipso jure* be deprived thereof, and if he shall contend to retain the same, he shall be deprived of the other; and the patron of the former, immediately after his accepting of the latter, shall bestow the same upon whom he shall think worthy (*g*).

(*e*) 12 Q. B. 488; 3 Ex. 28.

(*f*) See sect. 29 of the 4th council of Lateran, title "Quod nullus habeat duo beneficia cum curâ annexâ." Fol. edit. of General Councils, printed at Paris, 1671.

(*g*) Hughes, c. 16; Gibs. 903

The following case was recently decided in the Arches Court under the very provisions of this canon:—

"A clerk in holy orders being in possession of a perpetual curacy with cure of souls, augmented by the Governors of Queen Anne's Bounty, and having without dispensation been instituted and inducted into another benefice with cure of souls, was holden to have forfeited the former, which was on sentence declared void" (*h*).

The following case also deserves attention:—

"By a local act of parliament (6 Geo. 2, c. xxviii), the hamlet of Bethnal Green, in the parish of Stepney, was divided from it and made a distinct parish under the name of St. Matthew, Bethnal Green, with a parish church; and the advowson was vested in the patrons of the original church; and it was enacted, 'That the rectory of the said 'new church or parish shall not be taken or held *in commendam*.' The rector of St. Matthew, Bethnal Green, while holding that benefice, accepted another. It was holden that the rectory did not thereby and by force of the local statute become void, but only voidable, the rectory not being rated in the king's books and the patrons not making a new presentation" (*i*).

Restraints by provincial constitutions.

"Before institution, it shall be inquired whether the presentee hath any other benefice with cure of souls; and if he hath such benefice, it shall be inquired whether he hath a dispensation; and if he hath not a sufficient dispensation, he shall by no means be admitted, unless he do first make oath, that immediately upon his taking possession of the benefice unto which he is instituted, he will resign the rest. Whereupon he who granteth institution shall immediately give notice to the bishops in whose dioceses such former benefices shall be, and also to the patrons, that they may dispose of the same" (*j*).

"When confirmation is to be made of the election of a bishop, amongst other articles of inquiry and examination according to the direction of the canons, it shall be diligently inquired, whether he who is elected had before his election several benefices with cure of souls; and if he be found to have had such, it shall be inquired whether he hath had a dispensation, and whether the dispensation (if he shall exhibit any) is a true dispensation, and extendeth to all the benefices which he possessed" (*k*).

According to which constitution we find, in the times

(*h*) *Burder* v. *Mavor* (1848), 1 Rob. Ecc. 614. See *Daniel* v. *Morton*, 16 Ad. & El., N. S. 198.

(*i*) *King* v. *Alston* (1848), 12 Ad. & El., N. S. 971.

(*j*) Othob. Athon, 129.

(*k*) Ibid. 133.

Restraints by provincial constitutions.

of the archbishops Peecham and Winchelsea, that confirmation was denied to three bishops, by reason of pluralities without proper dispensation (*l*).

"He who shall have more benefices than one with cure of souls, without dispensation, shall hold only the last; and if he shall strive to hold the rest, he shall forfeit all. And it is further decreed, that he who shall take more benefices than one, having cure of souls, or being otherwise incompatible, without dispensation apostolical, either by institution or by title of commendam, or one by institution and another by commendam, except they be held in such manner as is permitted by the constitution of Gregory published in the council of Lyons, shall be deprived of them all, and be *ipso facto* excommunicated, and shall not be absolved but by us or our successors, or the apostolic see (*m*).

Having Cure of Souls.]—Whether it be a cathedral or parochial church, or a chapel having cure of the parishioners, either *de jure* or *de facto*, so that there be a parish wherein he can exercise parochial rites; also, whether it be a dignity or office, or church, as there are many archipresbyters, archdeacons and deans who have no church of their own, yet they have jurisdiction over many churches (*n*).

Or being otherwise incompatible.]—Namely, dignities, parsonages, and other ecclesiastical benefices, which require personal residence either by statute, privilege or custom (*o*).

In such manner as is permitted by the Constitution of Gregory.]—Namely, that he to whom the benefice is granted in commendam be of lawful age, and a priest, and that it be one only, and of evident necessity or advantage to the church, and to continue no longer than for six months (*p*).

And shall not be absolved but by us or our Successors, or the Apostolic See.]—And by another constitution of the same archbishop, if any shall otherwise absolve them, they shall be accursed (*q*).

The Court of Exchequer Chamber, reversing the judgment of the Court of Queen's Bench, has decided that the acceptance of a second living rendered the first living void

(*l*) Gibs. 905.

(*m*) Peecham, Lind. 137.

(*n*) Ibid. 135.

(*o*) Ibid. 137.

(*p*) Ibid.

(*q*) Ibid. 339. Since 1 & 2 Vict. c. 106, the old law on this subject has become merely matter of history. See *Holland's case*, 4 Co. 75; *Brazennoze College* v. *Bishop of Salisbury*, 4 Taunt. 831; *Shute* v. *Higden*, Vaugh. 131; *Rex* v. *Bishop of London and Baldock*, W. Jones, 404; Moir, 448; *Wolverstan* v. *Bishop of London*, 2 Wils. 174, 200; 3 Burr. 1504; *Boteler* v. *Allington*, 3 Atk. 455; *Bulwer* v. *Bulwer*, 2 B. & A. 470; *King* v. *Priest*, Jones, 339.

as to the patron, and though not so as to incur a lapse without notice by the ordinary, yet so as to render it void as to the incumbent, and, as it should seem, the sale of the advowson simoniacal (*r*).

Regulation of dispensations by canon.

By Can. 41 of 1603, "No licence or dispensation for the keeping of more benefices with cure than one, shall be granted to any, but such only as shall be thought very well worthy for his learning, and very well able and sufficient to discharge his duty: that is, who shall have taken the degree of a master of arts at the least in one of the universities of this realm, and be a public and sufficient preacher licensed. Provided always, that he be by a good and sufficient caution bound to make his personal residence in each of his said benefices for some reasonable time in every year; and that the said benefices be not more than thirty miles distant asunder; and, lastly, that he have under him, in the benefice where he doth not reside, a preacher lawfully allowed, that is able sufficiently to teach and instruct the people."

Very well worthy for his Learning.]—So is the tenor of the Lateran council under Innocent the Third against pluralities; where it is allowed, in this particular case and in no other, that the see apostolic may dispense with persons of sublime abilities and learning, that they may be honoured with more benefices than one (*s*).

A public and sufficient Preacher licensed.]—With regard to his being thus qualified (which in those days was not a common qualification), there is usually a proviso in the body of the dispensation, that in either of the churches he preach thirteen sermons every year, according to the orders of the Church of England published in that behalf, and therein handle the word of God religiously and reverently (*t*).

Bound to make his personal Residence for some reasonable Time.]—In every dispensation to hold two benefices, there is a proviso, that in that benefice from which he shall be the more absent, he shall exercise hospitality for at least two months every year: and that proviso being evidently founded on this canon, every pluralist who does not observe it is punishable by ecclesiastical censures (*u*).

Not more than Thirty Miles distant.]—Heretofore it was usual to obtain licences from the king, to take two benefices beyond the distance of thirty miles, by way of

(*r*) *Alston* v. *Atlay*, 7 Ad. & El. 311; *S. C.*, 6 Nev. & Mann. 686, C. J. Tindal; see remarks of Wightman, *arguendo*, and the cases there cited.

(*s*) Gibs. 910.

(*t*) Ibid.

(*u*) Ibid. 911.

Regulation of dispensations by canon.

dispensation with this canon; and in such cases we find this clause in the faculties granted by the archbishop, "The king's licence for distance beyond thirty miles having been first granted to you," or the like; by reason of which licence and clause, they have been usually called *royal dispensations*. But none of these (as it seems) have been granted since the Revolution; it having been then set forth in the Declaration of Rights, 1 Will. 3, sess. 2, c. 2, that the power of suspending laws or the execution of laws, by regal authority without consent of parliament, is illegal; and with respect to acts of parliament in particular, it is enacted by that statute, that no dispensation by *non obstante* of any statute shall be allowed, unless the same shall be specially provided for in such statute (*x*).

That he have under him, in the Benefice where he doth not reside, a Preacher lawfully allowed.]—In pursuance of this canon (and not of anything in the statute) a clause to the like purpose is inserted in the faculty or dispensation (*y*).

And it is further provided by Canon 47, that whosoever has two benefices, shall maintain a preacher licensed, in the benefice where he does not reside; except he preach himself at both of them usually.

Manner of obtaining a dispensation.

The method which a presentee used under the old law to pursue in order to obtain a dispensation, was as follows:

He obtained of the bishop in whose diocese the livings were, two certificates of the values in the king's books, and the reputed values and distance of such livings; one certificate for the archbishop, and the other for the lord chancellor. And if the livings lay in two dioceses, then he obtained two certificates, as aforesaid, from each bishop, each certifying the value in the king's books, and the reputed value of the living in his own diocese; and both of them the reputed distance of the two livings.

Which certificates were in this form:

"*To the Most Reverend Father in God, Thomas, by Divine Providence Lord Archbishop of Canterbury, Primate of all England, and Metropolitan:*

"*Whereas A. B., clerk, master of arts, vicar of C. in the county of D., and in my diocese of E., is presented to the rectory of F. in the county and diocese aforesaid: These are therefore to certify your grace, that the said vicarage of C. is valued in the king's books at ——, is of the reputed yearly value of ——; that the said rectory of F. is valued*

(*x*) Gibs. 911. As to this distance see *Rex* v. *Clive*, Blanch. Rep. 968.

(*y*) Gibs. 911.

in the king's books at ——, is of the reputed yearly value of ——; and that they are distant from each other about —— miles. Witness my hand the —— day of ——."

The like to the lord high chancellor of Great Britain.

He also exhibited to the archbishop his presentation to the second living.

And brought with him two papers of testimonials from the neighbouring clergy, concerning his behaviour and conversation; one for the archbishop, and the other for the lord chancellor.

The form of which testimonials was thus:

"*To the Most Reverend Father in God, Thomas, by Divine Providence Lord Archbishop of Canterbury, Primate of all England, and Metropolitan:*

"*We whose names and seals are hereunto subscribed and set, do humbly certify your grace, that we have personally known the life and behaviour of A. B., clerk, master of arts, vicar of C. in the county of D. and diocese of E., for the space of three years now last past; that he hath, during the said time, been of good and honest life and conversation, a faithful and loyal subject to his majesty King George the Third, and hath not (so far as we know) held, written, or taught anything but what the Church of England approves of and maintains. In witness whereof, we have hereunto set our hands and seals, this —— day of —— in the year of our Lord ——.*

A. B., Rector of A.
C. D., Vicar of B.
E. F., Vicar of C."

In like manner he exhibited to the archbishop his letters of orders of deacon and priest, and a certificate of his having taken the degree of master of arts at the least, in one of the universities of this realm, under the hand of the register of such university.

And in case he were not doctor or bachelor of divinity, nor doctor of law, nor bachelor of canon law, he had to procure a qualification (according to the form above expressed) as chaplain to some nobleman, or to some other person empowered by law to grant qualifications for pluralities (to be duly registered in the faculty office), in order to be tendered to the archbishop, according to the statute. And if he had taken any of the aforesaid degrees, which the statute allows as qualifications, he had to procure a certificate thereof in the manner before mentioned, and to exhibit the same to the archbishop (*z*).

(*z*) Ecton, 414.

Manner of obtaining a dispensation.

After which his dispensation was made out at the faculty office, where he gave security according to the direction of the canon; and afterwards he repaired to the lord chancellor, for confirmation under the broad seal.

All which being done, he had then to apply himself to the bishop of the diocese where the living lay, for his admission and institution(*a*).

Form of a dispensation.

In pursuance of the statute and canons aforegoing, the form of a dispensation was usually as follows:—

"*Thomas, by Divine Providence Archbishop of Canterbury, Primate of all England, and Metropolitan, by authority of parliament lawfully empowered for the purpose herein written: To our beloved in Christ A. B., clerk, master of arts, of —— college in the university of ——, and also chaplain to the Right Honourable C. Lord ——, health and grace. The greater progress men make in sacred learning, the greater encouragement they merit; and the more their necessities are in daily life, the more necessary supports of life they require. Upon which considerations, and being moved by your supplications in this behalf, We do (by virtue and in pursuance of the power vested in us by the statutes of this realm) by these presents graciously dispense with you; that, together with the rectory of the parish church of —— in the county of —— and diocese of ——, which you now possess, the annual fruits whereof, according to the valuation made in the books of first fruits and tenths of ecclesiastical benefices remaining in the exchequer of our sovereign lord the king, do not exceed the sum of ——, you may freely and lawfully accept, and hold as long as you shall live, the rectory of the parish church of —— in the county of —— and diocese of ——, not distant from the former above —— miles or thereabouts, the annual fruits whereof, according to the valuation aforesaid, do not exceed the sum of ——: Provided always, that in each of the churches aforesaid, as well in that from which it shall happen that you shall be for the greater part absent, as in the other, on which you shall make perpetual and personal residence, you do preach thirteen sermons every year according to the ordinances of the Church of England promulgated in that behalf; and do therein sincerely, religiously and reverently handle the holy word of God; and that in the benefice, from which you shall happen to be most absent, you do nevertheless exercise hospitality two months yearly; and for that time, according to the fruits and profits thereof,*

(*a*) Deg. p. 1, c. 4

as much as in you lieth, you do support and relieve the inhabitants of that parish, especially the poor and needy: Provided also, that the cure of the souls of that church, from which you shall be most absent, be in the meantime in all respects laudably served by an able minister, capable to explain and interpret the principles of the Christian religion, and to declare the word of God unto the people, in case the revenues of the said church can conveniently maintain such minister; and that a competent and sufficient salary be well and truly allowed and paid to the said minister, to be limited and allotted by the proper ordinary at his discretion, or by us or our successors, in case the diocesan shall not take due care therein: Provided nevertheless, that these presents do not avail you anything, unless duly confirmed by the king's letters-patent. Given under the seal of our office of faculties, this —— day of ——," &c.

The Lord Chancellor's confirmation:

"*George the Third, &c. To all to whom these our present letters shall come, greeting: We have seen certain letters of dispensation to these presents annexed; which, and everything therein contained, according to a certain act in that behalf made in the parliament of Henry the Eighth, heretofore king of England, our predecessor, we have ratified, approved and confirmed, and for us, our heirs and successors, we do ratify, approve and confirm by these presents: So that the reverend A. B., clerk, master of arts, in the letters aforesaid named, may use, have and enjoy, freely and quietly with impunity, and lawfully, all and singular the things in the same specified, according to the force, form and effect of the same, without any impediment whatsoever, although express mention of the certainty of the premises, or of any other gifts or grants by us heretofore made to the said A. B. be not made in these presents; or any other thing, cause or matter whatsoever in anywise notwithstanding. In testimony whereof we have caused these our letters to be made patent. Witness ourself at Westminster, the —— day of ——, in the —— year of our reign*" (*b*).

Restraints of plurality by earlier statutes.

It is not necessary to notice the restraints and dispensations by statute before August, 1838, and 21 Hen. 8, c. 13 (*c*), and 57 Geo. 3, c. 99.

(*b*) *Vide infra*, form of dispensation, under 1 & 2 Vict. c. 106.

(*c*) Confirmed by 25 Hen. 8, c. 21, Statute for Dispensations. See cases *Anon.*, Dyer, 327; *Rex* v. *Bishop of Chichester*, Noy, 149; *Colt and Glover* v. *Bishop of Coventry and Lichfield*, Hob. 158

Restraints and dispensations by statute since August, 1838.

These statutes have been repealed by 1 & 2 Vict. c. 106. This latter act has been again amended by 13 & 14 Vict. c. 98. The two acts together constitute the existing law on the subject of plurality.

1 & 2 Vict. c. 106.

1 & 2 Vict. c. 106, is entitled, "An Act to abridge the holding of Benefices in Plurality, and to make better Provision for the Residence of the Clergy." After reciting that 21 Hen. 8, c. 13, had been partly repealed by 57 Geo. 3, c. 99, it enacts as follows:—

Both acts now wholly repealed; saving as to penalties already incurred, or licences already granted.

"So much of the said recited acts as is now in force shall be and the same is hereby repealed, save and except only such part of the said last-recited act as repeals certain acts and parts of acts therein particularly recited: provided, that nothing herein contained shall exempt any person from any penalties incurred under the said last-recited act before the time of passing this act, or take away or affect any proceedings for recovery thereof, whether commenced or not before the passing of this act, or shall annul or abridge any licence granted under the provisions of the said last-recited act before the time of passing this act."

Not more than two preferments to be held together.

Sect. 2. "No spiritual person holding more benefices than one shall accept and take to hold therewith any cathedral preferment or any other benefice; and that no spiritual person holding any cathedral preferment and also holding any benefice shall accept and take to hold therewith any other cathedral preferment or any other benefice; and that no spiritual person holding any preferment in any cathedral or collegiate church shall accept and take to hold therewith any preferment in any other cathedral or collegiate church, any law, canon, custom, usage, or dispensation to the contrary notwithstanding: provided, that nothing herein-before contained shall be construed to prevent any archdeacon from holding, together with his archdeaconry, two benefices, under the limitations hereinafter mentioned with respect to distance, joint yearly value and population, and one of which benefices shall be situate within the diocese of which his archdeaconry forms a part, or one cathedral preferment in any cathedral or collegiate church of the diocese of which his archdeaconry forms a part, and one benefice situate within such diocese, or to prevent any spiritual person holding any cathedral preferment, with or without a benefice, from holding therewith any office in the same cathedral or collegiate church, the duties of which are statutably or accustomably performed by the spiritual persons holding such preferment."

As by this section no spiritual person may hold more

than one *preferment* and one *benefice* together, it was of course very necessary that there should be an accurate definition of these terms, and such is to be found in section 124, which enacts,

Definition of the term "cathedral preferment,"

"That in all cases where the term 'cathedral preferment' is used in this act, it shall be construed to comprehend (unless it shall otherwise appear from the context) every deanery, archdeaconry, prebend, canonry, office of minor canon, priest vicar, or vicar choral, having any prebend or endowment belonging thereto, or belonging to any body corporate consisting of persons holding any such office, and also every precentorship, treasurership, sub-deanery, chancellorship of the church, and other dignity and office in any cathedral or collegiate church, and every mastership, wardenship, and fellowship in any collegiate church; and that in all cases where the term 'benefice' is used in this act, the said term shall be understood and taken to mean benefice with cure of souls, and no other (unless it shall otherwise appear from the context), and therein to comprehend all parishes, perpetual curacies, donatives, endowed public chapels, parochial chapelries, and chapelries or districts belonging or reputed to belong, or annexed or reputed to be annexed, to any church or chapel, any thing in any other act to the contrary notwithstanding" (*d*).

and "benefice."

This definition of "benefice" is repeated in 13 & 14 Vict. c. 98.

Restrictions on holding two benefices.

By sect. 1 of 13 & 14 Vict. c. 98, no spiritual person may take or hold together any two benefices, except in the case of two benefices the churches of which are within three miles of one another by the nearest road, and the annual value of one of which does not exceed 100*l.*

The computation of this distance is provided for by section 129 of 1 & 2 Vict. c. 106, which enacts,

Distance how to be computed.

"That the distance between any two benefices for the purposes of this act shall be computed from the church of the one to the church of the other by the nearest road or footpath, or by an accustomed ferry; and if on one of the said benefices there be two or more churches, then the distance shall be computed from or to the nearest of such churches, as the case may be; or if on one of such benefices there be no church, then in such manner as shall be directed by the bishop of the diocese in which the benefice

(*d*) It had been previously enacted by 58 Geo. 3, c. 45, s. 26, and 1 & 2 Will. 4, c. 38, s. 13, that no church of any distinct or district parish, or to which a district had been assigned, should be tenable with the original church of the parish out of which such distinct or district parish or district has been taken.

proposed to be taken and held by any spiritual person in addition to one already held by him shall be locally situate."

It is enacted by sect. 4 of 1 & 2 Vict. c. 106, as amended by 13 & 14 Vict. c. 98, s. 2,

Nor if population of one such benefice is more than 3,000.

"That, except as hereinafter provided, no spiritual person holding a benefice with a population of more than three thousand persons shall accept and take to hold therewith any other benefice having, at the time of his admission, institution, or being licensed thereto, a population of more than five hundred persons, nor shall any spiritual person holding a benefice with a population of more than five hundred persons accept and take to hold therewith any other benefice having, at the time of his admission, institution, or being licensed thereto, a population of more than three thousand persons."

The mode of computing the population for the purposes of these statutes is provided for by section 130 of 1 & 2 Vict. c. 106, which enacts,

Population how to be computed.

"That whenever the population of any place shall be required by this act to be ascertained, the same shall be taken from the latest returns of population made under any act of parliament for that purpose at the time when the question shall arise, if such returns shall apply to the place respecting which the question shall be, but if such place shall only form part of a parish or district named in such returns, then such returns shall be taken to represent truly the population of the parish or district named therein, and from them the population of the place required shall be computed, according to the best evidence of which the subject shall be capable."

Sect. 132 of this act provides—

Not to affect former powers of bishops.

"That nothing in this act contained shall be deemed, construed, or taken to derogate from, diminish, prejudice, alter, or affect, otherwise than is expressly provided, any powers, authorities, rights, or jurisdiction already vested in or belonging to any archbishop or bishop under or by virtue of any statute, canon, usage, or otherwise howsoever."

Annexation of sinecures to cures of souls.

By 3 & 4 Vict. c. 113, s. 71, a provision is made for the annexation of *sinecures* to benefices with cure of souls (*e*):

"That with respect to any benefice with cure of souls which is held together with or in the patronage of the holder of any prebend or other sinecure preferment belonging to any college in either of the universities, or to any private patron, arrangements may be made by the like authority, and with the consents of the respective patrons,

(*e*) Under this statute and 1 & 5 Vict. c. 39, sinecures may be suppressed *or* annexed. See pp. 506, 507, *supra*.

for permanently uniting such preferment with such benefice: provided that this act shall not apply to or affect any prebend or other sinecure preferment in the patronage of any college or of any lay patron in any other manner than as is herein expressly enacted."

But to hold the two benefices allowed by this act section 6 enacts (*f*),

Licence or dispensation to hold together any two benefices must be obtained from the Archbishop of Canterbury.

"That it shall be necessary for such person to obtain from the Archbishop of Canterbury for the time being, a licence or dispensation for the holding thereof, which licence or dispensation the said archbishop is hereby empowered to grant under the seal of his office of faculties, upon being satisfied as well of the fitness of the person as of the expediency of allowing such two benefices to be holden together, and that such licence or dispensation shall issne in such manner and form as the said archbishop shall think fit; and for such licence or dispensation there shall be paid to the registrar of the said office the sum of thirty shillings and no more, and to the seal keeper thereof the sum of two shillings and no more; and that no stamp duty, nor any other fee, save as hereinbefore mentioned, shall be payable on the licence or dispensation to be granted as aforesaid, nor shall any confirmation thereof be necessary; nor shall it be required of any spiritual person applying for any such licence or dispensation to give any caution or security by bond or otherwise before such licence or dispensation is granted; and if the said Archbishop of Canterbury shall refuse or deny to grant any such licence or dispensation as aforesaid, it shall be lawful for her Majesty, if she, by the advice of her privy council, shall think fit, upon application by the person to whom such licence or dispensation shall have been refused or denied, to enjoin the said archbishop to grant such licence or dispensation, or to show to her Majesty in council sufficient cause to the contrary, and thereupon to make such order touching the refusal or grant of such licence or dispensation as to her Majesty in council shall seem fit, and such order shall be binding upon the archbishop."

A statement of certain particulars to be made by every spiritual person to the bishop of the diocese previous to appli-

By sect. 7, "Where any spiritual person shall be desirous of obtaining a licence or dispensation for holding together any two benefices, such spiritual person shall, previously to applying for the grant of such licence or dispensation, deliver to the bishop of the diocese where both benefices are situate in the same diocese, or to the bishops of the two dioceses where such benefices are situate in

(*f*) See also 13 & 14 Vict. c. 98, s. 2.

cation for a licence or dispensation.

different dioceses, a statement in writing under his hand, verified as such bishop or bishops respectively may require, according to a form or forms to be promulgated from time to time by the Archbishop of Canterbury, and approved by the Queen in council, in which statement such spiritual person shall set forth, according to the best of his belief, the yearly income arising from each of the said benefices, separately, on an average of the three years ending on the twenty-ninth day of September next before the date of such statement, and the sources from which such income is derived, and also the yearly amount, on an average of the same period of three years, of all taxes, rates, tenths, dues, and other permanent charges and outgoings to which the same benefices are respectively subject, and also the amount of the population of each of the said benefices, to be computed according to the last returns made under the authority of parliament, and also the distance between the two benefices, to be computed according to the directions of this act; and it shall be lawful for the bishop to whom such statement shall be delivered to make any inquiry which he may think right as to the correctness of the same in respect to the benefices or benefice within his diocese; and such bishop is hereby required, within the space of one month after he shall have received such statement as aforesaid, to transmit to the Archbishop of Canterbury a certificate under his hand, in which certificate such bishop shall set forth or shall annex thereto a copy of the statement delivered to him as aforesaid, and shall thereby certify the amount at which he considers that the annual value and the population of each of the two benefices (where both benefices are situate in the same diocese) and the distance of the said two benefices from each other, or the amount at which he considers the annual value and the population of the benefice within the diocese of such bishop (where the two benefices are situate in different dioceses), and the distance of such benefice from the other benefice, ought to be taken, with respect to the licence or dispensation in question; and whenever both or either of the benefices shall be in the diocese or jurisdiction of the Archbishop of Canterbury, a certificate shall be made out in manner aforesaid by the archbishop, and shall be retained by him."

Bishop may make inquiry as to the accuracy of statement.

Bishop to transmit a certificate to the Archbishop of Canterbury, setting forth copy of the statement made to the bishop and other particulars.

How annual value of two benefices to be held together by dispensation to be estimated.

By sect. 8, "In estimating the annual value of any benefice for the purpose of any such certificate as aforesaid, it shall be lawful for the archbishop or bishop by whom such certificate shall be made, and every such archbishop and bishop is hereby directed, to deduct from the gross amount of the yearly income arising from such bene-

fice all taxes, rates, tenths, dues, and other permanent charges and outgoings to which such benefice shall be subject, but not to deduct or allow for any stipend or stipends to any stipendiary curate or curates, nor for such taxes or rates in respect of the house of residence on any benefice, or of the glebe land belonging thereto, as are usually paid by tenants or occupiers, nor for monies expended in the repair or improvement of the house of residence and buildings and fences belonging thereto (*g*).

Certificate to be deposited in office of faculties; and be conclusive evidence of value, population, and distance.

By sect. 9, "The certificate or certificates to be transmitted to or retained by the Archbishop of Canterbury as aforesaid shall be deposited in the said office of Faculties, and in the event of the required licence or dispensation being granted, shall for the purposes of this act be conclusive evidence of the annual value and population of each of the benefices to which the same shall relate, and of their distance from each other; and the registrar of the Faculties shall and he is hereby required to produce such certificate or certificates to any person who may require to inspect the same."

Acceptance of preferment contrary to this act vacates the former preferment.

By sect. 11, "If any spiritual person, holding any cathedral preferment or benefice, shall accept any other cathedral preferment or benefice, and be admitted, instituted or licensed to the same contrary to the provisions of this act, every cathedral preferment or benefice so previously held by him shall be and become *ipso facto* void, as if he had died or had resigned the same, any law, statute, canon, usage, custom or dispensation to the contrary notwithstanding; and if any spiritual person holding any two or more benefices shall accept any cathedral preferment, or any other benefice, or if any spiritual person holding two or more cathedral preferments shall accept any benefice, or if any spiritual person holding any cathedral preferment or preferments, and benefice or benefices, shall accept another benefice, he shall, before he is instituted, licensed, or in any way admitted to the said cathedral preferment or benefice, in writing under his hand, declare to the bishop or bishops within whose diocese or dioceses any of the cathedral preferments or benefices previously holden by him are situate, which cathedral preferment and benefice, or which two benefices (such two benefices being tenable together under the provisions of this act), he proposes to hold together, and a duplicate of such declaration shall by such spiritual person be transmitted to the registry of the diocese, and be there filed; and immediately upon any such spiritual person being instituted, licensed or in

(*g*) See also 13 & 14 Vict. c. 98, s. 4.

any way admitted to the cathedral preferment or benefice which he shall have accepted as aforesaid, such cathedral preferment or preferments, benefice or benefices as he previously held, and as he shall not as aforesaid have declared his intention to hold, or such benefice as shall not be tenable under the provisions of this act with such newly-accepted benefice, shall be and become *ipso facto* void, as if he had died or had resigned the same; and if such spiritual person shall in any such case refuse or wilfully omit to make such declaration as aforesaid, every cathedral preferment and benefice which he previously held shall be and become *ipso facto* void as aforesaid: provided always, that nothing herein contained shall be construed to affect the provision hereinbefore made with respect to archdeacons, or with respect to spiritual persons holding, with any cathedral preferment, and with or without a benefice, offices in the same cathedral or collegiate church" (*h*).

Present rights of possession saved.

Sect. 12. "Nothing hereinbefore contained shall be construed to prejudice or affect the right of possession in any cathedral preferment or benefice to which any spiritual person shall have been collated, admitted, instituted or licensed, or which shall have been otherwise granted to any spiritual person before the passing of this act, unless he shall, after the passing of this act, accept or take some cathedral preferment or benefice contrary to the provisions of this act."

Saving of other rights.

Sect. 13 of 1 & 2 Vict. c. 106 and sect. 10 of 13 & 14 Vict. c. 98, save the vested rights of all persons possessed of one living and nominated or appointed for the next presentation to another living before December 23, 1837.

Sect. 9 of 13 & 14 Vict. c. 98, also saves the rights of all persons duly possessed of their livings before its passing.

Storie v. Bishop of Winchester.

"It was holden in a case where the incumbent of a parish church presented himself to a district church within the parish, created under the Church Building Acts, 58 Geo. 3, c. 45, and 59 Geo. 3, c. 134, the annual value of the two livings exceeding £1,000, that the parish church became, under the provisions of 1 & 2 Vict. c. 106, *ipso facto* void" (*i*).

By 13 & 14 Vict. c. 98, it is further provided—

Deans of cathedrals not to hold office of heads of colleges or halls

Sect. 5. "That it shall not be lawful for any person appointed after the passing of this act to the deanery of any cathedral church, to hold the office of head ruler of any college or hall within either of the Universities of

(*h*) See also 13 & 14 Vict. c. 98, s. 7.

(*i*) *Storie* v. *Bishop of Winchester* (1850), 9 Comm. Ben. 62; *vide supra*, p. 1171, note (*d*).

Oxford or Cambridge, or the office of provost of Eton College, or of Warden of Winchester College, or of master of the Charter House, together with his deanery: provided always, that nothing herein contained shall apply to the dean of the Cathedral Church of Christ in Oxford, as chief ruler of the college there maintained."

in the universities.

Sect. 6. "That (anything in the said recited act to the contrary notwithstanding), it shall not be lawful for any spiritual person, being head ruler of any college or hall within either of the universities of Oxford or Cambridge, or being warden of the University of Durham, and also holding any benefice, to take after the passing of this act and hold therewith any cathedral preferment or any other benefice, or for any such spiritual person, also holding any cathedral preferment, to take after the passing of this act and hold therewith any benefice: provided always, that nothing in this act contained shall be construed to prevent any such spiritual person from holding any benefices or cathedral preferment permanently attached to or forming part of the endowment of his office."

Heads of colleges in the universities not to hold cathedral preferments except in certain cases.

Since the passing of the first statute the following form of dispensation has been adopted, which, it must be remembered, does not require the confirmation of the Great Seal.

Dispensation.—One Diocese.

Forms of dispensation under 1 & 2 Vict. c. 106.

"——, *by Divine Providence, Archbishop of Canterbury, Primate of all England, and Metropolitan, by authority of parliament, lawfully empowered for the purposes herein written. To our beloved in Christ,* ——, *health and grace: Whereas it appears by the certificate under the hand of the Right Reverend Father in God* ——, *by divine permission Lord Bishop of* ——, *made and transmitted to us in pursuance of an act of parliament passed in the first and second years of the reign of her present Majesty, intituled 'An Act to abridge the holding of Benefices in Plurality, and to make better Provision for the Residence of the Clergy,' that the annual value of the* ——, *in the county of* ——, *and within his diocese, is* ——, *and that the population thereof is* —— *persons. And that the annual value of the* ——, *in the county* ——, *and diocese aforesaid, is* ——, *and that the population thereof is* —— *persons. And whereas it also appears by the said certificate that the distance of the said two benefices from each other is* ——: *We therefore, being moved by your supplications in this behalf, and satisfied as well of your fitness, as of the expediency of allowing such two*

Forms of dispensation under 1 & 2 Viet. c. 106.

benefices to be holden together, do by virtue and in pursuance of the powers in us vested by the said act, graciously grant to you by these presents our licence or dispensation, that you may freely and lawfully hold together as long as you shall live the said —— and the said ——. Given under the seal of our Office of Faculties at Doctors' Commons, this —— day of ——, in the year of our Lord one thousand eight hundred and ——, and in the —— year of our translation.

"(L.S.) *J. H. T. M. S., Reg.*"

Dispensation.—Two Dioceses.

"——, *by Divine Providence, Archbishop of Canterbury, Primate of all England, and Metropolitan, by authority of parliament lawfully empowered for the purposes herein written. To our beloved in Christ ——, health and grace: Whereas it appears by the certificate under the hand of the Right Reverend Father in God ——, by divine permission Lord Bishop of ——, made and transmitted to us in pursuance of an act of parliament passed in the first and second years of the reign of her present Majesty, intituled 'An Act to abridge the holding of Benefices in Plurality, and to make better provision for the Residence of the Clergy,' that the annual value of the ——, in the county of ——, and within his diocese, is ——, and that the population thereof is —— persons. And whereas it appears by the certificate under the hand of the Right Reverend Father in God ——, by divine permission Lord Bishop of ——, also made and transmitted to us in pursuance of the provisions of the said act, that the annual value of the ——, in the county of ——, and within his diocese, is ——, and that the population thereof is —— persons. And whereas it also appears by the said certificates that the distance of the said two benefices from each other is ——: We therefore, being moved by your supplications in this behalf, and satisfied as well of your fitness, as of the expediency of allowing such two benefices to be holden together, do by virtue and in pursuance of the powers in us vested by the said act, graciously grant to you by these presents our licence or dispensation, that you may freely and lawfully hold together as long as you shall live the said —— and the said ——. Given under the seal of our Office of Faculties, at Doctors' Commons, this —— day of ——, in the year of our Lord one thousand eight hundred and ——, and in the —— year of our translation.*

"(L.S.) *J. H. T. M. S., Reg.*"

The provisions enabling archdeacons in certain cases to hold two benefices with their archdeaconry have been already mentioned (*j*).

Archdeacons.

3 & 4 Vict. c. 113 gives, by sects. 23, 51, the power of founding *honorary canonries;* and sect. 3 of 4 & 5 Vict. c. 39, provides as follows:—

Honorary canonries.

"The holding of an honorary canonry or of any prebend, dignity or office, not now in any manner endowed, or whereof the lands, tithes, or other hereditaments, endowments or emoluments, shall have been vested in the Ecclesiastical Commissioners for England, or which may hereafter be endowed to an amount not exceeding twenty pounds by the year, shall not be construed to prevent the holding therewith of more benefices than one.

Honorary preferment may be held with two benefices.

By sect. 11 of 13 & 14 Vict. c. 98, "The provisions of 4 & 5 Vict. c. 39, which authorize the holding of more benefices than one with an honorary canonry, or with any prebend, dignity, or office not then in any manner endowed, or whereof the endowments shall have been vested in the Ecclesiastical Commissioners for England, or which might thereafter be endowed to an amount not exceeding twenty pounds by the year, shall be extended so as to authorize the holding of one benefice and one cathedral preferment in the same church with such honorary canonry, prebend, dignity, or office."

Extension of this provision.

SECT. 7.—*Miscellaneous Subjects.*

It may be useful to refer to the law derived from the Canons of 1603 upon the following subjects (*k*):—

Summary of the canons.

A. The Law as to the Admission of Curates (*l*) and Preachers (*m*)—Canons 48 to 57 inclusive, 71.

B. The Dress and Conversation of the Clergy—Canons 74, 75 (*n*).

C. The general Duties of the Minister (*o*)—
In Preaching—Canons 45, 46, 47 (*p*).

(*j*) *Vide supra*, pp. 246, 250.

(*k*) They are for the most part treated of in detail in other parts of this work, to which the particular subjects which they embrace belong.

(*l*) Page 561, *supra*.

(*m*) Pp. 1023—1026, *supra*.

(*n*) Pp. 1090, 1091, *supra*.

(*o*) In *Bennett* v. *Bonaker* many irregularities of different kinds formed the subject of the charges against the incumbent, who was acquitted (3 Hagg. 21).

(*p*) Pp. 561, 1024—1027, *supra*. See, too, the case of *The Bishop of Down and Connor* v. *Miller* (11 Ir. Ch. Rep., App. i., and 5 L. T., N. S. 30), there cited.

Summary of the Canons.

In Catechizing—Canon 59 (q).
As to Confirmation—Canons 60, 61 (r).
As to Marrying—Canons 62, 63, 70 (s).
As to Christening and Burying—Canons 68, 69, 70 (t).
As to visiting the Sick—Canon 67 (u).
As to the Holy Communion—Canons 26, 27, 28, 71 (x).
As to the Spiritual Discipline of his Flock—Canons 65, 66, 113, 114, 115 (y).
As to the Observance of Sundays, Holydays and Fasts, *etc.*—Canons 13, 14, 15, 64, 72 (z).

D. Restraints on unauthorized Action—Canons 72, 73.

E. Against serving a plurality of Churches in one Day—Canon 48, and 1 & 2 Vict. c. 106, s. 106 (a).

Officiating in private houses.

F. Against officiating in Private Houses the Canon is as follows:—

71. "*Ministers not to Preach or Administer the Communion in Private Houses.*

"No minister shall preach or administer the holy communion in any private house, except it be in times of necessity, when any being either so impotent, as he cannot go to the church, or very dangerously sick, are desirous to be partakers of the holy sacrament, upon pain of suspension for the first offence, and excommunication for the second. Provided, that houses are here reputed for private houses, wherein are no chapels dedicated and allowed by the ecclesiastical laws of this realm. And provided also, under the pains before expressed, that no chaplains do preach or administer the communion in any other places but in the chapels of the said houses; and that also they do the same very seldom upon Sundays and Holydays; so that both the lords and masters of the said houses and their families shall at other times resort to their own parish churches, and there receive the holy communion at the least once every year."

(q) Page 668, *supra.*
(r) Pp. 671, 672, *supra.*
(s) Pp. 785, 786, *supra.*
(t) Pp. 640, 642, 648, *supra.* The reported cases against clerks for violating the canons as to burial are—*Kemp* v. *Wickes*, 3 Phillim. 276; *Escott* v. *Mastin*, 1 Notes of Cases, 552; 4 Moo. P. C. 104; *Nurse* v. *Henslowe*, 3 Notes of Cases, 272; *Titchmarsh* v. *Chapman*, ibid. 370; *Re Todd*, ibid. li; *Cooper* v. *Dodd*, ibid. 514; 2 Roberts. 270.
(u) Page 836, *supra.*
(x) Pp. 676, 677, 678, *supra.*
(y) Page 1080, *supra.*
(z) Pp. 1033, 1047, 1049, 1050, *supra.*
(a) Pp. 561, 568, *supra.*

Officiating without leave.

On this canon, and on the cognate subject of ministering in the parish without the proper authority, there have been the following decisions:—

Trebec v. Keith.

In the case of *Dr. Trebec* v. *Keith*, Feb. 12, 1742, Mr. Keith, minister of May Fair Chapel, which was a chapel of ease to St. George's parish, Hanover Square, of which the plaintiff was rector, being cited into the Bishop of London's court, for officiating as a clergyman of the Church of England without being licensed by the bishop, and having been denounced excommunicate forty days, for contumacy and contempt of the ecclesiastical laws, upon the bishop's certificate into chancery of this fact, the writ *de excommunicato capiendo* issued. It was moved to quash the writ, and one of the suggestions was, that Mr. Keith is within the Toleration Act. But by the Lord Chancellor Hardwicke: "The act of toleration was made to protect persons of tender consciences, and to exempt them from penalties; but to extend it to clergymen of the Church of England, who act contrary to the rules and discipline of the church, would introduce the utmost confusion." And the exception was overruled (*b*).

General rights of the incumbent over chapels, how vindicated by the ecclesiastical courts.

There is no general principle of ecclesiastical law more firmly established than this: that it is not competent to any clergyman to officiate in any church or chapel within the limits of a parish without the consent of the incumbent. See the leading cases on this cardinal point of ecclesiastical law: *The Duke of Portland* v. *Bingham* (*c*); *Carr* v. *Marsh* (*d*); *Moysey* v. *Hillcoat* (*e*); *Bliss* v. *Woods* (*f*); *Williams* v. *Brown* (*g*), and the recent case of *Hodgson* v. *Dillon* (*h*). In most of these cases the office of the judge was promoted, *i. e.* a criminal suit was instituted by the incumbent against another clergyman for unlawfully officiating within the limits of his parish, and it is obvious that the practical effect of the suit was often to ascertain the character of the chapel, whether chapel of ease, free, private, or the two other kinds which are the growth of more modern times,—district and proprietary. In *Williams* v. *Brown*, decided 1835, Dr. Lushington said, "Although the form of the suit is a criminal one, I apprehend that all that is sought to be determined upon the facts before the court is, the rights of the respective parties." After citing several of the above cases, he continues, "I could entertain

(*b*) 2 Atk. Rep. 498.
(*c*) 1 Consist. Rep. 157.
(*d*) 2 Phillim. 198.
(*e*) 2 Hagg. 30.
(*f*) 3 Hagg. 486.
(*g*) 1 Curteis, 54.
(*h*) 2 Curteis, 388.

General rights of the incumbents over chapels, how vindicated by the ecclesiastical courts.

no doubt that this court had jurisdiction and the power of expressing its opinion upon the question. But I will state candidly the difficulty which presented itself to my mind, which was this: in the course of this discussion I might perhaps be trying incidentally the right to a perpetual curacy, and there was a doubt in my mind whether the court was competent to come to a decision upon the point; at least, whether it would not have been open to either party to have applied for a prohibition if the court proceeded. However, the authorities which I have mentioned of cases in these courts, and which have not been in the slightest degree impugned—no prohibition having been applied for—are sufficient to warrant me in considering the circumstances of this case."

Keate v. Bp. of London.

Keate v. *Bishop of London* (*h*).—Keate was libelled against in several articles at the promotion of the rector of St. George's, Hanover Square, for baptizing, marrying, and administering the sacrament in a chapel in the parish without a licence from the bishop, and for collecting money in the chapel in the offertory and not paying the said money to the minister or churchwardens of the said parish. The court discharged a rule for showing cause why a prohibition should not go, for these are matters of spiritual connsance.

Opinion of Sir J. Nicholl.

To the same effect is the following opinion given by Sir J. Nicholl, when consulted as to the consent requisite for the opening of a chapel: "A chapel for the performance of public worship according to the liturgy of the Church of England cannot be opened without the consent of the bishop, the minister of the parish, and, I think, the patron of the living, and such chapel should be consecrated. A clergyman performing divine service in such a chapel as is suggested, without a licence, is liable to be punished with ecclesiastical censures, and upon repeating the offence, I apprehend that suspension might be inflicted.

"J. NICHOLL, 1795."

Moysey v. Hillcoat.

Sir J. Nicholl says, in *Moysey* v. *Hillcoat* (*i*), the incumbent of the parish has a right to perform divine service in any *consecrated* building within the parish; and again,

Carr v. Marsh.

in *Carr* v. *Marsh*, "By law no persons can procure divine service to be administered without the consent of the incumbent and the licence of the bishop (to which, in some instances, must be added the consent of the patron), and

(*h*) Serj. Hill's MSS. (*i*) 2 Hagg. 48.

the person officiating without such consent is liable to ecclesiastical censures"(*j*).

Proprietary chapels.

In these two last cases the nature of unconsecrated proprietary chapels was discussed. These are anomalies unknown to the ecclesiastical constitution of this kingdom, and can possess no parochial rights. The two principal decisions upon this subject are *Moysey* v. *Hillcoat,* and *Hodgson* v. *Dillon,* already referred to. The substance of the former case was as follows: a chapel being built shortly before 1735 by private subscription, and the subscribers agreeing out of the pew rents to pay the rector of the parish a yearly stipend for performing divine service, a licence was obtained from the bishop to the rector and his successors, who from time to time performed therein parochial duties; but there being no proof of consecration, nor of any composition between the patron, incumbent, and ordinary, such chapel was held merely proprietary, and the minister, nominated by the rector of the parish, *cannot perform parochial duties therein,* nor *distribute the alms collected at the Lord's Supper*(*k*). The case of *Hodgson* v. *Dillon* decided that *the bishop has the power of revoking absolutely and discretionally licences to officiate in unconsecrated chapels.* During the course of this judgment, Dr. Lushington said, "I think that the principle on which the law of the Church of England stands is this, no clergyman whatever of the Church of England has any right to officiate in any diocese in any way whatever as a clergyman of the Church of England unless he has a lawful authority so to do, and he can only have that authority when he receives it at the hands of the bishop, which may be conferred in various ways; as by institution in the case of a benefice, by licence where the party is a perpetual curate, and by licence when the clergyman officiates as stipendiary curate. I need not say the ancient canon law of this country knew nothing of proprietary chapels or unconsecrated chapels at all. The necessity of the times, and want of accommodation in the churches and chapels in the metropolis and other large towns, gave rise to the erection of chapels of this kind, and to the licensing of ministers of the Church of England to perform duty therein. The licence emanates from his episcopal authority; he could not, however, grant such a licence without the consent of the rector or vicar of the parish." The learned judge proceeded to say that the bishop may revoke such licence whenever he thinks fit,

Bishop has absolute power of revoking a licence to officiate in an unconsecrated chapel.

(*j*) 2 Phillim. 198. (*k*) 2 Hagg. 30.

Bishop's power to revoke licence of unconsecrated chapel.

according to a discretion not examinable by the ecclesiastical judge; and that it is not in the power of the bishop to estop himself from such a remedy, or to confer a permanent right against himself (*k*).

Barnes v. *Shore.*

In the case of *Barnes* v. *Shore* (*l*), articles against an ordained minister of the Church of England for officiating in an unconsecrated chapel after the revocation of his licence by the bishop were sustained. An *allegation* responsive to the articles pleading that the defendant had prior to the service of the citation seceded from the Established Church. and had taken certain oaths, &c. prescribed by the Toleration Acts, *rejected* on the ground that those acts do not apply to a minister of the Established Church, and that one in holy orders cannot divest himself of such orders (*m*).

An unconsecrated proprietary chapel, into which strangers are admitted, is not a "private house" or "chapel," within the meaning of the 71st Canon; consequently to read the service of the church in such a building is publicly to read, &c.

Freeland v. *Neale.*

Again, in *Freeland* v. *Neale* (*n*) articles against a clergyman for publicly reading prayers, preaching, and administering the sacrament of the Lord's Supper in an unconsecrated building called *Sackville College Chapel*, without the licence of, and contrary to the inhibition of the bishop of the diocese, were sustained. This case also contains a decision as to what constitutes a public reading of the prayers.

Jones v. *Jelf.* *Molyneux* v. *Bagshaw.*

The cases of *Jones* v. *Jelf* (*o*) and *Molyneux* v. *Bagshaw* (*p*), are also cases where criminal proceedings have been taken against clergymen for publicly officiating in parishes without the consent of the incumbent.

As the case of *Jones* v. *Jelf* gave rise to the act next following, it may be well to mention it in this place.

English services in Wales. 26 & 27 Vict. c. 82.

It is an act empowering the bishops of Welsh dioceses to facilitate the provision of English services in the Welsh-speaking parts of Wales (26 & 27 Vict. c. 82).

Bishop on certain applications and under certain

By sect. 1, "The bishop of the diocese, on an application in writing from ten or more inhabitants of any parish, district or place, setting forth their desire to have divine

(*k*) Interlocutory decree in the Consistory of London, Easter Term. 7th May, 1840.

(*l*) 1 Roberts, 382 (1845); 8 Ad. & El. 640 (1846).

(*m*) See, however, now 33 & 34 Vict. c. 91, *infra*, p. 1186.

(*n*) 1 Roberts, 643 (1848). See also *Kitson* v. *Drury*, 11 Jur., N.S. 272 (1865).

(*o*) 8 L. T., N. S. 399.

(*p*) 9 Jur., N. S. 553; *vide supra*, p. 616.

service and the administration of the sacraments in English, their undertaking to provide a building for a chapel, and a clerk to officiate, and to pay all expenses of the service, may, if he thinks there is not sufficient provision for divine service in English, and on the incumbent's nominating a fit minister, license from year to year or for any term not exceeding two years such building as a chapel, and such minister as the minister thereof, for the performance of divine service, preaching, and the administration of the sacraments in English."

conditions may license chapel for English services.

By sect. 2, "If the incumbent refuses to nominate such a minister, or if any disagreement as to the sufficiency of the services, the provision for their performance or for the minister, or in respect of the competency of the minister, arises between the persons applying to the bishop and the incumbent, the bishop after three months from the receipt of the application (if due notice of the application has been given by the persons applying to the incumbent) may signify in writing to the incumbent the name of a minister whom he intends to nominate to the chapel. If the incumbent does not within fourteen days object, the bishop may nominate and license. If he does object, the bishop shall refer the nomination to the archbishop, and the licence shall not be granted without the archbishop's approval in writing."

In case of disagreement, incumbent to have notice of bishop's intention to license, and an appeal to the archbishop.

By sects. 3, 4, The licensed building shall not, without the assent of the incumbent, be a parochial chapel; the minister shall have no power to perform any pastoral or ministerial functions other than those specified in his licence; and the rights of the incumbent as to publication of banns, solemnization of marriages, and performance of burials, or to offertories, fees, dues or emoluments, shall not be affected.

Building not to have parochial rights.

G. As to relinquishing profession:—

By Can. 76, "No man being admitted a deacon or minister, shall from thenceforth voluntarily relinquish the same, nor afterwards use himself in the course of his life as a layman, upon pain of excommunication. And the churchwardens shall present him."

Shall not relinquish his profession.

This canon however is, as to all civil respects, materially affected by "The Clerical Disabilities Act, 1870," 33 & 34 Vict. c. 91.

The act provides as follows:—

Sect. 3. "Any person admitted (before or after the passing of this act) to the office of minister (*q*) in the

Execution and inrolment of

(*q*) That is, "priest or deacon" (sect. 2).

deed of relinquishment.

Church of England may, after having resigned any and every preferment (*r*) held by him, do the following things:—

(1.) He may execute a deed of relinquishment in the form given in the second schedule to this act:

(2.) He may cause the same to be inrolled in the High Court of Chancery:

(3.) He may deliver an office copy of the inrolment to the bishop of the diocese in which he last held a preferment, or if he has not held any preferment then to the bishop of the diocese in which he is resident, in either case stating his place of residence:

(4.) He may give notice of his having so done to the archbishop of the province in which that diocese is situate."

"THE SECOND SCHEDULE.

"*Form of Deed of Relinquishment.*

"Know all men by these presents, that I *A. B.* of having been admitted to the office of priest [*or* deacon, *as the case may be*] in the Church of England, [and having resigned *here to be inserted description of late preferment, if any,*] do hereby, in pursuance of 'The Clerical Disabilities Act, 1870,' declare that I relinquish all rights, privileges, advantages, and exemptions of the office as by law belonging to it. In witness whereof I have hereunto set my hand and seal, this day of 18 .

"(Signed) *A. B.* (L.S.)

"Executed by *A. B.* in presence of *C. D.* of [*address and description of witness*]."

Recording by bishop of deed of relinquishment and consequences thereof.

Sect. 4. "At the expiration of six months after an office copy of the inrolment of a deed of relinquishment has been so delivered to a bishop, he or his successor in office shall, on the application of the person executing the deed, cause the deed to be recorded in the registry of the diocese, and thereupon and thenceforth (but not sooner) the following consequences shall ensue with respect to the person executing the deed:—

(1.) He shall be incapable of officiating or acting in any manner as a minister of the Church of England, and of taking or holding any preferment

(*r*) "Preferment," "bishop," and "diocese" have the same meaning as in 3 & 4 Vict. c. 86 (sect. 2).

therein, and shall cease to enjoy all rights, privileges, advantages, and exemptions attached to the office of minister in the Church of England:

(2.) Every licence, office, and place held by him for which it is by law an indispensable qualification that the holder thereof should be a minister of the Church of England shall be *ipso facto* determined and void:

(3.) He shall be by virtue of this act discharged and free from all disabilities, disqualifications, restraints, and prohibitions to which, if this act had not been passed, he would, by force of any of the enactments mentioned in the first schedule to this act (*s*) or of any other law, have been subject as a person who had been admitted to the office of minister in the Church of England, and from all jurisdiction, penalties, censures, and proceedings to which, if this act had not been passed, he would or might, under any of the same enactments or any other law, have been amenable or liable in consequence of his having been so admitted and of any act or thing done or omitted by him after such admission."

Sect. 5. "Provided, that if within the aforesaid period of six months the bishop to whom an office copy of the inrolment of a deed of relinquishment is delivered, or his successor in office, has notice of proceedings pending against the person executing the deed as a person who had been admitted to the office of minister in the Church of England, the bishop shall, on the application of that person, cause the deed to be recorded in the registry of the diocese on the termination of those proceedings by a definitive sentence, or interlocutory decree having the force and effect of a definitive sentence, and execution thereof, but not sooner."

Provision for pending proceedings before recording in registry.

By sect. 6, for the purposes of any proceedings within the six months against a person executing a deed of relinquishment, the service of any document at the place stated by him under the act as his place of residence shall be good service.

By sect. 7, a copy of the record in the registry, certified by the registrar, shall be evidence of the due execution, inrolment, and recording of the deed, and of the fulfilment of all the requirements of this act in relation thereto.

Copy of record to be evidence.

A copy of the record shall be given to the person exe-

(*s*) That is, 41 Geo. 3, c. 63; 5 & 6 Will. 4, c. 76, s. 28 (*vide supra*, p. 633), and 3 & 4 Vict. c. 86 (*vide infra*).

cuting the deed on payment of a fee not exceeding ten shillings for the recording and copy thereof.

Saving for pecuniary liabilities.

Sect. 8. "Nothing in this act shall relieve any person or his estate from any liability in respect of dilapidations or from any debt or other pecuniary liability incurred or accrued before or after his execution of a deed of relinquishment under this act, and the same may be enforced and recovered as if this act had not been passed."

Disobedience to ordinary.

H. Disobedience to lawful commands of ordinary.

The *Bishop of Winchester* v. *Rugg* (*t*) is a case of a clerk proceeded against for disobeying the lawful commands of his ordinary; and that of *Sieveking* v. *Kingsford* (*u*) one of a clerk proceeded against for making alterations in a church without a faculty.

I. The following provision is made in 3 & 4 Vict. c. 33, s. 4:—

Penalty on allowing clergy of the Protestant Episcopal Church in Scotland or in the United States of America to officiate without permission, or on allowing other clergy to officiate.

"And be it enacted, that any incumbent or stipendiary curate who, without the production of such written permission or renewed permission as aforesaid, shall allow any bishop or priest of the Protestant Episcopal Church in Scotland, or in the United States of America, or who shall allow any deacon of either of such churches, or any other bishop, priest or deacon not being a bishop, priest or deacon of the United Church of England and Ireland, or of any her Majesty's foreign possessions, to officiate in any church or chapel of which he is incumbent or curate, shall for the first offence be liable to be called to appear before the bishop of the diocese in person, and, if he show no sufficient cause to the contrary, to be publicly or privately monished at the discretion of the said bishop; and for the second and every subsequent offence, if a curate, he shall, after having been in like manner called to appear, and showing no sufficient cause to the contrary, be liable to be removed or to be temporarily suspended from his curacy, at the discretion of the said bishop; and if an incumbent, he shall, on proof of the offence in due course of law, be suspended from his office and benefice for any time not exceeding three months, or be subject to other ecclesiastical censures: and the said bishop shall during any such suspension, provide for the performance of the spiritual duties of such benefice, by sequestration or otherwise, as in the case of non-residence."

So far as relates to the Church in Scotland this section is repealed by 27 & 28 Vict. c. 94.

(*t*) L. R., 2 Adm. & Eccl. 247; 2 P. C. 223 (1868).

(*u*) 36 L. J., N. S., Eccl. 1 (1866).

CHAPTER IV.

THE ECCLESIASTICAL COURTS.

Administration of ecclesiastical law.

The law which governs matters ecclesiastical is, as has been seen, administered partly in the spiritual, partly in the temporal courts—directly and principally however in the former, indirectly and incidentally in the latter.

It is more especially with the former that we are now concerned.

Divisions of subject.

The subject will be considered under the following heads:—

I. The courts in which the law is administered.
II. The officers by whom it is administered.
III. The modes of procedure.
IV. The enforcement of the proper exercise of spiritual jurisdiction, and the restraint within certain limits of that jurisdiction by the temporal courts, under the titles of *Mandamus*, *Prohibition*, and *Consultation.*

Jurisdiction of bishops, &c.

Lord Hale says, every *bishop*, by his election and confirmation, even before consecration, has ecclesiastical jurisdiction annexed to his office, as *judex ordinarius* within his diocese; and divers abbots anciently, and most archdeacons (*a*) at this day, by usage, have had the like jurisdiction, within certain limits and precincts (*b*).

Qualifications of judges in ecclesiastical courts.

By a constitution of Archbishop Chicheley, it is enjoined as follows: "To remove the scandals brought upon the authority of the church, we, following the footsteps of the holy canons, do decree, that no *clerk married*, nor *bigamus*, nor *layman*, shall upon any pretence, in his own name or in the name of any other, exercise any spiritual jurisdiction; nor in causes of correction, where the proceedings are for the health of the soul, or where the judge proceedeth *ex officio*, shall in anywise be a scribe, or register, or keeper of the registry of such corrections: And if any ordinary inferior to the bishop or other person having ecclesiastical jurisdiction, shall admit or suffer any such person to exercise any such office as aforesaid, he shall be *ipso facto* sus-

(*a*) *Sed vide supra*, p. 246.

(*b*) Hale's Hist. of the Common Law, 30.

Qualifications of judges in ecclesiastical courts.

pended from the exercise of his office and jurisdiction, and from the entrance of the church; and all citations, processes, sentences, acts, and other proceedings had or made by such clerks married, bigami, or laymen, shall *ipso facto* incur the sentence of the greater excommunication"(c).

37 Hen. 8, c. 17.

But by 37 Hen. 8, c. 17 (d), it was enacted: "That all and singular persons, as well lay as married, being doctors of the civil law lawfully create and made in any university, who shall be appointed to the office of chancellor, vicar general, commissary, official, scribe or register, may lawfully execute and exercise all manner of jurisdiction commonly called ecclesiastical jurisdiction, and all censures and coercions appertaining or in any wise belonging to the same, albeit such person or persons be lay, married, or unmarried, so that they be doctors of the civil law as is aforesaid; any law, constitution, or ordinance to the contrary notwithstanding" (e).

Walker v Lamb

In the case of *Walker* v. *Sir John Lamb* (8 Car. 1), one question was, whether the patent of the office of commissary to the plaintiff, who was a lay person, and not a doctor but a batchelor only of the civil law, was good, or was restrained by this statute. And as to that point all the court conceived the grant was good, for the statute does not restrain any such grant, and it is but an affirmance of the common law where it was doubted if a lay or married person might have such offices; and to avoid such doubts this statute was made, which explains that such grants were good enough: and it is but an affirmative statute, and there is no restriction therein; and although doctors of the law (though lay persons or married), shall have such offices, yet that is not any restriction that none others shall have them but doctors of the law; and the statute mentions as well registers and scribes as commissaries, and that a doctor of the law shall have those offices, yet in common experience such persons as are merely lay and not doctors have exercised such offices. Wherefore they resolved that the grant was well enough (f).

Can. 127.

By Can. 127 of 1603, "No man shall be admitted a chancellor, commissary, or official to exercise any ecclesiastical jurisdiction except he be of the full *age of six and twenty years* at the least, and one that is *learned in the civil and ecclesiastical laws*, and is at least *a master of arts*, or *batchelor of laws*, and is reasonably well practised in the course thereof, is likewise well affected and

(c) Lindw. 128.
(d) Now repealed.
(e) Jones, 264; *S. C.*, Salk. 134.
(f) Cro. Car. 258.

zealously bent to *religion*, touching whose life and *manners* no evil example is had; and except before he enter into or execute any such office, he shall take the *oath of the king's supremacy* in the presence of the bishop, or in the open court, and shall *subscribe to the Thirty-nine Articles*, and shall also *swear that he will to the uttermost of his understanding deal uprightly and justly in his office, without respect of favour or reward;* the said oaths and subscription to be recorded by a register then present."

By the ancient canon law no person was to be a proctor unless he were seventeen years of age, nor judge unless he were of the age of twenty-five (*g*).

Surrogates.

An ecclesiastical judge may appoint a duly qualified deputy called a surrogate to act for him.

Can. 128

By Can. 128, " No chancellor, commissary, archdeacon, official, or any other person using ecclesiastical jurisdiction, shall *substitute*, in their absence, any to keep court for them, except he be either a grave minister and a graduate, or a licensed public preacher, and a beneficed man near the place where the courts are kept, or a bachelor of law or a master of arts at least, who hath some skill in the civil and ecclesiastical law, and is a favourer of true religion, and a man of modest and honest conversation, under pain of suspension, for every time that they offend therein, from the execution of their offices for the space of three months *toties quoties;* and he likewise that is deputed being not qualified as is before expressed, and yet shall presume to be a substitute to any judge, and shall keep any court as aforesaid, shall undergo the same censure in manner and form as is before expressed."

4 Geo. 4, c. 76.

And by 4 Geo. 4, c. 76, s. 18, no surrogate deputed by any ecclesiastical judge, who has power to grant licences of marriage, shall grant any such licence before he hath taken an oath before the said judge, or before a commissioner appointed by commission under seal of the judge (which the judge is authorized to issue), faithfully to execute his office according to law, to the best of his knowledge; and has given security by his bond in the sum of 100*l.* to the bishop of the diocese, for the due and faithful execution of his office.

The authority of a surrogate cannot of course exceed that of his principal (*h*).

10 Geo. 4, c. 53.

But by 10 Geo. 4, c. 53, it is enacted, that the surrogates of the Arches and Consistory of London are to con-

(*g*) Gibs. 987.

(*h*) *Balfour* v. *Carpenter*, 1 Phillim. 205.

time, after the death of such judges, till the new appointments are made.

Bargain and sale of offices.
5 & 6 Edw. 6, c. 16.

By 5 & 6 Edw. 6, c. 16, if any person shall *bargain or sell* any office or deputation of any office, or any part thereof, or take any reward, promise, covenant, bond, or other assurance to receive any profit, directly or indirectly, for the same, or to the intent that any person should have or enjoy the same, which said office shall in any wise concern the administration or execution of justice, he shall forfeit all his interest therein and right of nomination thereunto, and he who shall give or pay or make such promise or agreement as aforesaid, shall be disabled in the law to have and enjoy the same; and such bargain shall be void. But acts done by such officer so offending before he be removed, shall be good in law.

Dr. Trevor's case.

Any Office.]—In *Dr. Trevor's case,* in 8 Jac. I., it was resolved by the opinion of the justices, upon a reference unto them by the lord chancellor, that the offices of chancellor, register, and commissary in the ecclesiastical courts, are within this statute. Which statute being made for avoiding of corruption in officers, and for the advancement of persons more worthy and sufficient to execute the said offices, by which justice and right shall be advanced, shall be expounded most beneficially to suppress corruption. And inasmuch as the law allows ecclesiastical courts to proceed in the case of blasphemy, heresy, schism, incontinence, matrimony, divorce, right of tithe, probate of wills, granting of administrations, and such like; and that from these proceedings depends not only the salvation of souls, but also the legitimation of issues, and the like; and that no debt or duty can be recovered by executors or administrators, without the probate of testaments, or letters of administration, and other things of great consequence: it is more reason that such officers, which concern the administration and execution of justice in these points, that concern the salvation of souls and other matters aforesaid, shall be within this statute, than officers which concern the administration or execution of justice in temporal matters only (*i*).

Culliford v. Cardonell.

Or Deputation of any Office.]—In the case of *Culliford* v. *Cardonell,* in 8 Will. III., the defendant was made deputy to the plaintiff in his office, and gave bond to pay the plaintiff half the profits. On putting the bond in suit, the defendant pleaded this statute. But the determination of the court was, that such bond is not within

(*i*) 12 Co. 78; Cro. Jac. 279.

the statute, because the condition is not to pay him so much in gross, but half the profits, which profits must be sued for in the principal's name, for they belong to him though out of them a share is to be allowed to the deputy for his service. But in the case of *Godolphin* v. *Tudor*, in 3 Anne, where the deputy was to have the fees, and in consideration thereof was to pay 200*l.* a year and save the principal harmless, this was declared to be within the statute. And it was holden by the court, that where an office is within the statute, and the salary is certain, if the principal make a deputation, reserving a lesser sum out of the salary, it is good; so if the profits be uncertain, arising from fees, if the principal made a deputation, reserving a sum certain out of the fees and profits of the office, it is good; for in these cases, the deputy is not to pay unless the profits rise to so much. And though a deputy, by his constitution, is in place of his principal, yet he has no right to the fees; they still continue to be the principal's, so that, as to him, it is only reserving a part of his own and giving away the rest to another. But where the reservation or agreement is not to pay out of the profits, but to pay generally a certain sum, it must be paid at all events; and such bond is void by the statute (*k*).

Godolphin v. *Tudor*.

The doctrine which we find in Lindwood upon this head is: If a person having spiritual jurisdiction assign to another for his salary a certain sum, so that he answer to his principal for the whole profits, this is lawful; but if the other be to retain the whole profits to himself, and answer to his principal a certain sum, this is unlawful (*l*).

He shall forfeit all his interest therein.]—In the case of *Sir A. Ingram*, in 13 Jac. 1, it was resolved by the Lord Chancellor Egerton, and Coke, Chief Justice, to whom the king had referred it, upon conference with the other justices, that the disability here intended is such that the person is utterly disabled during life to take the same office; although that afterwards becomes void by the death of any other, and a new grant be made unto him (*m*).

Sir A. Ingram's case.

And Right of Nomination thereunto.]—The statute not having said who shall dispose of the office upon such forfeiture and disability, that point came under consideration in the case of *Woodward* v. *Fox*, in 2 Will. 3, and two things were resolved:—1. That the right of disposing of the office so forfeited (which in that case was the

Woodward v. *Fox*.

(*k*) Gibs. 980; 2 Salk. 466, 468.

(*l*) Lind. 282.

(*m*) 3 Inst. 154.

registership of the archdeaconry of Huntington) did devolve to the crown; 2. That the king might make a new register before office found, or the appearing of the title by any matter of record (*n*).

As to grant of new offices.

1 Eliz. c. 19.

By 1 Eliz. c. 19, s. 4, "All gifts, grants, or other estates to be made by any archbishop or bishop, of any hereditaments belonging to his archbishopric or bishopric, other than for the term of twenty-one years or three lives, and whereupon the old accustomed yearly rent or more shall be reserved and payable yearly during the said term, shall be void."

13 Eliz. c. 10.

And by 13 Eliz. c. 10, s. 2, "All gifts, grants, or other estates to be made by any dean and chapter of any cathedral or collegiate church, or other having any spiritual or ecclesiastical living, of any hereditaments belonging to such cathedral church or other spiritual promotion other than for the term of one and twenty years or three lives, and whereupon the accustomed yearly rent or more shall be reserved and payable during the said term, shall be utterly void and of none effect" (*o*).

Offices of chancellor, &c. are hereditaments.

And it has been adjudged, that the offices of chancellor, commissary, official, register, and such like, are hereditaments within these statutes. The general design of which being to preserve the rights of successors against any illegal practices of the present possessors; it has been, ever since, the general rule in the courts of common law, that *no offices of any kind* are grantable by bishops or other ecclesiastical persons, as such, in any larger extent, than they shall appear to have been granted before these statutes (*p*).

Jones v. *Pugh*.

In the case of *Jones* v. *Pugh*, in 3 Will. 3, the Bishop of Landaff had granted the office of vicar general to two persons, to hold jointly and severally, to be exercised by themselves or their sufficient deputy. It appeared, and was made part of the cause by the counsel on both sides, that this office had been anciently and usually granted to two, jointly and severally, and to the survivor of them. But it was objected, that a judicial office could not be granted to two; for if they differ, nothing can be done. But the answer was, that the same may be said of four judges, as in the Court of King's Bench, and in ministerial offices, as two sheriffs. And the court held the grant good, and said, if an office be granted to two, and one dies, the office does not survive, but determines; as if

(*n*) Gibs. 981; 2 Ventr. 188, 267.

(*o*) *Vide infra*, Part V., On the Property of the Church.

(*p*) Gibs. 982; Cro. Car. 258; W. Jones, 263; 10 Co. 60.

there be two sheriffs, and one dies, the other cannot act; otherwise, if granted to two, and the survivor of them (*q*).

Confirmation by dean and chapter.

According to the usual course, the person appointed chancellor or official obtains the confirmation of the bishop's grant by the dean and chapter; his office then becomes a freehold for his life.

The power of augmentation of the fee or salary belonging to an ancient office is also restrained by these statutes; as when the keepership of a park was granted with the ancient fee, and also with pasture for two horses in the same park, this was void: and it has been said, that if the ancient fee was less than 5*l.*, and a grant is made with a fee of 5*l.* entire, the whole grant is void, as well for the ancient fee, as the overplus: but if the office, and the ancient and new fee, are as several grants, in several sentences; the grant is good for the office and ancient fee, and void only for the new (*r*).

But Lord Coke says, that if the office has been ancient and necessary, the grant thereof, with the ancient fee, is not any diminution of the revenue, nor impoverishing of the successor: and therefore, for necessity, such grants are by construction exempted out of the general restraint of these acts. And as to granting it for the life of the grantee, he adds, if bishops should not have power to grant such offices of service and necessity for the life of the grantees, but that their estates should depend upon uncertainties, as upon the death or translation of the bishop: then able persons would not serve them in such offices, or at least would not discharge their office with any alacrity, if they have not such certain estates for their lives, as their predecessors had in the same offices (*s*).

However, this equity of granting for life amounts to no more than for one life; and therefore where a bishop grants an office for two or more lives, it must be upon the foot of custom, that is, because such patent has usually been for two or more lives, and had been so granted before the present act was made. For this is the great rule; and in this there is no difference between bishoprics of the old and of the new foundation, since the new as well as old are capable of coming under this rule (*t*).

The same is the law, and the reason of it, concerning

(*q*) Gibs. 983; 2 Salk. 465; Carth. 213.

(*r*) Gibs. 735; *Bishop of Chichester* v. *Freedland*, Cro. Car. 47; *S. C.*, Ley, 71.

(*s*) 1 Inst. 44; 10 Co. 61.

(*t*) Gibs. 735, 982; 4 Mod. 17, 18; *Walker* v. *Sir John Lamb*, Cro. Car. 258.

As to grant of offices.

grants of offices in reversion (that is, to have and enjoy such office, after the death of the present grantee, for life); for there can be no pretence, that such second grant is necessary, or for the advantage of the bishopric; and therefore nothing can make it legal but custom, and particularly instances, or an instance, of such grant before the making of the statute (*u*).

But to the end that unquestionable grants of ancient established offices may be good against the successor of a bishop; they must, in the first place, be grants of one office singly; for two offices, which have been usually granted apart, cannot be granted by one patent, though to the same person: and, in the next place, they must be confirmed by the dean and chapter (though they be but for one life), because they are grants at common law and not warranted by this statute; and must therefore pass as they usually did at common law before this statute (*x*).

In like manner the grants of new offices (if of necessary use to the bishop), and of new fees annexed to such offices, shall be good, and bind the successor; as was declared in the case of the Bishop of Ely, who granted the keeping of his house and garden, with 3*l.* a year, to one for life, and it was adjudged to be good against the successor, because the office was necessary, and the fee thought reasonable by the court. But on the other hand, where the foundation of the grant to a civilian for life, was for counsel given and to be given, and an annual pension was annexed to the office, judgment was given against the grant, as not binding the successor, though it was alleged to be the ancient fee; because this was a voluntary thing, to make an election of one man to be of his counsel, and not an office; and peradventure the next bishop would not make such election (*y*).

Trelawney v. *Bishop of Winchester.*

But notwithstanding all that has been said concerning the necessity of the office, it has been determined, upon solemn hearing, that the necessity of the office is not at all material. Thus in the case of *Sir John Trelawney* v. *The Bishop of Winchester* (30 Geo. 2) (*z*), Lord Mansfield, Chief Justice, delivered the resolution of the court:— "The plaintiff brings his action of debt to recover 500*l.*, being for five years' arrears of a salary of 100*l.* a year, for

(*u*) Gibs. 735; *Young* v. *Fowler*, Cro. Car. 555; 10 Co. 62; and see Co. Lit. 3 b, note 5; Dyer, 80, ed. by Vaillant.

(*x*) Gibs. 735; *Scambler* v. *Waters*, Cro. Eliz. 636; Cro. Car. 50.

(*y*) Gibs. 735; Ley, 75.

(*z*) 1 Burr. 219.

executing the office of 'great and chief steward of the bishop, and of *conductor tenentium* of the bishop,' and as a fee annexed to those two offices.

"This comes before the court upon a special verdict, the material facts of which are, that these offices are ancient offices, and existed before the statute of 1 Eliz. c. 19, and that they have been granted in the usual manner, and with the ancient fee; that Bishop Trelawny by indenture granted this office to the plaintiff, his eldest son, for life; that the dean and chapter confirmed this grant; that every bishop since hath paid to the plaintiff this fee of 100*l.* a year, and that the defendant paid it for eleven years after he came to the bishopric; and that this action is brought for five years accrued since: but the jury further find, that these several offices, at the time of making the said statute, were, and ever since have been, and still are, offices merely nominal; and that no duty, service, work or labour, attendance or business, ever was or is done in respect of these offices, as the defendant hath in his plea alleged.

"This is the only doubt which the jury have, and upon this fact the whole question depends.

"This case hath been argued several times, and we are all of the opinion which I shall now give.

"At common law the bishop, with the confirmation of the dean and chapter, might exercise every act of ownership over the revenue of the see, and might bind his successors in the same manner as every tenant in fee might bind his heirs. The statute was made in restraint of this power. But patents or grants of offices, with the fees or the privileges annexed to them, are not mentioned therein; nor are there any general words adapted to the case of offices. And yet there were not any bishoprics in the kingdom at that time, but what had some ancient offices annexed to them granted by the bishop. Had the legislature meant to restrain the granting of these offices, there must have been a special provision in the statute; and as the general restraint is not extended to offices, there was no reason to make the exception. Their continuing ancient offices was no injury or dilapidation to the bishopric. They brought no new charge upon the successor; and he accepted the bishopric charged with these offices as his predecessor had done, and the office and bishop continued subject to the same ancient fee.

"The act had no retrospect. It was made on the 23rd of January in the 1 Eliz. *The Bishop of Ely's case*, H., 10 Eliz. (*a*), proves that the statute doth not extend to the

(*a*) Ley's Rep. 78.

As to grant of offices.

Trelawney v. Bishop of Winchester.

grant of an office: where an annuity was recovered against the successor, upon the grant of the keeping of the bishop's house in Holborn, with the fee of 3*l.*: which grant was made after the beginning of the parliament, to which the act hath reference, to wit, on the 20th of April in the first of Eliz. This was a grant of a new office with a new fee, made the very year the act took place; and yet was held to be good, as not being restrained by the statute. It was extraordinary, if it was thought that the office of taking care of a house was necessary; it was also extraordinary, to hold the fee of 3*l.* a year a reasonable fee, which considering the value of money at that time would amount to 30*l.* a year now; and as extraordinary, as it was the grant of an office which never subsisted before: but the true ground was, the court did not think the grant of such offices within the statute.

" T., 30 Eliz., *Bolton's case* (*b*). When the Bishop of Chester, after the said statute, granted to Bolton an annuity of five marks for counsel given and to be given, which was confirmed by the dean and chapter, the bishop died, and Bolton brought a writ of annuity against the successor; the plaintiff had no judgment; but the reason of that case was not that the office was within the statute, but that it was no office at all, but a voluntary thing to make election of one man to be his counsel, and that the grant of the salary was an alienation of the revenue of the bishopric.

" In the case of the *Archbishop of Canterbury*, 43 Eliz. (*c*), the true distinction is taken: the archbishop granted the office of surveyor, with the ancient fee, to a parker: and further he granted to him pasture for two horses in a park: and the whole grant was adjudged void. This judgment was grounded upon the new addition made to the ancient fee.

" The statute of 1 Jac. 1, c. 3, extends this same restraint to the king, which by the 1 Eliz. c. 19, was laid upon the subject. Yet the legislature did not interpose then in this case of granting ancient offices; and therefore we may presume they were satisfied that the bishop should continue to have this power.

" The *Bishop of Salisbury's case* (*d*) came next in point of time.

No grant of a new office with a new fee is good.

" From the 10 Eliz. to this day, no grant of a new office by a bishop with a new fee has been held good. Such a grant is within the 1 Eliz. c. 19, by construction; for it is

(*b*) Cited Ley, 75; 10 Co. 60.
(*c*) Cited Ley, 75.
(*d*) 10 Co. 58.

a colourable alienation. But a grant of an ancient office with an ancient fee is not within that statute, but remains at common law. And if such a grant is not within the statute, but stands as at common law, the utility or necessity of the office cannot be material. And there is no case since the 10 Eliz. that has turned upon these: the only questions have been, whether the grants were within the statute.

"In the said case of the Bishop of Salisbury, it is not alleged in the pleadings, that the office was necessary. The fifth resolution in this case (*e*) is very material: Resolved, that the grant of an ancient office to one with an ancient fee, by a bishop, shall not bind his successor, unless confirmed by the dean and chapter: for such grants are not restrained by the statute of the 1 Eliz. c. 19, and therefore remain as at the common law, and by consequence ought to be confirmed by the dean and chapter.

"If such grants remain as at the common law, the necessity of the office cannot be material.

"In the case of *The Bishop of Chichester* and *Freedland* (*f*), there were no allegations in the pleadings, whether the offices were necessary or not.

"In the case of *Young* and *Fowler*, 14 Car. (*g*). Upon a special verdict, the jury do not find that the office (of register) was a necessary office: the question turned upon the grant in reversion.

"Thus stood the construction, upon the reason, the words, and the practice of making these grants, until the 14 Car.

"But besides the real ground upon which the case in 10 Co. 60, was determined, the counsel *ex abundanti* laboured to prove that the office was necessary; but the arguments are so confused and inconsistent, that it is difficult to understand them.

"In real truth, few of these offices (except judicial ones) are useful or necessary in any respect. None of them can be granted in reversion, unless they existed before the 1 Eliz., and then they remain as at common law; and, however unnecessary they were, will bind the successor.

"The case of *Ridley* and *Pownal*, 27 Car. 2 (*h*), is the first case wherein it appeared to the court judicially, that the office was necessary. But my Lord Hale, who understood what he read, and clearly distinguished, made no distinction upon the necessity of the office.

(*e*) 10 Co. 62.
(*f*) Cro. Car. 47.
(*g*) Cro. Car. 557.
(*h*) 2 Lev. 136.

As to grant of offices.

Trelawney v. *Bishop of Winchester.*

"In the case of *Jones* and *Bean* (*i*), the issue out of chancery was, whether the office had been granted to two before the statute of the 1 Eliz. c. 19, but there is not a word whether necessary or not.

"The present office is found never to have been more useful than at present; and yet the predecessors of the bishop have thought the grants of it valid, and have granted it to some of the greatest men in the kingdom, who accepted (*k*) it as valid; and the succeeding bishops acquiesced, until the present bishop conceived a doubt thereupon.

"Upon the whole, we are unanimously of opinion: First, this being an ancient office, which existed before the statute, that it is not within it. And, secondly, that the utility or necessity of the office are not material: and this opinion we think agreeable to every judicial determination since the making of the said statute."

Courts where to be kept.

By Can. 125 of 1603, "All chancellors, commissaries, archdeacons, officials, and all other exercising ecclesiastical jurisdiction, shall appoint such meet places for the keeping of their courts, by the assignment or approbation of the bishop of the diocese, as shall be convenient for entertainment of those that are to make their appearance there, and most indifferent for their travel. And likewise they shall keep their courts in such convenient time as every man may return homewards in as due season as may be."

Approbation of the Bishop.]—And is agreeable to the rule of the ancient canon law (*l*).

In the case of *The Bishop of St. David's*, in 11 Will. 3, it was alleged against the proceedings of the archbishop, that he was cited to Lambeth before the archbishop himself, and not to the Court of Arches, upon which it was declared by the Court of King's Bench, that the archbishop may hold his court where he pleases, and may convene before himself, and sit judge himself; and so may any other bishop; for the power of a chancellor or vicar general is only delegated in case of the bishop (*m*).

A constitution of Otho enjoins as follows:—

Seal of court.

"We do ordain, that archbishops, bishops and their officials, abbots, priors, deans, archdeacons and their

(*i*) 4 Mod. 16.

(*k*) Sir John's grant was, to hold in as ample a manner as Richard, Earl of Portland, Thomas Cary, George, Duke of Buckingham, Charles, Earl of Nottingham, Thomas, Duke of Norfolk, Philip, Earl of Pembroke and Montgomery, James, Duke of Ormond, or Henry, Earl of Clarendon, had holden, 1 Burr. 225.

(*l*) Gibs. 1001.

(*m*) 1 Salk. 134.

officials, and deans rural, as also chancellors of cathedral churches, and all other colleges whatsoever, and convents either jointly with their rector or severally (according to their custom or statutes) shall have a seal, on which seal shall be engraved their several distinctions; as the name of their dignity, office or college; also their proper name (if it be an office perpetual), and so it shall be esteemed an authentic seal: but if the office is not perpetual, as that of rural deans and officials, then the seal shall have engraved upon it only the name of office; and at the expiration of their office, they shall immediately and without difficulty resign it to those from whom they received the office" (*n*).

By Can. 124, "No chancellor, commissary, archdeacon, official, or any other exercising ecclesiastical jurisdiction, shall without the bishop's consent have any more seals than one, for the sealing of all matters incident to his office; which seal shall always be kept either by himself, or by his lawful substitute exercising jurisdiction for him, and remaining within the jurisdiction of the said judge, or in the city or principal town of the county. This seal shall contain the title of that jurisdiction which every of the said judges or their deputies do execute."

Existing ecclesiastical courts.

Provincial Courts.

The existing ecclesiastical courts are: First, the Courts of the Primates or Provincial Courts, being, in the province of Canterbury, the Court of Arches or Supreme Ecclesiastical Court of Appeal; the Court of the Vicar General, wherein bishops of the province are confirmed; the Court of the Master of the Faculties, wherein cases relating to notaries public are heard; the Court of Audience, and the Court of the Commissary of the Archbishop, which has jurisdiction over the *diocese* of the Archbishop, from which an appeal appears to lie to the Court of Arches (*o*).

In the province of York, the Supreme Court, called the Chancery Court, the Consistory Court, and the Court of Audience.

In these Courts of Audience the primates once exercised a considerable part of their jurisdiction. They are now I think obsolete, or at least only used on the rare occurrence of the trial of a bishop, as in the case of the Bishop of St. David's, deprived by the Archbishop of Canterbury in 1695 (*p*). But in this case the primate appears to have adopted the forms, procedure, seal and sentence of the Arches Court, and to have been attended by six bishops and

(*n*) Otho, Athon. 67.
(*o*) 1 Phill. Rep. 201.
(*p*) 14 State Trials, 447. *Vide supra*, p. 84.

Provincial Courts.

by the judge of that court as his assessor. It has been supposed that a criminal suit against a bishop may be instituted in the Court of Arches. The late Archbishop Longley seems to have been of this opinion, which is perhaps countenanced by the language of the Provincial Constitutions cited by Oughton (*q*) and other writers; but I am not aware of any such suit having been ever instituted. In Ireland a bishop has been deprived by a suit in the court of the archbishop brought *ex officio promoto* of his grace, not by a private person (*r*).

Diocesan Courts.

Next in order are to be mentioned the *Diocesan Courts*, being the *Consistorial Court* of each diocese, exercising general jurisdiction;—the court or courts of one or more *commissaries* appointed by the bishop, in certain dioceses, to exercise general jurisdiction within prescribed limits.

Courts of Archdeacons.

Lastly, the court or courts of one or more *archdeacons*, or their *officials*, exercising general or limited jurisdictions, according to the terms of their patents, or to local custom, or to the authority of recent legislation.

The provincial courts of the Archbishop of Canterbury and the Archbishop of York are independent of each other; the process of one province not running into the other, but being sent, by a requisition, to the local authority, for execution. The appeal from each of the provincial courts lies to the crown, which now exercises its authority through the judicial committee of the privy council.

Power of Court of Arches.

The *Arches Court* exercises the appellate jurisdiction from each of the diocesan courts within the province. It may also take original cognizance of causes, by letters of request from each of those courts.

The Diocesan Courts take cognizance of all ecclesiastical matters arising locally within their respective limits (*s*).

The Archdeacon's Court is subordinate, with an appeal to the Bishop's Court. The 6 & 7 Will. 4, c. 77, enacts, by sect. 19, "that all archdeacons throughout England and Wales shall have and exercise full and equal jurisdiction within their respective archdeaconries, any usage to the contrary notwithstanding."

It is probable that, under this authority, it would be competent to every archdeacon to appoint an official with

(*q*) *Vide post.*

(*r*) *Vide supra*, p. 90.

(*s*) The Ecclesiastical Courts in Jersey and Guernsey are established by canons of A.D. 1623, confirmed by royal charter. The court in each island consists of the dean, or his commissary, and certain assessors chosen from among the beneficed clergy. The appeal is to the Bishop of Winchester *in person*, or, *sede vacante*, to the Archbishop of Canterbury *in person* (*Dean of Jersey* v. *Rector of* ——, 3 Moo. P. C. 229; Falle's Account of the Island of Jersey, Appendix, pp. 251, 260).

power to exercise the functions incident to that office, and to receive fees as such officer, which otherwise would be receivable by the archdeacon (*t*).

Peculiars.

The jurisdictions called "Peculiars" (*u*), once nearly 300 in number, are practically abolished by recent legislation (*v*). They were, for the most part, introduced by the Pope into this country, and seem to have had for their principal object the curtailment of the bishop's legitimate authority in his diocese (*x*), an object which they certainly attained, to the great confusion of ecclesiastical jurisdiction for many years.

Officials of deans and chapters.

Some deans and chapters still preserve their "officials" (who were formerly judges exercising, in a great measure, episcopal jurisdiction), as legal advisers and assessors in matters affecting the interests of the chapter, and in some cases still possessing perhaps some small jurisdiction as to matters connected with the fabric and interior arrangements of the cathedral.

Officers of archbishops and bishops.

Some observations must now be made as to the general authority incident to archbishops and bishops to appoint the necessary officers for the administration of justice in their courts, and as to the character of these officers. And, first, with respect to the archbishops both of Canterbury, who is *totius Angliæ Primas*, and of York, who is *Angliæ Primas*. The chief officer of the former is his official principal, generally known as Dean of the Arches. The office of vicar general is at present separated from that of official principal. In all the bishoprics of England the two offices are united. The Court of Audience, it has been already said, has fallen into desuetude. It was, however, distinct from the Court of Arches (*y*).

(*t*) *Vide supra*, p. 475.

(*u*) See *Parham* v. *Templar*, 3 Phill. 245.

(*v*) *Vide supra*, p. 260.

(*x*) An exception, confirming the rule of exemption, was made in cases of heresy, which being *de causis majoribus* appertained to the bishop, or the dean and chapter during a vacancy, or an inquisitor specially appointed by the Pope. Lind. l. v. t. 3, p. 296; De Hæret. gloss *f* on "Ordinarii," i. e. "Episcopi in suis diœcesibus qui habent ordinariam jurisdictionem circa *non exemptos* suæ diœcesis. Circa exemptos vero in suâ diœcesi existentes habent jurisdictionem delegatam a Papâ." The official principal or vicar general of the bishop, Lindwood says, had no cognizance of this cause.

(*y*) As to this distinction, see Statuta et Ordinationes Rev. in Christo &c. W. Warham Archiep. Cantuar. in *Curiâ Audientiæ* apud Lambeth edita, &c. "Imprimis statuimus quod nullus officium advocati seu procuratoris *in Curiâ Audientiæ* præsumat exercere nisi prius fuerit in advocatum vel procuratorem in *Curiâ Cantuarensi* admissus." *Vide* Lindwood in fine, p. 76. "Constitutio *Officialis Cantuarensis Curiæ Consistorialis de Arcubus* pro tribunali sedens: Decrevit et statuit.

Officers of archbishops and bishops.

The celebrated Zouch, who wrote in 1636 "Descriptio juris et judicii ecclesiastici secundum Canones et Constitutiones Anglicanas" (*z*), says, "Inter Curias verò Archiepiscopi Cantuarensis primaria est Curia de Arcubus, ab Ecclesiâ arcuatâ quæ Londini Beatæ Virgini Mariæ dicata est, denominata: cujus judex Decanus de Arcubus insignitur. Post eam Curia Audientiæ in Ecclesiâ Beati Pauli Londini habetur: quæ etsi æqualis sit jurisdictionis, inferior tamen cum antiquitate tum dignitate existimatur: ejusque judex causarum negotiorumque audientiæ Cantuarensis auditor seu officialis dicitur."

But Oughton, called by Lord Stowell "one of the oracles of our practice," writing in 1728 (*a*) "De Curiâ (olim) Audientiæ Cantuarensis," ends by saying, "Nullus autem a plurimis abhinc retroactis annis extitit Audientiæ Judex: utpote Forensis. Hæc itaque Curia Audientiæ Cantuarensis omnino jamdudum exolevit: nisi quatenus ipse (nonnunquam) Archiepiscopus in arduis (utputa *deponendis Episcopis* aut similibus) audientiam suam celebrat in propriâ personâ et proprio in palatio cum auditore speciali, sive auditoribus ad hoc specialiter constitutis, pro istâ vice una secum assidentibus."

Mr. Johnson says: "The Archbishop of Canterbury had formerly his Court of Audience, in which at first were dispatched all such matters, whether of voluntary or contentious jurisdiction, as the archbishop thought fit to reserve for his own hearing. They who prepared evidence and other materials to lay before the archbishop, in order to his decision, were called auditors. Afterwards this court was removed from the archbishop's palace, and the jurisdiction of it was exercised by the master official of the audience, who held his court in the consistory place at St. Paul's. But now the three great offices of official principal of the archbishop, dean or judge of the peculiars and official of the audience, are and have been for a long time past united in one person under the general name of Dean of the Arches, who keepeth his court in Doctors' Commons Hall" (*b*).

"The Archbishop of York hath in like manner his court of audience" (*c*).

de assensu et voluntate omnium existentium in dictâ curiâ *absente Decano de Arcubus*, quod ab illo die, &c." *Vide* Lindwood in fine, 77. In this constitution, therefore, the judge of the Arches is spoken of as judge of the consistorial court of the Arches, and makes rules in the absence of the Dean of the Arches.

(*z*) Pars iii. s. 3, p. 172.

(*a*) T. i. Prolegomena, cap. iii.

(*b*) Johns. 254.

(*c*) Johns. 255.

As to the judge of the Court of Arches, Oughton says (*d*):—" Porrò, ille officialis archiepiscopi principalis cum ipso archiepiscopo quoad jurisdictionem æquiparatur: dicitur enim, eandem esse dignitatem, et idem auditorium officialis et episcopi: et, in foro judiciali, parem esse officialem archiepiscopi, ipsi archiepiscopo (*e*): quodque officialis principalis habet idem consistorium, cum ipso archiepiscopo, tam in eis quæ competunt archiepiscopo, jure legati, quàm in his quæ competunt jure metropolitico (*f*): et nonnunquam, episcoporum ordinarium esse dicitur" (*g*).

In fact, as Gibson observes, the dean was originally the judge of thirteen peculiar parishes in London which were under the jurisdiction of the Archbishop of Canterbury (*h*): the official principal of the archbishop being often absent as ambassador on the continent, the Dean of the Arches became his substitute, and gradually the two offices became blended together; but the legal title in the patent of the judge of the Arches is Official Principal (*i*).

The patent of the present judge of the Arches Court is as follows:

Patent of judge of Arches Court.

" *Charles Thomas*, by Divine Providence Lord Archbishop of Canterbury, Primate of all England, and Metropolitan: To our beloved in Christ *Sir Robert Joseph Phillimore, Knight, Q. C., Doctor of Civil Law*, health and grace. We, trusting in your sound doctrine, good morals, purity of conscience, and in your special fidelity, circumspection and industry, do for us and our successors, archbishops of Canterbury, give and grant and by these presents confirm to you during the term of your natural life the office of Official Principal of the Arches Court of Canterbury, London, now vacant, with all and singular the fees, wages, profits, advantages and emoluments to the said office howsoever belonging and appertaining, due or to grow due, as well by law as by custom, in the like ample manner and form as the *Right Honorable Stephen Lushington, Doctor of Laws*, or any other official of the said court heretofore obtained or possessed, or might or ought to have exercised, possessed or enjoyed the said office. And we do, for us and our successors, nominate, constitute and appoint you the said *Sir Robert Joseph Phillimore, Knight, Doctor of Civil Law*, Official Principal of the Arches Court of Canterbury, London, aforesaid, during

(*d*) T. i. Prolegomena, cap. xi. s. xix.

(*e*) Lind. cap. i., De Accusationibus, verb. vel ejus officialis.

(*f*) Ibid.

(*g*) Statuta de Arcubus, Anno 1342. Stratford, ibid.

(*h*) *Vide supra*, p. 259.

(*i*) Gibs. 1004.

Patent of judge of Arches Court.

the term of your natural life, and that you may the better know how and in what manner you are to behave yourself in the exercise of the said office, according to what is from law and custom to be known, grant, enjoin and commit the said office and everything above granted to you the said *Sir Robert Joseph Phillimore*, and to your surrogate or deputy surrogates or deputies to be approved of by us and our successors during the term of your natural life as aforesaid in the tenor of the words following, to wit, to receive in due form of law all and every the appeals interposed or to be interposed to our Arches Court of Canterbury, and all and every the complaints by law or custom devolved or to be devolved to the said court, and also to take cognizance of and proceed in all and every such causes or businesses of appeal and complaint, and in all and singular the causes or businesses whatsoever now depending undecided, or hereafter to be brought and examined in our said court, and to do, exercise and administer plenary justice according to the exigency of the law and to the statutes of this kingdom of Great Britain to all and singular the parties in the said suits now or hereafter to be controverted, and also receive in due form of law all and singular the appeals interposed or to be interposed from our Dean of the Arches or his surrogate, deputy or commissary, and from all others whomsoever interposed to the audience of us and our jurisdiction of our church of Christ, Canterbury, and finally to determine the said causes of appeal according to law and the custom of the said Arches Court anciently used. And, also, all and singular other things to do, perform and expedite, which to the said office of Official Principal by law are known to belong, or which in and concerning the premises may be fit and necessary, though by the nature thereof it might require a more special mandate. We do for ourselves and our successors give and grant to you the said *Sir Robert Joseph Phillimore* our power and authority legally to inflict any ecclesiastical censures whatsoever, as also of surrogating, deputing and constituting any other person or persons in your place and stead, he or they being approved of by us and our successors for the performance of all and singular the premises. And we do for ourselves and our successors by these presents ordain, appoint and constitute you the said *Sir Robert Joseph Phillimore, Knight, Doctor of Civil Law*, Official Principal of the Arches Court of Canterbury, during the term of your natural life as aforesaid. In testimony whereof we have hereunto caused our archiepiscopal seal to be put. Given at Lambeth Palace

this first day of August, in the year of our Lord 1867, and in the fifth year of our translation.

Stamp O 35*s*. "C. T. (seal) CANTUAR."

(*Confirmation.*)

"And we, the Dean and Chapter of the Cathedral and Metropolitical Church of Christ, Canterbury, do by these presents, so far as in us lies, ratify and approve, and by our authority confirm the foregoing patent or grant of the office of Official Principal of the Arches Court of Canterbury, London, with all fees, profits and advantages thereof late enjoyed by the *Right Honorable Stephen Lushington, Doctor of Laws*, now granted by His Grace *Charles Thomas* Lord Archbishop of Canterbury to *Sir Robert Joseph Phillimore, Knight, Doctor of Laws*, for the term of his natural life, in manner in the foregoing writing or patent mentioned. And all things contained and specified in the writing or patent hereunto annexed, as above specified and expressed, as they are in the said patent or writing recited, so far as we may we do by our authority ratify and confirm by these presents. In witness whereof we have hereunto set our common seal. Dated in the Chapter House of us the said Dean and Chapter, the seventeenth day of September, in the year of our Lord one thousand eight hundred and sixty-seven."

(Dean and Chapter's seal.)

Style of judge of York courts.

The style and title of the judge of the Chancery Court of York (the Provincial Court or Court of Appeal for cases within the province) is "Granville Harcourt Vernon, Master of Arts, Vicar General and Official Principal of the Most Reverend Father in God William, by Divine Providence Lord Archbishop of York, Primate of England and Metropolitan, lawfully authorized."

The style and title of the judge of the Consistory Court of York (the court of the diocese) is "Granville Harcourt Vernon, Master of Arts, Official Principal of the Consistory Court of York, lawfully authorized."

The court in which the judge sits is described as "the Consistory place within the Cathedral and Metropolitical Church of Saint Peter in York" (*k*).

Chancellor.

The word *chancellor*, though mentioned in the statute of Elizabeth and in some modern statutes (*l*), is not men-

(*k*) An appeal lies from the ecclesiastical court of the Isle of Man to the court at York. The ecclesiastical court of the Isle of Man still retains the old jurisdiction of the ordinary as to testaments and marriages.

(*l*) 1 Eliz. c. 2, s. 11; 43 Eliz. c. 4; 3 & 4 Vict. c. 86, s. 11.

Chancellor.

tioned, as Bishop Gibson observes, in the commission, and but rarely in our ancient records; but seems to have grown into use in imitation of the like title in the state; inasmuch as the proper office of a chancellor, as such, was to be keeper of the seals of the archbishop or bishop, as appears from divers entries in the registry of the archbishops of Canterbury (*m*).

Official principal and vicar general.

This office (as it is now understood) includes in it two other offices, which are distinguished in the commission by the titles of *official principal* and *vicar general*. The proper work of an *official* is, to hear causes between party and party, and formerly concerning wills, legacies, marriages, and the like, which are matters of temporal cognizance, but have been granted to the ecclesiastical courts by the concessions of princes. The proper work of a *vicar general* is, the exercise and administration of jurisdiction purely spiritual, by the authority and under the direction of the bishop, as visitation, correction of manners, granting institutions, and the like, with a general inspection of men and things, in order to the preserving of discipline and good government in the church (*n*).

And although these two offices have been ordinarily granted together, yet we find in the acts and records of the several sees frequent appointments of vicars general separately, upon occasional absences of the archbishops or bishops (*o*).

For the vicar general was an officer occasionally constituted, when the bishop was called out of the diocese, by foreign embassies, or attendances in parliament, or other affairs whether public or private; and being the representative of the bishop for that time, his commission contained in it all that power and jurisdiction which still rested in the bishop notwithstanding the appointment of an official, that is, the whole administration except the hearing of causes in the Consistory Court (*p*).

Dr. Sutton's case.

In the second year of King Charles I., Dr. Sutton, chancellor of Gloucester, was sued before the high commissioners, for that he being a divine, and having never been brought up in the science of the civil or canon laws, nor having any understanding therein, took upon him the office of chancellor, contrary to the canons and constitutions of the church. Whereupon he prayed a prohibition in the Common Pleas, suggesting that he had a freehold in the chancellorship, and ought to enjoy the same for life:

(*m*) Gibs. 986.

(*n*) Gibs. Introd. 22; Gibson's Tracts, 108.

(*o*) Gibson's Tracts, 110.

(*p*) Gibs. Introd. 23.

but the court would not grant the prohibition; because it belonged to the spiritual courts to examine the abilities of spiritual officers; and so, though a lay person gains a freehold by his admission to a benefice, yet he may be sued in the spiritual court, and deprived for that cause (*q*).

Dr. Jones's case.

But of later days, when Dr. Jones, chancellor of Landaff, was libelled against for ignorance, prohibition was prayed, and also obtained, upon this foot of freehold; and when consultation was prayed, as in a case of mere ecclesiastical cognizance, and the prayer was supported by the precedent of Dr. Sutton, the court inclined against it, and denied Sutton's case to be law (*r*).

By a constitution of Otho, judges ignorant of the law, in a doubtful case, from which a prejudice may arise to either party, may, at the expense of both parties, call in the counsel of a learned assessor (*s*).

Jurisdiction.

Concerning the nature and extent of the power of chancellors, as that name is understood at present, Bishop Stillingfleet says as follows:—

"There is a difference in law and reason, between an ordinary power depending on an ancient prescription and composition, (as it is in several places in the deans and chapters within their precincts,) and an ordinary power in a substitute, as a chancellor or vicar general. For although such an officer hath the same court with the bishop, so that the legal acts of court are the bishop's acts by whose authority he sits there, so that no appeal lies from the bishop's officer to the bishop himself, but to the superior; and although a commissary be allowed to have the power of the ordinary in testamentary causes, which were not originally of ecclesiastical jurisdiction: yet in acts which are of spiritual and voluntary jurisdiction, the case is otherwise. For the bishop by appointing a chancellor doth not divest himself of his own ordinary power; but he may delegate some parts of it by commission to others, which goes no farther than is expressed in it. For it is a very great mistake in any to think, that such who act by a delegated power, can have any more power than is given to them, where a special commission is required for the exercise of it. For by the general commission no other authority passeth, but that of hearing causes: but all acts of voluntary jurisdiction require a special commission, which the bishop may restrain as he sees cause. For, as Lindwood saith, nothing passes by virtue of the office but the hearing of causes; so that other acts depend upon the

(*q*) Gibs. 987; Litt. Rep. p. 22; Brown, Rep. part 2.

(*r*) Gibs. 987; 4 Mod. 31.

(*s*) Ath. 72.

Jurisdiction.

bishop's particular grant for that purpose. And the law nowhere determines the bounds of a chancellor's power as to such acts; nor can it be supposed so to do, since it is but a delegated power, and it is in the right of him that deputes to circumscribe and limit it. Neither can use or custom enlarge such a power which depends upon another's will. And however by modern practice the patents for such places have passed for the life of the person to whom they were first granted; yet it was not so by the ancient ecclesiastical law of England. For Lindwood affirms, that a grant of jurisdiction ceaseth by the death of him who gave it; or otherwise it could never pass into the dean and chapter *sede vacante*, or to the guardian of the spiritualties. And he gives a good reason for it, that the bishop may not have an official against his will, perhaps disagreeable to him. It is true, that by the statute of the 37 H. 8, c. 17, mere doctors of laws are made capable of exercising all manner of ecclesiastical jurisdiction; but it doth not assign the extent of their jurisdiction, but leaves it to the bishops themselves, from whom their authority is derived. And the law still distinguisheth between ordinary and delegated power: for the former supposeth a person to act in his own right, and not by a deputation, which no chancellor or official doth pretend unto" (*t*).

Jurisdiction voluntary and contentious.

Voluntary jurisdiction is exercised in matters which require no judicial proceeding, as in granting probate of wills, letters of administration, sequestration of vacant benefices, institution, and such like; *contentious* jurisdiction is, where there is an action or judicial process, and consists in the hearing and determining of causes between party and party (*u*).

And the distinction which Bishop Stillingfleet here lays down, between contentious and voluntary jurisdiction, as the one is supposed to be conveyed to the official, and the other to remain in the bishop, is supported, as to the contentious jurisdiction, by the books of common law; which affirm that a bishop may well sue for a pension or other right before his own chancellor: and say, that the archbishop having constituted an official principal (as the Dean of the Arches) to receive appeals, cannot afterwards come into that court and execute the office himself. Add to this, what is generally said, that if a bishop does not constitute a chancellor, he may be obliged to do it by the archbishop of the province (*x*). It has been holden to be

(*t*) 1 Still. 330.
(*u*) Ayl. Parerg. 318.
(*x*) Gibs. 926.

no ground for prohibiting a cause before the chancellor of a diocese in the consistorial court of the diocese, that the bishop of the diocese is interested in the cause, and that the decision had the effect of giving costs to the bishop (*y*).

But as to the other branch, to wit, voluntary jurisdiction, as visitation, institution, licences, and the like; all this remains in the archbishop or bishop, notwithstanding the general grant of all and all manner of jurisdiction to the official. And therefore in our ancient ecclesiastical records, we find special commissions to hear and determine matters found and detected in the visitation, granted by the visitors to such persons whose zeal and integrity they could confide in, for the effectual prosecution of the crimes and vices detected. In like manner, institutions, licences and the like, can belong to chancellors no otherwise, than as the right of granting is conveyed to them distinctly and in express terms: And all that is here said of chancellors, holds equally in the case of commissaries and officials, according to the respective powers delegated to them (*z*).

Delegated jurisdiction

Under the appellation of delegated jurisdiction, in a large sense, may be comprehended the jurisdiction of archdeacons, who exercise such branches of episcopal power (in subordination to the bishops) as have been anciently assigned to them, especially the holding of visitations: and of deans, deans and chapters, and prebendaries, who used to exercise episcopal jurisdiction of all kinds, independent from the bishops, though no jurisdiction at all could accrue to them otherwise than by grant from the bishops, or by the arbitrary and overruling power of the popes. Both of these, however, originally delegated, have long obtained the style of ordinary jurisdiction, as belonging of course and without any express commission, to the several offices before mentioned (*a*).

But the power which we properly call delegated, is the power of chancellors, commissaries and officials; which they exercise by express commission from the respective ordinaries, to whose stations or offices such powers are annexed (*b*).

Bishop may be compelled to appoint a chancellor.

But the learned Ayliffe says, "But notwithstanding the afore-mentioned distinction of a chancellor and a vicar general in spirituals, strictly speaking, yet in truth, and according to the common way of speech, a chancellor is a vicar general to the bishop to all intents and purposes of law, and if the bishop will not choose a chancellor, the

(*y*) *Ex parte Medwin and Hurst* (1853), 1 El. & Bla. 609.

(*z*) Gibs. 987.

(*a*) Gibs. Introd. 22.

(*b*) Ibid.

metropolitan may and ought to do it, *for the bishop himself, according to the common law, cannot be a judge in his own consistory but in some particular cases*" (*c*). "It has been said, that a bishop's official or chancellor is he to whom the bishop delegates the cognizance of causes in a general manner, and as such an official or chancellor has the same consistorial audience with the bishop himself that deputes him. An appeal does not lie from such an official to the bishop himself, but to him only unto whom it ought to be appealed from the bishop himself. But 'tis not the same thing in commissaries, who are not principal officials, though deputed to an universality of causes in a certain part of the diocese, because a principal official is an ordinary, and the other only a delegated judge" (*d*).

Distinction between chancellors and commissaries.

Appeal and letters of request lie from the commissary to the metropolitan court.

It was settled, however, in *Burgoyne* v. *Free* (*e*), that the appeal lies from the commissary to the metropolitan, and not to the chancellor, the doctrine of the canon law, as cited by Ayliffe, being overruled in this particular by the Statute of Citations, 23 Hen. 8, c. 9. The same decision established that letters of request go in the same course with the appeal.

Chancellor, &c. not entitled to put a party to his oath that they have *bona notabilia* out of their jurisdiction, except in his own court.

In *Chose* v. *Yonge* (*f*), Sir John Nicholl's opinion inclined against the power of a commissary to appear and deny the jurisdiction of a superior court, for the purpose of obstructing the grant of a probate, till the question of whether the person requesting it had or had not "*bona notabilia*," had been determined. He thought the *interest* of the commissary, arising from his right to grant probate, if there were no "*bona notabilia*," did not entitle him to put the executor, otherwise than by oath in his own court (*g*), on proof of there being "*bona notabilia*," before probate was granted in the Prerogative Court. In this case, the official of the archdeaconry of Norwich had interposed a caveat to the issue of the probate, but he proceeded no farther after this intimation of the judge's opinion, and was ultimately condemned in the costs of the proceeding.

Power of modern vicars general.

Sir G. Lee, in *Smith* v. *Lovegrove* (*h*), decided that modern chancellors or vicars general, who held patents for life, were only assistants to the bishop, and not such vicars general as those mentioned by Gibson (*i*): that by the Statute of Uniformity, 14 Car. 2, c. 4, the archbishop, bishop, and guardian of the spiritualties were alone empowered to license a lecturer; and that the chancellor of London had no such power.

(*c*) Ayl. Par. 161.
(*d*) Ibid. 163.
(*e*) 2 Add. Rep. 410.
(*f*) 1 Add. Rep. 336.
(*g*) See Can. 92.
(*h*) 2 Lee's Rep. 169.
(*i*) *Vide supra*, p. 1208.

Continuance.

As the bishop may bound commissions in point of power, so he may also bound them in point of duration. The commission of official, for hearing of causes, is the only one which the bishop is pretended to be under an obligation to grant, and he (as official) has less share than any other in the spiritual administration; and yet even in this the rule of the law is, that the power of officials ceases, not only by revocation, but by the death of him who deputed them. And the reason given for it is, that otherwise upon the death of the bishop the guardian of the spiritualties (and the same holds good of the successors also), might have an unacceptable person intailed upon him. Accordingly, before the Reformation, and for some time after, we find new commissions for offices of all kinds generally granted together after the consecration or translation of a new bishop, and those grants usually either to continue during pleasure in express words, or without any mention of the continuance for life or other term, and so equally revocable at the pleasure of the bishop. The same seems to have continued, at least the common style, for some years in the reign of Queen Elizabeth, and in the next reign we find it a question in the case of the prebend of Hatcherley, whether any confirmation could bind the successor; and though in the case of Dr. Barker, in the twenty-first year of King James I., the court were of opinion that the bishop had no right to take from him his office of commissary and vicar general, which was granted for life; it is to be observed, that that grant had been made by deed from the bishop himself, who therefore was bound by his own act, and could not undo it at pleasure; but in the next reign, in 3 Car. 1, in *Sutton's case*, it is mentioned again as a doubtful point, whether the grant of the predecessor (however confirmed) could bind the successor (*j*).

And it should seem that the grantees themselves doubted their title for life, in the known way of commissions, according to the ecclesiastical method; and therefore for greater security (no doubt by the advice of common lawyers), they obtained the offices by way of letters patent, with the habendum and other attendants on temporal grants; in which way they still continue. And it is now, as has been already observed, taken for clear law in the case of bishops and other ordinaries, that the grant of an office for life by the predecessor, whether judicial or ministerial, if it be confirmed by the dean and chapter, is bind-

(*j*) Gibs. Introd. 25.

Continuance of power.

ing to the successor. But it is to be remembered that this is an allowance, and not a command; the law declares such grants good when made, but does not direct them to be made; in this the bishop is at his own liberty as much as ever, no restraint therein being laid upon him by any law of this realm (*k*).

The same holds good much more strongly in the case of grants for more lives and grants in reversion. In favour of a grant for one life it may be alleged that the grantee, under the uncertainty of the life of the grantor, would have no encouragement to sequester him from all other business, and turn his thoughts wholly to the execution of that office; and that by the time he has attained a competent knowledge of persons and things relating to it, he may be removed; but these cannot be pleaded in favour of grants for more lives, and grants in reversion. It is true, the temporal courts do so far restrain such grants as to declare them void unless warranted by precedents before 1 Eliz. c. 19, in the case of bishops, and before 13 Eliz. c. 10, in the case of others (in which years the two statutes were made against the laying these and the like unreasonable burdens upon successors), and they also do declare them void unless they be granted freely and without reward, and unless the grantee (supposing him of full age) appear to have sufficient knowledge for the work. But they have allowed them to be good upon the foundation of precedents subsequent to 1 Eliz. c. 19, on presumption that there might be precedents before; and they have also allowed grants to minors to be good, on presumption that in due time they will qualify themselves for the offices, and that until such time as they shall come of age they may supply the places by deputies (*l*).

When an action lies against a chancellor.

An action lies against the judge of an ecclesiastical court who has acted beyond the jurisdiction of the court: as where a party was excommunicated for refusing to obey an order of the ecclesiastical court which it had no authority to make; or where the party had not been previously served with a citation or monition, nor had due notice of the orders (*m*). An action was holden not to lie against the vicar general of the bishop for excommunicating the plaintiff for contumacy in not taking upon him administration of intestate's effects to whom plaintiff was next of kin, and had intermeddled with the goods, &c.; although the citation by which plaintiff was cited was void by reason

(*k*) Gibs. Introd. 25.
(*l*) Ibid. 26.
(*m*) *Beaurain* v. *Scott*, 3 Cowp. 388, per Lord Ellenborough.

that it required him to appear and take administration, &c. without leaving him an option to renounce it, and the proceedings thereupon had been set aside upon appeal; for the vicar general had jurisdiction over the subject-matter, viz., the granting administration, and there was no malice (*n*).

Commissary, what he is.

Commissary is a title of jurisdiction, appertaining to him that exercises ecclesiastical jurisdiction in places of the diocese so far distant from the chief city, that the chancellor cannot call the people to the bishop's principal consistory court without great trouble to them. This commissary is called by the canonists *commissarius*, or *officialis foraneus*, and is ordained to this special end, that he should supply the office and jurisdiction of the bishop in the out places of the diocese, or in such parishes as are peculiars to the bishop, and exempted from the archdeacon's jurisdiction: for where by prescription or by composition there are archdeacons who have jurisdiction in their archdeaconries, as in most places they have, there the office of commissary is superfluous (*o*).

Official.

Official is the judge of the archdeacon's court (*p*).

(*n*) *Ackerley* v. *Parkinson*, 3 M. & S. 411.

(*o*) Terms of the Law, "Commissary;" 4 Inst. 338.

(*p*) *Vide supra*, p. 243.

CHAPTER V.

OFFICERS OF THE ECCLESIASTICAL COURTS.

SECT. 1.—*Advocate.*
2.—*Proctor.*
3.—*Register or Registrar.*
4.—*Secretary.*
5.—*Notary Public.*
6.—*Apparitor.*

SECT. 1.—*Advocate.*

Who may be.

LINDWOOD says that by the civil law none could be advocate, but he who had studied for five years (*a*).

But this is mitigated by a constitution of Archbishop Peecham to three years; by which it is enjoined that none shall be permitted to exercise the office of advocate, unless he shall have been for three years at least a diligent hearer of the canon and civil law. And he shall give proof of this by his own oath, if the same shall not appear by proper testimony, or by the notoriety of the fact (*b*).

Generally, by the usage and practice of England and other countries at this day, a person may be admitted to this office who has taken a doctor of laws' degree (*c*).

No mandamus to admit.

In the case of *Rex* v. *The Archbishop of Canterbury*, in 47 Geo. 3, an application was made to the Court of King's Bench for a mandamus to the archbishop, to issue his fiat to the vicar general of the province of Canterbury, for the purpose of making out a rescript under the seal of the vicar general, commanding the Dean of Arches to admit Dr. Highmore as an advocate in the Court of Arches. Dr. Highmore had taken his doctor of laws' degree at Cambridge, and the fiat was refused, because he had been admitted into deacon's orders. Lord Ellenborough, C. J., "There ought in all cases to be a specific legal right, as well as the want of a specific legal remedy, in order to found an application for a mandamus. Nothing

(*a*) Lind. 76. (*b*) Lind. 75. (*c*) Ayl. Parerg. 54.

appears to show that Dr. Highmore has any legal right to what he claims, more than any other of his majesty's subjects; therefore we cannot interfere" (*d*).

Stamp duty.

The stamp duty on the admission of an advocate is, by 33 & 34 Vict. c. 97, schedule, tit. "Admission," 50*l*.

His office in general.

By the Canons of 1603 it was ordered as follows: "For the furtherance and increase of learning, and the advancement of civil and canon law, it is ordained that no proctor, exercising in any of the archbishop's courts, shall entertain any cause whatsoever, and keep and retain the same for two court days without the counsel and advice of an advocate, under pain of a year's suspension from his practice; neither shall the judge have power to release or mitigate the said penalty, without express mandate and authority from the archbishop" (*e*).

"And no judge in any of the said courts shall admit any libel or any other matter, without the advice of an advocate admitted to practise in the same court, or without his subscription; neither shall any proctor conclude any cause depending, without the knowledge of the advocate retained and feed in the cause; which if any proctor shall do or procure to be done, or shall by any colour whatsoever defraud the advocate of his duty or fee, or shall be negligent in repairing to the advocate and requiring his advice what course is to be taken in the cause, he shall be suspended from all practice for the space of six months, without hope of being thereunto restored before the said term be fully complete" (*f*).

In case of inhibitions.

"No inhibition shall be granted out of the archbishop's court at the instance of any party, unless it be subscribed by an advocate practising in the said court, which the said advocate shall do freely, not taking any fee for the same, except the party prosecuting the suit do voluntarily bestow some gratuity upon him for his counsel and advice in the said cause: the like course shall be used in granting forth any inhibition at the instance of any party by the bishop or his chancellor against the archdeacon, or any other person exercising ecclesiastical jurisdiction. And if in the court or consistory of any bishop there be no advocate at all, then shall the subscription of a proctor practising in the same court be held sufficient" (*g*).

Suborning witnesses.

All advocates shall take care that they do not suborn witnesses by themselves or by any other, or instruct the parties either to suggest what is false, or suppress the

(*d*) 8 East, Rep. 213.
(*e*) Can. 130.
(*f*) Can. 131.
(*g*) Can. 96.

truth. And all who shall act contrary hereunto shall be *ipso facto* suspended from their office, until they shall make competent satisfaction, and shall be otherwise duly punished upon conviction of their offence (*h*).

In the Report of the Ecclesiastical Commissioners of 1832 it was stated as follows:—

Judges and advocates.

"The ecclesiastical laws, as now existing, have been for upwards of three centuries administered, in the principal courts, by a body of men associated, as a distinct profession, for the practice of the civil and canon laws.

"Some of the members of this body, in the year 1567, purchased the site upon which Doctors' Commons now stands, on which, at their own expense, they erected houses for the residence of the judges and advocates, and proper buildings for holding the ecclesiastical and admiralty courts, where they have ever since continued to be held. In the year 1768, a royal charter was obtained, by virtue of which the then members of the society, and the successors, were incorporated, under the name and title of 'The College of Doctors of Law exercent in the Ecclesiastical and Admiralty Courts.'

"This college consists of a president (the Dean of the Arches for the time being) and of those doctors of law who, having regularly taken that degree in either of the universities of Oxford and Cambridge, and having been admitted advocates in pursuance of the rescript of the Archbishop of Canterbury, shall have been elected fellows of the college in the manner prescribed by the charter.

"From this brief account of the origin, and present constitution, of the college of doctors of law, it will be seen that no person can be admitted a member, or allowed to practise as an advocate in the courts at Doctors' Commons, without having first taken the degree of Doctor of Laws in one of the English universities.

"According to the present rules of these courts, a candidate for admission, as an advocate, is required to deliver, into the office of the vicar general of the province of Canterbury, a certificate of his having taken the degree of Doctor of Laws, signed by the registrar of the university to which he belongs. A petition, praying that in consideration of such qualification the candidate may be admitted an advocate, is then presented to the archbishop, who issues his *fiat* for the admission of the applicant, directed to his vicar general, who thereupon causes a rescript or commission to be prepared, addressed to the

(*h*) Otho. Athon, 70.

Dean of the Arches, empowering and requiring him to admit the candidate as an advocate of that court. To this a proviso is always added, 'that the person to be admitted shall not practise for one whole year from the date of his admission,' in order that, by attending during that interval, he may acquire a competent knowledge of the form of the proceedings in those courts.

"On the day appointed for the admission, which is always one of the four regular sessions in each term of the Arches Court, the candidate is presented, by the two senior advocates, to the dean, who directs the archbishop's rescript to be read, and the oaths to be administered; which being done, he is admitted into the number of advocates, according to the tenor of the rescript.

"From the college of advocates the archbishop has always selected the judges of the archiepiscopal courts."

Modern changes.

The college was abolished in pursuance of 20 & 21 Vict. c. 77, ss. 116, 117, when the probate and divorce courts were established.

The ecclesiastical courts have latterly, *ex necessitate rei*, admitted barristers to practise in them, but the archbishop's power to admit advocates remains.

By the Church Discipline Act, 3 & 4 Vict. c. 86, s. 7, it was enacted, "that if the bishop's commissioners think there is *primâ facie* ground for instituting proceedings against a clergyman, articles shall be drawn up against him, which must be signed by an advocate practising in Doctors' Commons" (*i*).

Sect. 2.—*Proctor.*

In the Report of the Ecclesiastical Commissioners of 1832, it is said as follows:—

"Proctors in the ecclesiastical and admiralty courts discharge duties similar to those of solicitors and attornies in other courts.

Who may be proctors.

"In order to entitle a person to be admitted a proctor, to practise in the Court of Arches, it is required that he shall have served a clerkship of seven years, under articles, with one of the thirty-four senior proctors, who must be of five years' standing; and who, by the rules of the court, is prohibited from taking a second clerk until the first shall have served five years; except in the event of the death of

(*i*) *Sed vide post*, chapter on Procedure under 3 & 4 Vict. c. 86.

Who may be proctors.

a proctor, to whom a clerk may have been articled, before the term of his clerkship is completed. In this case any other of the thirty-four senior proctors may take such clerk for the remainder of the term, although he himself may at the same time have a clerk of less than five years' standing. Before a clerk is permitted to be articled, he is required to produce a certificate of his having made reasonable progress in classical education.

"When the term of seven years is completed, the party is admitted a notary, by a faculty from the Archbishop of Canterbury; a petition is then presented to his grace, accompanied by a certificate, signed by three advocates and three proctors, that the party applying to be admitted has served, as articled clerk to a proctor of the court, for the full term of seven years. If this certificate is approved, the archbishop issues his fiat, and a commission is directed to the Dean of the Arches, by whom the party is admitted under the title of a supernumerary, with similar ceremonies to those observed on the admission of an advocate.

"The proctor so admitted is qualified to commence business upon his own account immediately, but he is not entitled to take an articled clerk, until he shall have been for five years within the number of the thirty-four senior proctors."

Proctors how appointed.

Proxies.

Proctors are officers established to represent in judgment the parties who empower them (by warrant under their hands called a *proxy*) to appear for them, to explain their rights, to manage and instruct their cause, and to demand judgment (*k*). Two *proxies* are generally executed; one authorizing the proctor to institute, the other to withdraw proceedings. They are signed by the parties, attested by two witnesses, and deposited in the registry of the court (*l*). The proctor, till such power be withdrawn, is *dominus litis*.

Proctor not obliged to answer foreign seals.

A proctor is not obliged to answer to foreign seals, and to the subscription and seals of foreign notaries; the rule of a proctor's answering extends only to the seals of courts in England, and to the seals and subscriptions of English notaries, with which the law supposes him to be acquainted (*m*).

(*k*) 2 Dom. 583.

(*l*) The nature of a proxy, how far requisite, and when it may be dispensed with, is considered in the following cases:—*Kirkhouse* v. *Fawkener*, 2 Lee, 331; *Prankard* v. *Deacle*, 1 Hagg. 169; 4 Hagg. 402; *Hawkes* v. *Hawkes*, 1 Hagg. 194; *Cook* v. *Cowper*, 2 Lee, 388, 487; *Suter* v. *Christie and others*, 2 Add. 150. For the form of a proxy in a criminal suit, see note to *Watson* v. *Thorp*, 1 Phill. 273.

(*m*) Sir G. Lee; *Raymond* v. *Baron von Watteville*, 2 Lee, 551.

By 5 Geo. 2, c. 18, s. 2, no proctor in any court shall be a justice of the peace during such time as he shall continue in the business and practice of a proctor.

Stamp duty.

By 33 & 34 Vict. c. 97, schedule, tit. "Admission," the admission of any person as a proctor in any court is subject to a stamp duty of 25*l.* But where a person has been so admitted in any court, his admission in any other court is exempt from duty.

Canons respecting proctors.

By Can. 129 of 1603, "None shall procure in any cause whatsoever, unless he be thereunto constituted and appointed by the party himself, either before the judge, or by act in court; or unless in the beginning of the suit, he be by a true and sufficient proxy thereunto warranted and enabled. We call that proxy sufficient, which is strengthened and confirmed by some authentical seal, and party's approbation, or at least his ratification therewithal concurring. All which proxies shall be forthwith by the said proctors exhibited into the court, and be safely kept and preserved by the register in the public registry of the said court. And if any register or proctor shall offend herein, he shall be secluded from the exercise of his office for the space of two months, without hope of release or restoring."

"Whereas a custom is said to prevail, that he who is cited to a certain day constitutes a proctor for that day without letters, or by letters not sealed with an authentic seal; by which means it happeneth, that whilst such proctor will not prove his mandate, or confirm his letters by witnesses, or some other impediment comes in the way, nothing is done that day, nor on the following day, the proctor's office being at an end; and so all former diligence is lost without any effect. As a caution against this fallacy, we do ordain, that for the future a special proctor be constituted absolutely without any limitation of time; or if he be constituted for the day, yet not for one day only, but for several days, to be continued if need be. And the mandate shall be proved by an authentic writing; unless he be constituted in the acts of court, or the constitutor cannot easily find an authentic seal" (*n*).

"We do ordain, that no dean, archdeacon or his official, or bishop's official, shall set his seal to any proxy, unless it be publicly requested of him in court, or out of court, when he who constituteth the proctor, and is known to be the principal party, is present, and personally requesteth it. And whatsoever dean, archdeacon or his official, or official of the bishop, shall do the contrary out of certain malice,

(*n*) Otho. Athon, 61.

Canons respecting proctors.

shall be *ipso facto* suspended from his office and benefice for three years. And if any advocate shall procure a false proxy to be made, he shall be suspended for three years from his office of advocate, and be disabled to hold any ecclesiastical benefice, and if he be married or bigamus [*whereby in those days he was incapacitated to hold a benefice*] he shall be excommunicated *ipso facto;* and whatever shall be done by virtue of such false proxy shall be utterly void to all intents and purposes, and the proctor who was the chief actor in such falsity shall be for ever repelled from executing any legal act. And all of these nevertheless, if they shall be convicted, shall be bound to render damages to the party injured" (*o*).

Canons 130 and 131 relating to proctors have been already referred to (*p*). Canons 132, 133, also relate to proctors.

53 Geo. 3, c. 127.

The 53 Geo. 3, c. 127, contained the following provisions with respect to proctors:

Proctors allowing their names to be used by persons not entitled to act as proctors, struck off roll.

Sect. 8. "If any proctor of the Arches Court of Canterbury, or any other ecclesiastical court or courts in which he shall be entitled to act as proctor, shall act as such, or permit or suffer his name to be in any manner used in any suit, the prosecution or defence whereof shall appertain to the office of a proctor, or in obtaining probates of wills, letters of administration or marriage licences, to or for, or on account or for the profit and benefit of any person or persons not entitled to act as a proctor, or shall permit or suffer any such person or persons to demand or participate in such profit and benefit, and complaint thereof shall be made to the court or courts wherein such proctor hath been admitted and enrolled, and proof given to the satisfaction of the said court or courts that such proctor hath offended therein as aforesaid, then and in such case every such proctor so offending shall be struck off the roll of proctors, and be for ever after disabled from practising as a proctor, or be suspended from the office, function and practice of a proctor in all and every the said court or courts for so long a period as the judge or judges of the said court or courts may deem fit; save and except as to any allowance or allowances, sum or sums of money that are or shall be agreed to be made to the widows or children of any deceased proctor or proctors by any surviving partner or partners of such deceased proctor or proctors; and also save and except as to any agreement made, or

Exceptions.

(*o*) Peecham, Lind. 76.

(*p*) *Vide supra*, p. 1217.

understood to have been made, between proctors and articled clerks, whose articles have been executed prior to the passing of this act" (*q*).

Persons exercising functions of a proctor not being duly enrolled.

Sect. 9. "In case any person or persons shall in his or in their own name, or in the name of any other person or persons, make, do, act, exercise or perform any act, matter or thing whatsoever, in any way appertaining or belonging to the office, function or practice of a proctor, for or in consideration of any gain, fee or reward, or with a view to participate in the benefit to be derived from the office, functions or practice of a proctor, without being admitted and enrolled, every such person, for every such offence, shall forfeit and pay the sum of fifty pounds, to be sued for and recovered in manner hereinafter mentioned."

Penalty.

Proviso for salaries of clerks of seven years standing.

Sect. 10. "Nothing herein contained shall extend or be construed to extend to any salary which shall be agreed to be paid by a proctor, his partner or successor, to a clerk really and *bonâ fide* serving in his office at the time of the passing of this act, and who shall have been *bonâ fide* serving in the office of any proctor or proctors for seven years next before the passing of the same."

Recovery of penalties, &c.

Sect. 11. "All pecuniary forfeitures and penalties imposed on any person or persons for offences committed against this act, shall and may be sued for and recovered in any of his Majesty's courts of record at Westminster."

By 10 Geo. 4, c. 7, s. 16, Roman Catholics are excluded from any office in the ecclesiastical courts. By 41 Geo. 3, c. 79, s. 14, it is provided that nothing in that act regulating public notaries shall apply to a proctor in the ecclesiastical courts (*r*).

Power of the ecclesiastical court over proctors.

In *Leigh's case* in 2 Will. 3 (*s*), a proctor of Doctors' Commons, who had done business without the advice of an advocate, contrary to the canon, and refused to pay a tax of 10*s*. imposed upon him by order of the court towards the charges of the house, and was suspended from his office, prayed a mandamus in the Court of King's Bench to be restored: but it was denied, and said by the court, that officers are incident to all courts, and must partake of the nature of those several and respective courts in which they attend; and the judges, or those who have the supreme authority in such courts, are the proper persons to censure the behaviour of their own officers; and if they should be

(*q*) See *Stephenson* v. *Higginson*, 3 H. L. C. 638.

(*r*) *Vide post*, Sect. 5, "Notary Public."

(*s*) Gibs. 995; 3 Mod. 332. See 3 Bac. Abr. 531.

Power of the ecclesiastical courts over proctors.

mistaken, the King's Bench cannot relieve, for in all cases where such judges keep within their bounds, no other court can correct their errors in proceedings; and if any wrong be done in this case, the party must appeal.

The decisions have established the following propositions:—Where a party regularly complains of gross extortion by his proctor, the court may punish the proctor by suspension or otherwise (u). In a case where a proctor had charged 88*l.* 4*s.* 4*d.*, and the bill was referred to the registrar, who reported the proper charge to be 52*l.* 15*s.* 6*d.*, the court suspended the proctor for three months, and condemned him in costs: in this case it was the first time his conduct had been brought before the court, and there were other extenuating circumstances (x). A client is under all circumstances entitled to a detailed bill of costs from his proctor; and where it has been long acquiesced in, and payment made after the close of the suit, he is not entitled to have it referred to the registrar for examination (y). A proctor is *dominus litis*, and therefore responsible to the court for the purity of his proceedings (z). But the court has no power to decide what expenses are due between proctor and client, or to enforce payment of them; but where costs are given against a party, the court, in order to carry its sentence into execution, is empowered to tax the costs and to enforce their payment. All that the court can do in the case of proctor and client is to refer the bill to the registrar for his examination; this is merely in aid of justice, and for the convenience of suitors (a).

Pauper—proctor.

A party having been admitted to sue as a pauper was, on facts respecting an income, proved against him by the proctor assigned to him, dispaupered (b).

Admission of proctors.

The lawful admission of proctors depends upon the usage and practice of the court into which they are admitted.

A decree of a judge of a diocesan court for the admission of proctors, contrary to the usage and practice of his court, has been reversed on appeal to the Arches Court (c).

The claim of a proctor in the Arches Court of Canter-

(u) *Prentice* v. *Prentice*, 3 Phill. 311; *Peddle* v. *Evans*, 3 Hagg. 689.

(x) *In the goods of Lady Hatton Finch*, 3 Hagg. 255.

(y) *Peddle* v. *Toller*, 3 Hagg. 296.

(z) *Myun* v. *Robinson*, 2 Hagg. 195.

(a) *Peddle* v. *Toller*, 3 Hagg. 389, per Sir J. Nicholl.

(b) *Lait* v. *Bailey*, 2 Roberts. Ecc. Rep. 159 (1852).

(c) *Fell* v. *Bond*, 1 Roberts. Ecc. Rep. 740 (1849).

bury to practise in a diocesan court of the province, without having been formally admitted therein, has been allowed (*d*).

"A proctor, by virtue of his proxy, may be held by the court till after sentence, and till then it will not be sufficient for him to declare he proceeds no further for his party. But if an appeal is interposed he is not bound to give an appeal so far. On the contrary, he cannot act without exhibiting a new proxy in the Court of Appeal" (*e*).

Proctor may be kept before court.

By 33 & 34 Vict. c. 28, s. 20, "It shall be lawful for an attorney or solicitor to perform all such acts as appertain solely to the office of a proctor in any ecclesiastical court other than the provincial courts of the Archbishops of Canterbury and of York, and the diocesan court of the Bishop of London, without incurring any forfeiture or penalty, and to make the same charges which a proctor would be entitled to make, and to recover the same, any enactment or enactments to the contrary notwithstanding."

Attornies may act as proctors except in courts of Canterbury, York and London.

SECT. 3.—*Register or Registrar.*

By Can. 123 of 1603, "No chancellor, commissary, archdeacon, official, or any other person using ecclesiastical jurisdiction, shall speed any judicial act, either of contentious or voluntary jurisdiction, except he have the ordinary register of that court, or his lawful deputy; or if he or they will not or cannot be present, then such persons as by law are allowed in that behalf to write or speed the same, under pain of suspension *ipso facto.*"

His presence necessary to a judicial act.

And this is according to the rule of the ancient canon law; which, to prevent falsifications, requires the acts to be written by some public person (if he may be had), or else by two other credible persons: and the credit which the canon law gives to a notary public is, that his testimony shall be equal to that of two witnesses (*f*).

By Can. 134, "If any register, or his deputy or substitute whatsoever shall receive any certificate without the knowledge and consent of the judge of the court; or willingly omit to cause any person (cited to appear upon

When he may be suspended.

(*d*) *Butlin* v. *Harris*, 6 Notes of Cases, p. xli (Supp.) (1848).

(*e*) Dr. Battine's opinion, Mr. Toker's MSS. 357. See *Obicini* v. *Bligh*, 8 Bingham, 352, as to difference between proctor and attorney; see also Cat. of Processes in Del., No. 679, A.D. 1707.

(*f*) Gibs. 996. As to his being a notary, *vide infra*, p. 1232.

When he may be suspended.

any court day) to be called; or unduly put off and defer the examination of witnesses to be examined by a day set and assigned by the judge; or do not obey and observe the judicial and lawful monition of the said judge; or omit to write or cause to be written such citations and decrees as are to be put in execution and set forth before the next court day; or shall not cause all testaments exhibited into his office to be registered within a convenient time; or shall sit down or enact, as decreed by the judge, any thing false or conceited by himself, not so ordered or decreed by the judge; or in the transmission of processes to the judge *ad quem*, shall add or insert any falsehood or untruth, or omit any thing therein, either by cunning or by gross negligence; or in causes of instance, or promoted of office, shall receive any reward in favour of either party, or be of council directly or indirectly with either of the parties in suit; or in the execution of their office shall do ought else maliciously, or fraudulently, whereby the said ecclesiastical judge or his proceedings may be slandered or defamed: we will and ordain, that the said register, or his deputy or substitute, offending in all or any of the premises, shall by the bishop of the diocese be suspended from the exercise of his office, for the space of one, two, or three months or more, according to the quality of his offence; and that the said bishop shall assign some other public notary to execute and discharge all things pertaining to his office, during the time of his said suspension."

How his office is to be supplied during suspension.

Opinions on this point.

Dr. Harris says a registrar may be articled against "for "neglect of or refusal to do his duty, and might be cen-"sured for it by *suspension* from his office and *deprivation* "if he persisted in his neglect or refusal." This is a very curious and learned opinion (*h*).

But the remedy against the registrar for taking *excessive fees* is by action at common law under 21 Hen. 8, c. 5, s. 5. Sir W. Wynne says, "If the registrar misbehaves "in the duties of his office he is liable to be suspended "and even deprived of it. But I do not think that the "chancellor has power *extra*-judicially to exclude the "registrar from the execution of any duty of his office, "or to confer it upon any other person." "I do not think "that the chancellor can appoint his seal-keeper to issue "out licences without passing through the hands of his "registrar. I think that usage of very many years will "justify the registrar in taking an equal fee with the "chancellor upon marriage licences, notwithstanding that

(*h*) Mr. Toker's MSS. 466.

"his fee was less in the old table published in the 16th "century" (*i*).

Right to office to be tried at law.

Dr. Godolphin says, if there be a question between two persons touching several grants, which of them shall be register of the bishop's court; this shall not be tried in the bishop's court, but at the common law; for although the *subjectum circa quod* be spiritual, yet the office itself is temporal (*j*).

Mandamus to admit. *Rex* v. *Ward*.

So in the case of *Rex* v. *Ward*, in 4 Geo. 2, there was a mandamus to Dr. Ward, the commissary, to admit Henry Dryden to be deputy register of the Archbishop of York's court: suggesting that Dr. Thomas Sharpe had been admitted to the office, to execute the same by himself or his deputy; that he had appointed Dryden (who is averred to be a fit person) to be his deputy, whom the commissary had refused to admit, to the great damage of Dr. Sharpe who complains; and therefore the writ commands the commissary to admit and swear Dryden, or show cause to the contrary. To this the commissary returns; that long before the constituting Dryden to be deputy, John Sharpe and Thomas Sharpe were admitted to the office as principals, to hold for their lives, and the life of the survivor; that they, in the year 1714, appointed John Shaw to be their deputy, who executed the office till John Sharpe died; that Thomas Sharpe survived, and on May 12, 1727, by a new appointment constituted Shaw his deputy, who was admitted, and executed the office until suspended in the manner after mentioned; that Shaw at the time of his admission took an oath that he should justly and honestly execute the office, without favour or reward, and do every thing incumbent on the office, and not be an exacter or greedy of rewards; and then sets forth the 134th canon; and further, that while Shaw was deputy, several proctors of the court on the 16th of February, 1727, exhibited to the commissary several articles against him, complaining of divers misbehaviours in his office, contrary to several of the particulars set forth in the said canon; that Shaw being summoned on the 6th of April, 1728, gave in his answer in writing (which is set forth); and then the return goes on, that forasmuch as it appeared to the commissary that the answer was insufficient, and that Shaw had confessed himself guilty of several omissions and extortions in the exercise of his office, therefore upon complaint thereof to the archbishop, he on the 21st of May, 1728, by his commission under his

(*i*) Mr. Toker's MSS. 467.

(*j*) God. 125.

Mandamus to admit.
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archiepiscopal seal directed to the commissary and reciting that Shaw had been guilty in the manner before mentioned, did therefore empower the commissary to suspend him and assume another notary public; that by virtue thereof, he on the 24th of May, 1728, suspended Shaw for five years, and assumed Joseph Leech a notary public, who before the constituting Dryden to be deputy, took upon him and has ever since executed the office: that Shaw appealed, and in that appeal alleged, that on the 23rd of May, 1728, he resigned the office, and that Dr. Sharpe had appointed William Smith to be deputy; that delegates were appointed, who on the 23rd of October, 1728, issued an inhibition to the commissary, that pending the appeal he should do nothing to the prejudice of the appellant; that the appeal remains undetermined; and for these reasons he cannot admit Dryden to be the deputy of Dr. Sharpe. Strange argued, that the return was ill, and that there ought to be a peremptory mandamus; which argument was to the following effect: "I must observe in general, that there is no incapacity returned in Dryden, no want of any regular appointment or deputation; on the contrary, it appears that Dr. Sharpe had a power to make a deputy, and that he had executed it with regard to Dryden. As therefore Dryden hath *primâ facie* a regular title to the office, the commissary who is to admit him ought not to refuse to do his duty; especially considering, that the admission gives no right, but only a legal possession, to enable him to assert his right if he has any. And upon this foundation it is, that *non fuit electus* hath been held no good return to a mandamus to swear in a churchwarden, because it is directed only to a ministerial officer, who is to do his duty, and no inconvenience can follow; for if the party hath a right, he ought to be admitted; if he hath not, the admission will do him no good. This effect of a mandamus to admit, was laid down in the case of *Rex* v. *The Dean and Chapter of Dublin* (H., 7 Geo. 1), which was a mandamus to admit one Dougate to his seat in the choir and his voice in the chapter; for wherever the office is but ministerial, he is to execute his part, let the consequence be what it will. In the case of *Rex* v. *Simpson* (M., 11 Geo. 1), there was a mandamus to the Archdeacon of Colchester, to swear Rodney Fane into the office of churchwarden; the archdeacon returned, that before the coming of the writ he received an inhibition from the bishop; but the court held that was no excuse, and that a ministerial officer is to do his duty, whether the act will be of any validity or not. In the case of *Taylor*

"v. *Raymond* (M., 4 Geo. 1), to a mandamus to swear in a churchwarden, it was returned, that before the coming of the writ he had sworn in another, and it was held an ill return, for be the right which way it will, the officer is to do his duty. These two last cases are both in point; in one there was an inhibition (as there is in this case), and in the other there was another officer, as they pretend there is here, to wit, Joseph Leech. But what is that inhibition? it is, to do nothing that may prejudice the appeal. Can this hurt Shaw? no; if he is relieved on the appeal, he will be restored, though another is admitted; if he is not relieved, it must be for want of a right, and he will not be capable of suffering any prejudice by the other's admission. But what takes off all pretence of the inhibition's being material in this case is, that it appears by Shaw's own showing, that he had the day before his suspension surrendered his deputation; and that accounts for the last part of the return, that the appeal is undetermined; it not being of any consequence to Shaw to prosecute it any further; besides, this would be to deprive Dr. Sharpe of the benefit of this office as long as Shaw should think fit to sleep upon the appeal, Dr. Sharpe having no power to expedite the determination. A deputy is but at will; and this is to deprive Dr. Sharpe of his will for five years; which suspension I take to be illegal; for the expression in the canon of such a number of months *or more*, must have a reasonable construction, and can never be extended to five years. Shaw is entirely divested of the office, which answers the purpose of reformation better than a bare suspension. As therefore, the office is vacant, there can be no reason why the commissary should refuse to fill it up, and a peremptory mandamus ought to go." And by the court: "Surely it is attempting too much, to support this as a good return; the effect of a mandamus, as laid down, is certainly so, that it gives no right. The canon only intended that the bishop should suspend where the principal would not revoke; but an actual revocation is better than a suspension. It would be carrying the power of inhibitions a great way if we should allow them the force contended for by the return. We are therefore all of opinion, that the return is ill." Then exception was taken to the writ, that a mandamus would not lie for a deputy; and for this was cited 6 Mod. 18, where Holt, Chief Justice, lays it down that for a deputy a mandamus will not lie. But it was answered, that this is not a mandamus for the deputy, but for the principal to be admitted to have a deputy; the refusal of Dryden is laid to be, to the great damage of

Mandamus to admit.

Rex v. Ward.

Dr. Sharpe, and, therefore, to do Dr. Sharpe right in the premises is the writ awarded; it appears that Dr. Sharpe has a freehold in the office, so though his deputy is but at will, he has it for life; and in 1 Ventr. 110, a mandamus was granted to restore a person to the office of deputy steward of the court of the council of the Marches, and it was held to lie for a revocable deputy, because the principal has no other way to get him admitted; and in the report of the same case in 1 Lev. 306, it is said by the court, that although a mandamus does not lie for a deputy, yet it lies for him who deputes him, to have him admitted or restored, for otherwise he may be deprived of his power to make a deputy. Then it was further objected, that a mandamus does not lie for a spiritual office; and for this were cited divers cases, where it was determined that a mandamus will not lie for a proctor, who belongs as much to the ecclesiastical court as the register does. Unto which it was answered, that this is not any objection; a mandamus has been granted to admit an under-schoolmaster, and yet schoolmasters are within the canons of 1603 as well as registers; so in the case of Mr. Folks, lately for the office of apparitor-general of the Archbishop of Canterbury; so it has been often granted for a parish clerk; for a sexton; so in like manner it was granted to restore Dr. Bentley to his degrees; and to admit Dr. Sherlock to a prebend at Norwich; and it is to be observed that no assize will lie for this office, therefore if the party has not this remedy he has none; the reason why it was refused to a proctor was, because it did not appear what interest he had, but here appears a freehold. And by the court: "We all think this writ is good, notwithstanding the exceptions that have been taken, and therefore a peremptory mandamus must go" (*k*).

Rex v. Bp. of Gloucester.

In *Rex* v. *The Bishop of Gloucester* the registrars of a diocese were authorized by their patent of office (under the bishop's hand and seal) to appoint a deputy "to be approved of and allowed by the bishop," who, if he should not approve of and allow the deputy named and proposed to him, was empowered to nominate another with a salary payable out of the profits of the registrarship. The registrars appointed a deputy, subject to the approval of the bishop, who declared that, "for good and sufficient reasons," which he did not specify, he disapproved of the party nominated. In this case the court refused a rule nisi for a mandamus to the bishop to admit the deputy (*l*).

(*k*) Str. 893.

(*l*) 2 B. & Adol. 158.

Bp. of Bangor's case.

In the case of *The Bishop of Bangor*, who was prosecuted at the Shrewsbury Assizes in 1796, by the deputy registrar of the Consistorial Court, for a riot and assault in forcibly taking possession of his room in the chapter house, Mr. Justice Heath intimated his doubt whether the bishop had the power of withdrawing his confirmation once given of this officer's appointment, and his strong opinion that at all events he must have recourse to a proceeding at common law. The jury, however, acquitted the defendant. This case has obtained great celebrity, from the speech delivered by Lord Erskine in his defence of the bishop (*m*).

Registrar in new diocese.

In *Ridley* v. *Pownall* (*n*), it was holden that the bishop of a new diocese might appoint a registrar.

Fees.

A registrar may recover his fees by action at law (*o*).

Duty to register under modern acts.

The duty of the registrar by statute to register orders in council, baptisms, burials, under the statutes 1 & 2 Vict. c. 106, s. 116, and 52 Geo. 3, c. 146, s. 8, has been already mentioned (*p*).

Under 3 & 4 Vict. c. 113, ss. 88, 89, he is bound under penalties to register every order in council made under that act, and is entitled to a fee in each case for so doing.

SECT. 4.—*Secretary.*

Nature of office.

The office of secretary to a bishop is one of comparatively modern origin; its duties are nowhere defined, and there seems no reason why the office, though a convenient one, should necessarily exist. Secretaries are, however, mentioned in 41 Geo. 3, c. 79, s. 14 (*q*). They are also mentioned in 1 & 2 Vict. c. 106, ss. 47, 131, where they are spoken of as officers having to do with the admission of spiritual persons to benefices or cathedral preferments, and provision is made for fixing their fees in these matters by Order in Council; and their fees have been accordingly so fixed (*r*).

Mentioned in statutes.

(*m*) See the whole trial reported in vol. i. of Lord Erskine's Speeches. See as to the revocation of the appointment of a deputy registrar, analogy of deputy recorder, *Reg.* v. *Sutton*, 10 Mod. 74, case 44.

(*n*) 2 Lev. 136.

(*o*) *Ballard* v. *Gerard*, 12 Mod. 608; Ld. Raym. 703; 1 Salk. 233; *Shepherd* v. *Payne*, 12 C. B., N. S. 414; 16 ib. 132; 31 L. J., C. P. 297; 33 ib. 158; *Veley* v. *Pertwee*, L. R., 5 Q. B. 573; *vide post*, Chapter on Visitation.

(*p*) Pp. 582, 653, *supra*; and *vide supra*, Part IV., Chap. VII.

(*q*) *Vide infra*, p. 1235.

(*r*) *Vide supra*, pp. 474, 521.

Mentioned in statutes.

They are further mentioned in 30 & 31 Vict. c. 135, s. 1, as having duties and receiving fees on consecrations and ordinations; and their fees in such matters have been fixed by an Order in Council framed under the powers of this statute and gazetted on March 19th, 1869 (*t*).

Sect. 5.—*Notary Public* (*u*).

Notary, who.

A notary was anciently a scribe, that only took *notes* or minutes, and made short draughts of writings, and other instruments both public and private. But at this day we call him a notary public, who confirms and attests the truth of any deeds or writings in order to render the same authentic (*x*).

The law books give to a notary several names or appellations; as *actuarius*, *registrarius*, *scriniarius*, and such like. All which words are put to signify one and the same person. But in England, the word *registrarius* is confined to the officer of some court, who has the custody of the records and archives of such court, and is oftentimes distinguished from the *actuary* thereof. But a register ought always to be a notary public, for that seems to be a necessary qualification of his office.

How appointed.

A notary public is appointed to this office by the Archbishop of Canterbury; who in the instrument of appointment decrees, that "full faith be given, as well in as out of judgment, to the instruments by him to be made." Which appointment is also to be registered and subscribed by the clerk of his majesty for faculties in Chancery (*y*).

Master of faculties.

The chief officer of the Archbishop of Canterbury is the master of faculties, to whom applications are to be made for the admission or the removal, under any special circumstances, of notaries. In the Institutes, the Court of Faculties is stated to be "a court, although it holdeth no plea of controversie. It belongeth to the archbishop, and his officer is called *magister ad facultates*" (*z*).

Lord Coke supposes that it holds no plea of controversy. Several instances have, however, occurred in my recollection in which the application to be admitted a notary has been argued by counsel before this judge.

(*t*) *Vide supra*, p. 131; *vide post*.

(*u*) See Brooke's Treatise on the Office and Practice of a Notary.

(*x*) Ayl. Par. 382.

(*y*) 1 Ought. 486; Ayl. Par. 385.

(*z*) Inst. part 4, p. 337.

Notaries are mentioned in the Statute of Provisors, 25 Edw. 3, stat. 4 (A.D. 1351), in 27 Edw. 3, stat. 1, c. 1 (A.D. 1353), and in 16 Ric. 2, c. 5 (A.D. 1392—1393), commonly called the Statute of Præmunire.

25 Hen. 8, c. 21.

No person shall sue for any dispensation or licence to the bishop of Rome.

25 Hen. 8, c. 21, sect. 2, enacts as follows: "That neither your highness, your heirs nor successors, kings of this realm, nor any your subjects of this realm, nor of any other your dominions, shall from henceforth sue to the said bishop of Rome called the Pope, or to the see of Rome, or to any person or persons having or pretending any authority by the same, for licences, dispensations, compositions, faculties, grants, rescripts, delegacies, or any other instruments or writings, of what kind, name, nature, or quality soever they be of, for any cause or matter, for the which any licence, dispensation, composition, faculty, grant, rescript, delegacy, instrument, or other writing, heretofore hath been used and accustomed to be had and obtained at the see of Rome, or by authority thereof, or of any prelates of this realm; nor for any manner of other licences, dispensations, compositions, faculties, grants, rescripts, delegacies, or any other instruments or writings that in causes of necessity may be lawfully granted without offending of the holy scriptures and laws of God; but that from henceforth every such licence, dispensation, composition, faculty, grant, rescript, delegacy, instrument and other writing afore named and mentioned, necessary for your highness, your heirs and successors, and your and their people and subjects, upon the due examinations of the causes and qualities of the persons procuring such dispensations, licences, compositions, faculties, grants, rescripts, delegacies, instruments or other writings, shall be granted, had or obtained, from time to time, within this your realm, and other dominions, and not elsewhere, in manner and form following, and none otherwise; that is to say, the Archbishop of Canterbury for the time being, and his successors, shall have power and authority, from time to time, by their discretions, to give, grant, and dispose, by an instrument under the seal of the said archbishop, unto your majesty, and to your heirs and successors, kings of this realm, as well all manner such licences, dispensations, compositions, faculties, grants, rescripts, delegacies, instruments, and all other writings, for causes not being contrary or repugnant to the holy scriptures and laws of God, as heretofore hath been used and accustomed to be had and obtained by your highness, or any your most noble progenitors, or any of your or their subjects, at the see of Rome, or any person or persons by au-

The Archbishop of Canterbury may grant dispensations to the king.

25 Hen. 8, c. 21.

thority of the same; and all other licences, dispensations, faculties, compositions, grants, rescripts, delegacies, instruments, and other writings, in, for and upon all such causes and matters as shall be convenient and necessary to be had, for the honour and surety of your highness, your heirs and successors, and the wealth and profit of this your realm; so that the said archbishop or any of his successors, in no manner wise shall grant any dispensation, licence, rescript, or any other writing afore rehearsed, for any cause or matter repugnant to the law of Almighty God."

The third section provides that the archbishop or his "sufficient and substantial commissary deputy" may grant such faculties.

It would seem from section 11 that an appeal lay from the master of the faculties to the lord chancellor.

41 Geo. 3, c. 79.

The 41 Geo. 3, c. 79, intituled "An Act for the better Regulation of Public Notaries in England," enacts as follows:—

"Whereas it is expedient, for the better prevention of illiterate and inexperienced persons being created to act as, or admitted to the faculty of public notaries, that the said faculty should be regulated in England:" . . .

No person in England to act unless duly admitted.

Sect. 1. "No person in England shall be created to act as a public notary, or use and exercise the office of a notary, or do any notarial act, unless such person shall have been duly sworn, admitted and inrolled, in manner hereinafter directed, in the court wherein notaries have been accustomarily sworn, admitted and inrolled."

Sects. 2, 3 and 7 provided that no person should be admitted a notary unless he had served a notary seven years, and an affidavit to that effect was filed. These provisions have been repealed by the following act, 6 & 7 Vict. c. 90.

By sect. 13 of 41 Geo. 3, c. 79, "'And whereas the Incorporated Company of Scriveners of London, by virtue of its charter, hath jurisdiction over its members being resident within the city of London, the liberties of Westminster, the borough of Southwark, or within the circuit of three miles of the said city, and hath power to make good and wholesome laws and regulations for the government and control of such members, and the said company of scriveners, practising within the aforesaid limits, and it is therefore expedient that all notaries resident within the limits of the said charter should come into and be under the jurisdiction of the said company;' be it therefore

Persons ap-

enacted, that all persons who may hereafter apply for a

faculty to become a public notary, and practise within the city of London and the liberties thereof, or within the circuit of three miles of the same city, shall come into and become members and take their freedom of the said company of scriveners, according to the rules and ordinances of the said company, on payment of such and the like fine and fees as are usually paid and payable upon the admission of persons to the freedom of the said company, and shall, previous to the obtaining such faculty, be admitted to the freedom of the said company, and obtain a certificate of such freedom, duly signed by the clerk of the same company for the time being, which certificate shall be produced to the master of faculties, and filed in his office prior to or at the time of issuing any faculty to such person to enable him to practise within the jurisdiction of the said company."

plying for a faculty to become notaries within the jurisdiction of the company of scriveners, shall previously take their freedom of the company.

Sect. 14. "Nothing in this act contained shall extend or be construed to extend, to any proctor in any ecclesiastical court in England; nor to any secretary or secretaries to any bishop or bishops, merely practising as such secretary or secretaries; or to any other person or persons necessarily created a notary public for the purpose of holding or exercising any office or appointment, or occasionally performing any public duty or service under government, and not as general practitioner or practitioners; anything hereinbefore contained to the contrary notwithstanding: provided always, that nothing herein contained shall extend or be construed to exempt any proctor, being also a public notary, from the pains, penalties, forfeitures and disabilities by this act imposed upon any public notary, who shall permit or suffer his name to be in any manner used for or on account, or for the profit and benefit of any person or persons not entitled to act as a public notary."

Act not to extend to proctors in ecclesiastical courts, secretaries to bishops, &c.

By 6 & 7 Vict. c. 90, reciting 41 Geo. 3, c. 79, and further reciting as follows: "And whereas doubts have arisen whether a public notary, being also an attorney, solicitor, or proctor, can have and retain any person to serve him as a clerk or apprentice in his profession or business of a public notary, and also at the same time in that of an attorney, solicitor or proctor, and whether such service is in conformity with the provisions of the said recited act: and whereas it is expedient to remove all such doubts with regard to persons who have served or are now serving or may hereafter serve as a clerk or apprentice in manner aforesaid;" it is enacted as follows:

Sect. 1. "Every person who has been duly admitted,

Public notaries

may retain clerks or apprentices in their business as such, or as attorneys, and notaries if so practising, and persons serving them not disqualified.

sworn and enrolled a public notary in England may take, have and retain any clerk or apprentice to serve him under the provisions of the said recited act or of this act in the proper business of a public notary, or if such person is also an attorney or solicitor in any of the courts of law or equity, or a proctor in any ecclesiastical court in England or Wales, to serve him at the same time in the general business of a notary as well as that of an attorney, solicitor or proctor; and that no person who shall have regularly and duly served any such public notary, being also an attorney, solicitor or proctor, for the time required by the said recited act or this act, and be otherwise entitled to be admitted a public notary, shall be prevented or disqualified from being so admitted a public notary by reason of his having also served a clerkship to such public notary or his partner as an attorney, solicitor or proctor during the same time or any part thereof."

No public notary to retain a clerk or apprentice, unless in actual practice.

Sect. 2. "No public notary may have and retain any such clerk or apprentice to serve him, under the provisions of the said act or of this act, if he has been admitted, sworn and enrolled a public notary for the purpose only of carrying on any business, or holding or exercising any office or appointment, and not as a general practitioner; nor shall any public notary be allowed to have and retain such clerk or apprentice after he shall have discontinued or left off or during such time as he shall not actually practise and carry on the profession or business of a public notary."

Persons serving five years to a notary to be entitled to admission as notaries.

Sect. 3. "In case any person shall have been or shall be bound by any contract to serve and shall have actually served as a clerk or apprentice for the term of five years any public notary as aforesaid, and shall have caused an affidavit to be made and filed as to the due execution of such contract, and shall have complied with the other provisions of the said recited act, save as to the length of service, then and in such case every such person shall be qualified and entitled to be sworn, admitted and enrolled a public notary to practise in England, as fully and effectually as any person having been bound and having served seven years as required by the said recited act would be qualified and entitled to be sworn, admitted and enrolled a public notary under and by virtue of the said recited act:

Proviso as to consent of notary if bound for a longer time.

provided always, that no person shall be entitled to be admitted and enrolled a public notary at the expiration of the term of five years, if bound for a longer time, without the consent in writing of the public notary, if living, to whom he shall have been so bound being first obtained and produced at the time of his admission, and filed with

the other papers relating thereto; and provided also, that in case the affidavit required by the said recited act as to the execution of any contract be not filed within the time required by the said act, the same may be filed by the proper officer after the expiration thereof, but the service of such clerk shall be reckoned to commence and be computed from the day of filing such affidavit, unless the master of the faculties shall otherwise order; and such service shall be as effectual, and the public notary and clerk shall be equally bound for and during the term, reckoning as aforesaid, as if such term had been originally intended and mentioned in the contract."

If affidavit as to execution of contract be not filed within time required, the service to reckon from the day of filing, unless otherwise ordered.

Sect. 4. "The master of the faculties for the time being may make any general rule or rules requiring testimonials, certificates, or proofs as to the character, integrity, ability, and competency of any person who shall hereafter apply for admission or re-admission as a public notary to practise either in England or in any of her Majesty's foreign territories, colonies, settlements, dominions, forts, factories, or possessions, whether such person shall have served a clerkship or not, and from time to time alter and vary such rules as to the master of the faculties shall seem meet, and may admit or reject any person so applying, at his discretion, any law, custom, usage, or prescription to the contrary notwithstanding."

Master of the faculties may require testimonials of ability, &c.

Sect. 5. "If the master of the faculties shall refuse to grant any faculty to practise as a public notary to any person without just and reasonable cause, then the chancellor of England or the Lord Keeper of the Great Seal for the time being, upon complaint thereof being made, shall direct the Queen's writ to the said master of the faculties to the effect and shall proceed thereon according to the intent and meaning of the act 25 Hen. 8, c. 21, and in manner and form as is therein provided and set forth in case of the refusal of any licences, dispensations, faculties, instruments, or other writings, as fully and effectually, and with the same powers and authority, as if the same were here inserted and re-enacted."

Appeal.

Sect. 6 saves the rights of the Scriveners company.

Sect. 7. "Every person to be admitted and enrolled a public notary shall, before a faculty is granted to him authorizing him to practise as such, in addition to the oaths of allegiance and supremacy (*a*), make oath before

Oath on admission of notary.

(*a*) Now turned into a simple oath of allegiance by 31 & 32 Vict. c. 72.

Oath on admission of notary.

the said master of the faculties, his surrogate or other proper officer, in substance and to the effect following:

'I A. B. do swear, That I will faithfully exercise the 'office of a public notary; I will faithfully make contracts 'or instruments for or between any party or parties re-'quiring the same, and I will not add or diminish any 'thing without the knowledge and consent of such party 'or parties that may alter the substance of the fact; I 'will not make or attest any act, contract, or instrument 'in which I shall know there is violence or fraud; and in 'all things I will act uprightly and justly in the business 'of a public notary, according to the best of my skill and 'ability. So help me God.'"

And that such oath shall be received and taken instead of the oath of office now in use on the admission of a notary public, which oath shall from and after the passing of this act be wholly discontinued: provided always, that in such cases where by any act an affirmation or declaration is allowed to be received instead of an oath, or any form of oath or declaration substituted instead of the oaths of allegiance and supremacy, the said master of the faculties, his surrogate or other proper officer, is hereby authorized and empowered to receive a declaration or affirmation instead of any oath required by this act, or such form of oath or declaration instead of the oaths of allegiance or supremacy as by any act of parliament is authorized and allowed."

Oaths, &c. may be taken by commission.

Sect. 8. "The master of the faculties for the time being, or his surrogate, shall and he is hereby authorized and empowered to issue commissions to take any oaths, affidavits, affirmations, or declarations required by law to be taken before the grant of any faculty, marriage licence, or other instrument issuing from the said office of faculties; and that all oaths, affidavits, affirmations, or declarations taken before the commissioner so appointed, and the faculty, marriage licence, or other instrument granted in pursuance thereof, shall be as valid and effectual as if such oath, affidavit, affirmation, or declaration was taken before the said master or his surrogate, any thing in any act or law to the contrary thereof notwithstanding."

Application to strike a notary off the roll for defect in articles, &c. to be made within twelve months.

Sect. 9. "No person who has been admitted and enrolled a public notary shall be liable to be struck off the rolls for or on account of any defect in the articles of clerkship, or in the registry thereof, or in his service under such articles, or in his admission and enrolment, unless the application for striking him off the roll be made within

twelve months from the time of his admission and enrolment; provided that such articles, registration, service, admission, or enrolment be without fraud."

Sect. 10. "In case any person shall, in his own name or in the name of any other person, make, do, act, exercise, or execute or perform, any act, matter, or thing whatsoever of or in anywise appertaining or belonging to the office, function, or practice of a public notary, for or in expectation of any gain, fee, or reward, without being able to prove, if required, that he is duly authorized so to do, every such person for every such offence shall forfeit and pay the sum of fifty pounds, to be sued for and recovered by action of debt, plaint, or information in any of her Majesty's superior courts of record at Westminster, or if the cause of action shall have arisen in any colony or place to her Majesty belonging out of England, then in the supreme court of law of such colony or place, provided the action for the recovery thereof shall be commenced within twelve months next after the fact committed; and that, save so far as they are altered or repealed, or repugnant to the provisions of this act, the like remedies for recovering thereof, and all other the rules, directions, powers, and provisions contained in the said recited act, and also in the act 3 & 4 Will. 4, c. 70 (*b*), shall and may severally and respectively attach and be in force as fully and effectually as if the said penalties were imposed, or the said remedies were given, or the same powers, rules, directions, and provisions were particularly enacted in or by this act, or repealed and re-enacted."

Persons practising as notaries not being duly authorized to forfeit 50*l*.

Like forfeitures and provisions as in former act, and all the powers thereof, and of 3 & 4 Will. 4, c. 70, not hereby varied, to be in force as if re-enacted.

By 41 Geo. 3, c. 79, s. 4, "The following persons shall be deemed and taken to be the proper officers for taking and filing such affidavits; (that is to say,) the master of the faculties of his grace the Lord Archbishop of Canterbury in London, his surrogate or commissioners."

Officers for taking and filing affidavits.

Sect. 5. "The officer filing such affidavits as aforesaid shall keep a book, wherein shall be entered the substance of such affidavit, specifying the names and places of abode of every such public notary, and clerk or person bound as aforesaid, and of the person making such affidavit, with the date of the contract or indenture of apprenticeship in such affidavit to be mentioned, and the days of swearing and filing every such affidavit respectively; and such officer shall be at liberty to take, at the time of filing every such affidavit, the sum of five shillings and no more, as a recompense for his trouble in filing such affidavit; and which book shall and may be searched in office hours by any

Officers filing affidavits to enter the substance in a book.

Fee.

(*b*) *Vide infra*, p. 1241.

Book may be searched.

person or persons whomsoever, upon payment of one shilling for such search."

Fee.

If any master shall die, or leave off practice, or any indenture shall be cancelled by mutual consent, or any apprentice shall be legally discharged, in such cases if apprentices serve the residue of seven years with other masters, it shall be effectual, if an affidavit be filed of the second contract.

Sect. 8. "If any such public notary, or scrivener being also a public notary, to or with whom any such person shall be bound, shall happen to die before the expiration of such term, or shall discontinue or leave off such his practice as aforesaid; or if such contract or indenture of apprenticeship shall, by mutual consent of the parties, be cancelled; or in case such clerk or apprentice shall be legally discharged before the expiration of such term, and such clerk or apprentice shall, in any of the said cases, be bound by another contract or contracts, indenture or indentures in writing, to serve, and shall accordingly serve in manner hereinbefore mentioned, as clerk or apprentice to any such public notary or scrivener (being also a public notary), as aforesaid, during the residue of the said term of seven years (*a*), then such service shall be deemed and taken to be as good, effectual and available, as if such clerk or apprentice had continued to serve as a clerk or apprentice for the said term of seven years to the same person to whom he was originally bound; so as an affidavit be duly made and filed of the execution of such second or other contract or contracts, within the time and in like manner as is hereinbefore directed concerning such original contract."

Apprentices bound before admission, to file affidavits that they have really served seven years.

Sect. 9. "Every person who . . . shall become bound as clerk or apprentice as aforesaid, shall, before he be admitted and inrolled a public notary according to this act, make before, and file with, the proper officer hereinbefore for that purpose mentioned, or cause the public notary, to whom he was bound, to make and file an affidavit that he hath actually and really served and been employed by such practising public notary, to whom he was bound as aforesaid, during the whole term of seven years (*a*), according to the true intent and meaning of this act."

If any notary shall act as such, or permit his name to be used for the profit of any person not entitled to act as a notary, he shall be struck off the roll.

Sect. 10. "If any public notary shall act as such, or permit or suffer his name to be in any manner used for or on account, or for the profit and benefit, of any person or persons not entitled to act as a public notary, and complaint shall be made in a summary way to the court of faculties wherein he hath been admitted and inrolled, upon oath, to the satisfaction of the said court, that such notary hath offended therein as aforesaid, then and in such case every such notary so offending shall be struck off the roll of faculties, and be for ever after disabled from practising as a public notary, or doing any notarial act; save and except as to any allowance or allowances, sum or sums of

(*a*) Now five years; *vide supra*, p. 1236.

money, that are or shall be agreed to be made or paid to the widows or children of any deceased public notary or notaries, by any surviving partner or partners of such deceased notary or notaries."

Sect. 11 imposes a penalty of 50*l.* on any person doing anything belonging to the office of notary without being admitted.

Sect. 16 provides for the recovery of this penalty.

Sect. 17 limits the time for bringing actions to three months, provides that the venue shall be laid only in the county where the cause of action arose, gives leave to plead the general issue, and gives the defendant, if successful, treble costs.

The case of *Rex* v. *Scriveners' Company* (*c*), upon the construction of the old act, may be considered as now obsolete.

District notaries. 3 & 4 Will. 4, c. 70.

As to district notaries the following special act has been passed. By 3 & 4 Will. 4, c. 70, "Whereas by 41 Geo. 3, c. 79, it is enacted that no person shall be sworn, admitted and inrolled as a public notary, unless such person shall have been bound by contract in writing or by indenture of apprenticeship to serve as a clerk or apprentice for the term of not less than seven years to a public notary, or a person using the art and mystery of a scrivener (according to the privilege and custom of the city of London, such scrivener being also a public notary), duly sworn, admitted and inrolled, and shall have continued in such service for the said term of seven years; and certain other enactments are contained in the said act, regulating the admission and practice of notaries public: And whereas the provisions of the said act are in their operation found to be extremely inconvenient in some places distant from the city of London:" . . . Sect. 1, "So much of the said recited act as requires that persons to be admitted notaries public shall have served a clerkship or apprenticeship for seven years, as hereinbefore mentioned, shall, so far as the same affects persons being attornies, solicitors, or proctors admitted as hereinafter mentioned, be limited and confined to the city of London and liberties of Westminster, the borough of Southwark, and the circuit of ten miles from the Royal Exchange in the said city of London."

Recited act limited to London and ten miles thereof.

Attornies may be admitted as notaries out of those limits.

Sect. 2. "It shall and may be lawful for the master of the Court of Faculties of his grace the Lord Archbishop of Canterbury in London from time to time, upon being satisfied as well of the fitness of the person as of the expe-

(*c*) 10 B. & C. 511; 3 Q. B. 939.

3 & 4 Will. 4, c. 70.

diency of the appointment, to appoint, admit and cause to be sworn and inrolled in the said Court of Faculties any person or persons residing at any place distant more than ten miles from the Royal Exchange in the said city of London, who shall have been previously admitted, sworn and inrolled an attorney or solicitor in any of the courts at Westminster, or who shall be a proctor practising in any ecclesiastical court, to be a notary public or notaries public to practise within any district in which it shall have been made to appear to the said master of the Court of Faculties that there is not (or shall not hereafter be) a sufficient number of such notaries public admitted or to be admitted under the provisions of the said recited act for the due convenience and accommodation of such district, as the said master of the Court of Faculties shall think fit, and not elsewhere; any law or usage to the contrary notwithstanding."

Not to authorize notaries appointed thereby to act in London or within ten miles thereof.

Sect. 3. "Nothing herein contained shall extend to authorize any notary who shall be admitted by virtue of this act to practise as a notary, or to perform or certify any notarial act whatsoever, within the said city of London, the liberties of Westminster, the borough of Southwark, or within the circuit of ten miles from the Royal Exchange in the said city of London."

Notary admitted under this act, practising out of his district, to be struck off the roll of faculties.

Sect. 4. "If any notary admitted by virtue of this act shall practise as a notary, or perform or certify any notarial act whatsoever, out of the district specified and limited in and by the faculty to be granted to him by virtue of this act, or within the city of London, the liberties of Westminster, the borough of Southwark, or the circuit of ten miles from the Royal Exchange in London aforesaid, then and in every such case it shall be lawful for the said Court of Faculties, on complaint made in a summary way and duly verified on oath, to cause every such notary so offending to be struck off the roll of faculties, and every person so struck off shall thenceforth for ever after be wholly disabled from practising as a notary or performing or certifying any notarial act whatsoever; anything herein contained to the contrary notwithstanding."

Notarial acts abroad.

By 6 Geo. 4, c. 87, s. 20, and 18 & 19 Vict. c. 42, British diplomatic and consular officers abroad may administer oaths and do notarial acts.

Office of notary in the contestation of suit.

A notary public (or actuary) that writes the acts of court ought not only to be chosen by the judge, but approved also by each of the parties in suit; for though it does of common right belong to the office of the judge, to assume and choose a notary for reducing the acts of court in every

cause into writing, yet he may be refused by the litigants: for the use of a notary was intended, not only on account of the judge, to help his memory in the cause, but also that the litigants might not be injured by the judge (*d*).

And, particularly, the office of a notary in a judicial cause is employed about three things: first, he ought to register and inrol all the judicial acts of the court, according to the decree and order of the judge, setting down in the act the very time and place of writing the same; secondly, he ought to deliver to the parties, at their especial request, copies and exemplifications of all such judicial acts and proceedings as are there enacted and, decreed; and thirdly, he ought to retain and keep in his custody the originals of such acts and proceedings, commonly called the *protocols* (πρῶτος κολλὴ, the *notes*, or *first draughts*(*e*)), the things first *glued* together(*f*).

Authenticity of his proceedings.

As a notary is a public person, so consequently all instruments made by him are called public instruments; and a judicial register of record made by him is evidence in every court according to the civil and canon law. And a bishop's register establishes a perpetual proof and evidence, when it is found in the bishop's archives; and credit is given not only to the original, but even to an authentic copy exemplified (*g*).

And one notary public is sufficient for the exemplification of any act; no matter requiring more than one notary to attest it (*h*).

And the rule of the canon law is, that one notary is equal to the testimony of two witnesses: *unus notarius æquipollet duobus testibus* (*i*).

Stamps.

By 33 & 34 Vict. c. 97, the faculty for admitting or authorizing a notary shall be upon a 30*l*. stamp. And every notarial act shall be on a 1*s*. stamp.

Suit for improperly acting as notary.

In the catalogue of processes in the registry of the High Court of Delegates, from 1609 to 1823, will be found the following record: "No. 590. *Williams* v. *Gentry*. In 1ma inst. Off. Judicis (Bishop of St. David's) promoted by Gentry against Williams;" as it should seem, for acting as notary without a regular faculty. It has been said,

(*d*) Ayl. Par. 382.

(*e*) Hoffman. Lex. Univ. v. Protocollum.

(*f*) Just. Novella, 45, De Tabellionibus.

(*g*) Ayl. Par. 386.

(*h*) Ibid.

(*i*) Gibs. 996. "Besides I know thou art a public notary, and such stand in law for a dozen witnesses," is Massinger's allusion to this *dictum*, in the mouth of Sir Giles Overreach. —*New Way to pay Old Debts*, act 5. *Vide supra*, p. 1225.

that, by sect. 11 of 25 Hen. 8, c. 21, the appeal from the master of the faculties lies to the lord chancellor.

Roman Catholics may now be notaries public.

Power under 5 & 6 Will. 4, c. 62.

The following opinion was given by the attorney-general upon various points respecting the act for the abolition of unnecessary oaths, 5 & 6 Will. 4, c. 62, submitted for his opinion by the Society of Public Notaries of London:

"You are requested to advise the Society of Public Notaries of London,—

"1st. Whether, under the above act of 5 & 6 Will. 4, s. 15, a notary public, duly admitted and practising, be authorized to receive the solemn declarations mentioned in the said section?

"I think there is no doubt whatever that a notary is authorized to receive the solemn declarations referred to. The authority is expressly given, and there is nothing in the act to restrict or qualify it.

"2ndly. Whether, by the same section, the provisions of the act extend to debts, &c. due to residents in Great Britain and Ireland, by persons resident in foreign states, in like manner as to debts, &c. in his Majesty's colonies?

"I do not think that the 15th section extends to debts due by persons resident in foreign states.

"3rdly. Whether the blank in the schedule of the act for the year of the reign should be supplied by the words 'fifth and sixth years of the reign,' &c., or by the word 'sixth' year, the royal assent having been given in the sixth year of his Majesty's reign?

"The blank in the schedule ought to be filled up with the word 'sixth' only. No single act of parliament can be passed in two years of the king's reign.

"J. Campbell.

"*Temple, Sept.* 30, 1835."

Form of a Faculty appointing a Notary Public.

"——, *by Divine Providence Archbishop of Canterbury, Primate of all England, and Metropolitan, by authority of Parliament lawfully empowered for the purposes herein written: To our beloved in Christ* ——, *a literate person now residing* ——, *health and grace: We being willing, by reason of* —— [or, "*Whereas it has been made known to our master of the faculties that there is an insufficient number of notaries at* ——: *we therefore, by reason of the premises, and of*"] *your merits, to confer on you a suitable title of promotion, do create you a public notary; previous examination, and the other requisites, to be herein observed, having been had: And do out of our favour towards you*

admit you into the number and society of other notaries, to the end that you may henceforward in all places [clause of exception or limitation] *exercise such office of notary: —— hereby decreeing, that full faith ought to be given, as well in judgment as thereout, to the instruments to be from this time made by you; the oaths hereunder written having been by us, or our master of the faculties, first required of you and by you taken.*"

[Here come the oaths of allegiance, of office, as by 6 & 7 Vict. c. 90, s. 7; and of service, if not under 3 & 4 Will. 4, c. 70.]

"*Provided always, that these presents do not avail you anything, unless duly registered and subscribed by the clerk of her Majesty for faculties in chancery. Given under the seal of our office of faculties, at Doctors' Commons, this —— day of ——, in the year of our Lord one thousand eight hundred and ——, and in the —— year of our translation.*"

Cases where admission has been argued.

In the cases of *Dering and Brooke* v. *Wright* (May 4, 1836), and *Hoskins* v. *Greetham* (February, 1838), caveats were entered against the grant of a faculty, and the causes were argued by counsel at Doctors' Commons before the Master of the Faculties. In the former case the faculty was granted, in the latter refused.

There have been several cases of late years in which the question of the admission of notaries has been argued.

The Melbourne notaries have been several times before the Master, the last time being the 10th of April, 1872. On the same day a case was argued relating to a Liverpool notary. On the 27th of July, 1871, a case of *Stephenson and Oates* v. *Hearfield*, relating to the admission of notaries at Great Grimsby, was argued. All these latter cases were before the present Master, Dr. Lushington, at his private house.

Modern practice.

The modern practice, in the case of district notaries, is for the applicant for admission to file a memorial signed by himself, and a further memorial of such of the principal inhabitants of the place where he intends to practise as will support his application. The memorial may be met by a counter-memorial on the part of the opponents, and further memorials may be filed in reply. Affidavits are rarely used. Every application should be supported by a certificate of the fitness and good character of the applicant, signed by two notaries public.

Individual notaries, and in some cases societies of notaries

practising at a particular place, are admitted to oppose the grant of faculties to applicants.

Sect. 6.—*Apparitor.*

Who.

Apparitors (so called from that principal branch in their office, which consists in summoning persons to *appear*) are officers appointed to execute the proper orders and decrees of the court (*h*).

How appointed.

And these are chosen by the ecclesiastical judges respectively; who may suspend them for misbehaviour, but may not remove them at discretion, when they hold their office by patent.

His office and duty.

The proper business and employment of an apparitor is, to attend in court, to receive such commands as the judge shall please to issue forth; to convene and cite the defendants into court; to admonish or cite the parties in the production of witnesses and the like; and to make due return of the process by him executed (*i*).

For particular regulations in early times, see Otho, Athon. 63; and Boniface, Lind. 221.

By 21 Hen. 8, c. 5, as well as by the 138th canon, apparitors are called summoners or sumners (*k*).

Canon 138.

By Canon 138 of 1603, "Forasmuch as we are desirous to redress such abuses and aggrievances as are said to grow by sumners or apparitors; we think it meet that the multitude of apparitors be (as much as is possible) abridged or restrained: wherefore we decree and ordain that no bishop or archdeacon, or other their vicars or officials, or other inferior ordinaries, shall depute or have more apparitors to serve in their jurisdictions respectively, than either they or their predecessors were accustomed to have thirty years before the publishing these our present constitutions. All which apparitors shall by themselves faithfully execute their offices; neither shall they under any colour or pretence whatsoever cause or suffer their mandates to be executed by any messengers or substitutes, unless upon some good cause to be first known and approved by the ordinary of the place. Moreover, they shall not take upon them the office of promoters or informers for the court. Neither shall they exact more fees than are in these our constitu-

(*h*) Ayl. Parerg. 67.
(*i*) Ibid. 68.
(*k*) The word used in Chaucer, Canterbury Tales.

tions formerly prescribed. And if either the number of the apparitors deputed shall exceed the assigned limitation, or any of the said apparitors shall offend in any of the premisses; the persons deputing them, if they be bishops, shall upon admonition of their superior discharge the persons exceeding the number so limited; if inferior ordinaries, they shall be suspended from the execution of their office, until they have dismissed the apparitors by them so deputed; and the parties themselves so deputed shall for ever be removed from the office of apparitors, and if being so removed they desist not from the exercise of their said offices, let them be punished by ecclesiastical censures as persons contumacious. Provided, that if upon experience the number of the said apparitors be too great in any diocese, in the judgment of the archbishop for the time being, they shall by him be so abridged, as he shall think meet and convenient."

This canon was probably founded on the decrees in the Provincial Constitutions of Lindwood.

Cases on Can. 138.

Faithfully execute their Offices.]—If a monition be awarded to an apparitor, to summon a man, and he upon the return of the monition avers that he had summoned him, when in truth he had not, and the defendant be thereupon excommunicated; an action on the case at common law will lie against the apparitor for the falsehood committed by him in his office, besides the punishment inflicted on him by the ecclesiastical court for such breach of trust (*l*).

Office of Promoters or Informers for the Court.]—The case of *Carlion* v. *Mill*, in 8 Car. 1, was an action upon the case, for that the defendant being an apparitor under the bishop of Exeter, maliciously, and without colour or cause of suspicion of incontinency, of his own proper malice, procured the plaintiff *ex officio*, upon pretence of fame of incontinency with one Edith (whereas there was no such fame nor just cause of suspicion), to be cited to the consistory court, and there to be at great charges and vexation until he was cleared by sentence; which was to his great discredit, and cause of great expenses and losses; for which the action is brought. Upon not guilty pleaded, and found for the plaintiff, it was moved in arrest of judgment, that in this case an action lies not; for he did nothing but as an informer, and by virtue of his office. But all the court held, forasmuch as it is alleged that he did maliciously and without colour of suspicion cause him to be cited, upon

(*l*) Ayl. Parerg. 70; 2 Bulst. 264.

Cases on Can. 138.

pretence of fame where there was no offence committed, and it is averred that there was not any such fame, and he is found guilty thereof, therefore the action well lies (*n*).

Neither shall they exact more Fees than are in these our Constitutions formerly prescribed.]—That is, in Can. 135. These fees, if withheld, may be recovered in an action at law, but cannot be libelled for in the Ecclesiastical Court (*o*).

Cases on general law.

In *Folks' case* (*p*) it would seem that a mandamus lies to admit the archbishop's apparitor-general. See *Reyner and Parker's case*, upon the authority of a summoner, which was held not to extend to ordering a parson to pay tithes to a person to whom he had not paid them, although the bishop certified he had refused to pay them according to 26 Hen. 8, c. 3 (*q*). In *Pool and Godfrey's case* an action was allowed to lie against a summoner for having falsely returned to the Ecclesiastical Court that he had summoned a person, in consequence of which false return the plaintiff had been excommunicated (*r*).

(*n*) Cro. Car. 291; 1 Roll. Ab. 93.

(*o*) Doug. Rep. 629.

(*p*) Cited Stra. 877.

(*q*) Moore's Rep. 1225.

(*r*) See *Dr. Barker's case* in the Star Chamber (2 Rolle's Rep. p. 384).

CHAPTER VI.

PROCEDURE—GENERALLY.

SECT. 1.—*Preliminary.*
2.—*Who may be Parties to a Suit.*
3.—*Mode of conducting a Suit.*
4.—*Sentence.*
5.—*Execution of Sentence.*
6.—*Appeal.*
7.—*Letters of Request.*
8.—*Caveat.*
9.—*Citation.*
10.—*Libel and Allegation.*
11.—*Articles.*
12.—*Personal Answers.*
13.—*Costs.*

SECT. 1.—*Preliminary.*

Law of the Ecclesiastical Courts.

THE subject matter over which the Ecclesiastical Courts exercise jurisdiction has been considered generally (*a*).

(*a*) *Consult*—I. *As to the old Practice of the English Courts.*

1. Praxis Francisci Clarke, per P. Bladen, V.P.D. (Lond. 1684.)
2. Titles Citation, Libel, &c. in Repertorium Canonicum, or an Abridgment of the Ecclesiastical Laws of this Realm consistent with the Temporal, by John Godolphin, LL.D. (Lond. 1687.)
3. Practice of the Ecclesiastical Courts, by H. Conset. (London, 1700.)
4. Ordo Judiciorum, per Thomam Oughton. (London, 1728.) The first part translated, with notes, by J. T. Law, M.A., Chancellor of Lichfield and Coventry. (London, 1831.) This author and Godolphin are called by Lord Stowell "the oracles of our own practice;" *Briggs* v. *Morgan*, 3 Phill. 329.
5. Titles Citation, Libel, &c. in Ayliffe's Parergon Juris Canonici. (London, 1726.)
6. Similar titles in Gibson's Codex Juris Ecclesiastici. (Oxford, Clarendon Press, 1761.)
7. Cockburn's Clerks' Assistant. (London, 1800.)

II. *As to the Practice of the Irish Courts.*

1. Cunningham's Forms and Precedents for Ecclesiastical Courts. (Dublin, 1834.)
2. Bullingbroke's Eccles. Laws, chapters 43 to 46. (Dublin, 1770.)

III. *As to Foreign Writers on the Practice of the Civil and Canon Law.*

1. Andr. Gaill. Practicæ Quæstiones. (Cologne, 1634.)
2. Speculum Gul. Durandi.

The object of this chapter is to give an outline of the mode of proceeding both in criminal and in civil suits in the Ecclesiastical Court (*c*).

Original object of suit may be changed.

There is a remarkable peculiarity which distinguishes certain suits in the Ecclesiastical Court from those which can be brought in equity or at common law. It is this: the original object of a suit may be changed, and assume in the conclusion an entirely different shape from that in which it had been instituted. Thus under the old law a suit might be commenced against a woman for jactitation of marriage, and if her defence were that she was duly married, and this defence were established, the sentence would be a decree against the husband for a restitution of conjugal rights. A wife might sue for a restitution of conjugal rights, and the defence of the husband might be that she had been guilty of adultery, and if he succeeded the sentence would be a divorce *à mensâ et thoro* against the wife. On the same principle a husband, against whom a wife had instituted a suit for divorce on the ground of cruelty, might plead her adultery in a responsive allegation (*d*), and was not compelled to take out any separate or cross citation for the purpose.

SECT. 2.—*Who may be Parties to a Suit.*

The Criminal Suit is open to every one whom the ordinary allows to promote his office, and the Civil Suit to every one showing an interest (*e*).

Persons excommunicated.

1. In a case in the Court of Arches, where a dissenter had been permitted to promote the office of the judge against a clergyman, an objection was taken by the counsel for the latter against the institution of the suit by one who it appeared from the evidence was among those denounced by the 9th and 12th Canons of 1603 as schismatics, and therefore *ipso facto* excommunicate, it being contended that the 53 Geo. 3, c. 127, had only removed civil penal-

cum Annot. Johannis Andreæ. (Bâsle, 1574.)

3. "Speculum Aureum," called also "Advocatorum Lumen," of Maranta. (Frankfurt on the Maine, 1586.)

4. Censura Forensis Theoretica Practica, by Simon Von Leewen. (Amsterdam.) An excellent work.

5. The very full catalogue of writers on the Civil Law, practical and theoretical, given at the end of the first part of Macheldey's Lehrbuch des Römischen Rechts (Giessen, 1838) may be also consulted.

(*c*) The existing rules regulating the procedure in the Court of Arches, made Jan. 1, 1867, will be given in the Appendix.

(*d*) *Best* v. *Best*, 1 Add. 411.

(*e*) *Turner* v. *Meyers*, 1 Consist. 415, note.

ties from dissenters. The judge, however, overruled the objection, holding that a person, even when excommunicated by sentence, was not now disabled from suing in the Ecclesiastical Courts. The Privy Council confirmed this sentence (*f*).

But since 53 Geo. 3, c. 127, a party pronounced *contumacious*, and whose *contempt* has been *signified* at a preceding stage of the cause for disobedience to any order of the judge, cannot appear in court at a subsequent period, or prosecute an appeal from proceedings carried on *in pœnam*, until he has been absolved from his contempt, and taken the oath *de parendo juri* (*g*) to his ordinary (*h*).

Outlaw.

An outlaw would have no *persona standi* in these courts.

Minors, imbecile persons, lunatics.

2. All minors may bring suits by their guardian, elected for the purpose by the Ecclesiastical Courts; lunatics by their committee appointed by the Court of Chancery. But the judge cannot compel a father to continue as a party in a suit when his son has become a major during its continuance; if he attempt to do so, he will be liable to an action on the case at common law (*i*).

Married women.

3. Married women might under the old law in certain cases have instituted *alone* a civil suit in the ecclesiastical courts, as in a case of defamation (*j*), or in a legacy bequeathed to the separate use.

Paupers.

4. A person may sue *in formâ pauperis;* but "this is a great privilege of law belonging only to the necessity

(*f*) *Mastin* v. *Escott*, 2 Curt. 692; 4 Moore, P. C. 104; 1 Notes of Cases, 552. See also the case of *Titchmarsh* v. *Chapman*, 3 Notes of Cases, 387.

(*g*) Lynd. De Sent. Excom. c. Decernimus, and p. 266, v. Commodum; and X. 2, 25, 11; X. 5, 39, 40; Decret. l. 2, tit. 25, c. 12; Doujat in Lancel. lib. 4, 319, 343. "Licet a censuris ecclesiæ absolvatur, debet tamen etiam ipse præstare juramentum de parendo mandatis ecclesiæ, sicut ille qui absolutè absolvitur," Decret. l. 5, t. 39, c. 52, Venerabili. "Ubi manifestum est delictum, non conceditur absolutio, nisi previâ cautione de parendo mandatis ecclesiæ," Doujat in Lancel. l. 4, 347. See Fitzherbert, Nat. B. 62; 2 Inst. 189; 8 Co.. 68; and *Re Baines*, 1 Cr. & Phill. 31; 10 L. J., N. S., Cha. 108; *S. C.*, 10 L. J., N. S., Q. B. 34; *nom. Reg.* v. *Baines*, 12 Ad. & Ell. 210 (1841): but if the contempt has not been *signified*, it would seem that it is purged by appearance and payment of costs; see *Herbert* v. *Herbert*, 2 Phillimore, 438, 439, Arnold & Swabey, *arguendo*.

(*h*) Nor could he have been released from an imprisonment until the passing of 3 & 4 Vict. c. 93.

(*i*) *Beaurain* v. *Scott*, 3 Campb. 388.

(*j*) *Anon.*, 3 Salk. 288; *Chamberlane* v. *Hewson*, 5 Mod. 70; *Dominus Gerard* v. *Dominam Gerard*, error, C. B., 1 Raym. 73; *Tarrant* v. *Mawr*, 1 Stra. 756; *Capel* v. *Robarts*, 3 Hagg. 161, in note.

Paupers.

arising from absolute poverty and from the absence of any other mode of obtaining justice; no person is entitled to the gratuitous labours of others who can furnish the means for providing them for himself: besides, it places the adverse party under great disadvantages, it takes away one of the principal checks to vexatious litigation; the legal claim therefore to so great a privilege ought to be clearly made out. It is a complete but not an uncommon misapprehension of the law to suppose that because a person is in insolvent circumstances, and because he can truly swear that he is not worth 5*l.* after all his just debts are paid, that therefore he is entitled to be admitted, or, rather, to proceed, as a pauper; it is *primâ facie* ground to admit him as such, but no more" (*i*). It would seem from the cases cited in this extract from Sir J. Nicholl's judgment, that the *criterion* is, the *income*, and not the *debts*, of the party; for instance, where a person admits an income of 70*l.* per annum, and owes 200*l.* beyond his effects, he will not be admitted to sue as a pauper. A person erroneously admitted as a pauper may be dispaupered (*k*).

Interveners.

5. *Interveners* in a suit are unknown to the common law, but the doctrine of the civil and canon law administered in the admiralty and ecclesiastical courts (*l*), is, "*Tertius intervenire potest pro interesse suo in omni causâ quæ tangit bona aut personam suam*" (*m*). In a matrimonial cause there might have been an intervention (*n*) at any time, even in the appeal; but a person who has no interest cannot be permitted to intervene (*o*). In testamentary causes, it has been said, that "Interveners must take the cause in which they intervene as they find it at the time of such their intervention; hence they can only of right do what they might have done had they been parties in the first instance, or had their intervention occurred in an earlier stage of the cause" (*p*). In cases of incestuous marriages the court allows a very slight degree of interest to annul them (*q*). In a case of divorce, where the alleged marriage is denied to be valid, the court has permitted

(*i*) The whole law on this subject is elaborately discussed in *Lorekin* v. *Edwards*, 1 Phill. 179.

(*k*) *Lait* v. *Bailey*, 2 Roberts. Eccl. Rep. 159; *vide supra*, p. 1224.

(*l*) Clarke's Praxis Admiral. t. 38, 39.

(*m*) Oughton, Ordo Judic. p. 28, tit. xiv.; and see *Pertreis* v. *Tondear*, 1 Consist. 136.

(*n*) *Dalrymple* v. *Dalrymple*, 2 Consist. 137.

(*o*) *Brotherton* v. *Hellier*, 1 Lee, 599.

(*p*) *Clement* v. *Rhodes*, 3 Add. 40, per Sir J. Nicholl.

(*q*) 1 Consist. 188; *Ray* v. *Sherwood*, 1 Curt. 173—193.

third parties who have estates expectant (*inter alia*) upon the issue of such marriage being declared illegitimate, to be *cited to see proceedings* so far as relate to the marriage (*r*); but such parties cannot object to the manner in which the original citation in the cause was executed, nor can an intervener take an objection to the jurisdiction of the court if the principal parties litigant have submitted to it (*s*). The passage on which the law of intervention in appeals is founded appears in the Digest:—"*A sententiâ inter alios dictâ appellari non potest nisi ex justâ causâ, veluti si quis in cohæredum præjudicium se condemnari patitur, vel similem huic causam, quamvis vel sine appellatione tutus est cohæres; item fidejussores pro eo pro quo intervenerunt, igitur et venditoris fidejussor emptore victo appellabit, licet emptor et venditor acquiescant*" (*t*).

SECT. 3.—*Mode of conducting a Suit.*

It may be convenient in this section to give a general sketch of the forms to be observed in the conduct of a suit, both civil and criminal, in the Ecclesiastical Court.

Frame and ends of old system.

The old mode of procedure was framed upon a system which proceeded on written evidence taken before an examiner (*u*), but this has, for all practical purposes, been entirely altered by the statute which introduced *vivâ voce* evidence into the Ecclesiastical Courts (18 & 19 Vict. c. 41), and proceedings have been since conducted in substance as cases at *nisi prius* are conducted; though the names and forms of the pleadings are different, and the power remains of taking evidence before an examiner when necessary.

Citation.

The mode of commencing the suit and bringing the parties before the court is by a process called in the consistorial courts a citation, containing the name of the judge, the plaintiff, and name, residence, and diocese of the defendant; the cause of action, and the time and place of appearance. In the Arches Court this process is called a decree. This citation, in ordinary cases, is prepared and signed by the proctor, and issued under seal

(*r*) *Montague* v. *Montague*, 2 Add. 372.

(*s*) *Donegal* v. *Chichester*, 3 Phill. 596; *Donegal* v. *Donegal*, 3 Phill. 593, 613.

(*t*) See Dig. l. 5, pr. De Appellat. xlix. 1, Marcian; and Voet. l. 5, tit. De Judiciis, ss. 35, 36; and the passages in the Pandects referred to by Mühlenbruch, in his "Delectus Legum," p. 2472; Pars Gen. l. 2, c. v. s. 169.

(*u*) See for a full account of the old practice, Burn, ed. Phillimore, tit. Practice, vol. 3.

Citation.

of the court; but in special cases the facts are alleged in what is termed an act of court, and upon those facts the judge or his surrogate *decrees* the party to be cited, to which in certain cases is added an intimation that if the party does not appear, or, appearing, does not show cause to the contrary, the court will proceed to do as therein set forth. These decrees or citations are signed by the registrar of the court.

First plea—its different names.

The name of the first plea varies according to the description of the cause. In criminal proceedings the first plea is called articles, because it runs in the name of the judge, who *articles* and *objects*. In plenary causes, which are not criminal, the first plea is termed the libel, and runs in the name of the party or his proctor, who *alleges* and *propounds* the facts founding the demand. In testamentary causes the first plea was called an allegation.

This first plea, though more comprehensive (especially in criminal suits), is analogous to a declaration at common law, or a bill in equity. But there is this characteristic difference, that all such pleas are broken into separate positions or *articles*, the facts upon which the party founds his demand being alleged under separate heads according to the subject-matter and the time in which they have occurred. Every *subsequent plea, in all causes*, whether responsive or rejoining, and by whatever party given in, is termed an allegation.

Subsequent pleas.

Advantages incident to this mode of pleading.

Here it should be remarked, that before a plea of any kind, whether articles, libel or allegation, is admitted, it is open to the adverse party to object to its admission, either in the whole or in part; in the whole, when the facts altogether, if taken to be true, will not entitle the party giving the plea to the demand which he makes, or to support the defence which he sets up; in part, if any of the facts pleaded are irrelevant to the matter in issue, or could not be proved by admissible evidence, or are incapable of proof.

These objections are made and argued before the judge, and decided upon by him; and his decision may be appealed from. For the purpose of the argument, all the facts capable of proof are assumed to be true; they are, however, so assumed, merely for the argument, but are not so admitted in the cause; for the party who offers the plea is no less bound afterwards to prove the facts; and the party who objects to the plea is no less at liberty afterwards to contradict the facts. This proceeding is attended with great convenience in abridging the introduction of unnecessary and improper matter, to which parties themselves are generally too much disposed. They are apt to

consider trivial circumstances to be important, and desire them to be inserted in the plea: a desire which neither the honest reluctance of the practitioners, nor the judicious advice of counsel, is always able to counteract: even the authority and vigilance of the court itself cannot altogether prevent redundant pleading, and can only check it by taking it into consideration on the question of costs.

The proceedings just referred to have also the convenience of enabling parties, in many instances, to take the opinion of the court in a very summary way, particularly in amicable suits: if the facts are candidly stated, and the court, upon the plea being objected to, should be of opinion, that if proved, the facts either will or will not support the prayer of the plea; in the one case, if the plea is admitted, the further opposition may be withdrawn; in the other case, if the plea is rejected, the party offering it either abandons the suit, or appeals, in order to take the judgment of a superior tribunal. This course saves the expense and delay consequent upon proving the facts by witnesses, in cases where there exists no doubt of the facts being correctly alleged in pleas, and where the question between the parties is principally or perhaps altogether a question of law arising out of the facts so stated in plea.

Litis contestatio;

The plaintiff, or his proctor who brings in the libel, prays that a day may be assigned for the defendant's or his proctor's answer to it, and on such day assigned, the plaintiff or his proctor, in presence of the defendant or his proctor, requests the answer, the giving of which creates the *litis contestatio* (*v*), which common lawyers call the *issue* (*x*). Such issue may be either, 1, *simple affirmative*, in which case there is of course an end of the suit; or, 2, *simple negative*, consisting of a general denial of the libel; or what may be termed, 3, *qualified affirmative or negative*, in the language of Conset. "When the defendant doth indeed confess the fact, but yet adds some certain qualities or circumstances of this fact, which are silently passed over by the plaintiff, by reason of which omission of the circumstances of the fact it may be said to be different from the fact propounded in the libel; hence,

different kinds of.

(*v*) The origin of the phrase is to be traced to the primitive manners of the Romans. At the opening of the suit the defendant invoked some of the standers by as witnesses. This was called *antestari* or *contestari*. See *Festus de V. S. sub voce* "*Contestari*."

(*x*) Before issue given, a suit is not held to be commenced by the civil or canon law; but from the return of the citation there is a *lis pendens*. See *Sherwood* v. *Ray*, 1 Curteis, 173, 193; 1 Moo. P. C. 365.

though the defendant may not simply deny the fact, yet he may do it indirectly, while he shows the fact to be much otherwise than what is related by the plaintiff" (*y*). In causes of divorce the party used, generally, to answer by confessing the fact of marriage, but otherwise contesting the suit negatively.

Personal answers.

The plaintiff is, in all civil causes, entitled to what are called the personal answers of the defendant on oath, with this exception, that the defendant is not bound to answer any criminal matter, though *civiliter intentata*, as the charge of adultery in a matrimonial suit. In criminal suits he cannot be called upon for answers at all. This stage of the cause corresponds with the plea at common law (*z*), i. e., it is an answer of fact to all and every the positions or articles of the libel (which, we have seen, resembles the declaration).

Designation of witnesses.

Whatever parts of the libel (or allegation, as the case may be) the defendant has not admitted, in his personal answers, the plaintiff proceeds to prove by witnesses. The old practice was as follows: a notice, called a designation, is delivered to the defendants of their names, and the different articles on which it is intended to examine them; he is, therefore, distinctly apprised of the points to which he should address his cross-examination of each witness, as well as the matters which it may be necessary for him to contradict or to explain by counterpleading; the mode of doing this, is to give in a responsive allegation (*a*), which may be attended with the same consequences as the earlier plea, that is to say, objections to its admissibility, answers upon oath, and the examination of witnesses.

Responsive allegation.

Examination of witnesses.

The witnesses are examined secretly, and their depositions taken down by an examiner. Publication of the evidence is prayed by one party, and unless the party has not had time to prepare his interrogatories, or unless he alleges an allegation exceptive to the evidence, publication is decreed by the judge.

Term assigned for proof.

In all cases the court may extend this time on reasonable cause being shown, and its duration must, too, of course, depend on the distance of the abode of the witnesses, the facility of reaching them, &c. Each term assigned is technically called an *assignation*, and the book in which the minutes of the court were kept by the re-

(*y*) See an instance, p. 3, of *Mastin* v. *Escott*, reported by Dr. Curteis, 1841.

(*z*) See Stephen on Pleading, p. 25.

(*a*) This plea is sometimes confounded by inferior Ecclesiastical Courts with the personal answers.

gistrar is called the *assignation book.* The term given for proof is called the *term probatory.* The court may also, on very strong reasons being shown, renew a lapsed term.

Counter-allegation.

A counter-allegation may be given in to the responsive allegation, and is subject to the same incidents and rules as the former. But in a rejoinder to a responsive allegation, the only facts strictly pleadable are those either contradictory to or explanatory of facts pleaded in the allegation to which it rejoins, and those *noviter perventa* to the proponent's knowledge; though the court *may*, under certain circumstances, permit facts to be pleaded which do not come under these descriptions (*b*). Beyond this step the mere pleadings are rarely carried (*c*), but it should seem that the discretion of the judge and the advocate, and the apprehension of costs, rather than any positive rule, prevents further pleading: and here one exception should be mentioned; it is always permitted to give in an allegation of facts "*noviter perventa*" to the knowledge of one of the parties in the suit, it being fully established to the satisfaction of the judge that such facts could not have been earlier known to the party now propounding them. For instance, as has been said, in matrimonial causes it is allowed to plead acts of adultery committed since the institution of the suit, or before, such being shown to be *noviter perventa.* An exceptive allegation might also be given under certain restrictions to the character of witnesses.

Conclusion.

But when the parties in a cause renounce all further allegations, unless exceptive, *the cause is concluded* against them, though it is still within the discretion of the court to allow further pleading by rescinding the conclusion (*d*).

Citation.

Monition.

The instruments adopted by the Ecclesiastical Court for giving effect to its process are, first, *citation* or *decree*, as has been shown (*e*); and, secondly, *monition*, that is to say, granting to the party complaining an order *monishing* the party complained against to obey "under pain of the law and contempt thereof." Thus there may

(*b*) *Dew* v. *Clark*, 2 Add. 102.

(*c*) A fourth allegation was admitted by the judge of the Consistorial Court of London, in *Sarjeant* v. *Sarjeant*, on the ground that it afforded the judge better means of arriving at a just conclusion, June 27th, 1834. For the *exceptio* of the Roman law, see Inst. 4, 13; 1 Dig. 44. 1; for the *replicatio*, 1 Dig. 44, 1, fr. 22; Inst. 4, 14; and 4 Dig. 12, 2, fr. 9; for the *duplicatio*, 1 Inst. 4, 14, fr. 2, 3; 1 Dig. 44, 1. Exceptive allegations have disappeared since the introduction of *vivâ voce* evidence.

(*d*) *Middleton* v. *Middleton*, 2 Hagg. Rep. Suppl. 135; *Addams* v. *Kneebone*, 2 Phill. 124.

(*e*) *Vide supra*, p. 1253.

Monition.

be a monition for personal answers, for bringing in scripts and scrolls, for payment of costs or alimony, to churchwardens to hold a vestry, to a clergyman to reside, &c., &c.

The difference between a citation and a monition seems to be, that the former requires a party to appear, the latter an act to be done.

Compulsory.

Thirdly, *compulsory:* a writ to compel the attendance of a witness to undergo examination.

Certificate.

All writs require a *certificate* of their execution. Such certificate is indorsed on the instrument setting forth the day and place of service on the party, signed by the officer or person who served it. An affidavit is also indorsed to the truth of the certificate.

Writ *de contumace capiendo.*

The last resource of the ecclesiastical courts for the enforcement of their processess, is to obtain a writ "*de contumace capiendo*" or a sequestration.

Process where a decree cannot be personally served before proceeding *in pœnam contumaciæ.*

If there should be no opportunity of effecting a personal service of a citation or decree, proof of the fact is made by affidavit of the officer on returning the citation into court, upon which another decree issues, called a decree *viis et modis.* This decree is served if possible on the person, if not upon the house, the last known place of residence, or the church-door, and by all *ways and means* likely to affect the party with the knowledge of its contents. Such decree is returned into court, with the certificate of the apparitor as to the means which have been taken, and on the return of such citation *viis et modis* (*f*), the court proceeds *in pœnam contumaciæ;* and the proceedings thus necessarily conducted *ex parte* would be conclusive upon the party not appearing (*g*). An unsuccessful attempt was very recently made to enforce upon the Ecclesiastical Court the necessity of applying for a *significavit* against the non-appearing party, instead of proceeding *in pœnam* during his absence; but both the Courts of Queen's Bench and of Chancery refused a prohibition applied for on this amongst other grounds; the lord chancellor remarking, that many courts proceeded to judgments in the absence of parties who were voluntarily absent.

Appearance under protest.

The party cited, to save his contumacy, may appear *under protest,* and may show cause against being cited; for instance, that the court has no jurisdiction in the subject-matter, or that he is not amenable to that jurisdic-

(*f*) In the Arches Court a further decree would issue to see proceedings, and endeavours would be made to serve this upon the party: but this is not thought necessary in the Consistory of London.

(*g*) See *Re Baines,* Cr. & Phill. 31; *Reg.* v. *Baines,* 12 Ad. & Ell. 210.

tion. This preliminary objection is heard upon petition and affidavits, and either the protest is allowed and the defendant dismissed, or the protest is overruled, and the defendant is assigned to *appear absolutely*. Costs, it should be remarked, are usually given against the unsuccessful party. Either party may appeal from the decision on this preliminary point; or the defendant, should the judge decide against him on the question of jurisdiction, may apply to a court of common law for a prohibition. It may be well to remark that a defendant must appear in the Ecclesiastical Court before he can move the Court of Queen's Bench for a prohibition (*h*).

Initiatory process in the Arches.

The initiatory process in the Arches Court is by citation, which is founded on letters of request, or on an appeal, except in suits for legacies, where it formerly had original cognizance, when once the will had been proved in the Prerogative Court. The first plea, as has been said, is termed a Libel in Civil, and Articles in Criminal Suits, not an Allegation, as in the Prerogative Court.

Act on petition.

It seems proper to mention here that a very convenient and summary mode of proceeding, called an act on petition, or an act of court, is often resorted to in these courts for the adjudication of any incidental subject which may arise during or after the progress of a suit: such as the taxation of costs between party and party; or on a preliminary matter, such as a question of domicil; or an appearance under protest; or on the grant of an administration *pendente lite.*

An act on petition is the form of proceeding by which a party may be compelled before the ordinary to take upon him the office of churchwarden, and in which a cause is heard whenever application for a faculty for the alteration or removal of a church, the erection of an organ or monument, &c. is opposed.

Of this nature, too, are proceedings in a cause, which is of rare occurrence, before the master of the faculties, where the issue of a licence for a marriage is opposed, or the creation of a notary public.

Proceedings on an act on petition must be so conducted as not to prejudice the defendant, if the more formal proceedings by plea and proof would have been in the particular case more regular (*i*).

It is competent to either party to what is technically termed *write to the act*, that is, to reply by written statements and affidavits to the statement of the adversary,

(*h*) *Ex parte Law*, 2 Dowl. Rep. 528.

(*i*) *Dease* v. *Kelly*, 2 Roberts. Eccl. Rep. 511.

under of course a liability to costs for unnecessarily protracting the suit. This mode of proceeding is very simple, consisting of statements supported by affidavits, and argued by counsel.

Sect. 4.—*Sentence.*

By canon law.

By the ancient canon law, sentence of suspension or excommunication ought not to be given without a previous admonition: unless the offence is such as in its own nature immediately requires such sentence. In Archbishop Arundel's Register, mention is made of an appeal from a sentence of suspension, as unjust for want of a canonical admonition (*j*).

And every sentence must be in writing; otherwise it deserves not the name of a sentence, and needs not the formality of an appeal to reverse it (*k*).

And the sentence must be pronounced in the presence of both parties; otherwise sentence given in the absence of one of the parties is void (*l*).

A sentence is either *definitive* or *interlocutory.*

Definitive.

A *definitive* sentence is that which puts an end to the suit in controversy, and regards the principal matter in question.

Interlocutory.

An *interlocutory* sentence determines only some incident or emergent matter in the proceeding, as some exception, or the like, but does not affect the principal matter in controversy (*m*).

Final interlocutory decree.

But according to modern practice, frequent use is made in the Arches Court and Prerogative Court of what is termed a *final* interlocutory decree; and the only difference between this and a sentence is, that the one (the sentence) is a decree itself under the hand of the judge making it; and that the other, the interlocutory decree (and which should express that it is to have the force of a written sentence), is merely the statement of the registrar, who is a notary public, that a decree (to such an effect or in such terms) *was made* by the judge. They are both equally effective, and therefore sometimes one is had and sometimes the other.

Place of trial.

The following case is of some importance as to the *place* in which suits must be tried.

A suit proceeded to a sentence in the Commissary Court

(*j*) Gibs. 1046.

(*k*) Ibid. 1047. That is, by the canon law, must be reduced to writing, and then pronounced in the presence of the parties by the judge standing. C. 2, 1, 8; C. 3, 9, 11; Inst. J. C. 3, 15. It may be pleaded briefly in the temporal courts, without showing the manner thereof and of their proceedings. Free. 84; 2 Bulstr. 182.

(*l*) Gibs. 1047.

(*m*) Ayl. Par. 487.

of Surrey, in which certain witnesses had been produced, sworn, and examined, in the diocese of London, without *express* consent given to time and place; on appeal objection was taken to the depositions of such witnesses. It was ruled that the objection could not be sustained, especially by reason that the appellant had acquiesced by his acts in what had been done, and that, as the facts were within his knowledge in the court below, and no objection taken, it was too late to object to the Court of Appeal (*n*).

Sect. 5.—*Execution of Sentence.*

When there is no appeal.

The *execution of the sentence*, in case there be no appeal interposed, is either completed by the act of the court itself, or remains to be completed by the act of the party, in which cases *execution* is enforced by the compulsory process of *contumacy*, *significavit* and *attachment* (*o*).

Writ *de contumace capiendo.*

The act of 53 Geo. 3, c. 127, abolished for the future the power of excommunicating, as a means of enforcing any civil process; and in lieu thereof empowered the ecclesiastical judge to pronounce the disobedient party "contumacious and in contempt," and within ten days "to signify" the same to the Court of Chancery, which was then directed to grant a writ *de contumace capiendo*, substituted by this act for the writ *de excommunicato capiendo* of 5 Eliz. c. 23. 2 & 3 Will. 4, c. 93, greatly enlarged the power of the Ecclesiastical Courts to enforce their process, extending it beyond the limits of their usual jurisdictions, and rendering it available against *privileged* persons, by enabling the Court of Chancery to sequester the real and personal estate of a privileged contumacious party for the payment of money ordered by the Ecclesiastical Court. Lastly, 3 & 4 Vict. c. 93, empowered the Ecclesiastical Courts to order, under certain circumstances, *the release* of persons imprisoned under a writ *de contumace capiendo*. This statute enacts as follows:—

Privileged persons.

When Ecclesiastical Court may order the release of parties imprisoned.

Court may order discharge of persons in custody under writ *de contumace capiendo.*

"After the passing of this act it shall be lawful for the judicial committee of her Majesty's most honourable privy council, or the judge of any ecclesiastical court, if it shall seem meet to the said judicial committee or judge, to make an order upon the gaoler, sheriff, or other officer in whose custody any party is or may be hereafter, under any writ *de contumace capiendo* already issued or hereafter to be issued, in consequence of any proceedings before the

(*n*) *Parkes* v. *Parkes*, 2 Roberts. Ecc. Rep. 518 (1852).

(*o*) *Vide infra*, Chap. X. Sect. 8, on Excommunication.

said judicial committee or the judge of the said ecclesiastical court, for discharging such party out of custody; and such sheriff, gaoler, or other officer, shall on receipt of the said order forthwith discharge such party: provided always, that no such order shall be made by the said judicial committee or judge without the consent of the other party or parties to the suit: provided always, that in cases of subtraction of church rates for an amount not exceeding five pounds where the party in contempt has suffered imprisonment for six months and upwards, the consent of the other parties to the suit shall not be necessary to enable the judge to discharge such party, so soon as the costs lawfully incurred by reason of the custody and contempt of such party shall have been discharged, and the sum for which he may have been cited into the ecclesiastical court shall have been paid into the registry of the said court, there to abide the result of the suit; and the party so discharged shall be released from all further observance of justice in the said suit"(*p*).

Proviso.

Form of order.

Sect. 2. "Any such order may be in the form given in the schedule annexed to this act."

SCHEDULE.

Warrant of Discharge.

"To the sheriff [gaoler, *or* keeper, *as the case may be*] of —— in the county of ——.

"Forasmuch as good cause hath been shown to us —— [*or* me] [*here insert the description of the judicial committee or judge, as the case may be,*] wherefore A. B. of ——, now in your custody, as it is said, under a writ *de contumace capiendo*, issued out of [*here insert the description of the court out of which the writ issued*], in a suit in which [*here insert the description of the parties to the suit*], should be discharged from custody under the said writ: We [*or* I], therefore, with the consent of the said [*here insert the description of the parties consenting*], command you, on behalf of our sovereign lady the Queen, that if the said A. B. do remain in your custody for the said cause and no other, you forbear to detain him [*or* her] any longer, but that you deliver him [*or* her] thence, and suffer him [*or* her] to go at large, for which this shall be your sufficient warrant.

"Given under the seal of —— at —— the —— day of ——, in the year of our Lord ——.

"A. B. registrar, *or* deputy registrar,
or, as the case may be."

(*p*) See *Baker* v. *Thorogood*, 2 Curt. 635.

The judicial committee of the privy council have special powers of enforcing their decrees (q).

Power of privy council.

Form of Significavit.

To his most excellent Majesty and our Sovereign Lord William the Fourth, by the Grace of God of the United Kingdom of Great Britain and Ireland King, Defender of the Faith. William, by Divine Providence Archbishop of Canterbury, Primate of all England and Metropolitan. Health in him by whom kings and princes rule and govern. We hereby notify and signify unto your Majesty, That one J. T., of ——, in the county of ——, hath been duly pronounced guilty of manifest contumacy and contempt of the law and jurisdiction ecclesiastical, in not appearing before —— [or "*in not obeying the lawful commands of ——*,"] [or "*in having committed a contempt in the face of the court of ——, lawfully authorized by ——*,"] *on a day and hour now long past, in a certain cause of proving in solemn form of law, by good and sufficient witnesses, the last will and testament of A. B., late of L.*

We therefore humbly implore and entreat your said most excellent Majesty would vouchsafe to command the body of the said J. T. to be taken and imprisoned for such contumacy and contempt. Given under the seal of our court the —— day of ——.

C. D.
J. J. } *Deputy Registers.*
W. F. G.

Form of Writ De Contumace capiendo.

William, &c. To the sheriff of ——, greeting. The —— hath signified to us that J. T. of ——, in your county of ——, is manifestly contumacious and contemns the jurisdiction and authority of ——, nor will he submit to the ecclesiastical jurisdiction: but forasmuch as the royal power ought not to be wanting to enforce such jurisdiction, We command you that you attach the said J. T. by his body, until he shall have made satisfaction for the said contempt; and how you shall execute this our precept notify unto ——, and in nowise omit this; and have you there this writ. Witness ourself at Westminster, the —— day of ——, in the —— year of our reign.

Form of Writ of Deliverance.

Whereas J. T., of ——, in your county of ——, whom lately at the denouncing of —— for contumacy, and by

(q) See 3 & 4 Will. 4, c. 41, s. 28; 6 & 7 Vict. c. 38, ss. 6, 7; 7 & 8 Vict. c. 69, s. 12. *Vide infra*, p. 1274.

writ issued thereupon you attached by his body, until he should have made satisfaction for the contempt. Now he having submitted himself, and satisfied the said contempt, We hereby empower and command you, that without delay you cause the said J. T. to be delivered out of the prison in which he is so detained, if upon that occasion and no other he shall be detained therein. Given under the seal of our —— of ——, this —— day of ——, in the year of our Lord one thousand eight hundred and thirty-five.

C. D.
J. J. } *Deputy Registers.*
W. F. G.

Sect. 6.—*Appeal* (*r*).

The description and origin of appeal.

An appeal is a provocation from an inferior to a superior judge, whereby the jurisdiction of the inferior judge is for a while suspended as to the cause from which such appeal is made, the cognizance of it having been transferred to the superior judge. It is laid down in the books of civil and canon law that an appeal, as well as a judicial process, derives its origin from the law of nations.

Very ancient usage, it would seem, invented and introduced this right in order that no man might be injured by the injustice or unskilfulness of his judge, but that every person *judicially* aggrieved, whether principal litigant or not, provided it were his interest to have the sentence from which he appealed reversed, should be entitled to this remedy. Appeals have been therefore much favoured by all systems of jurisprudence, and the right of instituting them universally considered as sacred. Durandus expressly says that the right should be so esteemed by the judge appealed from ("*reverenter ei deferat*"), and that even in doubtful cases he should receive and admit an appeal. The best authorities are of opinion, that during the Saxon dominion in this kingdom there existed a court of appeal from the *rigour* of the law, and from *false judgments*, which might have passed in the Hundred Courts before the establishment of the courts in Westminster Hall in the reign of Edward I. This court of appeal in cases of equity was then the king in his court of the lords, as appears by the laws of Edgar, Canute, and Edward the

(*r*) Stillingfleet on the Foundation of Ecclesiastical Jurisdiction, iii. 752; Ayliffe's Parerg. Jur. Can. Anglic. (tit. Appeal); Durandus. Speculum, lib. ii. partic. 3; De Appell. cap. "Nunc dicemus;" Bingham's Eccles. Antiq. 6, 2, c. 16. s. 25; Corp. Jur. Can. x. 2. 28. 59; 2, 2, 6, 30; Dig. 49, 1, 1.

Confessor. After the Norman Conquest, there were two supreme courts: the Exchequer Court, which William I. transplanted from Normandy to adjudicate on all matters relating to the royal revenue; the Supreme Court of Justice, "*Curia Regis*," where all greater causes and appeals were heard. Here the lord chancellor attended the king's person as well as the judges of the King's Bench (*s*); chiefly, it appears, for the direction and adjudication of appealed cases, which the division of the courts in Westminster Hall ultimately transferred to the House of Lords, as successors to the *Curia Regis*. "For a court of appeal somewhere is certainly a part of our constitution." In the Courts of Chancery and the Ecclesiastical Courts of this country, paupers have been allowed the right of appeal in recent cases (*t*).

Appeals granted to the clergy by the early practice of the church.

As to the early practice of the church upon this point with respect to its ordained ministers, it seems to have permitted a presbyter or deacon, excommunicated by his own bishop, to appeal first to the metropolitan, from him to the provincial synod, and from that to the patriarch, from whom there lay no appeal except to a general council (*u*).

Origin of appeals to Rome.

There were no appeals to the pope out of England before the reign of King Stephen, when they were introduced by Henry de Blois, bishop of Winchester, the pope's legate. Not but attempts had been made before that time to carry appeals to Rome, which were vigorously withstood by the nation, as appears by the complaint of the pope in the reign of Henry I. that the king would suffer no appeals to be made to him; and before that, in the reign of William Rufus, the bishops and barons told Anselm (who was attempting it) that it was a thing unheard of for any one to go to Rome (that is, by way of appeal), without the king's leave. And though this point was yielded in the reign of King Stephen, yet his successor Henry II. resumed and maintained it, as appears by the constitutions of Clarendon, which provide for the course of appeals within the realm, so as that further process be not made, without the king's assent (*v*). And afterwards, in the parliament of Northampton, the constitutions of Clarendon were

(*s*) Artic. super Chart. c. 5, 28, ed. 1.

(*t*) *Blond* v. *Lamb*, 2 J. & W. 402; *Grindall* v. *Grindall*, 1 Hagg. Eccl. 1.

(*u*) Concil. Sardic. Can. 14.

(*v*) This assent might be withheld and the appeals prohibited, as we find by a writ in the Register, fo. 89, *De securitate inveniendâ quod se non divertat aliquis versus partes exteras sine licentia regis.*

Origin of appeals to Rome.

renewed; and in the reigns of Richard I. and King John, we find new complaints of the little regard paid to those appeals; for which also divers persons were imprisoned in the reigns of Edward I., Edward II. and Edward III. (*v*).

Nevertheless, appeals to Rome still obtained until the reign of king Henry VIII. when they were finally abolished by 24 Hen. 8, c. 12, and 25 Hen. 8, c. 19, here following:

Appeals to Rome abolished.

By 24 Hen. 8, c. 12, ss. 1, 2, "All causes testamentary, causes of matrimony, and divorces, rights of tithes, oblations, and obventions, shall be finally determined within the king's jurisdiction and authority, and not elsewhere: any foreign appeals to the see of Rome, or to any other foreign courts or potentates, to the let or impediment thereof in any wise notwithstanding. And if any person shall procure from the see of Rome or any other foreign court any appeal in any the causes aforesaid, or execute any process concerning the same, he shall incur a *præmunire*."

And by 25 Hen. 8, c. 19, s. 4, "No manner of appeals shall be had out of this realm to the bishop or see of Rome, in any causes or matters whatsoever; but all manner of appeals, of what nature or condition soever they be, shall be made and had after such form and condition, as is limited for appeals in causes of matrimony, tithes, oblations, and obventions, by a statute made since the beginning of this parliament. And if any person shall sue any appeal to the bishop or see of Rome, or procure or execute any process from thence; he, his aiders, counsellors, and abettors, shall incur a *præmunire*."

Appeals to the several courts respectively within this realm.

And by 24 Hen. 8, c. 12, s. 3, "Appeals within this realm shall be in this form, and not otherwise; first, from the archdeacon or his official, if the matter or cause be there begun, to the bishop."

"If it be commenced before the bishop or his commissary, then from the bishop or his commissary, within fifteen days next ensuing the judgment or sentence given, to the archbishop, and there to be definitively and finally ordered, decreed, and adjudged, without any other appeal whatsoever."

"If the matter, for any the causes aforesaid, be commenced before the archdeacon of any archbishop, or his commissary, then the party grieved may take his appeal, within fifteen days next after judgment or sentence given, to the Court of the Arches, or audience of the same archbishop; and from the said Court of the Arches, or audi-

(*v*) Gibs. 83; 4 Inst. 341.

ence, within fifteen days then next ensuing after judgment or sentence there given, to the archbishop of the same province, there to be finally determined without any other appeal."

"If the matter be commenced, for any the causes aforesaid, before the archbishop, then the same shall be before him definitively determined, without any other appeal, provocation, or any other foreign process out of this realm to be sued to the let or derogation of the said judgment, sentence or decree, otherwise than is by this act limited; saving always the prerogative of the archbishop and church of Canterbury, in all the foresaid causes of appeals, to him and his successors, to be sued within this realm, in such and like wise as they have been accustomed and used to have heretofore" (*w*).

Appeals within this Realm shall be in this Form.]—Which is to be done by demanding letters missive, called *apostoli*, from the judge *a quo* to the judge *ad quem* (*x*).

From arch-deacon's court.

From the Archdeacon or his Official to the Bishop.]—And not *per saltum* to the archbishop: and this is agreeable to the rule of the ancient canon law (*y*). The canon law, however, allowed an appeal to the pope, *omisso medio* (*z*), and to his legates. Both an appellate and an original jurisdiction are said to belong to the Archbishop of Canterbury *legationis jure* (*a*). But this custom of appealing to the pope is said not to have obtained in France, where if the bishops in council doubted of the ecclesiastical law, the appeal lay to the metropolitan in council, and from him to the primate, whose decision was final (*b*). The rule of the civil law is that appeals shall be made *gradatim*, and not *per saltum* (*c*).

As to beginning suits in archdeacon's court.

In the case of *Robinson* v. *Godsalve*, in 8 Will. 3, it was resolved by the court, that where an archdeacon has a *peculiar* jurisdiction, he is totally exempt from the power of the bishop, and the bishop cannot enter there and hold court. And in such case, if the party who lives in the peculiar be sued in the bishop's court, a prohibition shall be granted, for the statute intends that no suit shall be *per saltum*. But if the archdeacon has not a peculiar, then the bishop and he have concurrent jurisdiction, and

(*w*) These acts were repealed by 1 & 2 Phil. & Mar. c. 8, but revived by 1 Eliz. c. 1.

(*x*) Gibs. 1035.

(*y*) Gibs. 1036; X. 2, 28, 66.

(*z*) C. 2, Q. 6, c. 4, 5, 6, *et seq.*; X. 2, 28, 7.

(*a*) X. 1, 30, 1.

(*b*) C. 6, Q. 4, c. 3.

(*c*) See Huber ad Pand. 49, 3; Dig. 49, 1, 21. And Bockelman, De Differentiis Jur. Civ. et Can. c. 79, *in notis*.

As to suits in archdeacon's court.

the party may commence his suit either in the archdeacon's court or the bishop's; and if he commence in the bishop's court, no prohibition shall be granted; for if it should, it would confine the bishop's court to determine nothing but appeals, and render it incapable of having any causes originally commenced there (*c*).

Appeals from bishop's court.

From the Bishop.]—This is to be extended to all who have episcopal jurisdiction: as in the case of *Johnson* v. *Ley*, in 7 Will. 3, where the Dean of Salisbury, in one of his peculiars, made letters of request to the Dean of the Arches; it was objected, in order to obtain a prohibition, that this was *per saltum*, and that he ought to have made request to the Bishop of Salisbury, his immediate ordinary: but the plea was not allowed, because this was not (as in the case of an archidiaconal peculiar) subject to the jurisdiction of the ordinary, but immediately to the archbishop (*d*).

From the Bishop or his Commissary, to the Archbishop.]—And not from the bishop's official or commissary, to the bishop himself; for the reason given in the canon law, namely, lest (having both but one auditory) the appeal should seem to be made from the same person to the same person (*e*).

Appeals from archbishop's court.

By 25 Hen. 8, c. 19, s. 4, "For lack of justice in the archbishop's courts, the party may appeal to the king in chancery; and upon every such appeal, a commission shall be directed under the great seal to such persons as shall be named by the king, like as in case of appeal from the admiral's court, to hear and determine such appeals; whose sentence shall be definitive: and no further appeals to be had from the said commissioners."

For lack of Justice in the Archbishops' Courts.]—Such appeal lies not from a local visitor; nor in any cause of a *temporal* nature; nor did it lie from the *high commission court* when in being, because they themselves were the king's delegates, as acting by immediate commission from him, and there was no remedy against their sentences but a new commission to others, grantable in virtue of the royal prerogative and independent from this statute (*f*).

The Party grieved may appeal to the King in Chancery.]—And no commission of delegates, in any case of weight, used to be awarded, but upon petition preferred to the Lord Chancellor, who named the commissioners himself, to the end they might be persons of convenient quality,

(*c*) Ld. Raym. 123.
(*d*) Gibs. 1035.; Skin. 589.
(*e*) Gibs. 1036; 6°, 1, 4, 2, and 2. 15, 3.
(*f*) Wats. c. 6.

having regard to the weight of the cause and dignity of the court from which the appeal was (*g*).

And sometimes for a supply of justice, on petition to the king, a special commission of delegacy issued, to begin the suit, and proceed originally in the cause; as where the archbishop himself was interested, or the like (*h*).

A Commission shall be directed under the Great Seal, to such Persons as shall be named by the King.]—These commissioners were usually some of the lords spiritual and temporal or both, and commonly one or more of the twelve judges, and one or more doctors of the civil law (*i*).

And they were commonly called *delegates* (according to the language of the civil and canon law), on account of the special commission or delegation they received from the king, for the hearing and determining every particular cause. Agreeably whereunto, their proceedings were according to the rules of the civil and ecclesiastical laws; and on that account it has been particularly adjudged, that a suit there did not abate by the death of the parties: this being the course in the ecclesiastical courts. Also prohibitions went to them, as to an ecclesiastical court. But in the case of *Stephenson* v. *Wood*, in 10 Jac. 1 (*k*), the better opinion of the court was, that they could not grant letters of administration (*l*).

Whose Sentence shall be definitive.]—In the case of *Saul* v. *Wilson*, in 1689; by the lords commissioners: There lies no appeal from a sentence in a court of delegates; for they cannot have any original jurisdiction, because it is a matter grounded upon an act of parliament, and the act gives them none (*m*).

Commission of review.

But on a petition to the king in council, a commission of review might be granted under the great seal, appointing new judges, or adding more to the former judges, to revise, review, and rehear the cause (*n*).

And hereupon Lord Coke observes, that albeit these statutes do upon certain appeals make the sentence definitive as to any appeal, and that no further appeal should be had; yet the king after such a definitive sentence, as supreme head, may grant a commission of review, for two causes: 1. For that it is not restrained by the statute. 2. For that after a definitive sentence, the pope as supreme head by the canon law used to grant a commission *ad revidendum;* and such authority as the pope

(*g*) Bacon's Tracts, 294.
(*h*) 1 Oughton's Ordo Judiciorum, 437.
(*i*) Floy. 20.
(*k*) 2 Buls. 2.
(*l*) Gibs. 1037.
(*m*) 2 Vern. 118.
(*n*) 1 Ought. 437.

Commission of review.

had, claiming as supreme head, of right belongs to the crown, and is annexed thereunto by the statutes 26 Hen. 8, c. 1, and 1 Eliz. c. 1 (*o*). And so it was resolved in the King's Bench, in 39 Eliz., where the case was, that sentence being given in an ecclesiastical cause in the country, the party grieved appealed according to the act of 24 Hen. 8, c. 12, to the archbishop, before whom the first sentence was affirmed. Whereupon, according to the statute of 25 Hen. 8, c. 19, he appealed to the delegates: before whom both the former sentences were repealed and made void by definitive sentence. And thereupon the queen, as supreme head, granted a commission of review, *ad revidendum* the sentence of the delegates. And upon this matter a prohibition was prayed in the King's Bench, pretending that the commission of review was against law, for that the sentence before the delegates was definitive by the statute of 25 Hen. 8, c. 19. But upon mature deliberation and debate the prohibition was denied: for that the commission for the causes abovesaid was resolved to be lawfully granted. In this case Coke says, he being then the queen's attorney, was of counsel to maintain the queen's power. And precedents were cited in this court, in *Michelot's case*, 29 Eliz., and in *Goodman's case*, and in *Huet's case*, in the same year (*p*).

But a commission of review was matter of discretion, and not of right: and if it were a hard case, the chancellor would advise the crown not to grant it (*q*).

In the commission of review, there was sometimes a clause to admit other allegations and new matter, and to take proofs thereupon as well on the one part as on the other (*r*).

Appeal to the convocation, where the king is party.

By 24 Hen. 8, c. 12, s. 4, "If any matter, for any the causes specified in the said statute, shall come in contention in any of the aforesaid courts which shall touch the king, the party grieved may appeal from any of the courts of this realm to the spiritual prelates, and others abbots and priors of the upper house, assembled and convocate by the king's writs in the convocation being, or next ensuing, so that such appeal be within fifteen days after sentence given; and the same to be there finally deter-

(*o*) See this point much discussed in the case of *Poole* v. *The Bishop of London*, 14 Moore, P.C. 262; 7 Jur., N. S. 347.

(*p*) 4 Inst. 341.

(*q*) *Franklin's case*, 2 P. Will. 299; *Engleton* v. *Kingston*, 8 Ves. 438. See *Mathews* v. *Warner*, 4 Ves. 186. In *Henshaw* v. *Atkinson*, three commissions of adjuncts were granted. See also Sir G. Lee's Eccl. Rep., vol. i. pp. 191, 239 to 241. See *Ingram* v. *Wyatt*, 1 Hagg. Eccl. 38.

(*r*) 1 Ought. 437.

mined." It has been however decided that this section is no longer in force (*s*).

By 2 & 3 Will. 4, c. 92, and 3 & 4 Will. 4, c. 41, all the powers and jurisdiction of appeal were transferred from the Court of Delegates to a judicial committee of the privy council. It was enacted by the former act, that no commission of review should hereafter be granted (*t*); and by the latter, the constitution and powers of the new court are as follows:—

No commission of review to be hereafter granted.

Sect. 1. "The president for the time being of his Majesty's privy council, the lord high chancellor of Great Britain for the time being, and such of the members of his Majesty's privy council as shall from time to time hold any of the offices following, that is to say, the office of lord keeper or first lord commissioner of the great seal of Great Britain, lord chief justice or judge of the Court of King's Bench, master of the rolls, vice-chancellor of England, lord chief justice or judge of the Court of Common Pleas, lord chief baron or baron of the Court of Exchequer, judge of the Prerogative Court of the lord archbishop of Canterbury, judge of the High Court of Admiralty, and chief judge of the Court in Bankruptcy, and also all persons members of his Majesty's privy council who shall have been president thereof or held the office of lord chancellor of Great Britain, or shall have held any of the other offices hereinbefore mentioned, shall form a committee of his Majesty's said privy council, and shall be styled 'The Judicial Committee of the Privy Council:' provided nevertheless, that it shall be lawful for his Majesty from time to time, as and when he shall think fit, by his sign manual, to appoint any two other persons, being privy councillors, to be members of the said committee."

Certain persons to form a committee, to be styled "The Judicial Committee of the Privy Council."

Sect. 3. "All appeals or complaints in the nature of appeals whatever, which, either by virtue of this act, or of any law, statute or custom, may be brought before his Majesty or his Majesty in council from or in respect of the determination, sentence, rule or order of any court, judge or judicial officer, and all such appeals as are now pending and unheard, shall from and after the passing of this act be referred by his Majesty to the said judicial committee of his privy council, and that such appeals, causes and matters shall be heard by the said judicial committee, and a report or recommendation thereon shall be made to his

All appeals from sentence of any judge, &c. to be referred by his Majesty to the committee, to report thereon.

(*s*) *Re Gorham*, 5 Ex. 630; 15 Q. B. 52; 10 C. B. 102; 14 Jur. 480, 522, 876.

(*t*) But the Judicial Committee may allow a *rehearing*. *Hebbert* v. *Purchas*, L. R., 3 P. C. 664.

Majesty in council for his decision thereon as heretofore, in the same manner and form as has been heretofore the custom with respect to matters referred by his Majesty to the whole of his privy council or a committee thereof (the nature of such report or recommendation being always stated in open court).

In case the king directs the attendance of any judge, a member of the committee, arrangements to be made by the other judges of the court.

Sect. 6. "In case his Majesty shall be pleased, by directions under his sign manual, to require the attendance at the said committee for the purposes of this act, of any member or members of the said privy council, who shall be a judge or judges of the Court of King's Bench, or of the Court of Common Pleas, or of the Court of Exchequer, such arrangements for dispensing with the attendance of such judge or judges upon his or their ordinary duties during the time of such attendance at the privy council as aforesaid, shall be made by the judges of the court or courts to which such judge or judges shall belong respectively, in regard to the business of the court, and by the judges of the said three courts, or by any eight or more of such judges, including the chiefs of the several courts, in regard to all other duties, as may be necessary and consistent with the public service.

Evidence may be taken *viva voce*, or upon written depositions.

Sect. 7. "It shall be lawful for the said judicial committee, in any matter which shall be referred to such committee, to examine witnesses by word of mouth (and either before or after examination by deposition), or to direct that the depositions of any witness shall be taken in writing by the registrar of the said privy council, to be appointed by his Majesty as hereinafter mentioned, or by such other person or persons, and in such manner, order and course as his Majesty in council or the said judicial committee shall appoint and direct; and that the said registrar and such other person or persons so to be appointed, shall have the same powers as are now possessed by an examiner of the High Court of Chancery or of any court ecclesiastical.

Committee may order any particular witnesses to be examined, and as to any particular facts, and may remit causes for rehearing.

Sect. 8. "In any matter which shall come before the said judicial committee, it shall be lawful for the said committee to direct that such witnesses shall be examined or re-examined, and as to such facts as to the said committee shall seem fit, notwithstanding any such witness may not have been examined, or no evidence may have been given on any such facts in a previous stage of the matter; and it shall also be lawful for his Majesty in council, on the recommendation of the said committee, upon any appeal, to remit the matter which shall be the subject of such appeal to the court from the decision of which such appeal shall have been made, and at the same time to direct that such court shall rehear such matter, in such form, and

either generally or upon certain points only, and upon such rehearing take such additional evidence, though before rejected, or reject such evidence before admitted, as his Majesty in council shall direct; and further, on any such remitting or otherwise, it shall be lawful for his Majesty in council to direct that one or more feigned issue or issues shall be tried in any court in any of his Majesty's dominions abroad, for any purpose for which such issue or issues shall to his Majesty in council seem proper."

By sects. 10—13, the judicial committee may direct an issue to try any fact, may in certain cases direct depositions to be read at the trial of the issue, may make such orders as to the admission of evidence as are made by the Court of Chancery, and may direct new trials.

Costs to be in the discretion of the committee.

Sect. 15. "The costs incurred in the prosecution of any appeal or matter referred to the said judicial committee, and of such issues as the same committee shall under this act direct, shall be paid by such party or parties, person or persons, and be taxed by the aforesaid registrar, or such other person or persons, to be appointed by his Majesty in council or the said judicial committee, and in such manner as the said committee shall direct."

Decrees to be enrolled.

Sect. 16. "The orders or decrees of his Majesty in council made, in pursuance of any recommendation of the said judicial committee, in any matter of appeal from the judgment or order of any court or judge, shall be enrolled, for safe custody, in such manner, and the same may be inspected and copies thereof taken under such regulations as his Majesty in council shall direct."

By sect. 17, they may refer matters to the registrar in the same manner as matters used by the Court of Chancery to be referred to a master; and by sect. 18, the crown may from time to time appoint a registrar.

Attendance of witnesses and production of papers, &c. may be compelled by *subpœna*.

Sect. 19. "It shall be lawful for the president for the time being of the said privy council, to require the attendance of any witnesses, and the production of any deeds, evidences or writings, by writ to be issued by such president in such and the same form, or as nearly as may be, as that in which a writ of *subpœna ad testificandum* or of *subpœna duces tecum* is now issued by his Majesty's Court of King's Bench at Westminster; and that every person disobeying any such writ so to be issued by the said president, shall be considered as in contempt of the said judicial committee, and shall also be liable to such and the same penalties and consequences as if such writ had issued out of the said Court of King's Bench, and may be sued for such penalties in the said court."

Time of appealing.

Sect. 20. "All appeals to his Majesty in council shall be made within such times respectively within which the same may now be made, where such time shall be fixed by any law or usage, and where no such law or usage shall exist, then within such time as shall be ordered by his Majesty in council; and that, subject to any right subsisting under any charter or constitution of any colony or plantation, it shall be lawful for his Majesty in council to alter any usage as to the time of making appeals, and to make any order respecting the time of appealing to his Majesty in council" (*t*).

Suspension of the sentence during the appeal.

During the appeal, the sentence given by the inferior court or judge is suspended.

Thus, if a church be voidable by deprivation, and the ecclesiastical judge has actually pronounced a sentence of deprivation against the incumbent; yet if the person deprived makes his appeal, the church is not actually void, so long as the appeal depends; and if the sentence of deprivation upon the appeal be declared void, the clerk is perfect incumbent as before, without any new institution (*u*).

Inhibition.

And pending the appeal it is usual, at the instance of the appellant, for the superior court to grant an inhibition to stay the execution of the sentence in the inferior court until the appeal shall be determined.

An inhibition is a writ to forbid a judge from farther proceeding in a cause depending before him. Inhibitions most commonly issue from the higher court to the inferior on an appeal; but there are likewise inhibitions on visitations (*v*).

Concerning which, by Can. 96, it is ordained "that no inhibition shall be granted out of any court belonging to the archbishop, at the instance of any party, unless it be subscribed by an advocate practising in the said court. And the like course shall be used, in granting forth any inhibition at the instance of any party, by the bishop or his chancellor against the archdeacon, or any other person exercising ecclesiastical jurisdiction. And if in the court or consistory of any bishop there be no advocate, then shall the subscription of a proctor practising in the same court be held sufficient."

(*t*) The powers of the judicial committee are further extended by 6 & 7 Vict. c. 38, 7 & 8 Vict. c. 69, and 14 & 15 Vict. c. 83. *Vide Martin* v. *Mackonochie*, L. R., 3 P. C. 420; 7 Moo., N. S. 239. Refer also to Practice of Judicial Committee, by Macpherson, ch. x., and 34 & 35 Vict. c. 91, giving power to appoint paid judges; *et vide post*, in Part IV. Chap. VIII., 3 & 4 Vict. c. 86, ss. 15, 16.

(*u*) Wats. c. 6; Dy. 240, B; 6 Rep. 18.

(*v*) Terms of the Law.

And by Can. 97, it is further ordered and decreed "that henceforward no inhibition be granted by occasion of any interlocutory decree, or in any cause of correction, except under the form aforesaid. And moreover, that before the going out of any such inhibition, the appeal itself, or a copy thereof (avouched by oath to be just and true), be exhibited to the judge or his lawful surrogate, whereby he may be lawfully informed, both of the quality of the crime and of the cause of the grievance, before the granting forth of the said inhibition. And every appellant, or his lawful proctor, shall before the obtaining of any such inhibition, show and exhibit to the judge or his surrogate in writing, a true copy of those acts wherewith he complaineth himself to be aggrieved, and from which he appealeth; or shall take a corporal oath, that he hath performed his diligence and true endeavour for the obtaining of the same, and could not obtain it at the hands of the register in the country, or his deputy, tendering him his fee. And if any judge or register shall either procure or permit any inhibition to be sealed, so as is said, contrary to the form and limitation above specified; let him be suspended from the execution of his office for the space of three months; and if any proctor, or other person whatsoever by his appointment, shall offend in any of the premisses, either by making or sending out any inhibition, contrary to the tenor of the said premisses; let him be removed from the exercise of his office for the space of a whole year, without hope of release or restoring."

An appeal may be what is technically called *perempted* by certain acts done by the appellant or acquiesced in by him after the sentence complained of has been delivered, *e.g.* the receipt of costs; but courts are not now disposed to countenance this doctrine unless the act which perempts be of a decided character (x).

When an inhibition must precede an appeal.

If an appeal be interposed from a grievance inflicted, or a definitive or interlocutory sentence pronounced by an inferior judge, an inhibition is first to be requested from the judge to whom it is appealed; this inhibition usually contains a citation for the party who obtains the sentence, or at whose petition the grievance was imposed (called the party appellate), to answer in a cause of appeal; and, by virtue of this inhibition, the judge from whom it is appealed, his register, and the party appellate, are to be inhibited, that they proceed not further to the execution of the sentence pronounced against the appellant, while this

Its contents.

(x) *Brown* v. *Davenport*, 11 Moo. P. C. 297 (1857).

appeal depends, nor do any thing to his prejudice; and this inhibition is to be certified to the judge to whom it is appealed, with a certificate thereupon, mentioning what day the party and judge were inhibited, and on what day the party appellate was cited to answer in this cause of appeal. There is also issued a monition for the transmission of the process in the court below, which is a separate instrument. The inhibition contains the substance of what is subsequently set forth in the libel of appeal, which is called, the *præsertim* of the appeal. The court, it should be observed, is not legally obliged to defer to an appeal till an inhibition is served; nor is there any distinction whether all the acts be done on the day on which the appeal is asserted, or some on a subsequent day. And when the court has overruled objections to the admission of an allegation, it has admitted the allegation on the following court day, notwithstanding an appeal had in the *interim* been inserted (*y*). The general inclination of the court is to defer to the appeal; but it will not do so where the delay may defeat the ends of justice (*z*). It has been holden that the 97th canon inferred a discretion in the judge to grant or refuse his inhibition (*a*).

Monition for transmission of process.

Effect of inhibition.

The libel of appeal ought to agree with the inhibition (*b*).

Attentat.

An *attentat*, in the language of the civil and canon laws, is anything whatsoever wrongfully innovated or attempted in the suit by the judge *à quo*, pending an appeal; but steps taken by the judge *à quo* on the same court day, but after an appeal entered, and subsequent thereto, but prior to the service of the inhibition (the appellant not being *founded* in his first appeal), are not holden to constitute an *attentat* (*c*).

All the several acts of one court day constitute, with reference to *attentats*, but one act, notwithstanding an appeal intermediate between those acts (*d*).

Appeals: 1. Judicial. 2. Extra-judicial.

Appeals, as laid down in the books, are said to be of two kinds, that is to say, they are judicial or extra-judicial; the first from the sentence, the last from the acts and the extra-judicial decrees. The judicial appeal is made from the sentence of the judge, which is either definitive or interlocutory. The extra-judicial appeal may be interposed upon such *grievances* as any one may suffer, either

(*y*) *Middleton* v. *Middleton*, 2 Hagg. 141, Suppl. *in notis*.

(*z*) See last case, and *Chichester* v. *Donegal*, 1 Add. 21.

(*a*) *Herbert* v. *Herbert*, 2 Phill. 437.

(*b*) *Frankfort* v. *Frankfort*, 3 Curt. 715.

(*c*) *Chichester* v. *Donegal*, 1 Add. Rep. 22.

(*d*) Ibid.

by the judges deferring to pronounce sentence or rejecting some material evidence, or immoderate taxation of charges; sometimes, though rarely, from condemnation (*e*) in costs; from the granting too short a time or delay wherein to do any act, &c., and also, as laid down in the books, from an unjust excommunication upon a false certificate of the citation, and denying the service to any one.

Modes of instituting appeal.

An appeal must be instituted within fifteen days, and prosecuted within a year or year and a day from the date of the delivery of the sentence. There are three methods by which it may be instituted:

1. By an appeal asserted *vivâ voce*, before the judge and the registrar in open court, at the time of the delivery of the sentence, called an appeal *apud acta*, because taken down by the registrar in the act of court in the following form: "A. B. protested of a grievance, and of appealing, and instantly appealed."

2. By a protocol of appeal, which is an instrument attested by a notary public in the presence of two credible witnesses, or of one other notary, containing an outline of the proceedings in the court below, that is to say, such particulars as the time, place, judge, parties, and tenor of sentence.

3. By what must be called, for the sake of distinction, the appeal itself, viz., a more extended form of statement than the protocol, but signed and witnessed by the same persons.

Where nothing remains to be done after sentence.

Such being the different methods of instituting an appeal, it should be further observed, that where a definitive sentence or final interlocutory decree has been pronounced, and where *nothing further remains to be done* for the purpose of carrying the same into execution, as might be the case in matrimonial suits, the proctor, against whose party sentence is given, may, *within fifteen days*, enter a protocol before a notary public, and may prosecute his appeal by applying to the superior court for an inhibition at any time within a year, or, as some suppose, a year and a day, from the delivery of the sentence; but if *anything remains to be done* by the court after sentence, in order to carry it into effect, as by grant of probate or administration, by enforcing restitution of conjugal rights, payment of church rate, or of costs pronounced for, there being no appeal alleged *apud acta*, the party submitting to such judicial acts or orders would be barred of his right of appeal. Nor can the court (*f*) *à quo* dismiss, or perempt, or, otherwise

Where something remains to be done.

Power of the judge *à quo*.

(*e*) *Lloyd and Clarke* v. *Poole*, 3 Hagg. 477.

(*f*) See *Chichester* v. *Donegal*, 1 Add. 22.

than as above mentioned, affect the right of appeal where it *has* been alleged *apud acta*, although the party should delay to prosecute it; any such attempt would trespass on the province of the judge *ad quem*; the judge *à quo* can only proceed to carry his sentence into execution (*g*).

Of the judge *ad quem*.

A judge acting *ex officio mero* may be made a party to the appeal; not so however where he acts *ad instantiam partis* (*h*). New evidence is occasionally admitted on an appeal; but it must be shown to be of facts *noviter perventa* to the knowledge of the party (*i*).

SECT. 7.—*Letters of Request.*

What they are.

It has been said that the Arches Court may take original cognizance by Letters of Request of all causes which may be brought in a Diocesan Court of the Province. The nature of these remains to be explained. In any case, where a Diocesan Court within the Province has a jurisdiction over the parties, the plaintiff may apply to the judge of such court for letters of request, in order that the cause may be instituted in the Court of Arches or the Chancery Court of York; and when the judge of the court below has consented to *sign* such letters, and they have been *accepted* by the judge of the Arches Court or Court of York, a *decree* issues under his seal, calling upon the defendant to answer to the plaintiff in the suit instituted against him. The institution of a suit by Letters of Request does not fall under the prohibition of the "Bill of Citations," 23 Hen. 8, c. 9 (*k*). The effect of the provisions of 3 & 4 Vict. c. 86, as to Letters of Request, will be considered in the chapter on that act (*l*).

When refused.

The Dean of Arches has declined to accept letters of request presented jointly by the archdeacon and the chancellor of Norwich (*m*).

Limit of jurisdiction.

The jurisdiction of the provincial court is strictly limited to the letters of request; and it cannot be called upon to try a civil suit for a sum of money different from that stated to be in dispute in the letters of request (*n*).

(*g*) See the case of *Bowles* v. *Bowles*, Arches Court, 1841, 16th Feb.

(*h*) *Fell* v. *Law*, 1 Roberts. Eccl. 726.

(*i*) *Fletcher* v. *Le Breton*, 3 Hagg. 368.

(*k*) See *Bolton* v. *Bolton*, 1 Lev. 225; *Jones* v. *Jones*, Hob. 185; 2 Brownl. 27; Gibs. 1007.

(*l*) *Vide post*, Part IV. Chap. VIII.

(*m*) Office of the judge promoted by *Steward* v. *Bateman*, 3 Curteis, Rep. 201.

(*n*) *Asterley* v. *Adams*, L. R., 3 Adm. & Eccl. 361; apparently overruling *Hawes* v. *Pellatt*, 2 Curt. Eccl. Rep. 473.

Letters of request are sometimes issued for other purposes than for sending the cause to another court: *e.g.* they are sent from one judge to another to request him to examine witnesses out of the jurisdiction of the former but in that of the latter (*o*), to enforce a monition (*p*), &c.

Other purposes.

SECT. 8.—*Caveat.*

By canon law.

A caveat is a caution entered in the spiritual court, to stop licences, dispensations, faculties, institutions, and such like, from being granted without the knowledge of the party that enters it.

And a caveat is of such validity by the *canon* law, that if an institution, administration, or the like, be granted pending such caveat, the same is void (*q*).

By common law.

But not so by the *common* law. For by the common law, an admission, institution, *probate* (*r*), administration, or the like, contrary to a caveat entered, shall stand good; in the eye of which law, the caveat is said to be only a caution for the information of the court (like a caveat entered in Chancery against the passing of a patent, or formerly in the Common Pleas against the levying of a fine); but that it does not preserve the right untouched so as to null all subsequent proceedings, because it does not come from any superior; nor has it ever been determined, that a bishop became a disturber, by giving institution without regard to a caveat; on the contrary, it was said by Coke and Doderidge, in the case of *Hutchins* v. *Glover*, in 14 Jac. 1, that they have nothing to do with a caveat in the common law (*s*).

Effect of entry.

The mere entry of a caveat will not found a jurisdiction, for it might be entered with intent to deny the jurisdiction, and prevent the court from taking cognizance of the matter (*t*). A caveat against an inhibition has been entered, and the inhibition, after hearing counsel, refused (*u*). The proper course to be taken by the party wishing to proceed is to *revoke* the *caveat*, that is, enter a statement that he appears notwithstanding the caveat.

(*o*) 1 Oughton, 150; 2 Ibid. 446; *Woods* v. *Woods*, 2 Curt. 517.

(*p*) See *Crowley* v. *Crowley*, 3 Hagg. Eccl. 760 (note).

(*q*) Ayl. Par. 145, 146; 1 Lev. 157; Owen, 50.

(*r*) As to probates, *vide* 2 Stra. 857, 956.

(*s*) Gibs. 778; 2 Bac. Abr. 404; Ayl. Par. 145, 146.

(*t*) *France* v. *Aubrey*, 2 Lee, 534.

(*u*) *Herbert* v. *Herbert*, 2 Phill. 430; *Chichester* v. *Donegal*, 1 Add. 23, n.

If a ratepayer be dissatisfied with his assessment, one of his remedies is to enter a caveat against its confirmation by the ordinary (*s*).

Sect. 9.—*Citation.*

Nature and form of.

A citation is a judicial act, whereby the defendant, by authority of the judge (the plaintiff requesting it), is commanded to appear, in order to enter into suit, at a certain day, in a place where justice is administered (*t*).

Its contents.

The Citation ought to contain—1. The name of the judge, and his commission, if he be delegated; if he is an ordinary judge, then the style of the court where he is judge. 2. The name of him who is to be cited. 3. An appointed day and place where he must appear; which day ought either to be expressed particularly to be such a day of the week or month, or else only the next court day (or longer) from the date of the citation: and the time of appearance ought to be more or less, according to the distance of the place where they live. 4. The cause for which the suit is to be commenced. 5. The name of the party at whose instance the citation is obtained (*u*). 6. And also the residence and diocese of defendant, to show that he is not cited out of his diocese.

Process of *quorum nomina* forbidden.

By Can. 120 of 1603, "No bishop, chancellor, archdeacon, official, or other ecclesiastical judge, shall suffer any general processes of *quorum nomina* to be sent out of his court, except the names of all such as thereby are to be cited shall be first expressly entered by the hand of the register or his deputy under the said processes, and the said processes and names be first subscribed by the judge or his deputy, and his seal thereto affixed."

The rule of the ancient canon law in which case was, that by the general clause *quidam alii* in citations, not more than three or four persons should be drawn into judgment; whose names (*quorum nomina*) the person who obtained the citation was particularly to express, that there might be no room for fraud, in varying the names at pleasure (*x*).

Citation to a company.

A company in London refusing to pay a church rate set upon their hall, the master and wardens were cited into the Ecclesiastical Court by their sirnames and names of baptism, with the addition of master and wardens of the

(*s*) *Watney* v. *Lambert*, 4 Hagg. 87.

(*t*) Conset, 26.

(*u*) Ibid.

(*x*) Gibs. 1009.

company of wax chandlers. And upon moving for a prohibition, because they were cited in their natural capacity, when it should have been in their politic capacity, the court held the citation to be good, because the body politic could not be cited, and there was no remedy but in this way: and a prohibition was denied (*y*).

Opinions of Dr. Lawrence.

The following extracts are copied from two manuscript opinions of a very eminent civilian (the late Dr. Lawrence) upon this subject. He was consulted as to the liability of the Company of the Proprietors of the Birmingham Canal Navigation to pay church rates, and as to the mode of citing them.

Extracts from first opinion.

"The poor's rates and church rates are levied under different authorities and not necessarily on the same property always, and not necessarily in the same proportion. One may be at 3*d.* and another at 6*d.* in the pound, or at any other proportion according to the aggregate sum required by the parish. If not fairly and equally laid, the company, I apprehend, may resist a church rate on the same grounds that a poor's rate may be resisted." . . . "As the citation is not before me, I cannot tell whether any or what special matter of defence may appear on the face of it; but a citation addressed to a corporate body ought to call upon them to appear by their syndic, who is the party in the cause on their behalf. If the officers, or managers, or directors of the corporation against whom the citation issues, do not appoint a syndic in lawful form, or sufficiently instruct him, the ecclesiastical judge may compel them by censures passed even to excommunication." Doctors' Commons, January, 1800.

Extracts from second opinion.

"The citation should be directed to the managing part of the company by their proper description, as well as to the company generally: as to the warden or masters, &c., of the Bank of England; or chairman, deputy chairman, directors, &c., of the East India Company. What is the proper legal description of the Birmingham Canal Company, I know not; but whatever it is, unless that citation be used, it is a nullity, and may be resisted with effect." Doctors' Commons, April, 1800.

Sir V. Gibbs.

Sir Vicary Gibbs gave an opinion coinciding with that of Dr. Lawrence upon the same case.

The citation of a party by an erroneous christian name,

(*y*) H., 33 & 34 Car. 2; Skin. 27.

Misnomer of party.

a simple misnomer or false addition, where there is no doubt as to the identity of the party, has been holden to be sufficient (*z*). An objection of this kind urged as a plea in abatement must be taken before issue, for, by giving issue, the party allows himself to be the party designed (*a*); and whoever alleges a misnomer is bound to assign the true name by which he means to abide, and against which he is not at liberty to aver (*b*); but a new citation must be taken out. Where the general law is to be relied upon, it is not necessary that it should be specifically stated in the citation (*c*); and as to variance between the articles and citation, where the charge is substantially the same, and only a part of the charge is taken away, it will not be fatal. A citation has been holden sufficient, where it only called upon the party to bring in an administration, and to show cause why another should not be granted, and did not say to show cause why the original administration should not be revoked (*d*); but it has been holden void where it was taken out upon false pretences, and not served on the party against whom it had been entered (*e*). In a matrimonial suit it was holden that a citation issuing as "in a suit of nullity of marriage by reason of a former marriage," will not found a sentence of separation "by reason of an undue publication of banns," the woman being therein described as spinster; the first husband having died subsequently to the publication of banns, but prior to the marriage (*f*). A wrong description of the judge either by his name or title is fatal to the citation, and to all proceedings founded on it, especially in criminal suits. And an error of this kind in a copy delivered to the proctor of the defendant has been holden to entitle the latter to be dismissed from the suit (*g*).

Misnomer of judge.

A citation in a cause of office must describe sufficiently the offence charged against the party, so as to show that it is a matter of ecclesiastical cognizance, but it need not minutely specify all the particulars of the offence which are to be charged in the articles (*h*).

(*z*) *Powell* v. *Burgh*, 2 Lee, 517; *Barham* v. *Barham*, 1 Consist. 7; *Griffiths* v. *Reed*, 1 Hagg. 196.

(*a*) *Williams* v. *Bott*, 1 Consist. 3; *Powell* v. *Burgh*, 2 Lee, 518.

(*b*) *Pritchard* v. *Dalby*, 1 Consist. 187.

(*c*) *Hutchins* v. *Denziloe*, 1 Consist. 172.

(*d*) *Reece* v. *Strafford*, 1 Hagg. 347.

(*e*) *Murphy* v. *Macarthy*, 2 Lee, 529.

(*f*) *Wright* v. *Ellwood*, 2 Hagg. 598.

(*g*) *Williams* v. *Bott*, 1 Consist. 1.

(*h*) *Steward* v. *Francis*, 3 Curteis, Rep. 209. See, however, *Sheppard* v. *Bennett*, 39 L.J., N.S. 59; *et infra*, sub Chap. VIII.

In all cases of a process served on a minor, the court requires a certificate of its having been served in the presence of a natural and legal guardian of the minor; or at least, in that of some person or persons upon whom the actual care and custody of the minor, for the time being, has properly devolved (*i*).

Service of, on minor.

It has been said that a citation may be served *viis et modis* (*j*). There is some difference between this service and personal service. A personal service may conclude both the party and the court; but a service *viis et modis* is a constructive service, and concludes the party, but does not conclude the court. The court on good and sufficient grounds may open the proceedings to get at the substantial justice of the case (*k*). It is laid down in the books, says Sir William Wynne, and is not to be denied, that parties may be put in contempt by a public citation only (*l*).

Distinction between a citation and a personal service.

By a constitution of Archbishop Mepham it is ordained, that all ordinary judges of the province do readily assist one another in making citations and executions, and in executing all lawful mandates.

Citing out of the diocese.

Yet by the ancient laws of the church, the metropolitan was forbidden to exercise judicial authority in the diocese of a comprovincial bishop, unless in case of appeal or vacancy. And therefore when Archbishop Peccham excommunicated the Bishop of Hereford for resisting this concurrent power, and affirming against the archbishop that he could not exercise any jurisdiction exclusive of the bishop within the bishop's own diocese, nor take cognizance of causes there *per querelam*, the archbishop defended his claim, not upon the common right of a metropolitan, but upon the peculiar privilege of the Church of Canterbury, that the Church of Canterbury enjoys such a privilege, that the archbishop for the time being may and ought to hear causes arising within the dioceses of his suffragans, and that in the first instance. Which privilege probably sprung from the Archbishops of Canterbury being *legati nati* to the pope (*m*).

But now, by 23 Hen. 8, c. 9, intituled, The Bill of Citations, sect. 1, "Where great numbers of the king's subjects, as well men, wives, servants, as other the king's

23 Hen. 8, c. 9. Statute of Citations.

(*i*) *Cooper* v. *Green*, 2 Add. 454. As to service of citation, see Otho, Athon, 63, 123, 565; Stratf. Lind. 96; 1 Oughton, 44, 45; Lind. 85.

(*j*) *Vide supra*, p. 1258.

(*k*) *Herbert* v. *Herbert*, 2 Consist 263; *In the goods of Thomas Robinson*, 3 Phill. 511.

(*l*) 1 Phill. 176.

(*m*) Gibs. 1004.

23 Hen. 8, c. 9. Statute of Citations.

subjects, dwelling in divers dioceses of this realm of England and Wales, have been at many times called by citations and other processes compulsory, to appear in the Arches, Audience, and other high courts of the archbishops of this realm, far from and out of the diocese where they dwell; and many times to answer to surmised and feigned causes, and suits of defamation, withholding of tithes, and such other like causes and matters, which have been sued more for malice and for vexation than for any just cause of suit: and where certificate hath been made by the summoner, apparitor, or any such light literate person, that the party against whom any such citation hath been awarded, hath been cited or summoned, and thereupon the same party so certified to be cited or summoned hath not appeared according to the certificate, the same party therefore hath been excommunicated, or at the least suspended from all divine services; and thereupon before that he or she could be absolved, hath been compelled, not only to pay the fees of the court whereunto he or she was so called by citation or other process, amounting to the sum of 2*s.* or 20*d.* at the least; but also to pay to the summoner, apparitor, or other light literate person by whom he or she was so certified to be summoned, for every mile being distant from the place where he or she then dwelled, unto the same court whereunto he or she was so cited or summoned to appear, 2*d.*; to the great charge and impoverishment of the king's subjects, and to the great occasion of misbehaviour and misliving of wives, women and servants, and to the great impairment and diminution of their good names and honesties:" it is therefore enacted, "that no manner of person shall be from henceforth cited or summoned, or otherwise called to appear, by himself or by any procurator, before any ordinary, archdeacon, commissary, official, or any other judge spiritual, out of the diocese or peculiar jurisdiction where he shall be inhabiting at the time of awarding or going forth of the same citation or summons (except it shall be for any of the causes hereafter written, that is to say, (1) for any spiritual offence or cause committed or omitted by the bishop, archdeacon, commissary, official, or other person having spiritual jurisdiction, or being a spiritual judge, or by any other person within the diocese or other jurisdiction whereunto he shall be cited, or otherwise lawfully called to appear and answer; and (2) except also it shall be upon matter or cause of appeal, or for other lawful cause, wherein any party shall find himself grieved or wronged, by the ordinary or judge of the diocese or jurisdiction, or by any of his substitutes,

officers or ministers, after the matter or cause there first commenced and begun to be shewed unto the archbishop or bishop, or any other having peculiar jurisdiction, within whose province the diocese or place peculiar is; or (3) in case that the bishop or other immediate judge or ordinary dare not nor will not convent the party to be sued before him; or (4) in case that the bishop of the diocese or judge of the place, within whose jurisdiction or before whom the suit by this act shall be commenced and prosecuted, be party directly or indirectly to the matter or cause of the same suit; or (5) in case that any bishop or any inferior judge, having under him jurisdiction in his own right and title, or by commission, make request or instance to the archbishop, bishop or other superior ordinary or judge, to take, treat, examine or determine the matter before him or his substitutes, and that to be done in cases only where the law civil or canon doth affirm execution of such request or instance of jurisdiction to be lawful or tolerable; upon pain of forfeiture, to every person by any ordinary, commissary, official or substitute, by virtue of his office or at the suit of any person to be cited or otherwise summoned or called contrary to this act, of double damages and costs, to be recovered by action of debt or upon the case, in any of the king's high courts, or in any other competent temporal court of record, and upon pain of forfeiture for every person so summoned, cited, or otherwise called as aforesaid to answer before any spiritual judge out of the diocese or other jurisdiction where the said person dwelleth, 10*l*., half to the king, and half to him that will sue in any of the king's said courts."

Proviso in cases of heresy.

Sect. 2. "Provided always, that it shall be lawful to every archbishop of this realm to cite any person inhabiting in any bishop's diocese within his province for causes of heresy; if the bishop or other ordinary immediate thereunto consent, or do not his duty in punishment of the same."

As to probate.

Sects. 3 and 5 related to the prerogatives of the archbishops in respect of the probate of testaments (*n*).

Far from and out of the Diocese.]—By reason of this expression in the preamble, it was doubted in 6 Jac. 1,

(*n*) By sect. 6, "No archbishop, nor bishop, ordinary, official, commissary, or any other substitute or minister of any of the said archbishops, bishops, archdeacons, or other having any spiritual jurisdiction, shall demand or take of any of the king's subjects, any sum of money for the seal of any citation to be awarded or obtained, than only 3*d*.; upon the pains and penalties before limited in this act, to be in like form recovered as is aforesaid."

23 Hen. 8, c. 9. Statute of Citations.

whether the archbishop was not at liberty (notwithstanding this act) to cite the inhabitants of London and other neighbouring places of the same diocese, into his Court of Arches, which would be no more a grievance to the subject than the being cited into the Consistory of London, and could not properly be called a citing out of the diocese, since the Court of Arches is holden within the diocese of London. But all the justices of the Court of Common Pleas held, that the archbishop is restrained by this act from citing any inhabitants of London, besides his own peculiars, because the excusing the subject from travel and charges was not the only benefit intended by it, but also the benefit of appeals; and by diocese in this statute, was understood jurisdiction, and as to the language of the preamble, that the enacting part of the statutes are in many cases of larger extent than their preambles are (*o*).

That no manner of Person shall be from henceforth cited.]—But if a man is cited out of his diocese, and appears, and sentence is given, or if he submits himself to the suit, he shall have no benefit by this statute, nor will a prohibition be granted (*p*).

Privilege may be waived.

"It is certainly true (says Sir John Nicholl) that both the canon and the statute law forbid the citing of parties out of their dioceses or peculiar jurisdictions. But it is equally true that the rule, at least in the statute law, was meant for the benefit of the subject, which benefit it hath uniformly, as far as I see, been held to provide for sufficiently, by giving defendants who are so cited a privilege of pleading to the jurisdiction." Consequently, if a party who is so cited once waive that privilege by appearing and submitting to the suit, he or she is bound to the jurisdiction (*q*).

Out of the Diocese.]—And that, as it seems, whether the see be full or vacant. For in the 13 or 14 Jac. 1, in the case of one Pickover, it was resolved upon this statute that if a bishopric within the province of Canterbury be void, and so the jurisdiction be devolved to the metropolitan, he must hold his court within the inferior diocese, for such causes as were by the ecclesiastical law to be holden before the inferior ordinary; and the prothonotaries said, it had been so formerly resolved. But a little before this, in the 11 Jac. 1, the contrary was resolved, that is, where one was cited out of his diocese before the Archbishop of

(*o*) Gibs. 1005; *Gobbet's case*, Cro. Car. 339; *Ford* v. *Weldon*, Sir T. Raym. 91; 1 Keb. 651.

(*p*) Gibs. 1006; Carth. 33.

(*q*) *Chichester* v. *Donegal*, 1 Add. 17; 3 Phill. 605; *Prankard* v. *Deacle*, 1 Hagg. 169.

Canterbury *as guardian of the spiritualties*, not only prohibition was denied, but it was further said, that if he had been cited before him as *metropolitan*, it would have been granted upon this statute (*r*).

Or peculiar jurisdiction.]—That is, whether they be cited out of such peculiar to the Arches, or before the ordinary within whose diocese the peculiar lies. And Coke said, that if a man be sued out of his diocese, yet if he be sued within his own proper peculiar, he is not within this statute (*s*).

Where he shall be inhabiting.]—In 8 Jac. 1, an attorney in the King's Bench was sued in the Arches for a legacy; and, for that he inhabited in the diocese of Peterborough, prohibition was prayed and granted; because, though he remained here in term time, he was properly inhabiting within the jurisdiction of the bishop of Peterborough (*t*).

In the case of *Wilmett* v. *Lloyd*, in 5 Anne (*u*), a difference was taken by Holt, Chief Justice, where a man of another diocese is taken *flagranti delicto:* he said, where the party goes into another diocese, and is commorant there, and comes back casually into the first diocese, in such case the citation cannot be good; for suppose a man comes casually into the diocese of London and commits a crime there, and then goes back to the diocese where he dwells, and then casually comes to London again, it seems that he cannot be here cited; but if he had been cited before he left London, then that would be *flagranti delicto.*

Immediate Judge or Ordinary dare not, nor will not, convent the Party.]—In Archbishop Parker's register, we find the archbishop to have put benefices in another diocese under sequestration, by reason of the negligence of the ordinary; but this is an act only of voluntary jurisdiction. And before the Reformation, we find the archbishop requiring bishops to proceed against particular persons in their dioceses, or show cause why himself should not proceed (*x*).

Be Party.]—If the cause be begun before the archbishop, though the bishop or other judge (who was party in the cause) dies whilst it is depending, and so the occasion ceases upon which it was first brought before the archbishop, yet he being in possession of it, it shall not be

(*r*) Gibs. 1006.

(*s*) Ibid.

(*t*) Gibs. 1006; 2 Brownl. 12; see also Hardr. 421; *Westcote* v. *Harding*, 1 Lev. 96; 2 Brownl. 27; *Woodward* v. *Makepeace*, 1 Salk. 164; *Machin* v. *Molton*, 2 Salk. 549; Ld. Raym. 452, 534.

(*u*) Holt's Rep. 605.

(*x*) Gibs. 1007.

23 Hen. 8, c. 9. Statute of Citations.

removed (*y*). For per Doderidge, J., by the civil law the death of the plaintiff or defendant is not any abatement of the libel, but they have a revivor, as we a resummons, in ravishment of ward; and the intent of the statute is not that such a cause should be remanded, whereby the plaintiff should lose the costs of his suit.

Can. 94.

By Can. 94 of 1603, "No dean of the Arches, nor official of the archbishop's consistory, nor any judge of the audience, shall in his own name, or in the name of the archbishop, either *ex officio* or at the instance of any party, originally cite, summon or any way compel, or procure to be cited, summoned or compelled, any person which dwelleth not within the particular diocese or peculiar of the said archbishop, to appear before him or any of them, for any cause or matter whatsoever belonging to ecclesiastical cognizance, without the licence of the diocesan first had and obtained in that behalf, other than in such particular cases only as are expressly excepted and reserved in and by a statute 23 Hen. 8, c. 9. And if any of the said judges shall offend herein, he shall for every such offence be suspended from the exercise of his office for the space of three whole months."

Return of the citation under the old law.

The return of the citation is either personally in court by him who executed the same, who certifies and makes oath how and in what manner the defendant was cited; or else it is by authentic certificate, which is a kind of solemn writing, drawn or confirmed by some public authority, and ought chiefly to contain the name of the mandatory or person to whom it is directed, and the name of the judge who directed the same, with his proper style and title; likewise the day and place in which the defendant was cited, and the causes for which he is cited; in testimony whereof, some authentic seal ought to be put to it, of some archdeacon, official commissary or rural dean; and it ought to express that they set their seal thereunto at the special instigation and request of the mandatory. To all which certificates, in all causes, as much credit is given as if the mandatory had personally made oath of the execution thereof.

Modern practice.

According to modern practice, a *certificate* of the service of the citation is endorsed on that instrument, setting forth the day and place of its service on the party, signed by the person who served it: an affidavit of the truth of the certificate is also endorsed upon the instrument.

(*y*) Gibs. 1007; Cro. Jac. 483.

SECT. 10.—*Libel and Allegation.*

Nature of a libel.

A libel (*z*) is a declaration or charge, drawn up in writing, on the part of the plaintiff, unto which the defendant is obliged to answer (*a*).

For when the defendant appears upon the citation, then the libel ought to be exhibited by the plaintiff, and a copy of it delivered to the defendant (*b*).

2 Hen. 5, st. 1, c. 3.

To which purpose it is enacted by 2 Hen. 5, stat. 1, c. 3, as follows: "Forasmuch as divers of the king's liege people be daily cited to appear in the Spiritual Court before spiritual judges, there to answer to divers persons as well of things which touch freehold, debt, trespasses, covenants and other things, whereof the cognizance pertaineth to the court of our lord the king, as of matrimony and testament; and when such persons so cited appear and demand *a libel of that which against them is surmised* to be informed, to give their answer thereunto, or otherwise to purchase of our lord the king a writ of prohibition according to their case; which libel to them is denied by the said spiritual judges, to the intent that such persons should not be aided by any such writ, against the law, and to the great damage of such persons so impleaded: our said lord the king, by the advice and assent of the lords spiritual and temporal, and at the request and instance of the commons, hath ordained and established, that *at what time the libel is grantable by the law, it may be granted and delivered to the party without any difficulty*" (*c*).

Principles of law respecting libel and allegation.

The same principles of law, as to the form and substance of these pleas, govern both libel and allegation; the allegation being, as has been shown, an answer to the libel, and in certain causes, such as church rates, frequently altogether omitted. It often happens that the court admits part of an allegation and rejects part, or orders the whole or part to be reformed. The court will sometimes, and in particular cases, delay the admission of a libel, in order to allow the party charged an opportunity of stating any special matter in the way of protest, to induce the court to decline further proceedings in the case. The principle, *qui ponit fatetur*, that is, that he who sets up a plea is bound by it, is invariably held in the courts at Doctors' Commons. The contents of a libel or alle-

Delay to admit libel.

Principle *qui ponit fatetur*.

(*z*) *Libellus*, a little book, or articles drawn out into a formal allegation. 3 Black. Com. 99.

(*a*) Gibs. 1009.

(*b*) Wood, Civ. L. 318.

(*c*) See on this act, *Anon.*, 2 Salk. 553. In this case a prohibition shall go *quousque* they deliver a copy. Ld. Raym. 991; 6 Mod. 308; *Syms* v. *Selwood*, 3 Keb. 565; Reg. 58; F. N. B. 43; *Anon.*, 1 Vent. 252.

Principle qui ponit fatetur.

gation are to be presumed, in the first instance, to be true, being admitted in order to proceed to proof; and this maxim has been found in practice to be very beneficial to suitors, for if the facts alleged in the plea would not, if substantiated by evidence, entitle the party propounding them to the relief he prays, the cause is stopped *in limine*, and all further expense is saved. But the maxim does not go the length of supposing every syllable alleged to be true (*d*).

Sect. 11.—*Articles*.

General requisites of.

Where the ordinary has allowed his office, that is the office of the judge is promoted, the whole transaction must be fairly and specifically stated, in order that the defendant may be enabled, without injustice to himself, to give an affirmative issue (*e*). The *general* words of articles are construed only to include subordinate charges *ejusdem generis* with the principal (*f*), while the *præsertim* is looked to for the principal accusations (*g*).

(*d*) The introduction of *vivâ voce* evidence has rendered the doctrine on this subject of very inferior importance; but the following cases may be consulted: *Briggs* v. *Morgan*, 3 Phill. 325; 2 Consist. 328; *Grant* v. *Grant*, Feb. 24th, 1840, Jud. Com. of Privy Co.; *Thorold* v. *Thorold*, 1 Phill. 1, n.; *Croft* v. *Croft*, 3 Hagg. 311. An exception should be made in cases of pedigree, for in these a party is not entitled to see the adverse plea till he has set forth his own. *Rutherford* v. *Maule*, 4 Hagg. 238; *Neeld* v. *Neeld*, 4 Hagg. 266; *Montefiore* v. *Montefiore*, 2 Add. 354; *Glegg* v. *Glegg*, Consist. of London, Trinity Term, 1841; *Blunt and Fuller* v. *Harwood*, 1 Curteis, 648; *Sandford* v. *Vaughan*, 1 Phill. 49; *Bird* v. *Bird*, 1 Lee, 531; *Moore* v. *Hackett*, 2 Lee, 86; *Bradyll* v. *Jehen*, 1 Lee, 568; *Moore* v. *Moore*, Feb. 6, 1840; see Sir J. Nicholl's judgment in *Locke* v. *Denner*, 1 Add. 356, 357; *Molony* v. *Molony*, 2 Add 249; *Croft* v. *Croft*, 3 Hagg. 311; *Dew* v. *Clarke*, 1 Add. 282; 2 Add. 103; *Asberry* v. *Ashe*, 1 Hagg. 218; *Shand* v. *Gardiner*, 1 Lee, 529; *White* v. *White*, 2 Lee, 20; *Reeves* v. *Glover*, 2 Lee, 270; *Dickinson* v. *White*, 1 Add. 490; *Herbert* v. *Helyar*, 1 Lee, 452; *Moorsom* v. *Moorsom*, 3 Hagg. 97; X. 2, 27, 7; *Lindo* v. *Belisario*, 1 Consist. 220; *Middleton* v. *Middleton*, 2 Hagg. Suppl. 136; *Smith* v. *Blake*, 1 Hagg. 88; *Jones* v. *Jones*, 1 Hagg. 254; *Webb* v. *Webb*, 1 Hagg. 349; *Brisco* v. *Brisco*, 2 Add. 259; *Homerton* v. *Homerton*, 2 Hagg. 24; *Clement* v. *Rhodes*, 3 Add. 41; *Ingram* v. *Wyatt*, 1 Hagg. 101; *Halford* v. *Halford*, 3 Phill. 98. The case of *Swift* v. *Swift*, 4 Hagg. 139, contains a specimen of a responsive allegation and a discussion upon its admissibility.

(*e*) *Oliver* v. *Hobart*, 1 Hagg. 43; *Lee* v. *Mathews*, 3 Hagg. 174; *Moorsom* v. *Moorsom*, 3 Hagg. 97; *Wynn* v. *Davies and Weaver*, 1 Curt. 89; *Maidman* v. *Malpas*, 1 Consist. 209.

(*f*) *Bennett* v. *Bonaker*, 3 Hagg. 25.

(*g*) Ibid.

The court cannot go beyond the particular offence charged, nor the articles beyond the citation (*h*). But in a criminal suit for incest, a marriage may be annulled although the citation contained no evidence to that effect (*i*). On the other hand, though the promoter's motives may be shown in a defensive plea to be malicious and vindictive, because such conduct would affect both the question of costs and the credit of his witnesses, yet such defensive plea must be specific, and confined to the promoter's conduct with reference to the defendant (*j*). According to practice, the promoter of the office of the judge is bound not only to give in articles, but also a *correct copy* to the defendant—an error in the *copy* being as fatal to the suit as an error in the *original* (*k*).

Effect of misnomer. It is not a fatal objection that the articles are exhibited in the name of the surrogate, and not of the judge (*l*), or in the name of the bishop instead of his official (*m*); but where the office of the judge is wrongly described, the error is fatal, and may be pleaded in bar of further proceedings (*n*).

When articles are to be exhibited. The general rule is, that articles must be brought in on the court day immediately subsequent to that on which the defendant has appeared (*o*).

Amendment and admissibility of articles. Articles once brought in may be reformed and amended under the direction of the court prior to their actual admission, but when they are once admitted and issue is joined, either party is bound by them; and it must be borne in mind, that the promoter is not at liberty to drop in with charges one after another, with perhaps this single exception, that offences *ejusdem generis* subsequently committed may be pleaded in subsequent articles (*p*). But circumstances may justify the admission of further articles explanatory to a responsive allegation (*q*), or where it is clearly shown that they could not have been sooner pleaded (*r*).

In a case where the original articles pleaded a certain transaction without specification, the court allowed addi-

(*h*) *Breeks* v. *Woolfrey*, 1 Curt. 880.

(*i*) *Chick* v. *Ramsdale*, 4 Curt. 34.

(*j*) *Bennett* v. *Bonaker*, 3 Hagg. 25.

(*k*) See *Williams* v. *Bott*, 1 Consist. 1, and *Thorpe* v. *Mansell*, cited in note.

(*l*) *Prankard* v. *Deacle*, 1 Hagg. 169.

(*m*) *Maidman* v. *Malpas*, 1 Consist. 209.

(*n*) *Williams* v. *Bott*, 1 Consist. 1; *vide supra*, p. 1282, as to citations.

(*o*) *Dobie* v. *Masters*, 3 Phill. 175; *Schultes* v. *Hodgson*, 1 Add. 321.

(*p*) *Schultes* v. *Hodgson*, 1 Add. 321.

(*q*) *Roper* v. *Roper*, 3 Phill. 97.

(*r*) *Moorsom* v. *Moorsom*, 3 Hagg. 97.

tional articles, pleading the same transaction with greater minuteness, to be brought in afterwards (*s*).

When the court is bound to admit them.

If the articles contain a substantive charge, the court is bound to *admit* them, and cannot listen to a suggestion that they do not truly detail the circumstances (*t*), though the court is strictly confined to a consideration of the offences charged in the articles (*u*). In a case where the alleged offences were laid from September, 1824, till January, 1827, and the suit was instituted in April, 1828, the lapse of time was holden to be no bar (*v*).

The promoter may always bring in articles, even though the defendant in appearing has admitted his liability to censure; for, without the detail of the offences in the articles, the court would not know what punishment to inflict (*w*).

Sect. 12.—*Personal Answers* (*x*).

When brought in.

After contestation of suit (*y*), the next thing which follows in course of practice, if a suit proceeds, is the demanding and giving in of personal answers, unless it be in a criminal cause, wherein no one is bound to accuse himself. These are made in writing to the several articles or positions of a libel, or to any other judicial matter exhibited in court, and ought to be expressed in very clear and certain terms; and upon the oath also of the person that exhibits them.

When not.

Their object.

For personal answers are therefore provided in law, that by the help of them, the adverse party may be relieved in the matter of proof. And if these answers are not clear, full and certain, they are deemed and taken in law as not given at all: and upon a motion made, the judge ought to enjoin new answers; it being the same thing to give no answer at all, as to give a general and insufficient answer (*z*).

What they should contain.

A personal answer, therefore, ought to have these three qualities in it; first, it ought to be pertinent to the matter in hand. Secondly, it ought to be absolute and un-

(*s*) *Madan* v. *Karr*, 14 Jur. 275.

(*t*) *Jarman* v. *Bagster*, 3 Hagg. 356.

(*u*) *Bennett* v. *Bonaker*, 3 Hagg. 50.

(*v*) *Ibid.* 25.

(*w*) *Jones* v. *Jelf*, 8 L.T., N.S. 399.

(*x*) The same observation as to the effect of the introduction of *vivâ voce* evidence applies to this subject.

(*y*) Formerly also the oath of calumny was taken by both litigants. See tit. Cod. De jurejur. propt. calumn. dando, p. 16, ii. 59; Nov. 49, c. 3; Nov. 124, c. 1; Decret. (ii. 7), and lib. vi. (ii. 4, De jur. calumn.).

(*z*) "Nihil interest neget quis an taceat interrogatus, an obscure respondeat, ut incertum demittat interrogatorem (Dig. ii. i. 117), is the language of the Roman law upon this subject.

conditional. And, thirdly, it ought to be clear and certain (*a*).

In answers, a party, first, is bound only to answer in facts, not to his own motives, nor to his belief of the motives of another person: and, secondly, where the plea avers ignorance of the real nature of a transaction by a party to such transaction and to the suit, the other party is, in his answers to such plea, allowed to state facts inferring full knowledge thereof and acquiescence therein. A party is not bound to answer when his answer would criminate himself, nor, it should seem, when it would tend to degrade him (*b*).

Personal answers are not confined to being mere echoes of the plea accompanied with simple affirmances or denials, but the respondents are further at liberty to enter into all such matter as may *fairly* be deemed not more than sufficient to place the transactions, as to which their answers are, in what they insist to be the true and proper light (*c*). If the answers of a party are not brought in at the time assigned by the court, the facts pleaded are taken *pro confesso*, and the expense of taking depositions to prove facts confessed in answers, is paid by the party producing the witnesses. It is a maxim of the law administered in the Ecclesiastical Courts, that whatever is to be done *personally* by the party principal in the cause, requires, in strictness, a personal service of the notice or decree for doing it upon the party principal, and it has therefore been holden that a service of a decree for answers upon the *proctor* will not justify the court in putting the principal party in contempt, if these answers are not brought in. This was laid down as law by Sir John Nicholl, in his judgment in *Durant* v. *Durant* (*d*), during the course of which he entered into the following accurate and elaborate history of this branch of the suit.

Require a personal service.

"From the old practice (*e*), then, as laid down by Oughton, Clerk, and Consett, it is to be collected, that personal answers *were* twofold—being to be had, in certain causes, on special application, from the proctor in the cause, as well as from the principal. This is distinctly laid down by Oughton; for instance, in the 16th section of his 61st title, '*De litis contestatione*,' and in the subsequent section [s. 17 of the same title], the suits, in special, where the proctor's answers may be had, are pointed out,

Old practice with respect to.

(*a*) Ayl. Parerg. 65.

(*b*) *Swift* v. *Swift*, 4 Hagg. 139.

(*c*) See the whole judgment of Sir J. Nicholl, in *Oliver and Puke* v. *Heathcote*, 2 Add. 35.

(*d*) 1 Add. 114, 118, &c.

(*e*) Ibid. 118.

Old practice with respect to.

"and the uses to which they are capable of being made subservient in these suits, are ascertained. Now this being so, I apprehend that notices or decrees for personal answers were always served accordingly; that is, notices for such answers from the proctor, upon the proctor; and decrees for such answers from the party, upon the party.

"It is true indeed that Oughton, in his 62nd title, refers to a note on title xxi. [Obs. 9] by which it seems, that a decree for the answers of the party principal in the cause *may be* served on his proctor. But this can only be, he observes, under the special authority of the court, in virtue of a special clause inserted in the decree itself; and consequently it forms no exception to the rule, that in ordinary cases, the decree for the personal answers of the party principal must be personally served upon the party principal. Oughton's whole 62nd title represents, under ordinary circumstances, the decree for the personal answers of the party principal, as a formal process, under seal of the court, against the party principal, and required to be served, personally, upon the party, as contradistinguished from any mere assignation or notice to be served upon the proctor. And this I conceive to have been invariably the old practice, except as excepted in the 9th obs. on Oughton's 21st title—an exception not at all applicable to the case of the present appeal, or in ordinary instances.

Why a personal service is requisite.

"So stood the old practice,—a practice, I must also remark, both perfectly reasonable in itself, and perfectly consonant with the practice of the court in analogous cases. For the reasonableness of the practice, it is too obvious to be insisted upon; and for its consonance with analogy, we all know, that whatever is to be done, personally, by the party, absolutely requires, in strictness, a personal service of the notice or decree for doing it upon the party. Where steps are to be taken by the proctor merely, a mere assignation upon the proctor suffices—he, *quoad hæc*, being '*dominus litis*.' But where the personal intervention of the principal is requisite to the act to be done, as it is, for instance, where costs are taxed against him, or where sums are decreed to be paid by him on account of alimony, the practice is to take out a monition against the party, not merely to serve a notice on the proctor, which monition must be personally served upon the party; in all cases, that is, where it is requisite that the proceedings should be conducted with any semblance of regularity.

Modern practice of service on proctor incorrect.

"It must be conceded, however, in this matter of *personal answers*, that the modern practice has been to serve the decree on the proctor only, and not on the principal.

"This may have arisen, partly perhaps from the two species of personal answers already alluded to (the latter, for obvious reasons, now obsolete) being confounded in modern practice; and, partly, because persons seldom hang back in this matter of *answers*, which are to be obtained, in most cases, without any sort of difficulty. *Being* the practice, however, I should be disposed to admit, that a service of the decree for answers, though merely upon the proctor, might be a sufficient service of the decree for very many purposes. For instance, if, after such service, the party's answer to an allegation of faculties were not brought in within a fit and reasonable time, it might justify the court in allotting sums on account of alimony (the marriage, that is, being proved or confessed) in proportion to the full extent of the faculties alleged; and so on. But it is a very different question whether such a service would justify the court in putting the party in contempt, and proceeding to signify him, in order to his imprisonment, under the statute; a measure which, I conceive, ecclesiastical courts to be only warranted in adopting, where the prior proceedings have been conducted with the strictest regularity.

How far available.

"Nor would it vary the case, in this view of it, to my apprehension, that *notice* of the decree should have been served on the principal, or that the proctor should have *appeared* to the decree, and prayed further time, and so forth; both which circumstances occurred in this very suit. As for the notice, that was a mere notice from the adverse proctor; the only notice which the party was bound (under *this* penalty at least) to obey, being the decree of the court, under seal of the court, *duly*, i. e. personally, served upon him, the party. As for the proctor's appearing to, and acting upon the decree, I can by no means think the act of the proctor *so* binding on the principal—unless, indeed, in virtue of some special clause to the effect of enabling him to accept services of decrees, &c., upon the principal, inserted in the proxy—for I cannot concede that a party may be put in contempt, and signified so as to become liable to all the penalties of contumacy, merely from his proctor doing that, for doing which he has no strict legal authority.

Necessity of personal service.

"Such then being the old practice, and being so, as it is, consonant both to reason and analogy, it remains only to inquire whether it has undergone any authoritative alteration in later times. Nor do I conceive that the inquiry can be attended with any sort of difficulty. Is there any adjudged case producible where this court has

"proceeded to enforce decrees of this nature by its compulsory process, in the absence of a personal service? I am confident there are none. Can it even be shown that such decrees have been so enforced, unless after a personal service, the whole matter passing *sub silentio?* I am nearly as confident that *this* has not occurred; for the court *is* always (or means to be) satisfied that there has been a personal service before issuing its compulsory process in this description of cases. The result therefore of the whole inquiry, which is almost too obvious to be stated in terms, is, that the old practice in this matter of personal answers, being both perfectly reasonable, and perfectly analogous to the correct practice in similar cases, should and *must*, in all cases, *stricti juris*, be the practice of ecclesiastical courts at this very day."

Ancient practice.

It seems that the ancient practice was to give acts on petition exceptive to answers, but never an allegation (*f*).

Where answers can and cannot be claimed.

Answers cannot be claimed where they would subject the party making them to a prosecution for a felony (*g*). In criminal suits the defendant's answers upon oath are not to be required even to those positions which are not in themselves criminatory. The law upon this point is fully and carefully set forth by Sir J. Nicholl, in the case of *Schultes* v. *Hodgson* (*h*). It is a common error of country courts to consider personal answers as responsive allegations, and to examine witnesses, an error which arises from a confusion of the answers with the plea (*i*). The obvious use and advantage of answers is to save the necessity of taking evidence (*k*), and causes are sometimes decided upon them alone (*l*).

Reformation of.

Answers may be directed to be reformed. Instances are to be found in the Reports where they have been so on the several scores of redundancy (*m*), for containing abusive matter (*n*), for irrelevancy (*o*); and an assignation for fuller answers has sometimes been decreed after publication (*p*). When a certificate to a decree for answers has been discontinued, it is still competent to the proctor

(*f*) *Morgan* v. *Hopkins*, 2 Phill. 585.

(*g*) *Robins* v. *Wolseley*, 1 Lee, 620.

(*h*) 1 Add. 105.

(*i*) *Burnell* v. *Jenkins*, 2 Phill. 394; *Morgan* v. *Hopkins*, 2 Phill. 584.

(*k*) *Clutton* v. *Cherry*, 2 Phill. 385.

(*l*) *Wright* v. *Sarmuda*, 2 Phill. 266, n.; *Clark* v. *Douce*, 2 Phill. 335; *Morgan* v. *Hopkins*, 2 Phill. 582.

(*m*) *Jehen* v. *Jehen*, 1 Lee, 273; *Mayo* v. *Brown*, ibid. 570.

(*n*) *Raymond* v. *Baron de Watteville*, 2 Lee, 499.

(*o*) Ibid.; and see *Jones* v. *Yarnold*, 2 Lee, 568, *contra*.

(*p*) *Smith* v. *Smithson*, 2 Lee, 505; *Heath* v. *Heath*, 2 Lee, 562.

having discontinued it, to object to answers (q). Time has been allowed to an agent acting under a power of attorney to plead on an answer in an interest cause, when the principal resided in Jamaica (r), but a party not giving in his answers on the day of the return of the decree, *personally* served, will be pronounced contumacious (s).

Consequence of not giving.

The rules as to evidence are the same as those of other courts. The "exceptive allegation," that is, exception to the credit of witnesses, has become practically obsolete since the introduction of *vivâ voce* evidence; but see *Evans* v. *Evans* (t).

Evidence generally.

SECT. 13.—*Costs.*

The question of *costs* in the Ecclesiastical Courts is, for the most part, a matter in the discretion of the judge, according to the nature and justice of the case; and the reasons for granting or refusing costs are publicly expressed at the time of giving the judgment.

Costs.

If either party be condemned in costs, the proctor of the other party brings in his bill. The bill is referred to the registrar, who is attended by the proctors on both sides, and, after examining the bill item by item, he allows or disallows or modifies the several charges, according to the established practice, where such practice exists; and, in other cases, according to the reasonableness of each charge: having taken off all overcharges, he reports to the judge, in open court, the amount of the bill as allowed, and the proctor makes oath that the sum reported has been necessarily expended by or on behalf of his party. If no objection has been offered to the report, the judge then taxes the bill at that sum, and decrees a monition for the payment of it; but if either party is dissatisfied with the report of the registrar on any item of the bill, the objection may be brought before the court for its decision. The regular charges are, however, so well known and established, and the registrars of the several courts, who are acting under the sanction of an oath of office, are so experienced and respectable, being generally selected out of the body of proctors, on the ground of their high cha-

Proctor's bill referred to registrar.

(q) *Raymond* v. *Baron de Watteville*, 2 Lee, 495.

(r) *Liebenrood* v. *Lawson*, 2 Lee, 558.

(s) *Wyllie* v. *Mott and French*, 1 Hagg. 33, and see note.

(t) 1 Consist. 75.

racter and professional knowledge, that an exception to their report as to costs rarely occurs.

Payment of costs.

The payment of the costs thus taxed, as between *party and party*, is enforced by the process of *contumacy, significavit* and *attachment;* but costs as between proctor and client cannot be taxed by the judge, nor the payment thereof be enforced by the court; the proctor must recover his bill of costs against his client by an action at law (t).

General principles with respect to.

It has always been holden in the ecclesiastical courts, that costs are matters of discretion, but not of a capricious but a legal discretion, exercised according to a just consideration of all the circumstances, and with an adherence to general rules and former precedents (u). A client is, under all circumstances, entitled to a detailed bill of costs from his proctor, but where this has been delivered in, and long acquiesced in, and payment made, he is not entitled, after the suit is over, during which he has not been *inops consilii,* to have it referred to the registrar for examination (x). A monition for the payment of costs will be enforced, if necessary, by the further aid of the court (y). If a party committed for non-payment of costs under an *erroneous process* be thereupon released, the court is bound, at the application of the party to whom they are still due, to issue a new monition for payment of such costs (z). The court will sometimes give, in lieu of full costs, a smaller sum *nomine expensarum.* It has also pronounced an Irish peer in contempt for non-payment of costs, and directed such contempt to be signified, leaving the lord chancellor to decide whether the writ *de contumace capiendo* should issue.

Taxation of costs.

The costs are taxed at a certain sum (say 100*l.*), "besides the expense of a monition;" but if a monition be necessary, the expense of it falls, and of course any further expense, which disobedience to the monition may occasion, on the disobeying party (a). Costs may be taxed *de die in diem,* but usually costs are only taxed from term to term, and for the *hearing.* But if many charges are made, and very few proved, the party against whom they are brought

(t) Rep. of Eccles. Comm. 19; see *Peddle* v. *Evans*, 1 Hagg. 684; *Peddle* v. *Toller*, 3 Hagg. 287.

(u) *Lagden* v. *Robinson*, 1 Consist. 505; *Burnell* v. *Jenkins*, 2 Phill. 400; *Wilson* v. *M'Nath*, 3 Phill. 92; *Griffith* v. *Reed*, 1 Hagg. 210; *Goodall* v. *Whitmore*, 2 Hagg. 374.

(x) *Peddle* v. *Toller*, 3 Hagg. 296.

(y) *Coates* v. *Brown*, 1 Add. 345.

(z) *Austin* v. *Dregger*, 1 Add. 307.

(a) *Coates* v. *Brown*, 1 Add. 351.

will not be condemned in the expenses of the whole proceeding (*b*). Where a prohibition has been applied for, the common law courts have no power either by custom or by 1 & 2 Will. 4, c. 21, to allow to the successful party his costs in the ecclesiastical court. And this court will not, on the other hand, include the expenses incident to proceedings for a prohibition in its taxation of costs (*c*). It was so decided by the judge of the Consistory of London in the case of *Thorogood* (*d*).

Security for costs;

The court has the power in all cases upon application made to it, to direct security to be given for costs by either or all of the parties.

in criminal suits.

And in criminal suits, one of the reasons why an application must be made to the judge before his office is promoted is, that he may consider the fitness of the person to be made responsible for costs to the other party (*e*)

Where it is proved to the court that a party instituting his suit became bankrupt since the suit began, it will order such party to give security for costs, before it allow further proceedings in the cause. The court required such security in the case of *Goldie* v. *Murray*, saying, that it did not think it had the power to order the assignees to do so, as the common law courts seemed to have (*f*). There appears to be no reason for the supposition that this power of the court, to order security for costs, applied principally to testamentary cases (*g*).

Appeals in respect of costs.

The giving costs is not a matter absolutely unappealable, though such appeals, especially for trifling sums, are much to be discouraged (*h*). An appeal is perempted by doing any subsequent act in furtherance of the sentence, viz., attending taxation of costs (*i*). On an appeal from a grievance, the court will not enforce payment of the costs incurred in the inferior court (*j*) before the final hearing; but then the court, in cases not matrimonial, may give costs in both courts.

Costs in court of appeal.

The statute of 3 & 4 Will. 4, c. 41 (*k*) (establishing the Judicial Committee of the Privy Council), contains the following provision with respect to costs.

Sect. 15. " The costs incurred in the prosecution of any

(*b*) *Bardin* v. *Calcott*, 1 Consist. 20.

(*c*) 5 B. & A. 458; 1 B. & A. 154; 1 Str. 154.

(*d*) *Baker* v. *Thorogood*, 2 Curt. 635 (1841).

(*e*) *Carr* v. *Marsh*, 2 Phill. 204.

(*f*) Prerog. Court, May 12, 1841. See *Mason* v. *Polhill*, 1 Crompton & Meeson, 620; Tidd's New Practice, 346.

(*g*) *Turton* v. *Turton*, 3 Hagg. 346.

(*h*) *Lloyd* v. *Poole*, 3 Hagg. 477.

(*i*) *Lloyd and Clarke* v. *Poole*, 3 Hagg. 477.

(*j*) *Brisco* v. *Brisco*, 3 Phill. 38.

(*k*) *Vide supra*, p. 1273.

appeal or matter referred to the said judicial committee, and of such issues as the said committee shall under this act direct, shall be paid by such party or parties, person or persons, and be taxed by the aforesaid registrar, or such other person or persons, to be appointed by his Majesty in council or the said judicial committee, and in such manner as the said committee shall direct."

In criminal suits.

As a general principle, where an offence has been committed, the expense of correcting it is to be borne by the offender; full costs, however, are not given in all cases, but are mitigated according to the discretion of the court (*l*).

Proctor.

A proctor may be condemned in costs for improper practices in the conduct of a suit, besides being subject to other punishment for extortionate charges (*m*).

Monition for Costs.

William, by Divine Providence Archbishop of Canterbury, Primate of all England and Metropolitan. To all and singular clerks and literate persons whomsoever and wheresoever in and throughout our whole province of Canterbury, greeting. Whereas the Right Honourable Sir H. J., Knight, Doctor of Laws, Master, Keeper or Commissary of our Prerogative Court of Canterbury lawfully constituted, rightly and duly proceeding in a certain cause or business of proving in solemn form of law the last will and testament of G. K., late of Reading, in the county of Berks, deceased, promoted by J. S., the sole executor named in the said will, against J. M., the natural and lawful brother and only next of kin of the said deceased, which was lately depending in judgment before him, and in which cause or business a pretended codicil to the said will was propounded on behalf of the said J. M., did, at the petition of the proctor of the said J. S., condemn the said J. M. in the costs of the said J. S. And whereas on the day of the date hereof, the proctor of the said J. S. porrected a bill of costs on behalf of his said party, which our said master, keeper, or commissary, rightly and duly proceeding thereupon, moderated at the sum of —— pounds and —— shillings of lawful money of Great Britain and Ireland, current in Great Britain, to be paid to the said J. S. or his proctor, besides the

(*l*) *Griffiths* v. *Reed*, 1 Hagg. 210; *Jenkins* v. *Barrett*, 1 Hagg. 12. See also *Lee* v. *Matthews*, 3 Hagg. 176; *Palmer* v. *Tijou*, 2 Add. 203; *England* v. *Williams*, 2 Add. 309; *Clinton* v. *Hatchard*, 1 Add. 104; *Taylor* v. *Morley*, 1 Curteis, 470.

(*m*) *Prentice* v. *Prentice*, 3 Phill. 311; 3 Hagg. 255.

expenses of his monition, and decreed the said J. M. to be cited and admonished to pay or cause to be paid the said sum of —— pounds and —— shillings, the amount of the said costs, to the said J. S. or his proctor in manner and form hereinafter mentioned (justice so requiring). We do therefore hereby authorize and empower, and strictly enjoin and command you, jointly and severally, that you monish or cause to be monished peremptorily the said J. M. (whom we do so monish by the tenor of these presents) to pay or cause to be paid to the said J. S. or his proctor the sum of —— pounds and —— shillings, the amount of the said taxed costs, within fifteen days after the due execution of this monition upon him, under pain of the law and contempt thereof. And what you shall do or cause to be done in the premises you shall duly certify our said master, keeper or commissary, his surrogate, or some other competent judge in this behalf, together with these presents. Dated at London the —— day of ——, in the year of our Lord one thousand eight hundred and thirty —— and in the —— year of our translation.

*J. D.
J. I.
C. B.* } *Deputy Registers.*

Certificate.

This monition was personally served on the above-named J. M., by showing to him the same under seal, and leaving with him a true copy hereof, at Reading, in the county of Berks, this —— day of ——, in the year of our Lord one thousand eight hundred and thirty ——.

By me, G. S.

Appeared personally the above-named G. S., of Reading, in the county of Berks, Gentleman, and being sworn made oath that the whole body, series and contents of the above certificate, to which I have set and subscribed my name, were and are true.

G. S.

On Monday, the second day of June, ——, the above-named G. S. was duly sworn to the truth of the above affidavit, at Reading, in the county of Berks.

Before me, J. W.,
A Commissioner, &c.

Fees.

As to the fees in the Ecclesiastical Courts, see Canons 135, 136 of 1603, and 10 Geo. 4, c. 53, ss. 1—4.

CHAPTER VII.

PROCEDURE UNDER 1 & 2 VICT. C. 106.

Curates.

THE procedure against curates under this act has been already mentioned (*a*).

Clerks in orders.

By 7 & 8 Vict. c. 59, s. 2, persons in holy orders appointed to the office of church clerk, chapel clerk or parish clerk under that act are to be proceeded against as if they were licensed curates.

Spiritual persons illegally trading may be suspended, and for the third offence deprived.

As to trafficking and farming it is enacted by sect. 31 of the statute 1 & 2 Vict. c. 106 (*b*), "That if any spiritual person shall trade or deal in any manner contrary to the provisions of this act, it shall be lawful for the bishop of the diocese where such person shall hold any cathedral preferment, benefice, curacy, or lectureship, or shall be licensed or otherwise allowed to perform the duties of any ecclesiastical office whatever, to cause such person to be cited before his chancellor or other competent judge, and it shall be lawful for such chancellor or other judge, on proof in due course of law of such trading, to suspend such spiritual person for his first offence for such time not exceeding one year as to such judge shall seem fit; and on proof in like manner before such or any other competent ecclesiastical judge of a second offence committed by such spiritual person subsequent to such sentence of suspension, such spiritual person shall for such second offence be suspended for such time as to the judge shall seem fit; and for his third offence be deprived *ab officio et beneficio*, and thereupon it shall be lawful for the patron or patrons of any such cathedral preferment, benefice, lectureship, or office, to make donation or to present or nominate to the same as if the person so deprived were actually dead; and in all such cases of suspension, the bishop during such suspension shall sequester the profits of any cathedral preferment, benefice, lectureship, or office of which such spiritual person may be in

(*a*) *Vide supra*, Part II. Chap. XV.

(*b*) It is expressly provided, that this act shall not affect any powers the bishop may now have "by statute, canon, usage or otherwise howsoever" (see section 132). For the mode of proceeding to punish non-residence under the old law, before any act of parliament had been passed on the subject, see the case of *Pawlet* v. *Head*, 2 Lee, 566.

possession, and by an order under his hand direct the application of the profits of the same respectively, after deducting the necessary expenses of providing for the due performance of the duties of the same respectively, towards the same purposes and in the same order, as near as the difference of circumstances will admit, as are hereinafter directed with respect to the profits of a benefice sequestered in case of non-compliance after monition with an order requiring a spiritual person to proceed and reside on his benefice (*c*), save that no part of such profits shall be paid to the spiritual person so suspended, nor applied in satisfaction of a sequestration at the suit of a creditor; and in case of deprivation the bishop shall forthwith give notice thereof in writing under his hand to the patron or patrons of any cathedral preferment, benefice, lectureship, or office which the said spiritual person may have holden in the manner hereinafter required with respect to notice to the patron of a benefice continuing under sequestration for one whole year, and thereby becoming void, and any such cathedral preferment or benefice shall lapse at such period after the said notice as any such last-mentioned benefice would, under the provisions of this act, lapse: provided always, that no contract shall be deemed to be void by reason only of the same having been entered into by a spiritual person trading or dealing, either solely or jointly with any other person or persons, contrary to the provisions of this act, but every such contract may be enforced by or against such spiritual person, either solely or jointly with any other person or persons, as the case may be, in the same way as if no spiritual person had been party to such contract."

Contract by spiritual person.

This statute empowers the bishop to punish the non-residence of incumbents by the adoption of one of two modes of procedure provided by it for this purpose.

As to the non-residence of incumbents.

Two modes of proceeding to punish non-residence.

1. By a summary process of monition and sequestration; 2. By the infliction of certain penalties mentioned in Part IV. Chap. III. Sect. 5, under sect. 32 of 1 & 2 Vict. c. 106 (*d*). In both cases an appeal is given from the order of the bishop to the archbishop.

As to the process by monition and sequestration, it is enacted as follows:—

Sect. 54. "In every case in which it shall appear to the bishop that any spiritual person holding any benefice within his diocese, and not having a licence to reside elsewhere than in the house of residence belonging thereto,

Residence may be enforced by monition, instead of proceeding for penalties.

(*c*) *Vide infra*, p. 1305. (*d*) *Supra*, p. 1149.

nor having any legal cause of exemption from residence, does not sufficiently, according to the true meaning and intent of this act, reside on such benefice, it shall be lawful for such bishop, instead of proceeding for penalties under this act, or for penalties incurred before the passing of this act under 57 Geo. 3, c. 99, or after proceeding for the same, to issue or cause to be issued a monition to such spiritual person, requiring him forthwith to proceed to and to reside on such benefice, and perform the duties thereof, and to make a return to such monition within a certain number of days after the issuing thereof; provided that in every such case there shall be thirty days between the time of serving such monition on such spiritual person, in the manner hereinafter directed, and the time specified in such monition for the return thereto; and the spiritual person on whom any such monition shall be served shall, within the time specified for that purpose, make a return thereto into the registry of the diocese, to be there filed; and it shall be lawful for the bishop to whom any such return shall be made to require such return or any fact contained therein to be verified by evidence (*d*); and in every case where no such return shall be made, or where such return shall not state such reasons for the non-residence of such spiritual person as shall be deemed satisfactory by the bishop, or where such return, or any of the facts contained therein, shall not be so verified as aforesaid, when such verification shall have been required, it shall be lawful for the bishop to issue an order in writing under his hand and seal, requiring such spiritual person to proceed and reside as aforesaid within thirty days after such order shall been served upon him in like manner as is hereinafter directed with respect to the service of monitions; and in case of non-compliance with such order it shall be lawful for the bishop to sequester (*e*) the profits of such benefice until such order shall be complied with, or such sufficient reasons for non-compliance therewith shall be stated and proved as aforesaid, and to direct, by any order to be made for that purpose under his hand, and filed as aforesaid, the application of such profits, after deducting the necessary expenses of serving the cure, either in the whole or in such proportions as he shall think fit, in the first place to the payment of the penalties proceeded for, if any, and of such reasonable expenses as shall have been incurred in

Time to elapse between issue of monition and its return.

Bishop may require return to monition to be verified by evidence.

May proceed to sequester.

(*d*) See a further provision on this subject in section 123.

(*e*) Such sequestrations are to have a priority over all others; see section 110.

relation to such monition and sequestration, and in the next place towards the repair or sustentation of the chancel, house of residence of such benefice, or any of the buildings and appurtenances thereof, and of the glebe and demesne lands, and in the next place, where such benefice shall be likewise under sequestration at the suit of any creditor, then towards the satisfaction of such last-mentioned sequestration; and after the satisfaction thereof, then and in the next place towards the augmentation or improvement of any such benefice, or the house of residence thereof, or any of the buildings and appurtenances thereof, or towards the improvement of any of the glebe or demesne lands thereof, or to order and direct the same or any portion thereof to be paid to the treasurer of the governors of the bounty of Queen Anne, for the purposes of the said bounty, as such bishop shall, in his discretion, under all circumstances, think fit and expedient; and it shall also be lawful for the bishop, within six months after such order for sequestration, or within six months after any money shall have been actually levied by such sequestration, to remit to such spiritual person any proportion of such sequestered profits, or to cause the same or any part thereof, whether the same remain in the hands of the sequestrator or shall have been paid to the said treasurer, to be paid to such spiritual person; and every such sequestrator at the suit of the bishop is hereby required, upon receiving an order under the hand of such bishop, forthwith to obey the same; and the said treasurer is hereby authorized and required, upon receiving a like order from such bishop, to make such payment out of any money in his hands: provided always, that any such spiritual person may, within one month after service upon him of the order for any such sequestration, appeal to the archbishop of the province, who shall make such order relating thereto, or to the profits that shall have been so sequestered as aforesaid, for the return of the same or any part thereof to such spiritual person, or to such sequestrator at the suit of any creditor (as the case may be), or otherwise as may appear to such archbishop to be just and proper; but nevertheless such sequestration shall be in force during such appeal."

Appeal against sequestrations to the archbishop.

Before the writ of sequestration, which is of a highly penal character, issues, the clerk must be heard by the ordinary, but not before the issue of the monition.

As to hearing of clerk before process issues.

Upon these two points the following cases are important.

1. As to the issue of the monition.

In proceedings under this statute, for the sequestra-

As to hearing of clerk before process issues.

tion of a benefice for non-residence, it is not necessary that the bishop's monition, under sect. 54, should be preceded by a citation or other warning to the incumbent.

Where the incumbent, in answer to such monition, sends a return assigning an excuse for non-residence which the bishop considers insufficient, that is a sufficient hearing of the incumbent to authorize the bishop to make an order upon the incumbent to return into residence within thirty days.

Where the incumbent, being served with such order, sends to the bishop, upon affidavit, an excuse for not obeying the order, which the bishop considers insufficient, that is a sufficient hearing of the incumbent to authorize the bishop to sequestrate the benefice after the lapse of the thirty days.

Under sect. 58, a benefice becomes void if it remain for the space of a year under sequestration for non-residence, the year commencing from the date of the decree of sequestration; the case not falling within sect. 120, which provides that for all purposes of the act, except as therein otherwise provided, the year shall commence on 1st January and be reckoned to 31st December, both inclusive.

So holden on motion for prohibition by the Court of Queen's Bench and the Court of Exchequer; and afterwards in an action brought by such incumbent against his successor for the income of the living (*f*).

2. As to hearing the clerk before the sequestration issues.

A writ of sequestration issued under this statute to compel a clergyman to reside on his benefice is not merely in the nature of a distress to compel residence, but is also a penal proceeding against him, as it is one step towards the forfeiture of the benefice. The bishop, therefore, ought to give the clergyman an opportunity of being heard before directing the sequestration.

If, in obedience to a monition issued by the bishop, a clergyman goes into residence and again ceases to reside, the bishop may serve him with an order to reside; but if that order be disobeyed, the bishop is not justified in directing a sequestration at once, and the sequestration will be void, unless before issuing it he gives the clergyman an opportunity of rebutting the supposed facts, or of offering lawful excuse for his disobedience to the order to reside (*g*).

(*f*) *Ex parte Bartlett*, 11 Jur. 328; 3 Ex. 38; *Bartlett* v. *Kirwood*, 2 Ell. & Bla. 771 (1853).

(*g*) *Bonaker* v. *Evans*, 16 Q. B. 170; 20 L. J., N. S., Q. B. 137 (1850).

Sect. 55. "Every spiritual person to whom any such monition or order in writing shall be issued as aforesaid, who shall be at the time of the issuing thereof absent from his benefice, contrary to the provisions of this act, but who shall forthwith obey such monition or order, and the profits of whose benefice shall by reason of such obedience not be sequestered, shall nevertheless pay all costs, charges, and expenses incurred by reason of the issuing and serving such monition or order, and that the proceedings thereon shall not be stayed until such payment shall be made."

Incumbents returning to residence on monition to pay the costs.

Sect. 56. "And for effectually enforcing *boná fide* residence according to the intent of such monition and order, be it enacted, that if any spiritual person, not having a licence to reside out of the limits of his benefice, nor having other lawful cause of absence from the same, who after any such monition or order as aforesaid requiring him to reside, and before or after any such sequestration as aforesaid, shall in obedience to any such monition or order have begun to reside upon his benefice, shall afterwards, and before the expiration of twelve months next after the commencement of such residence, wilfully absent himself from such benefice for the space of one month together, or to be accounted at several times, it shall be lawful for the bishop, without issuing any other monition or making any order, to sequester and apply the profits of such benefice, as before directed by this act, for the purpose of enforcing the residence of such spiritual person, according to the true intent of the original monition issued by the bishop as aforesaid; and it shall be lawful for the bishop so to proceed in like cases from time to time as often as occasion may require; provided that in each such case such spiritual person may, within one month after the service upon him of the order for any such sequestration, appeal to the archbishop of the province, who shall make such order relating thereto, or to the profits sequestered, or to any part thereof, as to him may seem just and proper, but nevertheless such sequestration shall be in force during such appeal."

Incumbent returning to residence on monition, but again absenting himself within twelve months, the bishop may, without further monition, sequester.

Sect. 57. "In every case in which any archbishop or bishop shall think proper, after proceeding by monition for the recovery of any penalty under this act for non-residence of more than one-third part of the yearly value of any benefice for any non-residence exceeding six months in the year, to remit the whole or any part of any such penalty, such archbishop shall forthwith transmit to her Majesty in council, and such bishop shall forthwith transmit to the archbishop of the province to which he belongs,

Reasons for remitting penalties for non-residence of a certain amount to be transmitted to the Queen in Council.

a statement of the nature and special circumstances of each case, and the reasons for the remission of any such penalty; and it shall thereupon be lawful for her Majesty in council, or for the archbishop, as the case may be, to allow or disallow such remission in whole or in part, in the same manner as is provided in this act with relation to the allowance or disallowance of licences of non-residence granted in cases not hereinbefore expressly enumerated; provided always, that the decision of the archbishop with respect to cases transmitted to him from a bishop shall be final."

Benefice continuing so sequestrated one year, or being twice so sequestrated within two years, to become void.

Sect. 58. "If the benefice of any spiritual person shall continue for the space of one whole year under sequestration (*h*) issued under the provisions of this act for disobedience to the bishop's monition or order requiring such spiritual person to reside on his benefice, or if such spiritual person shall, under the provisions of this act, incur two such sequestrations in the space of two years, and shall not be relieved with respect to either of such sequestrations upon appeal, such benefice shall thereupon become void; and it shall be lawful for the patron of such benefice to make donation or to present or nominate to the same as if such spiritual person were dead: and the bishop, on such benefice so becoming void, shall give notice in writing under his hand to such patron, which notice shall either be delivered to such patron or left at his usual place of abode, or if such patron or place of abode shall be unknown, or shall be out of England, such notice shall be twice inserted in the London Gazette, and also twice in some newspaper printed and usually circulated in London, and in some other newspaper usually circulated in the neighbourhood of the place where such benefice is situate; and for the purposes of lapse the avoidance of the benefice shall be reckoned from the day on which such notice shall have been delivered as aforesaid, or from the day on which six months shall have expired after the second publication of such notice in the London Gazette, as the case may be: and every such notice in the Gazette and newspapers shall state that the patron or the place of abode of the patron is unknown, or that he is said to be out of England, as the case may be, and that the benefice will lapse, at the furthest, after the expiration of one year, from the second publication thereof as aforesaid; and upon any such avoidance it shall not be lawful for the patron to appoint by donation or present or nominate to such bene-

(*h*) See *Ex parte Bartlett*, 11 Jur. 328; 3 Ex. 38; *supra*, p. 1306.

fice so avoided the person by reason of whose non-residence the same was so avoided."

Provisions relating to bishops to apply to archbishops in their own dioceses.

Sect. 107. "All the powers, authorities, provisions, regulations, matters and things in this act contained, in relation to bishops in their dioceses, shall extend and be construed to extend to the archbishops in the respective dioceses of which they are bishops, and also in their own peculiar jurisdictions, as fully and effectually as if the archbishops were named with the bishops in every such case."

Sect. 108 extends the power to all exempt places.

Where jurisdiction is given to bishop, &c. all concurrent jurisdiction to cease.

Sect. 109. "In every case in which jurisdiction is given to the bishop of the diocese or to any archbishop, under the provisions of this act, and for the purposes thereof, and the enforcing the due execution of the provisions thereof, all other and concurrent jurisdiction in respect thereof shall, except as herein otherwise provided, wholly cease, and no other jurisdiction in relation to the provisions of this act shall be used, exercised, or enforced, save and except such jurisdiction of the bishop and archbishop under this act, any thing in any act or acts of parliament, or law or laws, or usage or custom to the contrary notwithstanding."

Sequestrations under this act to have priority.

Sect. 110. "Every sequestration issued under the provisions of this act shall have priority, and the sums to be thereby recovered shall be paid and satisfied in preference to all other sequestrations, and the sums to be thereby recovered, except such sequestrations as shall be founded on judgments duly docketed before the passing of this act, and also except such sequestrations as shall have been issued before any sequestration under this act under the provisions of an act passed in 17 Geo. 3, for promoting the residence of the parochial clergy, and the monies to be recovered by such excepted sequestrations respectively."

Appeals under this act.

Sect. 111. "All appeals under the provisions of this act to any archbishop shall be in writing signed by the party appealing, and that in order to discourage frivolous appeals, no proceeding shall be had in any such appeal until the appellant shall, if required, have given security, in such form and to such amount as the archbishop shall direct, of payment to the bishop of such costs as shall be awarded by the archbishop if he shall decide against the appellant; and that, after such security, if required, shall have been given, the said archbishop shall forthwith, either by himself or by some commissioner or commissioners appointed under his hand from among the other bishops of his province, make or cause to be made inquiry into the matter

complained of, and shall after such inquiry, and in the latter case after a report in writing from his said commissioner or commissioners, give his decision in such appeal in writing under his hand; and when he shall decide the merits of the appeal against the appellant, he shall also award and direct whether any and what amount of costs shall be paid by the appellant to the bishop respondent; and in like manner, when he shall decide in favour of the appellant, he shall also award and direct whether any and what amount of costs shall be paid by the bishop respondent to the appellant."

Regulations respecting monitions.

Sect. 112. "In all cases in which proceedings under this act are directed to be by monition and sequestration, such monition shall issue under the hand and seal of the bishop, and such monition, and any other instrument or notice issued in pursuance of the provisions of this act, and not otherwise specially provided for, shall be served personally upon the spiritual person therein named or to whom it shall be directed, by showing the original to him and leaving with him a true copy thereof, or, in case such spiritual person cannot be found, by leaving a true copy thereof at his usual or last known place of residence, and by affixing another copy thereof upon the church door of the parish in which such place of residence shall be situate, and also, in the case of such monition, by leaving another copy thereof with the officiating minister, or one of the churchwardens of the said parish, and also by affixing another copy thereof on the church door of the parish in which the benefice of such spiritual person shall be situate; and such monition or other instrument, or notice as aforesaid, shall, immediately after the service thereof, be returned into the consistorial court of such bishop, and be there filed, together with an affidavit of the time and manner in which the same shall have been served; and thereupon, in case of such monition, it shall be competent to the party monished to show cause, by affidavit or otherwise, as the case may require, why a sequestration should not issue according to the tenor of such monition; and if such spiritual person shall not, within the time assigned by such monition, show sufficient cause to the contrary, such sequestration shall issue under the seal of the consistorial court of such bishop, and shall be served and returned into the registry of such court in like manner as is hereinbefore directed with respect to monitions issued under the provisions of this act."

Personal service;

and sequestrations.

Sequestration not to issue after monition

Sect. 113. "In any case of non-residence in which a monition shall have been served upon any spiritual person

under the provisions of this act, requiring such spiritual person to reside on his benefice, no sequestration shall issue until an order requiring such spiritual person to proceed and reside upon such benefice within thirty days, as hereinbefore enacted, shall have been served upon him in the same manner as is hereinbefore directed as to the service of monitions."

to reside, until service of order.

With respect to the recovery of penalties and forfeitures under sect. 33, mentioned in the former chapter (*i*), the provisions are as follows:—

Sect. 114. All penalties and forfeitures which shall be incurred under this act by any spiritual person holding a benefice shall and may be sued for and recovered in the court of the bishop of the diocese in which such benefice is situate, and by some person duly authorized for that purpose by such bishop by writing under his hand and seal, and in no other court, and by or at the instance of no other person whatever; and that the payment of every such penalty or forfeiture, together with the reasonable expense incurred in recovering the same, shall and may be enforced by monition and sequestration; and that it shall and may be lawful for such bishop, by any order made for that purpose in writing under his hand, and to be registered in the registry of the diocese, which the registrar is hereby required to do, to direct that every such penalty or forfeiture so recovered as aforesaid, and which shall not have been remitted in whole or in part, or so much thereof as shall not have been remitted, shall be applied towards the augmentation or improvement of such benefice or of the house of residence thereof, or of any of the buildings or appurtenances thereof."

Penalties against spiritual persons under this act, when and how to be recovered.

Application of penalties recovered.

A suit to recover a *penalty* against a beneficed clergyman under this act for non-residence is a civil and not a criminal suit or proceeding, and, therefore, need not be brought under 3 & 4 Vict. c. 86 (*k*).

Not a criminal suit.

Sect. 117. "All penalties and forfeitures under this act incurred by persons not spiritual, or by spiritual persons not holding benefices, shall be sued for and recovered by any person who will sue for the same by action of debt in any of her majesty's courts of record at Westminster."

Recovery of penalties against laymen or unbeneficed clergymen.

Sect. 118. "No penalty shall be recovered against any spiritual person, under the provisions of this act, other or further than those which such spiritual person may have

Penalties not recoverable for more than one year.

(*i*) Part IV. Chap. III. Sect. 5, p. 1147, *supra*.

(*k*) *Bluck* v. *Rackham*, 1 Roberts. Ecc. Rep. 367 (1845); 5 Moo. P. C. 308; 9 Q. B. 691.

incurred subsequent to the first day of January in the year immediately preceding the year in which such proceedings shall be commenced."

Application of penalties.

Sect. 119. "All penalties recovered under the provisions of this act, the application of which is not specially directed thereby, shall be paid over to the treasurer of the governors of the bounty of Queen Anne, to be applied to the purposes of the said bounty."

Recovery of fees, &c. by monition and sequestration.

As to fees and other matters: Sect. 115. "All fees, charges, costs and expenses incurred or directed to be paid by any spiritual person holding any benefice under the provisions of this act, which shall remain unpaid for the period of twenty-one days after demand thereof in writing delivered to or left at the usual or last place of abode of such spiritual person, may be recovered by monition and sequestration: provided always, that it shall be lawful for the person or persons of whom any such fees, costs, charges and expenses shall be so demanded to apply to the bishop of the diocese to order the taxation thereof, and such bishop shall thereupon order some proper person

Their taxation.

to tax and settle the same; and the certificate of allowance, by the person so to be appointed, of such fees, costs, charges and expenses so to be taxed, shall be final."

Penalty on registrar for neglect.

Sect. 116. "If the registrar of any diocese shall refuse or neglect to make any entry, or to do any other matter or thing prescribed by this act, he shall forfeit for every such refusal or neglect the sum of five pounds."

Commencement and conclusion of the year.

Sect. 120. "For all the purposes of this act, except as herein otherwise provided, the year shall be deemed to commence on the first day of January, and be reckoned therefrom to the thirty-first day of December, both inclusive" (*l*).

How months to be calculated.

Sect. 121. "For all the purposes of this act the months therein named shall be taken to be calendar months, except in any case in which any month or months are to be made up of different periods less than a month, and in every such case thirty days shall be deemed a month."

Statements how to be verified.

Sect. 123. "When authority is given by this act to any archbishop or bishop to require any statement or facts to be verified by evidence, or to inquire or to cause inquiry to be made into any facts, such archbishop or bishop may require any such statement or any of such facts to be verified in such manner as the said archbishop or bishop shall see fit; and that when any oath, affidavit or affirmation,

(*l*) *Sed vide supra*, *Ex parte Bartlett*, 11 Jur. 328; 3 Ex. 38; *Bartlett* v. *Kirwood*, 2 Ell. & Bla. 771; p. 1306.

or solemn declaration is or may be by or in pursuance of the provisions of this act required to be made, such oath, affidavit, or affirmation or solemn declaration shall and may be made either before such archbishop or bishop, or the commissioner or commissioners, or one of them, or such archbishop or bishop respectively, or before some ecclesiastical judge or his surrogate, or before a justice of the peace, or before a master or master extraordinary in chancery, who are hereby authorized and empowered in all and every of the cases aforesaid to administer such oath, affidavit and affirmation, or to take such declaration, as the case may be."

Before whom affidavits may be made.

CHAPTER VIII.

PROCEDURE UNDER 3 & 4 VICT. C. 86.

Bishop's duty to punish criminous clerks.

In the form of consecration in the Book of Common Prayer, one of the questions put by the archbishop to the candidate for episcopacy, is—

"The Archbishop.—*Will you maintain and set forward as much as shall lie in you, quietness, love and peace, among all men; and such as are unjust, disobedient and criminous, within your diocese, correct and punish according to such authority as you have by God's word, and as to you shall be committed by the ordinance of this realm?*

"Answer.—*I will do so by the help of God.*"

Might have been imprisoned by the spiritual judge for incontinence.

It was enacted by 1 Hen. 7, c. 4, that it shall be lawful to all archbishops and bishops, and other ordinaries having episcopal jurisdiction, to punish and chastise priests, clerks, and religious men, as shall be convicted before them by examination, and other lawful proof requisite by the law of the church, of advoutry, fornication, incest, or any other fleshy incontinency, by committing them to ward and prison, there to abide for such time as shall be thought to their discretions convenient for the quality and quantity of their trespass. This is the first statute passed by the state in aid of the discipline of the clergy.

Present mode of punishing delinquent clerks.

On the 9th of August, 1843, was passed 3 & 4 Vict. c. 86, entitled, "An Act for better enforcing Church Discipline," which, proclaiming in its preamble that the *manner of proceeding in causes for the correction of clerks* required amendment, repealed the foregoing statute of Henry the Seventh (the continuance of which up to the present period was not a little extraordinary), and contained the following provisions:—First (though the enactment comes late in the statute), it is to be observed that it enacts as follows:—

As to criminal suits generally—

No suit to be instituted except as herein provided.

Sect. 23. "No criminal suit or proceeding against a clerk in holy orders of the United Church of England and Ireland, for any offence against the laws ecclesiastical (*a*),

(*a*) In *Rackham* v. *Bluck* (1 Rob. Eccl. Rep. 367; 5 Moo. P. C. 308; 9 Q. B. 691) it was holden that a proceeding to recover penalties for non-residence under 1 & 2 Vict. c. 106, ss. 33, 114, was not a "criminal suit or proceeding."

shall be instituted in any ecclesiastical court otherwise than is hereinbefore enacted or provided" (*b*).

Secondly, it is provided—the provision is perhaps difficult to construe and apply—

As to personal powers of ordinary—

Sect. 25. "That nothing in this act contained shall be construed to affect any authority over the clergy of the respective provinces or dioceses which the archbishops or bishops of England and Wales may now, according to law, exercise personally and without process in court."

Not to affect authority of bishop out of court.

Any authority of the bishop exercised out of court is no bar to the institution of proceedings under this act (*c*).

Thirdly, as to limitation of time.

This statute limits the time within which a clerk may be prosecuted under its provisions, a limitation introduced by positive law for the first time to the theory of clerical discipline. It is provided by sect. 20, "That every suit or proceeding against any such clerk in holy orders for any offence against the laws ecclesiastical shall be *commenced within two years after the commission of the offence, in respect of which the suit or proceeding shall be instituted, and not afterwards:* provided always, that whenever any such suit or proceeding shall be brought in respect of an offence for which a conviction shall have been obtained in any court of common law, such suit or proceeding may be brought against the person convicted at any time within *six calendar months* after such conviction, although more than two years shall have elapsed since the commission of the offence in respect of which such suit or proceeding shall be so brought."

Suits to be commenced within two years.

Proviso.

It has been finally ruled by the Privy Council and the Court of Arches, reversing the decision of the Archbishop of Canterbury acting for the Bishop of Bath and Wells, that the commencement of the suit dates from the service of the citation upon the accused clerk and not from the date of the issue of a preliminary commission (*d*). This case exhausts all the learning on the subject; see also

When the time begins to run.

(*b*) This clause has taken away any power which the ordinary, *quâ* visitor, *might* have possessed of depriving a clerk *summariè et sine figurâ judicii;* and this power is not preserved by sect. 25. *Reg.* v. *Abp. of York* (2 Ad. & Ell., N. S. 1; 2 G. & D. 202). But see the case of the *Dean of Bath and Wells* (Dyer's Rep. 278).

(*c*) *Ex parte Denison*, 4 El. & Bl. 292; 3 C. L. R. 247.

(*d*) *Denison* v. *Ditcher*, Deane & Swabey's Rep. 334; 11 Moo. P. C. 324.

When the time begins to run.

Sherwood v. *Ray* (e), *Brookes* v. *Cresswell* (f); and as to the application of this section to the 68th Canon, *Titchmarsh* v. *Chapman* (g).

The offence for which the clerk is articled must have been committed within the two years preceding the service of the citation, but it does not follow that offences without that limit may not be given in evidence as rendering probable the commission of an offence within the limits (h). For an analogous decision see *Duke of Norfolk's case* (h). See also *Bishop of Hereford* v. *Thompson* (i). The general rule at common law seems to be that the limited time begins to run from the moment when the injury complained of is so complete as to enable the injured party to take legal proceedings.

27 Geo. 3, c. 44, not to apply to suits against spiritual persons for certain offences.

It is further provided, however, by sect. 21, "That the act 27 Geo. 3, c. 44, does not and shall not extend to the time of the commencement of suits or proceedings against spiritual persons for any of the offences in the said act named" (k).

Fourthly, as to *preferments* subject to the provisions of this act.

Definition of the terms "preferment," "bishop," "archbishop," and "diocese."

Sect. 2. "Unless it shall otherwise appear from the context, the term 'preferment,' when used in this act, shall be construed to comprehend every deanery, archdeaconry, prebend, canonry, office of minor canon, priest vicar, or vicar choral in holy orders (l), and every precentorship, treasurership, sub-deanery, chancellorship of the church, and other dignity and office in any cathedral or collegiate church, and every mastership, wardenship, and fellowship in any collegiate church, and all benefices with cure of souls, comprehending therein all parishes, perpetual curacies, donatives, endowed public chapels, parochial chapelries,

(e) 1 Moo. P. C. 253.

(f) 1 Roberts. Eccl. 606.

(g) 3 Curt. Eccl. 715.

(h) *Martin* v. *Jackson*, Arches, 1870, in which the point was assumed but not argued.

(h) 12 How. State Trials, p. 927.

(i) 2 Roberts. 595; 17 Jur. 190.

(k) *Vide supra*, p. 1082, *et post*. *Free* v. *Burgoyne*, 2 Bligh, N. S. 65; 6 B. & C. 538, at p. 1319, *infra*.

(l) All the vicars choral of St. Paul's are laymen, and so are many of them in other cathedrals: these, therefore, it would seem, must still remain under the control of the visitor. In 1716, the dean and chapter of York passed sentence of deprivation on a vicar choral who was in holy orders, An appeal was prosecuted to the Archbishop of York, as visitor, and to the Court of Delegates. Both these tribunals confirmed the original sentence of the dean and chapter. See printed Catalogue of Processes in the Registry of the High Court of Delegates from 1609 to 1823, p. 45, n. 801, *Boughton*, *Vicar Choral in York Cathedral*.

and chapelries or districts belonging to or reputed to belong, or annexed or reputed to be annexed, to any church or chapel, and every curacy, lectureship, readership, chaplaincy, office, or place which requires the discharge of any spiritual duty, and whether the same be or be not within any exempt or peculiar jurisdiction; and the word 'bishop,' when used in this act, shall be construed to comprehend 'archbishop;' and the word 'diocese,' when used in this act, shall be construed to comprehend all places to which the jurisdiction of any bishop extends under and for the purposes of an act 1 & 2 Vict. c. 106" (*m*).

Fifthly, all places formerly *exempt* and *peculiar*, not subject to their proper ordinary, are made subject to him for the purposes of this act.

Power of archbishops and bishops as to exempt or peculiar places or preferments.

Sect. 22. "Every archbishop and bishop within the limit of whose province or diocese respectively any place, district or preferment, exempt or peculiar, shall be locally situate, shall, except as herein otherwise provided, have, use, and exercise all the powers and authorities necessary for the due execution by them respectively of the provisions and purposes of this act, and for enforcing the same with regard thereto respectively, as such archbishop and bishop respectively would have used and exercised if the same were not exempt or peculiar, but were subject in all respects to the jurisdiction of such archbishop or bishop; and where any place, district, or preferment, exempt or peculiar, shall be locally situate within the limits of more than one province or diocese, or where the same, or any of them, shall be locally situate between the limits of the two provinces, or between the limits of any two or more dioceses, the archbishop or bishop of the cathedral church to whose province or diocese the cathedral, collegiate, or other church or chapel of the place, district, or preferment respectively shall be nearest in local situation, shall have, use and exercise all the powers and authorities which are necessary for the due execution of the provisions of this act, and enforcing the same with regard thereto respectively, as such archbishop or bishop could have used if the same were not exempt or peculiar, but were subject in all respects to the jurisdiction of such archbishop or bishop respectively, and the same, for all the purposes of this act, shall be deemed and taken to be within the limits of the province or diocese of such archbishop or bishop: provided that the peculiars belonging to any archbishopric or bishopric, though locally situate in another diocese, shall

(*m*) *Vide supra*, Part IV. Chap. VII.

continue subject to the archbishop or bishop to whom they belong, as well for the purposes of this act as for all other purposes of ecclesiastical jurisdiction."

As to exempt places.

The Act of Uniformity, 1 Eliz. c. 2, had already, by sect. 4, empowered bishops and their officers to proceed for the purpose of enforcing that act in places otherwise exempt from their jurisdiction.

Sixthly, as to civil suits instituted in a criminal form.

Provisions of act not to interfere with persons instituting suits to establish a civil right.

Sect. 19. "*Nothing hereinbefore contained shall prevent any person from instituting as voluntary promoter, or from prosecuting, in such form and manner and in such court as he might have done before the passing of this act, any suit which, though in form criminal, shall have the effect of asserting, ascertaining, or establishing any civil right* (*n*), nor to prevent the archbishop of the province from citing any such clerk before him in cases and under circumstances in and under which such archbishop might, before the passing of this act, cite such clerk under and in pursuance of a statute passed in the twenty-third year of the reign of king Henry the Eighth, intituled 'An Act that no person shall be cited out of the diocese where he or she dwelleth, except in certain cases.'"

23 Hen. 8, c. 9.

Having considered the extent and limitation of the operation of the statute, we will now state the means which it employs for effecting the end which it has in view, namely, the discipline of the clergy.

Modes of trial.

The statute provides for the trial of an accused clerk as follows:—

1. The bishop may issue a commission of inquiry.
2. If that commission report that there is a *primâ facie* ground for further proceedings,—
3. The bishop may try the case himself with certain assessors;
4. Or may appoint a commissary to hear the case;
5. Or may, after issuing commission, and before articles are filed, send the case to be heard by the court of the province;
6. Or may pronounce sentence, with the consent of the accused and party complaining, without further proceedings;

(*n*) E.g., to try a question of impropriation (*Duke of Portland* v. *Bingham*, 1 Consist. 156), or the right of a chaplain to minister in a workhouse, notwithstanding the prohibition of the incumbent of the parish (*Molyneux* v. *Bagshaw*, 9 Jur., N. S. 553). See, however, *Liddell* v. *Rainsford*, L. R., Weekly Notes (1868), 21.

7. Or may, without issuing any commission, send the case to be tried in the first instance by the court of the province.

From the sentence of the bishop or his commissary an appeal lies to the court of the province. From the sentence of the court of the province, whether acting as a court of appeal or as a court of first instance, an appeal lies to the Judicial Committee of the Privy Council, of which a bishop must be a member.

The enactments of the statute relative to these matters are as follows:—

1. As regards the issuing and working of the commission the clauses are—

Bishop may issue a commission of inquiry.

Sect. 3. "In every case of any clerk in holy orders of the United Church of England and Ireland who may be charged with any offence against the laws ecclesiastical, or concerning whom there may exist scandal or evil report as having offended against the said laws, it shall be lawful for the bishop of the diocese within which the offence is alleged or reported to have been committed, on the application of any party complaining thereof, or if he shall think fit of his own mere motion, to issue a commission under his hand and seal to five persons, of whom one shall be his vicar general, or an archdeacon or rural dean within the diocese, for the purpose of making inquiry as to the grounds of such charge or report: provided always, that notice of the intention to issue such commission under the hand of the bishop, containing an intimation of the nature of the offence, together with the names, addition, and residence of the party on whose application or motion such commission shall be about to issue, shall be sent by the bishop to the party accused fourteen days at least before such commission shall issue."

Members of such commission.

What notice must be previously given.

The question how far "*a clerk in holy orders*" can, for the purposes of this act, relieve himself from his responsibility to the ordinary, has been considered (*o*).

What are offences.

The having caused a "*scandal or evil report*" is, in the case of a clerk, an offence *per se* (*p*); and for this reason, and for the sake of purging the church from such scandal, proceedings may be taken in the Ecclesiastical Court against a clerk, when they could not be taken because of 27 Geo. 3, c. 44, against a layman at all, or against a clergyman *pro salute animæ* (*q*), before the passing of this act (*r*).

(*o*) *Vide supra*, p. 1187.

(*p*) *Burder* v. —, 3 Curt. Eccl. Rep. 822.

(*q*) *Free* v. *Burgoyne*, 2 Bligh, N. S. 65; 6 B. & C. 538.

(*r*) See section 21.

Discretion of bishop as to allowing the promotion of his office.

The words "*it shall be lawful*," construed with the other words "if he shall think fit," and the whole tenor of the act, do not take away the discretion of the ordinary as to permitting or refusing his office to be promoted, or in other words, a criminal suit to be instituted against a clerk (*s*); but if he has allowed a commission to issue at the instance of a promoter, he has no longer a discretionary power, but must allow further proceedings to be taken if the promoter insist (*t*).

Vicar-general mentioned in act.

It should be observed that the word "vicar-general" is here used, and not "official principal," as if the act contemplated these two offices being holden by separate persons, though since the Reformation they have, as a matter of fact, been always united in the office of "chancellor" (*u*).

Limit of power of commissioners.

The commissioners are bound to confine their inquiry to offences committed within the diocese of the bishop who issues the commission (*x*). In the case of a bishop found incompetent under 6 & 7 Vict. c. 62, all proceedings had nevertheless to be taken in his name (*y*).

Notice of intended commission.

The "*notice*" only indicates the intention to institute proceedings, and such intention may be abandoned; and where no commission has issued according to the notice, the issue of letters of request is considered as superseding that notice (*z*).

Proceedings of the commissioners.

Sect. 4. "It shall be lawful for the said commissioners or any three of them to examine upon oath, or upon solemn affirmation in cases where an affirmation or declaration is allowed by law instead of an oath, which oath or affirmation or declaration respectively shall be administered by them to all witnesses who shall be tendered to them for examination as well by any party alleging the truth of the charge or report as by the party accused, and to all witnesses whom they may deem it necessary to summon for the purpose of fully prosecuting the inquiry, and ascertaining whether there be sufficient *primâ facie* ground for instituting further proceedings; and notice of the time when and place where every such meeting of the commissioners shall be holden shall be given in writing under the hand of one of the said commissioners to the party accused seven days at least before the meeting; and it shall be law-

(*s*) *Reg.* v. *Bp. of Chichester*, 2 El. & El. 209; *Martin* v. *Mackonochie*, L. R., 2 A. & E. p. 116; *Elphinstone* v. *Purchas*, 3 P. C. 245.

(*t*) *Reg.* v. *Abp. of Canterbury*, 6 El. & Bl. 546.

(*u*) *Vide supra*, p. 1208.

(*x*) *Homer* v. *Jones*, 9 Jur. 167.

(*y*) *Brookes* v *Cresswell*, 4 Notes of Cases, 429.

(*z*) *Sanders* v. *Head*, 2 Notes of Cases, 355; 3 Curt. 32, 565; 4 Moo. P. C. 186.

ful for the party accused, or his agent, to attend the proceedings of the commission, and to examine any of the witnesses; and all such preliminary proceedings shall be public, unless, on the special application of the party accused, the commissioners shall direct that the same or any part thereof shall be private; and when such preliminary proceedings, whether public or private, shall have been closed, one of the said commissioners shall, after due consideration of the depositions taken before them, openly and publicly declare the opinion of the majority of the commissioners present at such inquiry, whether there be or be not sufficient *primâ facie* ground for instituting further proceedings."

After letters of request no defect in commission material.

It seems that where the case is afterwards sent by letters of request to the court of the province, that court cannot take any cognizance of any defects in the mode of proceeding before the commissioners (*a*).

Report of the commissioners.

Sect. 5. "The said commissioners or any three of them shall transmit to the bishop under their hands and seals, the depositions of witnesses taken before them, and also a report of the opinion of the majority of the commissioners present at such inquiry, whether or not there be sufficient *primâ facie* ground for instituting proceedings against the party accused; and such report shall be filed in the registry of the diocese; and that if the party accused shall hold any preferment in any other diocese or dioceses, the bishop to whom the report shall be made shall transmit a copy thereof, and of the depositions, to the bishop or bishops of such other diocese or dioceses (*b*), and shall also upon the application of the party accused, cause to be delivered to such party a copy of the said report and of the depositions, on payment of a reasonable sum for the same, not exceeding two-pence for each folio of ninety words."

As to proceedings after the report—

Bishop may pronounce sentence, by consent, without further proceedings.

Sect. 6. "In all cases where proceedings shall have been commenced under this act against any such clerk, it shall be lawful for the bishop of any diocese within which such clerk may hold any preferment, with the consent of such clerk and of the party complaining, if any, first obtained in writing, to pronounce, without any further proceedings, such sentence as the said bishop shall think fit, not exceeding the sentence which might be pronounced in due course of law; and all such sentences shall be good and effectual in law as if pronounced after a hearing, according to the

(*a*) *Bonwell* v. *Bp. of London*, 14 Moo. 395; *Flamank* v. *Simpson*, L. R., 1 P. C. 463; *Sheppard* v. *Bennett*, 39 L. J., Eccl. 59

(*b*) See *Sheppard* v. *Bennett*, L. R., 2 Adm. & Eccl. 235.

provisions of this act, and may be enforced by the like means."

What is a lawful sentence.

A "sentence which might be pronounced in due course of law" may include a condition that at the expiration of the period of suspension decreed the clerk should procure a certificate, signed by three beneficed clergymen, of his good behaviour and morals during his suspension, and that such certificate should be approved of by the bishop before the suspension was taken off (*c*).

Articles and depositions to be filed.

Sect. 7. "If the commissioners shall report that there is sufficient *primâ facie* ground for instituting proceedings, and if the bishop of any diocese within which the party accused may hold any preferment, or the party complaining shall thereupon think fit to proceed against the party accused, articles shall be drawn up, and, when approved and signed by an advocate practising in Doctors Commons, shall, together with a copy of the depositions taken by the commissioners, be filed in the registry of the diocese of such last-mentioned bishop; and any such party, or any person on his behalf, shall be entitled to inspect without fee such copies, and to require and have, on demand, from the registrar (who is hereby required to deliver the same), copies of such depositions, on payment of a reasonable sum for the same, not exceeding two-pence for each folio of ninety words."

Any barrister may be an advocate.

The words "by an advocate practising in Doctors Commons" must be considered as directory only, and the direction can no longer be complied with, as the College of Advocates has legally ceased to exist; and it seems that the articles may now be signed by any barrister (*d*).

As to documents not produced to commissioners.

In a proceeding against a clerk the bishop sent all the documents connected with the case, whether produced before the commissioners or not, to the registry. When the case came before the Court of Arches an application was made to the court to direct the registrar to allow the clerk access to certain of these documents, which were stated to refer to some charges which had been abandoned. These documents *had not been* produced before the commissioners. It was holden that, as by sections 5 and 7 of this statute the clerk was entitled to be furnished only with the evidence given before the commissioners, the application must be rejected (*e*).

Service of copy

Sect. 8. "A copy of the articles so filed shall be forth-

(*c*) *Ex parte Rose*, 18 Ad. & El., N. S. 754. See *Morris* v. *Ogden*, L. R., 4 C. P. 687.

(*d*) *Mouncey* v. *Robinson*, 37 L. J., Eccl. 8.

(*e*) *Farnall* v. *Craig*, 5 Notes of Cases, 116.

with served upon the party accused, by personally delivering the same to him, or by leaving the same at the residence house belonging to any preferment holden by him, or if there be no such house, then at his usual or last known place of residence (*f*); and it shall not be lawful to proceed upon any such articles until after the expiration of fourteen days after the day on which such copy shall have been so served."

of the articles on the party.

Sect. 9. "It shall be lawful for the said last-mentioned bishop, by writing under his hand, to require the party to appear, either in person or by his agent duly appointed, as to the said party may seem fit, before him at any place within the diocese, and at any time after the expiration of the said fourteen days, and to make answer to the said articles within such time as to the bishop shall seem reasonable; and if the party shall appear, and by his answer admit the truth of the articles, the bishop, or his commissary specially appointed for that purpose, shall forthwith proceed to pronounce sentence thereupon according to the ecclesiastical law."

Bishop may require the party to appear before him;

and may pronounce judgment on admission.

Sect. 10. "Every notice and requisition to be given or made in pursuance of this act, shall be served on the party to whom the same respectively relate in the same manner as is hereby directed with respect to the service of a copy of the articles on the party accused."

How notice and requisition to be served.

Sect. 11. "If the party accused shall refuse or neglect to appear and make answer to the said articles, or shall appear and make any answer to the said articles other than an unqualified admission of the truth thereof, the bishop shall proceed to hear the cause, with the assistance of three assessors, to be nominated by the bishop, one of whom shall be an advocate who shall have practised not less than five years in the court of the archbishop of the province, or a sergeant at law, or a barrister of not less than seven years' standing, and another shall be the dean of his cathedral church, or of one of his cathedral churches, or one of his archdeacons, or his chancellor; and upon the hearing of such cause the bishop shall determine the same, and pronounce sentence thereupon according to the ecclesiastical law."

Proceedings on a hearing before the bishop.

Sect. 12. "All sentences which shall be pronounced by any bishop *or his commissary* in pursuance of this act shall be good and effectual in law, and such sentences may be enforced by the like means as a sentence pronounced by an Ecclesiastical Court of competent jurisdiction."

Sentence of bishop to be effectual in law.

(*f*) As to what may be deemed "place of residence" of a clerk executing a deed of relinquishment of his clerical profession, see 33 & 34 Vict. c. 91, s. 6; *supra*, p. 1187.

Therefore, disobedience to the sentence incurs the penalties of contumacy and of contempt of court (*f*).

As to Letters of Request.

Bishop may send the cause to the court of appeal of the province.

Sect. 13. "That it shall be lawful for the bishop of any diocese within which any such clerk shall hold any preferment, or if he hold no preferment, then for the bishop of the diocese within which the offence is alleged to have been committed, in any case, if he shall think fit, either in the first instance or after the commissioners shall have reported that there is sufficient *primâ facie* ground for instituting proceedings, and before the filing of the articles, but not afterwards, to send the case by letters of request to the court of appeal of the province, to be there heard and determined according to the law and practice of such court: provided always, that the judge of the said court may, and he is hereby authorized and empowered from time to time to make any order or orders of court for the purpose of expediting such suits or otherwise improving the practice of the said court, and from time to time to alter and revoke the same: provided also, that there shall be no appeal from any interlocutory decree or order not having the force or effect of a definitive sentence, and thereby ending the suit in the court of appeal of the province, save by the permission of the judge of such court" (*g*).

Judge of the court may make orders for expediting such suits.

No appeal from interlocutory decree.

No form of letters of request.

It is to be observed that no particular form of letters of request is authorized by the statute (*h*); and the tendency of the later judgments, especially of the Privy Council, has been to render it unnecessary to state the offence so fully as was formerly required (*i*).

Archbishop may send letters of request to his own court.

This act has effected a separation between the archbishop or bishop and his court, and it seems that under the provisions of it the archbishop may send letters of request to his own court (*k*).

Court must receive them.

It has been recently ruled by the Privy Council that the court of appeal of the province must accept letters of request sent to it under this section (*l*), the practical effect

(*f*) *Bp. of Lincoln* v. *Day*, 1 Roberts. Eccl. Rep. 721; 7 Notes of Cases, 1.

(*g*) It will be seen by sect. 24, that where the bishop is *patron* of the preferment of the accused party, the archbishop of the province may do all acts that the bishop might otherwise do; see note to sect. 24: and see sect. 15, for the power of the aggrieved party to appeal.

(*h*) *Sanders* v. *Head*, 4 Moo. P. C. 186.

(*i*) *Martin* v. *Mackonochie*, L. R., 2 P. C. 365; *Sheppard* v. *Bennett*, 39 L. J., Eccl. 59.

(*k*) *Noble* v. *Voysey*, L. R., 3 P. C. 357.

(*l*) *Sheppard* v. *Phillimore & Bennett*, L. R., 2 Adm. & Eccl. 235; 2 P. C. 450.

of which is to convert the court of appeal into a court of first instance. The judicial committee itself will not accept letters of request, and very rarely retains a case appealed to it upon a matter preliminary to the sentence (*m*).

As to Appeals.

What appeals may be made by the aggrieved party.

Sect. 15. "It shall be lawful for any party who shall think himself aggrieved by the judgment pronounced in the first instance by the bishop, or in the court of appeal of the province, to appeal from such judgment; and such appeal shall be to the archbishop, and shall be heard before the judge of the court of appeal of the province, when the cause shall have been heard and determined in the first instance by the bishop, and shall be proceeded with in the said court of appeal in the same manner and subject only to the same appeal as in this act is provided with respect to cases sent by letters of request to the said court; and the appeal shall be to the Queen in Council, and shall be heard before the Judicial Committee of the Privy Council when the cause shall have been heard and determined in the first instance in the court of the archbishop."

Appeal from archbishop sitting for bishop.

Where the archbishop has been substituted for the bishop under sect. 24, an appeal lies from his decision to the court of appeal of the province (*n*).

Archbishops and bishops members of the Privy Council to be members of the Judicial Committee on all appeals under this act.

Sect. 16. "Every archbishop and bishop of the United Church of England and Ireland, who now is or at any time hereafter shall be sworn of her Majesty's most honourable Privy Council, shall be a member of the Judicial Committee of the Privy Council for the purpose of every such appeal as aforesaid; and that no such appeal shall be heard before the Judicial Committee of the Privy Council, unless at least one of such archbishops or bishops shall be present at the hearing thereof: provided always, that the archbishop or bishop who shall have issued the commission hereinbefore mentioned in any such case, or who shall have heard any such case, or who shall have sent any such case by letters of request to the court of appeal of the province, shall not sit as a member of the Judicial Committee on an appeal in that case" (*o*).

Mode of Procedure.

Attendance of witnesses, and production of papers, &c.

Sect. 17. "It shall be lawful in any such inquiry for any three or more of the commissioners, or in any such proceeding for the bishop, or for any assessor of the bishop,

(*m*) *Noble* v. *Voysey*, L. R., 3 P. C. 365.

(*n*) *Reg.* v. *Dodson*, 7 El. & Bl. 315.

(*o*) The Judicial Committee may allow the appeal to be reheard, after it has been once heard before them. *Hebbert* v. *Purchas*, L. R., 3 P. C. 664.

may be compelled.

or for the judge of the court of appeal of the province, to require the attendance of such witnesses, and the production of such deeds, evidences or writings, as may be necessary; and such bishop, judge, assessor, and commissioners respectively shall have the same power for these purposes as now belong to the consistorial court and to the Court of Arches respectively."

Witnesses to be examined on oath, and to be liable to punishment for perjury.

Sect. 18. "Every witness who shall be examined in pursuance of this act shall give his or her evidence upon oath, or upon solemn affirmation in cases where an affirmation is allowed by law instead of an oath, which oath or affirmation respectively shall be administered by the judge of the court or his surrogate, or by the assessor of the bishop, or by a commissioner; and that every such witness who shall wilfully swear or affirm falsely shall be deemed guilty of perjury."

Accused admitted as witness.

It has been ruled by the present judge of the Court of Arches that the accused party is admissible to give evidence under 14 & 15 Vict. c. 99 (*o*), and such evidence has been received in several cases which have been subsequently appealed to the Privy Council, which seems to have acquiesced in this ruling, though the court has given no positive judgment upon this point (*p*).

Evidence in cases of heresy.

Use of authorities.

Upon the important topic of the use of authorities in a criminal suit for heresy as evidence of the liberty previously exercised without ecclesiastical censure of holding the doctrine complained of, I cite the following passages from well-considered judgments of the courts.

King's Proctor v. Stone.

In the first reported case, that of *The King's Proctor* v. *Stone*, Lord Stowell, sitting in the Consistory of London, said:—

"I think myself bound at the same time to declare, that it is not the duty nor inclination of this court to be minute and rigid in applying proceedings of this nature; and that if any Article is really a subject of dubious interpretation, it would be highly improper that this court should fix on one meaning, and prosecute all those who hold a contrary opinion regarding its interpretation. It is a very different thing where the authority of the Articles is totally eluded, and the party deliberately declares the intention of teaching doctrines contrary to them" (*q*).

(*o*) *Bp. of Norwich* v. *Pearse*, L. R., 2 Adm. & Eccl. 281, overruling *Burder* v. *O'Neill*, 9 Jur., N. S. 1109.

(*p*) In the recent case of *Martin* v. *Mackonochie*, the accused clerk was examined before the Privy Council, L. R., 3 P. C. 52.

(*q*) *King's Proctor* v. *Stone*, 1 Consist. 428.

Gorham case.

And in the case of Mr. Gorham the Judicial Committee of the Privy Council said—

"There are other points of doctrine respecting the sacrament of baptism which we are of opinion are, by the rubrics and formularies (as well as the Articles), capable of being honestly understood in different senses; and consequently we think that, as to them, the points which were left undetermined by the Articles are not decided by the rubrics and formularies, and that upon these points all ministers of the church, having duly made the subscriptions required by law (and taking holy scripture for their guide), are at liberty honestly to exercise their private judgment without offence or censure.

"Upright and conscientious men cannot in all respects agree upon subjects so difficult; and it must be carefully borne in mind that the question, and the only question for us to decide, is, whether Mr. Gorham's doctrine is contrary or repugnant to the doctrine of the Church of England as by law established. Mr. Gorham's doctrine may be contrary to the opinions entertained by many learned and pious persons, contrary to the opinion which such persons have, by their own particular studies, deduced from holy scripture, contrary to the opinion which they have deduced from the usages and doctrines of the primitive church, or contrary to the opinion which they have deduced from uncertain and ambiguous expressions in the formularies; still, if the doctrine of Mr. Gorham is not contrary or repugnant to the doctrine of the Church of England as by law established, it cannot afford a legal ground for refusing him institution to the living to which he has been lawfully presented" (*r*).

"In the examination of this case, we have not relied upon the doctrinal opinions of any of the eminent writers, by whose piety, learning and ability the Church of England has been distinguished; but it appears that opinions, which we cannot in any important particular distinguish from those entertained by Mr. Gorham, have been propounded and maintained, without censure or reproach, by many eminent and illustrious prelates and divines who have adorned the church from the time when the Articles were first established. We do not affirm that the doctrines and opinions of Jewel, Hooker, Usher, Jeremy Taylor, Whitgift, Pearson, Carlton, Prideaux, and many others, can be received as evidence of the doctrine of the Church of

(*r*) *Gorham* v. *Bp. of Exeter*, the Gorham Case, by E. F. Moore, p. 471.

Evidence in cases of heresy.
Use of authorities.
Gorham case.

"England, but their conduct, unblamed and unquestioned as it was, proves, at least, the liberty which has been allowed of maintaining such doctrine" (*s*).

"We express no opinion on the theological accuracy of these opinions or any of them. The writers whom we have cited are not always consistent with themselves, nor are the reasons upon which they found their positions always valid; and other writers of great eminence, and worthy of great respect, have expressed very different opinions. But the mere fact that such opinions have been propounded and maintained by persons so eminent, and so much respected, as well as by very many others, appears to us sufficiently to prove that the liberty which was left by the Articles and Formularies has been actually enjoyed and exercised by the members and ministers of the Church of England" (*t*).

Burder v. *Heath.*

And in the case of *Burder* v. *Heath*, Dr. Lushington, who had been one of the Lords of the Privy Council in the *Gorham case,* sitting as judge of the Court of Arches, observed:—

"And I apprehend that the course to be followed is, first, to endeavour to ascertain the plain grammatical sense of the Article of Religion said to be contravened, and if that Article admit of several meanings, without any violation of the ordinary rules of construction or the plain grammatical sense, then I conceive that the court ought to hold that any such opinion might be lawfully avowed and maintained.

"If, indeed, any controversy arise whether any given meaning is within the plain grammatical construction, the court must form the best judgment it can, with this assistance, as I have already said, that if the doctrine in question has been held without offence by eminent divines of the church, then, though perhaps difficult to be reconciled with the plain meaning of the Articles of Religion, still a judge in my position ought not to impute blame to those who hold it. That which has been allowed or tolerated in the church ought not to be questioned by this court" (*u*).

And again the same learned judge says:—

"Before concluding, I think it right to explain why I do not advert to the many authorities which the zeal and learning of counsel have produced. My reason is this,

(*s*) *Gorham* v. *Bp. of Exeter*, the Gorham Case, by E. F. Moore, p. 472.

(*t*) Ibid. 474.

(*u*) *Burder* v. *Heath*, 15 Moo. P. C. 45.

"that, in my judgment, not one of these authorities does that which was required in this case, namely, show that some divine of eminence has held, without reproach from ecclesiastical authority, doctrines in substance the same as those Mr. Heath has promulgated; whatever opinions may have been held in the vast field of polemical divinity, I find none which support Mr. Heath or justify him. In the *Gorham case* the Judicial Committee had the advantage of being able to quote, in support of their judgment, and in justification of Mr. Gorham, passages from the writings of divines of the highest authority."

And again:—

"No explanation has been offered which in any way shows that Mr. Heath's opinions can be reconciled with the Articles, nor has any eminent divine been shown to have shared his views. Mr. Heath therefore must be condemned by the Articles imposed by law, and which the law alone can change."

Sheppard v. *Bennett.*

It seems, however, difficult to reconcile the law as laid down in these passages with that laid down by the Privy Council in the recent case of *Sheppard* v. *Bennett*, which is as follows:—

"Citations from established authors may be of use to show that 'the liberty which was left by the Articles and Formularies has been actually enjoyed and exercised by the members and ministers of the Church of England.' But, to say the least, very few of the quotations in the judgment exhibit the same freedom of language as do the extracts from Mr. Bennett. And after every authority had been examined, there would still remain the question that is before this Committee, whether the licence or liberty is really allowed by the Articles and Formularies —whether anything has been said by the respondent which plainly contradicts them. If the respondent had made statements contradicting the Articles or Formularies, the citation of great names would not have protected him; if he has not done so, he is safe without their protection."

As to inhibition of accused clerk *pendente lite*—

Bishop empowered to inhibit party accused from performing services of the church, &c.

Sect. 14. "In every case in which, from the nature of the offence charged, it shall appear to any bishop within whose diocese the party accused may hold any preferment, that great scandal is likely to arise from the party accused continuing to perform the services of the church while such charge is under investigation, or that his ministration will be useless while such charge is pending, it shall be lawful for the bishop to cause a notice to be served on such party at the same time with the service of a copy of

the articles aforesaid, or at any time pending any proceedings before the bishop or in any ecclesiastical court, inhibiting the said party from performing any services of the church within such diocese, from and after the expiration of fourteen days from the service of such notice, and until sentence shall have been given in the said cause: provided that it shall be lawful for such party, being the incumbent of a benefice, within fourteen days after the service of the said notice, to nominate to the bishop any fit person or persons to perform all such services of the church during the period in which such party shall be so inhibited as aforesaid; and if the bishop shall deem the person or persons so nominated fit for the performance of such services he shall grant his licence to him or them accordingly, or in case a fit person shall not be nominated, the bishop shall make such provision for the service of the church as to him shall seem necessary; and in all such cases it shall be lawful for the bishop to assign such stipend, not exceeding the stipend required by law for the curacy of the church belonging to the said party, nor exceeding a moiety of the net annual income of the benefice, as the said bishop may think fit, and to provide for the payment of such stipend, if necessary, by sequestration of the living: provided also, that it shall be lawful for the said bishop at any time to revoke such inhibition and licence respectively."

As to substitution of archbishop for bishop when patron—

If a bishop is patron of the preferment held by accused party, archbishop to act in his stead.

Sect. 24. "When any act, save sending a case by letters of request to the court of appeal of the province, is to be done or any authority is to be exercised by a bishop under this act, such act shall be done or authority exercised by the archbishop of the province in all cases where the bishop who would otherwise do the act or exercise the authority is the patron of any preferment held by the party accused."

This was done in the case of *Ditcher* v. *Denison*, before referred to (*y*).

As to incumbents who have resigned upon pensions—

It is enacted as follows, by 34 & 35 Vict. c. 44, The Incumbents' Resignation Act, 1871 (*z*):—

Pensioned clerk amenable to ecclesiastical discipline.

Sect. 13. "Every pensioned clerk shall remain amenable to ecclesiastical discipline, and be liable to suspension from or forfeiture of pension for offences which would have involved suspension from or forfeiture of the benefice had

(*y*) Deane & Swabey, Rep. 334; 11 Moo. P. C. 324; *vide supra*, p. 689.

(*z*) *Vide supra*, p. 522.

he remained incumbent thereof, and proceedings under 3 & 4 Vict. c. 86, may be taken against every offending pensioned clerk in the same manner as if he had remained incumbent of the benefice, and in the same manner in all respects as if the offence alleged to have been committed had been committed within the said benefice: provided always, that in case any offending pensioned clerk shall reside elsewhere than in England or Wales or the Channel Islands it shall be lawful for the bishop by a letter or summons under his hand, with the consent of the archbishop of the province, to be signified by his countersigning such letter or summons, addressed and sent prepaid by post to such pensioned clerk at his last known place of residence, to require such clerk to attend in England and appear to any proceedings which may be instituted against him for any such offence by him committed or alleged to have been committed, and to appoint a place in England where service of all subsequent process, articles, and documents may be made, and service of such process, articles, and documents at such place shall be sufficient; and if such pensioned clerk shall neglect to appear to such proceedings within three calendar months after such letter or summons shall have been sent to him as aforesaid, and to appoint such place for service, such proceedings may be prosecuted in his absence."

CHAPTER IX.

VISITATION.

SECT. 1.—*General Law of Visitation.*
2.—*Bishop's Triennial Visitation.*
3.—*Archidiaconal Visitation.*
4.—*Royal Visitation.*

SECT. 1.—*General Law of Visitation.*

Origin.

FOR the government of the church and the correction of offences, visitations of parishes and dioceses were instituted in the ancient church, that so all possible care might be taken to have good order kept in all places (*a*).

Who shall visit.

For the first six hundred years after Christ, the bishops in their own persons visited all the parishes within their respective dioceses every year, and they had several deacons in every diocese to assist them. After that they had authority in case of sickness or other public concerns, to delegate priests or deacons to assist them; and hereupon, as should seem, they cantoned their great dioceses into archdeaconries, and gave the archdeacons commissions to visit and inquire, and to give them an account of all at the end of their visitations; and the bishops reserved the third year to themselves, to inform themselves (amongst other things) how the archdeacons, their substitutes, performed their duties (*b*).

How often and in what order.

By a constitution of Otho, archbishops and bishops shall go about their dioceses at fit seasons, correcting and reforming the churches, and consecrating and sowing the word of life in the Lord's field (*c*).

And, regularly, the order to be observed therein is this: In a diocesan visitation, the bishop is first to visit his

(*a*) God. Append. 7 Cf. Bishop Stillingfleet's Duties and Rights of Parochial Clergy, vol. iii. pp. 520—638; Bishop Gibson on Visitations; Barbosa de Officio et Potestate Episcopi; De Visitatione cujuscumque Prælati Ecclesiastici, a Gaudentio de Janua; De Episcopis, eorum Auctoritate, Officio et Potestate, Joannis Bertachini a Firmo; The King's Visitatorial Power asserted, by Nathaniel Johnston, London, 1648; *Attorney-General* v. *Smithies*, 1 Keen, 289.

(*b*) Deg. pt. 2, c. 15; Johns. 151.

(*c*) Ath 56.

cathedral church; afterwards the diocese. In a metropolitical visitation, the archbishop is first to visit his own church and diocese; then in every diocese to begin with the cathedral church and proceed thence as he pleases to the other parts of the diocese. Which appears from abundance of instances in the ecclesiastical records, as well of papal dispensations for the archbishop to visit without observing the said order, as of episcopal licences for the visitor to begin in other parts of the diocese than in the cathedral church (*d*).

And this sprang from the precept of the canon law, which requires that the archbishop willing to visit his province shall first visit the chapter of his own church and city, and his own diocese; and after he has once visited all the dioceses of his province, it shall be lawful for him (having first required the advice of his suffragans, and the same being settled before them, which shall be put in writing that all may know thereof) to visit again, according to the order aforesaid, although his suffragans shall not assent thereunto. And the like form of visiting observed by the archbishops shall be observed also by the bishops in their ordinary visitations (*e*).

General power of a visitor.

It may be as well to mention in this place, that where the ordinary or metropolitan have a right to visit, the manner of the visitation is not so material as to be a ground for prohibition, because any error or defect in the manner of the visitation may be remedied by appeal (*f*). It has been decided also, that even where a benefice is appropriated to a prior or a dean and chapter, the bishop may visit, to see how the church is served, &c., and for contumacy may proceed to suspension (*g*). In *Rex* v. *Bishop of Chester*, a mandamus was denied to a visitor who had deprived a prebendary for incontinency, and to restore a canon whom he had expelled (*h*), or to reverse his own sentence; but in this case the bishop was by royal charter visitor of the cathedral. But a prohibition has been issued to a bishop, who claimed a right to present by lapse, under pretence of his visitatorial authority, to the office of a canon residentiary of his church, it being a freehold office, and the right of election thereto; nor does it seem certain that by virtue of this power he may, in a case where the dean and chapter have neglected or refused to appoint

(*d*) Gibs. 957.

(*e*) Ibid.

(*f*) *Bp. of Kildare* v. *Archbishop of Dublin*, 2 Bro. P. C. 179.

(*g*) *Harrison* v. *Archbishop of Dublin*, 2 Bro. P. C. 199.

(*h*) 1 Wils. 206, and 1 W. Bla. 22.

such a canon, appoint one *pro tempore* until such election be had (*i*).

The Dean of York's case.

In 1840 the Archbishop of York held a visitation of the dean and chapter of that cathedral church, and appointed a commissary (*k*), for the purpose of carrying it into effect (*l*).

Among the presentments made to the commissary was one which charged the dean with the sale of the livings in his ecclesiastical patronage. The dean denied the jurisdiction of the commissary to try the charge, and conducting himself with violence in court, was pronounced in contempt, for which he refused to purge himself during the trial. The commissary proceeded to try the charge in the visitatorial court, witnesses were examined *vivâ voce*, and their depositions taken down by the registrar. Finally, the commissary, in a very long and elaborate judgment, pronounced the dean guilty of simony, and to have incurred the penalty of deprivation on the twofold ground of contumacious behaviour and simoniacal practices. The dean applied for a prohibition, after sentence, to the Court of Queen's Bench (*m*).

Arguments of counsel.

For the prohibition it was argued, that the commissary had exceeded the limits of the visitatorial jurisdiction, even as it stood before the 3 & 4 Vict. c. 86, as the proceedings ought to have been by articles, like all criminal suits in the ecclesiastical courts; but since the statute of 3 & 4 Vict. the whole trial was clearly illegal,—that the chapter of York were exempted from the visitatorial power of the ordinary,—that the proceedings were bad in the absence of the party accused,—that evidence was taken *vivâ voce*. On the other hand it was argued against the prohibition, that *jure ordinario*, every bishop or metropolitan might visit his cathedral,—that if he might visit he might punish, and therefore deprive if the offence was of a magnitude to require such punishment,—that the 3 & 4 Vict. c. 86, was framed *alio intuitu*,—that the visitatorial rights required express words to take them away,—that

(*i*) *Bp. of Chichester* v. *Harward*, 1 T. R. 650.

(*k*) Dr. Phillimore.

(*l*) For visitation generally see chapter on Deans and Chapters, Part II. Chap. IV., and for York visitation, p. 208; see also p. 1138.

(*m*) 2 G. & D. 202; 2 Q. B. 2; 6 Jur. 412. The cause was argued by Mr. Cresswell, Q.C., Sir W. Follett, Q. C., Addams, Advocate in Doctors Commons, and Mr. Cockburn, for the dean; by Sir John Campbell, Attorney-General, Sir James Wylde, Solicitor-General, Mr. Dundas, Q.C., R. Phillimore, Advocate in Doctors Commons, and Mr. Bayley, for the Archbishop of York, and the commissary.

they were saved by sect. 25 of that act,—that such power had been exercised in *Goodman's case* (*n*),—that there was a court of appeal (the judicial committee of the privy council) which would correct the judgment if wrong,—that it was competent to a visitor to proceed *summariè*, as in the case of a college, the power of the visitor being the same in both cases,—that it was too late to apply for a prohibition after sentence. It will be seen, however, that the prohibition was granted; but it is important to observe, that every other proceeding in the visitation, up to the time of trying the charge, was recognized as valid and legal by the Court of Queen's Bench.

The great importance of the judgment seems to require its insertion at length in this chapter.

Judgment.

By Lord Denman (*o*).—" The proceedings in this case may be very shortly stated. His grace the archbishop solemnly cited the dean and chapter of York to attend his visitation, and appointed the learned civilian, Dr. Phillimore, his commissary, for correcting and punishing, by ecclesiastical censures, whosoever shall be contumacious, and for administering articles in writing to the said dean and chapter, and receiving presentments and answers, and for doing everything else appertaining to the nature and quality of our said visitation.

" The ancient formula observed upon such occasions is in these terms: 'Cum nos ad errata enormia et delicta corrigendum et extirpandum et virtutes et alia ad pietatem conducendum plantandum et ad Dei laudem instituendam et seminandam,' &c.

" There seems no reason to doubt that here was sufficient authority to inquire into the ecclesiastical offences of every spiritual person belonging to the body visited; but at first the proceeding was confined to the fiscal concerns of the chapter, relating principally to the application of the fabric fund. The dean attended, and being examined respecting some share of this money which he was said to have received, conducted himself during that proceeding in a manner which was deemed contumacious, and a sentence of contumacy was by the commissary pronounced against him; he then absented himself. The proceedings

(*n*) Dyer, 273. Where the Bishop of Bath and Wells deprived the Dean of Bath and Wells by his commissary. It is remarkable that this case, though much relied upon by the counsel against the prohibition, was not mentioned in the judgment.

(*o*) Copy from Mr. Gurney's short-hand notes of the judgment delivered in the Court of Queen's Bench, Saturday, 19th June, 1841.

The Dean of York's case.

"went forward, and in answer to an interrogatory, as to the state of repair in which several churches and chapels were, the Rev. Mr. Dixon, one of the canons, made a statement that was considered as a direct charge of simony against the dean. He was requested to attend in order to meet this charge, and he did attend: the commissary required him, in the first place, to purge himself of the contempt, which he declined to do, and again absented himself, protesting against the proceeding, and saying, not by way of consent, but of defiance, that Mr. Dixon might go on to prove his charge in his absence; he did so, and the learned commissary declared the proof satisfactory, pronounced the charge established in several cases, and gave judgment that the dean should be for that offence, as well as for his contumacy, deprived of his office. Sentence to the like effect was afterwards solemnly pronounced by the archbishop.

"Prohibition is claimed on various grounds: and that which requires to be first considered, is the late act of parliament of the 3 & 4 Vict. c. 86, for better enforcing church discipline, which recites that the manner of proceeding in causes for the correction of clerks, requires amendment, repeals the act of the 1 Hen. 7, c. 4, prescribes the course of proceeding that shall hereafter be observed, in every case of any clerk in holy orders, who may be charged with any offence against the laws ecclesiastical, and finally enacts that no criminal suit or proceeding against a clerk in holy orders for any offence against the laws ecclesiastical, shall be instituted in any ecclesiastical court, otherwise than according to the provisions of that act.

"These enactments are, however, qualified by a proviso, 'That nothing in this act contained shall be construed to affect any authority over the clergy of their respective provinces or dioceses which the archbishops or bishops may now, according to law, exercise personally and without process in court.' And the 23rd section, enacting that no criminal suit or proceeding shall be instituted in any other manner than as this act requires, was relied upon as a decisive bar against the trial which has taken place.

"The counsel for the dean argued, that he being a clerk in holy orders was prosecuted in a criminal proceeding for the offence of simony, a known offence against the laws ecclesiastical, and that the authority which assumed to deprive him is an ecclesiastical court, that is, the court of the ordinary holding his visitation. In answer to that,

" arguments are offered first, that what has been done is not a criminal proceeding within the meaning of the act. Secondly, that the proceedings were by virtue of the authority exercised by the archbishop according to the law as it then stood over a clerk in his province personally and without process, and so were exempted from the operation of the act, sect. 23. The learned counsel against the prohibition observed in the first place, that the statute applied to causes, a word said to be well understood, and to imply suits regularly promoted in the ecclesiastical court; but the employment of that word in the short preamble affords a most inadequate reason for the arbitrary restriction of the whole act to that form of proceeding which in the ecclesiastical law may be properly described as a cause. It might as well be said to be restricted to causes promoted for incontinence, that being the only clause under the 1st of Henry VII. which is repealed in the same section after the recital that the manner of proceeding for the correction of clerks ought to be amended. But though the first section is thus limited, the general enactments are extended to all offences, and in like manner, though causes are the only proceedings mentioned in the preamble, the 23rd section clearly provides that the course imposed by the statute shall be pursued in every criminal suit or proceeding against a clerk in holy orders in the courts ecclesiastical.

" But is this properly styled a criminal proceeding, or is it merely an incidental fact arising out of the visitation, in the course of which it is brought to the ordinary's knowledge, and properly in the discharge of that duty inquired into by him, but not instituted as a criminal proceeding? The answer appears to be, that as soon as the visitor proceeds to examine the proof of the ecclesiastical offence charged upon the clerk for purpose of punishment by deprivation, or otherwise, more especially as in this case, at the instance of an accuser who avails himself of the aid of a professional advocate, a criminal proceeding is undoubtedly instituted and in progress.

" There is yet another term in the description of suits or proceedings given in the 23rd section—they must be in some ecclesiastical court. The ordinary's visitation is said not to be an ecclesiastical court, but to range within the proviso of sect. 25, which prevents the statute from applying to authority personally exercised by a bishop without process in court. This brings us directly to the question, whether a bishop as visitor of a dean and chapter is legally invested with power to deprive the dean of his office for

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"an ecclesiastical offence without process in court. If he has the power he must derive it from the general words above cited, but they can scarcely be expected to receive this construction without proof that they have habitually, and in former times when church discipline was much more active than of late, been so construed, or at least that the learned writers on ecclesiastical law have put that construction upon them.

"Now in the first place there is no example of such a power being exercised by the bishops over their clergy even in their regular and solemn visitations. They are indeed exempted from the forms required by the common law; they are to proceed, according to the language found in many of the books, and collected in Comyn's Digest, Visitor C, 'summariè, simpliciter, et de plano, sine strepitu aut figura judicii.' That is, adds Comyn, 'according to mere law and right;' some forms as involving an opportunity of knowing and answering the charges were absolutely necessary for securing this object.

"The Report of the Ecclesiastical Commissioners was appealed to on both sides. On the one for proof that the late statute was not meant to apply to the visiting power, because no recommendation to that effect was given. We have frequently had occasion to observe that the courts have no right to look to similar reports for the purpose of construing statutes founded upon them, which must speak for themselves. On the other hand, the report was referred to as an expositor of the former law, which was said not to have trusted the visitor with the power now claimed. It states, that the ordinary was to proceed in the visitation of clerks in his *forum domesticum.* However those words are to be understood, spiritual persons who offended were to be presented by the churchwardens, on whom this duty was cast, and if they neglected it, others might present, or even if common fame were the only accuser the ordinary might make his inquiries; different modes of dealing with the charges are enumerated, inquiries were instituted and denominations and articles were exhibited, and the party had time and place given him to answer. Sentence was at length passed by the ordinary, personally perhaps, but according to all our experience in his court, and in the usual sense of the words without process; and on this head of the argument, a question was asked, and which was not satisfactorily answered, why if the ordinary possessed this authority personally, and without process, such great difficulties have been encountered and such enormous expenses have been incurred in bringing notorious spi-

"ritual delinquents to justice by deprivation? It is well known that the assumed want of power in the court formed one of the strong motives for introducing the new law. The saving clause may not improbably have been intended to apply to some such powers vested by law in the archbishops and bishops, but even if none such can be surmised, the effect of any such saving clause cannot be greater than to continue the power the same as it has existed; it cannot create an authority in any one to act personally and without process in any particular case, by simply saying, that the act does not deprive him of such authority in general terms. The question remains, what does the law recognize?

"We are aware that the jurisdiction of visitors has been described in most comprehensive terms by common lawyers of high authority. Lord Holt himself is cited as allowing them an arbitrary power in his often reported judgment in the case of *Phillips* v. *Bury* (*p*), which taken from his own manuscript, and now printed in 2nd Term Reports, agrees almost word for word with that which is recorded by Skinner—scarcely any other remark upon that requires to be made than that the case arose out of the visitation of a charitable foundation. Lord Holt's strong language is all applied to that case, that a founder might do as he would with his own, and that the party deriving benefit from his endowment must do so on the conditions he has annexed to it—*cujus est dare ejus est disponere.*

"The case of *The Bishop of St. David's* v. *Lucy* (*q*), in 1st Lord Raymond and 1st Salkeld, was cited, where the Archbishop of Canterbury gave sentence of deprivation against one of his suffragan bishops for simony and other ecclesiastical offences, and this was supposed to show that that power resided in the breast of the archbishop without any rules or forms being observed whatever. Prohibition in that case was refused, but it had been claimed, because the citation was to appear at Lambeth, not in the usual place of holding the metropolitan court; and it was answered by Lord Holt and his brethren, that an archbishop may hold his court where he pleases, and that the spiritual court may proceed to punish a bishop for any offence done against the duty of his office as bishop. And as the clergy are subject to different rules and duties, it is but reasonable that if such person offends in his ecclesiastical duty, he should be punishable for it in the eccle-

(*p*) 2 T. R. 353.
(*q*) Ld. Raym. 447; 1 Salk. 136; *vide supra*, pp. 83—90, 1136.

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"siastical court. These expressions all occur in Salkeld. The bishop was compelled by citation to answer for his delinquency; the form and mode of proceeding were objected to in no other particular than the place. We scarcely need say that this case supplies no evidence of the right to proceed personally and without process in court.

"Another case was cited for the same purpose. *The Bishop of Kildare* v. *The Archbishop of Dublin* (*r*), brought by writ of error into the House of Lords in 1724. The bishop as dean of the cathedral church of the Holy Trinity, Dublin, complained that the archbishop had proceeded against him for contempt committed during a visitation. The principal question there intended to be raised, was whether the king or the archbishop was the visitor of the dean and chapter of that cathedral? and this being decided in favour of the archbishop, all other questions respecting the mode of proceeding were comparatively unimportant; nor, indeed, does the case furnish us with any full detail of what took place. Enough however appears to show that the offence was contumacy committed on shutting the doors of the cathedral against the archbishop, and not appearing in his visitation, and that the archbishop impleaded the dean in the Court Christian in his visitation as ordinary under pretence of a contempt. The House of Lords held that the right of the archbishop to visit the dean and chapter was established, and that the manner of his doing so was not at all material, because any error or defect in the manner might be remedied by appeal, and was no ground for a prohibition: and this is the marginal note appended to the report, that where an archbishop has a right to visit, the manner of his visitation is not so material as to afford a ground for a prohibition. But the declaration there, instead of alleging that the visitor proceeded to sentence (whatever that sentence might be, for it is not set forth in Brown's Reports) personally and without process, leads to the contrary inference. The words are a description of a suit instituted by the archbishop in his court as ordinary, and even where the offence was a charge of contempt against his person and authority. But it is enough to say, that it is indisputably true, that this case does not establish that proposition for which alone it was wanted, that the visitor has a lawful power to deprive personally and without process in court.

(*r*) 2 Bro. P. C. 179.

"So in *The Bishop of Exeter's case*, reported in Wilson and Blackstone (*s*), the acts of the bishop having been performed in his jurisdiction as visitor of Exeter College by appointment of the royal founder, were held by this court as conclusive. Such decisions can have no bearing upon the present case, unless it were shown that all the powers that any founder has conferred on his visitor grow out of the relation of ordinary to his clergy on his holding a visitation of them. It is highly probable that the use of the same words on two such different occasions has led to the belief that such was the law. The opinion is thus accounted for, but the law can only be established by practice and precedents, and both are wanting here.

"Some of the books speak of the court of visitation, and the phrase appears to be a correct one. It is an authority acting with general forms of procedure and inquiry, held from time to time by adjournment, making certain orders and decrees, whether or not those acts are of necessity judicial; those done in the course of establishing a charge against a party accused bear that undoubted character. This authority declared a party in contempt for withdrawing himself after citation. It then presided over the examination of witnesses in support of charges preferred against him, and finally adjudged him guilty and awarded sentence of deprivation. All these are assuredly the acts of a court, and we cannot conceive that the right of appeal against what was done, which was assumed and admitted on all hands, can be had against acts not done by a court. That court however the late statute has divested of all such jurisdiction; it is not within the saving clause, which leaves untouched the ordinary's power over his clergy, as it might then be exercised by law without process in court, because this power does not appear ever to have been exercised by law.

"We are constrained to conclude, that the most reverend prelate, in so far as he proceeded in his visitation to deprive the dean, has acted beyond his jurisdiction. We therefore decline to enter upon the consideration of the numerous points of objection raised against other portions of the proceeding of the learned commissary. But there is one which is not unfit to be disposed of; it was argued that the sentence was final, and that there was nothing now remaining which this court could prohibit from being done, and that there was not even a continuing court to which our writ could be addressed. These arguments, for

(*s*) This apparently refers to *Phillips* v. *Bury*, Ld. Raym. 5; 2 T. R. 346.

The Dean of York's case.

"obvious reasons, require to be narrowly watched, for they would give effect to unlawful proceedings merely because they were brought to a conclusion. But to the present case they are inapplicable, for on looking to the sentence we find that it admonishes the party not to exercise the functions of dean on pain of the greater excommunication, (and we find, too, that the court was adjourned only when this motion was made,) the inflicting of which pain would be the mode of enforcing the sentence, and this we may prohibit. We may also require a revocation of that sentence, according to the several forms, and it is plain that the dean could not apply before sentence, for the sentence of deprivation is the only thing done which is beyond the jurisdiction of the archbishop. *Up to that point his grace unquestionably had power to inquire with a view to ulterior proceedings, and it seems that the lord chancellor discharged an application for a prohibition that had been made to him before sentence upon that very ground.*

"Our clear conviction is not embarrassed by the opposite judgment formed by the learned commissary, for he does not appear to have adverted to the statute; during the whole proceedings in the court below it appears to have escaped his attention, occupied as it must have been with a vast variety of unusual circumstances, and not assisted, as indeed it could not be, according to the view which he took of the duties of his office, by advocates on both sides. If we felt any doubt, we should be bound to invite further discussion by calling on the dean of York to declare in prohibition (*t*), but no additional light can be expected after the full and elaborate, and well prepared, and maturely digested arguments, which we have heard enforced with consummate ability by counsel of the greatest learning and the highest eminence, and we owe it to all the parties to save them all the anxiety and inconvenience which would result from delay, and on the other hand, we owe it to the church to encourage no doubt, where we feel none, on subjects of such great importance, and so deeply affecting its interests, its rights, and its duties. The rule therefore for the prohibition must be made absolute.—Rule absolute."

At a subsequent stage of the visitation the dean appeared and read a paper expressive of regret for his contumacy, and for the sale of his livings, whether illegal or not, whereupon the commissary absolved him from his contumacy.

(*t*) There could therefore be no appeal from this decision.

Regina v. Dean, &c. of Chester.

In the case of *Regina* v. *The Dean and Chapter of Chester* (*u*), a mandamus commanding the dean and chapter of a cathedral to restore a chorister, alleged that the office was a freehold in their gift, paid by salary out of their land revenues, and conferring a right to vote on the election of members of parliament, and that the chorister had been wrongfully amoved. Return, that, by ordinances of the founder, for the government of the cathedral, it was provided that if any of the officers of the cathedral, including choristers, commit a small fault, he may be punished by the dean, but that, "if his crime be of a blacker dye (if it be judged equitable), he may be expelled by whom he was admitted," and that the bishop of the diocese should be the visitor of the cathedral, to take special care that all its ordinances should be inviolably preserved, to punish and correct all offences committed by officers of the cathedral, and to do all things that are judged lawfully to appertain to the office of visitor: and that the chorister had not appealed to the bishop. It was holden, on demurrer to the return, that mandamus did not lie, as the remedy for the wrongful amotion complained of was by application to the visitor, who had sufficient and exclusive jurisdiction, although the foundation was spiritual and not eleemosynary, and the office was a freehold office: and that it was not necessary to return the cause of amotion.

In this case, in the course of his judgment, Lord Campbell said, "We were then told that the mandamus ought "to go, because this is a spiritual, not an eleemosynary "foundation. But no authority was cited to show that "this distinction is material where there is a special "visitor appointed by the founder, although there is a "difference with respect to the acts of a visitor merely in "his capacity of ordinary. The office here is a lay office "belonging to a spiritual foundation; and, on principle, "there seems nothing to show for the present purpose "that it is to be viewed differently from a fellowship in a "college with a special visitor."

Chapters with visitor may alter statutes.

3 & 4 Vict. c. 113, s. 47, provides that cathedral and collegiate chapters, or their visitors in their default, may propose alterations in their statutes, and the visitors may confirm them; they are then to be submitted by the Ecclesiastical Commissioners to the Queen in Council, and shall, when approved by order in council, become law (*x*).

(*u*) 15 Adol. & El., N. S. 513 (1850); *vide supra*, p. 158.
(*x*) *Vide supra*, p. 215.

Certain powers are also conferred on the visitors of cathedral and collegiate bodies by 3 & 4 Vict. c. 113, s. 68 (*y*), and 4 & 5 Vict. c. 39, s. 18 (*z*).

SECT. 2.—*Triennial Visitation by Bishop.*

Can. 60.

By Can. 60 of 1603, for the office of confirmation, it is enjoined, that the bishop shall perform that office in his visitation every third year; and if in that year, by reason of some infirmity, he be not able personally to visit, then he shall not omit the same the next year after, as he may conveniently.

Dr. Gibson.

Upon which Dr. Gibson observes that by the ancient canon law, visitations were to be once a year; but it is to be noted, that those canons were intended of parochial visitations, or a personal repairing to every church; as appears not only from the assignment of procurations (originally in provisions and afterwards in money) for the reception of the bishop; but also by the indulgence which the law grants in special cases, where every church cannot be conveniently repaired to, of calling together the clergy and laity from several parts unto one convenient place that the visitation of them may not be postponed. From this indulgence, and the great extent of the dioceses, grew the custom of citing clergy and people to attend visitations at particular places; the times of which visitations, as they are now usually fixed about Easter and Michaelmas, have evidently sprung from the two yearly synods of the clergy, which the canons of the church required to be holden by every bishop about those two seasons, to consider of the state of the church and religion within the respective dioceses: an end that is also answered by the presentments that are there made concerning the manners of the people; as they used to be made to the bishop at his visitation of every particular church. But as to parochial visitation, or the inspection into the fabrics, mansions, utensils and ornaments of the church, that care has been long devolved upon the archdeacons; who at their first institution in the ancient church were only to attend the bishops at their ordinations, and other public services in the cathedral; but being afterwards occasionally employed by them in the exercise of jurisdiction, not only the work of parochial visitation, but also the holding of general synods or visitations when the

(*y*) *Vide supra*, p. 232.
(*z*) *Vide infra*, Part V. Chap. II., on "Residence Houses."

bishop did not visit, came by degrees to be known and established branches of the archidiaconal office as such; which by this means attained to the dignity of ordinary, instead of delegated, jurisdiction. And by these degrees came on the present law and practice of triennial visitations by bishops; so as the bishop is not only not obliged by law to visit annually, but (what is more) is restrained from it (*a*).

Reformatio Legum.

The *Reformatio Legum* contains the following provision on this subject: "Diocesim totam tertio quoque anno visitet, et procurationes accipiat—at vero *aliis temporibus* quoties visum fuerit visitet propter novos casus qui incidere possint ei liberum esto modo *suis impensis* id faciat, et nova onera stipendiorum aut procurationum ab ecclesiis non exigat" (*b*).

Inhibition during the time of visitation.

In the bishop's triennial, as also in regal and metropolitical, visitations, all inferior jurisdictions respectively are inhibited from exercising jurisdiction, during such visitation. And we find, in the time of Archbishop Winchelsey, a bishop prosecuted for exercising jurisdiction before the relaxation of the inhibition; and in Archbishop Tillotson's time, a bishop suspended, for acting after the inhibition. And even matters begun in the court of the inferior ordinary (whether contentious or voluntary) before the visitation of the superior, are to be carried on by the authority of such superior (*c*).

However, it has not been unusual, especially in metropolitical visitations, to indulge the bishops and inferior courts, in whole or in part, in the exercise of jurisdiction, pending the visitation. Thus, we find relaxations granted, pending the visitation, by Archbishop Abbot; and by others, an unlimited leave or commission, to exercise jurisdiction, or proceed in cases, notwithstanding the visitation; and elsewhere, a leave to confer orders, confirm, grant fiats for institution, institute, or correct, whilst the inhibition continued in other respects (*d*).

After the relaxation of the inhibition, and especially in metropolitical visitations, we find not only reservations of power to rectify and punish the *comperta et detecta*, but also special commissions issued for that end (*e*).

Where holden.

By Can. 125, "All chancellors, commissaries, archdeacons, officials, and all others exercising ecclesiastical jurisdiction, shall appoint such meet places for the keeping of their courts, by the assignment or approbation of the bishop

(*a*) Gibs. 958.
(*b*) Ref. Leg. 50 a.
(*c*) Gibs. 958; *vide supra*, p. 470.
(*d*) Gibs. 958.
(*e*) Ibid.

Where holden. of the diocese, as shall be convenient for entertainment of those that are to make their appearance there and most indifferent for their travel. And likewise they shall keep and end their courts in such convenient time, as every man may return homewards in as due season as may be."

Visitation court. The bishop at his triennial visitation, or whenever according to custom it is holden, and the archdeacon at his annual visitation, preside over a lawful court; and those subject to its jurisdiction, and refusing to appear, are liable to ecclesiastical punishment for their contumacy. Probably in the present state of the law the offender must be articled against under 3 & 4 Vict. c. 86; but he is certainly liable to punishment and to the costs incurred by his contumacy (*f*).

SECT. 3.—*Archidiaconal Visitation.*

How often to take place. Lindwood says, the archdeacon, although there be not a cause, may visit once a year: but if there be cause, he may visit oftener. Nor does it hinder, where it is said in the canon law, that he ought to visit from three years to three years; for this is to be understood so that he shall visit from three years to three years of necessity, but he may visit every year if he will (*g*).

In any part of diocese. 4 & 5 Vict. c. 39, s. 28, enacts, "that any bishop or archdeacon may hold visitations of the clergy within the limits of his diocese or archdeaconry, and at such visitations may admit churchwardens, receive presentments, and do all other acts, matters, and things by custom appertaining to the visitations of bishops and archdeacons in the places assigned to their respective jurisdiction and authority under or by virtue of the provisions of the said first or secondly recited act (*h*); and any bishop may consecrate any new church or chapel or any new burial ground within his diocese."

General power in visiting. Langton. "The archdeacons in their visitation shall see that the offices of the church be duly administered; and shall take an account in writing of all the ornaments and utensils of the churches, and also of the vestments and books; which they shall cause to be presented before them every year for their inspection, that they may see what have been added, or what have been lost" (*i*).

(*f*) See Cat. of Processes in the Delegates, No. 680, A.D. 1703, office of judge promoted against a clerk for not appearing at a visitation.

(*g*) Lind. 49.

(*h*) 6 & 7 Will. 4, c. 77, and 3 & 4 Vict. c. 113.

(*i*) Lind. 50.

Account in Writing.]—And it would be well to have the same indented: one part to remain with the archdeacon, and the other with the parishioners (*j*).

Utensils.]—That is, which are fit or necessary for *use:* and by these are understood all the vessels of the church of every kind (*k*).

Every Year.]—That is, every year in which they shall visit (*l*).

That they may see.]—Therefore the archdeacon ought to go to the place in person to visit, and not to send any other; which if he do, he shall not have the procurations (due upon the account of visiting) in money: but otherwise, he whom he shall send shall receive procurations for himself and his attendants in victuals (*m*).

Otho. "Concerning archdeacons we do ordain, that they visit the churches profitably and faithfully; by inquiring of the sacred vessels, and vestments, and how the service is performed, and generally of temporals and spirituals; and what they shall find to want correction, that they correct diligently. And when they visit, correct or punish crimes, they shall not presume to take anything of any one (save only moderate procurations), nor to give sentence against any persons unjustly, whereby to extort money from them. For whereas these and such like things do savour of simony, we decree, that they who do such things shall be compelled by the bishop to lay out twice as much for pious uses; saving nevertheless other canonical punishment against them. And they shall endeavour frequently to be present at the chapters in every deanry, and therein instruct the clergy (amongst other things) to live well, and to have a sound knowledge and understanding in performing the divine offices" (*n*).

Chapters.]—That is, rural chapters (*o*).

Reynolds. "We enjoin the archdeacons and their officials, that in the visitation of churches they have a diligent regard to the fabric of the church, and especially of the chancel, to see if they want repair: and if they find any defects of that kind, they shall limit a certain time under a penalty within which they shall be repaired. Also, they shall inquire by themselves or their officials, in the parishes where they visit, if there be ought in things or persons which wanteth to be corrected: and if they

(*j*) Lind. 50.
(*k*) Ibid.
(*l*) Ibid.
(*m*) Lind. 50.
(*n*) Athon, 52.
(*o*) Athon, 54.

General power in visiting.

shall find any such, they shall correct the same either then or in the next chapter (*p*).

And their Officials.]—Here it seems to be intimated, that the archdeacon's official may visit; which yet is not true, at least in his own right; yet he may do this in the right of the archdeacon, when the archdeacon himself is hindered (*q*).

Stratford. "Forasmuch as archdeacons and other ordinaries in their visitations finding defects as well in the churches as in the ornaments thereof and the fences of the churchyard and in the houses of the incumbents, do command them to be repaired under pecuniary penalties, and from those that obey not do extort the said penalties by censures, wherewith the said defects ought to be repaired, and thereby enrich their own purses to the damage of the poor people: therefore that there may be no occasion of complaint against the archdeacons and other ordinaries and their ministers by reason of such penal exactions, and that it becometh not ecclesiastical persons to gape after or enrich themselves with dishonest and penal acquisitions, we do ordain, that such penalties, so often as they shall be exacted, shall be converted to the use of such repairs, under pain of suspension *ab officio* which they shall *ipso facto* incur until they shall effectually assign what was so received to the reparation of the said defects" (*r*).

Can. 86.

By Canon 86 of 1603, "Every dean, dean and chapter, archdeacon and others which have authority to hold ecclesiastical visitations by composition, law or prescription, shall survey the churches of his or their jurisdiction once in every three years in his own person, or cause the same to be done; and shall from time to time, within the said three years, certify the high commissioners for causes ecclesiastical (*s*), every year, of such defects in any the said churches as he or they do find to remain unrepaired, and the names and surnames of the parties faulty therein. Upon which certificate we desire the said high commissioners will *ex officio mero* send for such parties and compel them to obey the just and lawful decrees of such ecclesiastical ordinaries making such certificates."

Visitation sermon.

In the year 1626, Mr. Huntley, rector of Stourmouth, was required by Dr. Kingsley, archdeacon of Canterbury, to preach a visitation sermon, which he refused: and being

(*p*) Lind. 53.
(*q*) Ibid.
(*r*) Lind. 224.

(*s*) The High Commission Court has since been abolished.

cited before the high commissioners, it was urged that he was bound to the performance of that office in pursuance of the archdeacon's mandate, by virtue of his oath of canonical obedience. He answered that he was not a licensed preacher according to the Canons of 1603, and especially that he was not bound thereunto by his said oath, which implied only an obedience according to the canon law, as it is in force in this realm; and that there is no canon, foreign or domestic, which required him to do this; but on the contrary, that the ancient canon law injoined the visitor himself to preach at his own visitation. But the court admonished him to comply; and on his refusal, fined him *500l.*, and imprisoned him till he should pay the same, and also make submission; and afterwards degraded and deprived him (*t*).

But this is one instance, amongst others, in which that court whilst it subsisted carried matters with a pretty high hand.

Exhibits.

By Canon 137, "Forasmuch as a chief and principal cause and use of visitation is, that the bishop, archdeacon or other assigned to visit, may get some knowledge of the state, sufficiency and ability of the clergy and other persons whom they are to visit: we think it convenient that every parson, vicar, curate, schoolmaster or other person licensed whosoever, do at the bishop's first visitation, or at the next visitation after his admission, show and exhibit unto him his letters of orders, institution and induction, and all other his dispensations, licences or faculties whatsoever, to be by the said bishop either allowed, or (if there be just cause) disallowed and rejected, and being by him approved, to be (as the custom is) signed by the register: and that the whole fees accustomed to be paid in the visitations in respect of the premises be paid only once in the whole time of every bishop, and afterwards but half of the said accustomed fees in every other visitation during the said bishop's continuance."

To be by the said Bishop allowed.]—None but the bishop, or other person exercising ecclesiastical authority by commission from him, has right *de jure communi* to require these exhibits of the clergy; nor does the enacting part of this canon convey the right to any other; and therefore if any archdeacons are entitled to require exhibits

(*t*) Johns., *Huntley's case.* "Sanè hujusmodi impensurus officium *proposito verbo Dei* quærat de vitâ et conversatione ministrorum," &c., is the precept of the canon law as to episcopal visitation. VI. l. 3, t. 20, c. 1, § 4.

Exhibits.

in their visitations, it must be upon the foot of custom, the beginning whereof has probably been an encroachment; since it is not likely that any bishop should give to the archdeacon and his official a power of allowing or disallowing such instruments as have been granted by himself or his predecessors (*u*).

Whole Fees.]—In the registry of Archbishop Islip, there is a sequestration of the benefices of divers clergymen refusing to make due exhibits in a visitation (*x*).

And afterwards but Half of the said accustomed Fees.]—Lindwood, speaking of the letters of orders to be exhibited by stipendiary curates going from one diocese to another, says, that after the archdeacon or his official or other ordinary has satisfied himself of their orders and of their life and conversation, they may be admitted to officiate, and their names ought to be entered in the register of such ordinary; whereupon in other visitations or inquiries, their letters of orders ought not to be reinspected, nor their names to be entered again, seeing they are sufficiently known already: and so they do ill (he says) who in every of their visitations take something for the inspection and approbation of the said letters of orders, seeing such entry ought not to be made but once, namely, at the first admission (*y*).

Presentments, by whom to be made.

Edmund. "There shall be in every deanry two or three men, having God before their eyes, who shall, at the command of the archbishop or his official, present unto them the public excesses of prelates and other clerks" (*z*).

In every Deanry.]—That is, in every rural deanry (*a*).

Public excesses.]—That is, notorious, whereof there is great and public infamy; and this, although the same be not upon oath; but if such excesses shall not be notorious, then the same shall not be presented, unless there be proof upon oath (*b*).

As to the churchwardens' duty in this particular, although they have for many hundred years been a body corporate to take care of the goods, repairs and ornaments of the church, as appears by the ancient register of writs; yet this work of presenting has been devolved on them and their assistants by canons and constitutions of a more modern date. Anciently the way was to select a certain number, at the discretion of the ordinary, to give information upon oath; which number the rule of the canon

(*u*) Gibs. 959.
(*x*) Gibs. 1545.
(*y*) Lind. 225; Gibs. 959.
(*z*) Lind. 277.
(*a*) Ibid.
(*b*) Ibid.

law upon this head evidently supposes to have been selected while the synod was sitting, and the people as well as clergy in attendance there. But in process of time this method was changed, and it was directed in the citation that four, six or eight, according to the proportion of the district, should appear (together with the clergy) to represent the people, and to be the *testes synodales* (*c*).

But all this while we find nothing of churchwardens presenting, but the style of the books is, "The parishioners say," "The laymen say," and the like, until a little before the Reformation, when the churchwardens began to present, either by themselves, or else with two or three more parishioners of credit joined with them. And this last (by the way) is evidently the origin of that office which our canons do call the office of sidesmen or assistants (*d*).

In the beginning of the reign of King James the First, a commissary had cited many persons of several parishes to appear before him at his visitation; and because they appeared not, they were excommunicated. But a prohibition was granted, because the ordinary has not power to cite any into that court, except the churchwardens and sidemen (*e*).

Can. 113.

But by Canon 113, "Because it often cometh to pass, that churchwardens, sidemen, questmen and such other persons of the laity as are to take care for the suppressing of sin and wickedness, so much as in them lieth, by admonition, reprehension and denunciation to their ordinaries, do forbear to discharge their duties therein, either through fear of their superiors, or through negligence, more than were fit, the licentiousness of these times considered, we ordain, that hereafter every parson and vicar, or, in the lawful absence of any parson and vicar, then their curates and substitutes, may join in every presentment with the said churchwardens, sidemen and the rest above mentioned, at the times of visitation, if they the said churchwardens and the rest will present such enormities as are apparent in the parish: or if they will not, then every such parson and vicar, or in their absence as aforesaid their curates, may themselves present to their ordinaries at such times, and when else they think it meet, all such crimes as they have in charge or otherwise, as by them (being the persons that should have the chief care for the suppressing of sin and impiety in their parishes) shall be thought to require due reformation: provided

(*c*) Gibs. 960. (*d*) Ibid. (*e*) Noy. 123.

Can. 113.

always, that if any man confess his secret and hidden sins to the minister, for the unburdening of his conscience, and to receive spiritual consolation and ease of mind from him, we do not any way bind the said minister by this our constitution; but do straightly charge and admonish him, that he do not at any time reveal and make known to any person whatsoever any crime or offence so committed to his trust and secrecy (except they be such crimes as by the laws of this realm his own life may be called in question for concealing the same) under pain of irregularity."

Can. 116.

And by Canon 116, "It shall be lawful for any godly disposed person, or for any ecclesiastical judge, upon knowledge or notice given unto him or them, of any enormous crime within his jurisdiction, to move the minister, churchwardens or sidemen, as they tender the glory of God and reformation of sin, to present the same, if they shall find sufficient cause to induce them thereunto, that it may be in due time punished and reformed."

Provided, that for these voluntary presentments there be no fee required or taken.

To be made upon oath.

Boniface. "We do decree, that laymen, when inquiry shall be made by the prelates and judges ecclesiastical for correcting the sins and excesses of those that are within their jurisdiction, shall be compelled (if need be) to take an oath to speak the truth" (*f*).

And that ordinaries are empowered by the laws of the church to require an oath of the *testes synodales*, appears not only from this constitution, but also from the body of the canon law. And the same practice of administering an oath appears in the ecclesiastical records of our own church, where it is often entered, that the presenters were charged upon their consciences to discover whatever they knew to want amendment in things and persons (*g*).

Or declaration.

Oaths on taking the office of churchwarden are abolished, and a declaration substituted in their stead by sect. 9 of 5 & 6 Geo. 4, c. 62.

Articles of inquiry.

By Can. 119, "For the avoiding of such inconveniences as heretofore have happened by the hasty making of bills of presentments upon the days of visitation and synods, it is ordered, that always hereafter, every chancellor, archdeacon, commissary and official, and every other person having ecclesiastical jurisdiction, at the ordinary time when the churchwardens are sworn, and the archbishop and bishops, when he or they do summon their visitation, shall deliver or cause to be delivered to the churchwardens,

(*f*) Lind. 109.

(*g*) Gibs. 960.

questmen and sidemen of every parish, or to some of them, such books of articles as they or any of them shall require (for the year following), the said churchwardens, questmen and sidemen to ground their presentments upon, at such times as they are to exhibit them. In which book shall be contained the form of the oath which must be taken immediately before every such presentment; to the intent that having beforehand time sufficient, not only to peruse and consider what their said oath shall be, but the articles also whereupon they are to ground their presentments, they may frame them at home both advisedly and truly, to the discharge of their own consciences (after they are sworn) as becometh honest and godly men."

Frame them at Home.]—By an entry in one of our records about 200 years ago, says Bishop Gibson, the ancient way of making presentments seems to have been the ordinary's examination of the synodal witnesses, and the taking their directions and presentments by word of mouth, and then immediately entering them in the acts of the visitation. And although presentments are now required to be framed at home, there is no doubt but every visitor has the same right of personal examination that ancient visitors had, as often as he shall find occasion (*h*).

By reason of several disputes which have been made concerning the articles of inquiry, the convocation has sometimes attempted to frame one general body of articles for visitations, but the same as yet has not been brought to effect (*i*).

Presentments on common fame.

By Can. 115, "Whereas for the reformation of criminous persons and disorders in every parish, the churchwardens, questmen, sidemen, and such other church officers are sworn, and the minister charged to present as well the crimes and disorders committed by the said criminous persons, as also the common fame which is spread abroad of them, whereby they are often maligned and sometimes troubled by the said delinquents or their friends, we do admonish and exhort all judges both ecclesiastical and temporal, as they regard and reverence the fearful judgment-seat of the highest Judge, that they admit not in any of their courts, any complaint, plea, suit or suits, against any such churchwardens, questmen, sidemen or other church officers, for making any such presentments, nor against any minister for any presentments that he shall make; all the said presentments tending to the restraint of shameless impiety, and considering that the rules both

(*h*) Gibs. 963. (*i*) Gibs. 962.

of charity and government do presume that they did nothing therein of malice, but for the discharge of their consciences."

The person accused in those days was required to answer upon oath to the charge laid against him, and to bring his compurgators; but the oath *ex officio* being now abolished, it is wrong and unlawful to present any person upon common fame only without proof.

Presentments in what manner to be made.

It is not enough to present that such a one has committed fornication, or the like, but the person ought to be named with whom he committed the offence, and that there is a public fame thereof; otherwise upon such a general and uncertain presentment, the person accused cannot know how to make his defence, and there may be cause of appeal (*k*).

At what time to be made.

By Can. 116, "No churchwardens, questmen, or sidemen of any parish, shall be enforced to exhibit their presentments to any having ecclesiastical jurisdiction, above once in every year where it hath been no oftener used, nor above twice in every diocese whatsoever, except it be at the bishop's visitation; . . . provided always, that as good occasion shall require, it shall be lawful for every minister, churchwardens and sidemen to present offenders as oft as they shall think meet;" and for these voluntary presentments no fee shall be taken.

By Can. 117, "No churchwardens, questmen or sidemen shall be called or cited, but only at the said time or times before limited, to appear before any ecclesiastical judge whosoever, for refusing at other times to present any faults committed in their parishes, and punishable by ecclesiastical laws. Neither shall they nor any of them, after their presentments exhibited at any of those times, be any further troubled for the same, except upon manifest and evident proof it may appear that they did then willingly and wittingly omit to present some such public crime or crimes as they knew to be committed, or could not be ignorant that there was then a public fame of them, or unless there be very just cause to call them for the explanation of their former presentments; in which case of wilful omission, their ordinaries shall proceed against them in such sort, as in causes of wilful perjury in a court ecclesiastical it is already provided."

By Can. 118, "The office of all churchwardens and sidemen shall be reputed ever hereafter to continue until the new churchwardens that shall succeed them be sworn, which

(*k*) 1 Ought. 229.

shall be the first week after Easter, or some week following, according to the direction of the ordinary; which time so appointed shall always be one of the two times in every year when the minister and churchwardens and sidemen of every parish shall exhibit to their several ordinaries the presentments of such enormities as have happened in their parishes since their last presentments. And this duty they shall perform before the newly chosen churchwardens and sidemen be sworn, and shall not be suffered to pass over the said presentments to those that are newly come into office, and are by intendment ignorant of such crimes; under pain of those censures which are appointed for the reformation of such dalliers and dispensers with their own consciences and oaths."

Fee for taking in presentments.

By Can. 116, "For the presentments of every parish church or chapel, the register of any court where they are to be exhibited shall not receive in one year above 4*d.*; under pain, for every offence therein, of suspension from the execution of his office for the space of a month *toties quoties.*"

Shephard v. *Payne.*

The Common Pleas, in 1862, and the Exchequer Chamber, in 1864, decided as follows:—

The office of registrar of an archdeaconry court, being a freehold office, with duties of a continuous and presumably perpetual character, and one whose existence is essential to the due exercise of the functions of the archdeacon, is an office to which fees may be annexed by immemorial usage.

The archdeacon's visitation operating for the benefit of the parish at large, and, among others, of the churchwardens themselves, the performance of whose duties is facilitated by the services of the registrar, the fees payable to that officer are properly chargeable upon the churchwardens.

For three centuries the practice of the archdeacons had been, in order to avoid expense, instead of visiting each parish in the archdeaconry separately, to divide the archdeaconry into districts, and to hold the visitation for all the parishes of that district at some one parish church within the district:—It was holden, that such a visitation was not open to objection in a temporal court (*l*).

Veley v. *Pertwee.*

The Queen's Bench, however, in 1870, held that the liability of the churchwardens to pay the registrar was not personal, and that if they had no funds in their hands for

(*l*) *Shephard* v. *Payne*, 12 C. B., N. S. 414; 16 ib. 132; 31 L. J., C. P. 297; 33 ib. 158; *vide supra*, p. 1221.

the repairs of the church or any other expenses of their office, and were without the means of obtaining funds except by voluntary subscriptions, they were not liable to pay the fees (*m*).

Table of fees fixed in pursuance of 30 & 31 Vict. c. 135.

By 30 & 31 Vict. c. 135, the two archbishops, their vicars-general and the lord chancellor, with the consent of the lords of the treasury, were empowered, from time to time, to settle a table of fees to be paid to the chancellors or vicars-general, registrars and other officers of archbishops and bishops, and to archdeacons and their officials and other officers, on the visitation of such archbishops and bishops and archdeacons respectively. The table was to be submitted to the Queen in council, and when approved to be published in the London Gazette, and to have the force of law.

A table of fees, fixed according to this statute, was published in the London Gazette of March 19, 1869.

By this table the fees on visitations are fixed as follows:—

	Vicar-general, Chancellor, Archdeacon or Official.	Registrar or other Officer by usage performing the Duty.	Apparitor.
	£ s. d.	£ s. d.	£ s. d.
Episcopal or Archidiaconal Visitation	0 2 0	0 12 6	0 3 6

"The chancellor's fee includes the attendance of the chancellor or his surrogate, the examination of the presentments of the outgoing churchwardens and the admission of the new churchwardens to office. The registrar's fee includes the drawing and issuing of the inhibition and of the mandate for the citation of the clergy; the preparation of the visitation books and of the articles of inquiry, and of the presentment papers; the attendance at the visitation and attesting the presentments and declarations of the churchwardens; the registering the papers exhibited by the clergy; the tabulating in the registry the copies of the register books of baptisms and burials, and other papers required to be annually transmitted. The apparitor's fee includes the preparation and delivery of the citations to the clergy and churchwardens, and the attendance at the visitation."

Penalty for not presenting.

Besides being proceeded against by the censures of the

(*m*) *Veley* v. *Pertwee*, 5 L. R., Q. B. 573.

church, it is enjoined by Canon 26, that no minister shall in anywise admit to the receiving of the holy communion any churchwardens or sidesmen, who, having taken their oaths to present to their ordinaries all such public offences as they are particularly charged to inquire of in their several parishes, shall (notwithstanding their said oaths, and that their faithful discharge of them is the chief means whereby public sins and offences may be reformed and punished) wittingly and willingly, desperately and irreligiously, incur the horrible crime of perjury (*n*), either in neglecting or in refusing to present such of the said enormities and public offences as they know themselves to be committed in their said parishes, or are notoriously offensive to the congregation there, although they be urged by some of their neighbours, or by their minister, or by the ordinary himself, to discharge their consciences by presenting of them, and not to incur so desperately the said horrible sin of perjury.

Selby's case.

In *Selby's case* (*o*), in 1680, a prohibition was prayed to the archdeacon of Exeter, because he proceeded to excommunicate the plaintiff, for that he, being churchwarden, refused to present a notorious delinquent, being admonished. And a prohibition was granted: for they are not to direct the churchwarden to present at their pleasure; but if one churchwarden refuses to present, he may be presented by his successor.

None to be presented twice for the same offence.

By Can. 121, "In places where the bishop and archdeacon do by prescription or composition visit at several times in one and the same year, lest for one and the selfsame fault any of his majesty's subjects should be challenged and molested in divers ecclesiastical courts, we order and appoint, that every archdeacon or his official, within one month after the visitation ended that year, and the presentments received, shall certify under his hand and seal, to the bishop or his chancellor, the names and crimes of all such as are detected and presented in his said visitation, to the end the chancellor shall thenceforth forbear to convent any person for any crime or cause so detected or presented to the archdeacon. And the chancellor, within the like time after the bishop's visitation ended and presentments received, shall under his hand and seal signify to the archdeacon or his official the names and crimes of all such persons, which shall be detected or presented unto him in that visitation, to the same intent as is aforesaid.

(*n*) It has been observed that no presentments are now made upon oath.

(*o*) Freem. 298.

And if these officers shall not certify each other as is here prescribed, or after such certificate shall intermeddle with the crimes or persons detected and presented in each other's visitation; then every of them so offending shall be suspended from all exercise of his jurisdiction, by the bishop of the diocese, until he shall repay the costs and expenses which the parties grieved have been at by that vexation."

Churchwardens to support their presentments.

Crimes evident and notorious, whether they be immoralities in persons, as lewdness, swearing, drunkenness, and such like; or defects in places, as the want of repairs, or of utensils, in churches, churchyards, and parsonage houses; are not only in their nature merely spiritual and ecclesiastical, but in the chief heads thereof (as fornication, adultery, and the repairing of churches and churchyards), by the statute of *Circumspectè agatis*, 13 Edw. 1, stat. 4, not liable to prohibition. And therefore, if offenders, being presented, do escape unpunished, it must be owing either to the want of proof, or the want of prosecution (*p*).

As to legal proof, in case the party presented denies the fact to be true, the making good the truth of the presentment, that is, the furnishing the court with all proper evidences of it, undoubtedly rests upon the person presenting. And as the spiritual court in such cases is entitled by law to call upon churchwardens to support their presentments, so are churchwardens obliged not only by law (Dr. Gibson says), but also in conscience, to see the presentment effectually supported; because to deny the court those evidences which induced them to present upon oath, is to desert their presentment, and is little better, in point of conscience, than not to present at all; inasmuch as through their default the presentment is rendered ineffectual, as to all purposes of removing the scandal, or reforming the offender. And from hence he takes occasion to wish, that the parishioners would think themselves bound (as on many accounts they certainly are bound) to support their churchwardens, in seeing that their presentments are rendered effectual. In any point which concerns the repairs or ornaments of churches, or the providing conveniences of any kind for the service of God, when such defects as these are presented, the spiritual judge, immediately, and of course, enjoins the churchwarden presenting, to see the defect made good, and supports him in repaying himself, by a legal and reasonable rate upon the parish.

(*p*) Gibs. 966. *Vide supra*, p. 1081; Cosin, Ecclesiæ Anglicanæ Politeia in tabulas digesta, Tab. 7 A. (1634).

But what he intends is, the supporting the churchwardens in the prosecution of such immoral and unchristian livers, as they find themselves obliged by their oath to present, as fornicators, adulterers, common swearers, drunkards, and such like, whose example is of pernicious consequence, and likely to bring many evils upon the parish (*q*).

Procurations.

In all visitations of parochial churches made by bishops and archdeacons, the law has provided that the charge thereof shall be answered by the procurations (*r*) then due and payable by the inferior clergy; wherein custom, as to the quantum, shall prevail (*s*).

Anciently by provisions in kind.

These procurations were anciently made by *procuring* victuals and other provisions in specie; concerning which constitutions have been ordained in England in accordance with the general canon law (*t*).

But by a constitution of Stratford, "No procuration shall be due without actually visiting; and if any shall visit more churches than one in one day, he shall have but one procuration, to be proportioned amongst the said churches. And because sometimes the retinue of a visitor exceedeth the number of men and horses appointed by the canons, so that they who pay their procurations in victuals are excessively burdened beyond the rate which is usually paid in money, it shall be in the choice of the visited to pay the same in money or in provisions" (*u*).

Procurations now converted into money.

And this last constitution, by putting it in the choice of the incumbent, whether he would entertain the visitor in provisions or compound for it by a certain sum of money, was the cause of the custom generally prevailing afterwards, and which now universally obtains, of a fixed payment in money, instead of a procuration in meat, drink, provender, and other accommodation (*x*).

Part of revenue of see.

These procurations are now part of the settled revenue of the bishop's see; the king himself pays them for his appropriations, as the abbeys did before the dissolution when they had appropriated churches (*y*).

Whether due when no visitation is made.

Procuration is due to the person visiting, of common right; and although originally due by reason of visitation only, yet the same may be due without actual visitation. The foregoing constitutions limit the payment, whether in provisions or money, to actual visitation, and warrant the

(*q*) Gibs. 966.

(*r*) See Canon Law, vi. 1. 3, t. 20, s. 5, "Procurationes autem recipiat," &c., but to be taken in food, not money.

(*s*) God. Introd. 19.

(*t*) See Lind. 219, 220, 221; Athon, 53, 114.

(*u*) Lind. 223.

(*x*) Gibs. Tracts, 13.

(*y*) *The King* v. *Sir Ambrose Forth*, Davy's Rep. 1.

Whether due when no visitation is made.

denial of them when no visitation is holden. Upon which a doubt has been raised, whether those archdeacons who are not permitted to visit, but are inhibited from doing it in the bishop's triennial visitation, have a right to require procurations for that year. They who have maintained the negative, build their opinion upon the express letter both of the ancient canon law, and of our own provincial constitutions. But others, who undertake to defend the rights of the archdeacons, allege, that though it might be reasonable that they lose their procurations, in case they neglect their office of visiting (which, by the way, was all that the ancient constitutions meant), yet that reason does not hold when they are restrained and inhibited from it; and that procurations are rated in the valuation of King Henry VIII. as part of the revenues of every archdeacon, who therefore paid a certain annual tenth for them; and the law could never intend the payment of the tenth part every year, if there had been any year in which he was not to receive the nine parts. Which two arguments (Dr. Gibson says) are so strong in favour of the archidiaconal rights, the first in reason, and the second in law as well as reason, that no more need to be said upon that head (*z*).

To be sued for in the spiritual court.

Procurations are suable only in the spiritual court, and are merely an ecclesiastical duty (*a*).

And may be levied by sequestration or other ecclesiastical process (*b*).

To be paid by rectories impropriate where there is no vicar endowed.

In the case of *Saunderson* v. *Clagett* (*c*), in 7 Geo. 1, Dr. Clagett, Archdeacon of Sudbury, commenced a suit in the Consistory Court of the Bishop of Norwich, against Saunderson, as proprietor or curate of the impropriate rectory of Aspal in Suffolk, for the annual sum of 6*s*. 8*d*. as a procuration or proxy due to the archdeacon for visitations. Saunderson moved the Court of King's Bench for a prohibition, and suggested that this rectory of Aspal was time out of mind a rectory impropriate, without any vicar endowed; that all the tithes and profits within this rectory time out of mind belonged to the proprietor thereof, who at his own expense used to provide a curate to celebrate divine service at the parish church of Aspal. But it was denied by the whole court, who delivered their opinions *seriatim*: 1, That this was an ecclesiastical duty, and therefore properly suable for in the spiritual court: 2, That it was claimed both by and from an ecclesiastical

(*z*) Gibs. 975.
(*a*) Lord Raym. 450.
(*b*) Gibs. 1546.
(*c*) 1 P. W. 657; Str. 421.

person, which made it the stronger: 3, That though there was an impropriation in the case, still there must be a curate to take care of the souls of the parishioners, and that curates as well as other persons must stand in need of bishop's or archdeacon's instructions and visitation: consequently, 4, That the ordinary or archdeacon ought to be allowed for his procuration what had been usually paid for it, which here appeared to be 6*s.* 8*d.*: 5, That where a thing is claimed by custom in the spiritual court, it must be intended according to their construction of a custom; and by their law, forty years make a custom or prescription.

Impropriate rectory where there is a vicar endowed.

If there be a parsonage and a vicarage endowed, only one is to pay procurations; but which of them must pay is to be directed by custom, or the endowment, if extant (*d*).

Chapel of ease under a parochial church.

Stratford. A chapel of ease shall be included in the procuration of the mother church (*e*).

Churches newly erected.

Churches newly erected shall be rated to procurations, according to the portion paid by the neighbouring churches (*f*).

Places excempted.

Donatives and free chapels used to pay no procurations to any ecclesiastical ordinary, because they were not visitable by any (*g*). But the holders of donatives have now become visitable (*h*).

SECT. 4.—*Royal Visitation* (*i*).

25 Hen. 8, c. 21.

25 Hen. 8, c. 21, taking the power of dispensations from the pope, and vesting them in the Archbishop of Canterbury, intituled "An Act concerning Peter-pence and Dispensations," provided by section 14 that neither the Archbishop of Canterbury, nor any other person, should have "power or authority by reason of this act, to visit or vex any monasteries, abbeys, priories, colleges, hospitals, houses or other places religious, which be or were exempt before the making of this act; any thing in this act to the contrary thereof notwithstanding; but that redress, visitation and confirmation shall be had by the king's highness, his heirs and successors, by commission under the great seal, to be directed to such persons as shall be appointed requisite for the same, in such mo-

The king by commission may visit colleges, hospitals and places exempt, and not the Archbishop of Canterbury.

(*d*) Deg. p. 2, c. 15.
(*e*) Lind. 223; Deg. p. 2, c. 15.
(*f*) Gibs. 976.
(*g*) Deg. p. 2, c. 15.
(*h*) *Vide supra*, pp. 326, 327.

(*i*) The King's Visitatorial Power Asserted, by Nathaniel Johnston, London, 1648; Cosin, Ecclesiæ Anglicanæ Politeia in tabulas digesta, Tab. 1 A. (1634).

25 Hen. 8, c. 21.

nasteries, colleges, hospitals, priories, houses and places religious exempt: so that no visitation nor confirmation shall from thenceforth be had or made, in or at any such monasteries, colleges, hospitals, priories, houses and places religious exempt by the said Bishop of Rome, nor by any of his authority, nor by any out of the king's dominions; nor that any person, religious or other, resiant in any the king's dominions, shall from henceforth depart out of the king's dominions to or for any visitation, congregation or assembly for religion, but that all such visitations, congregations and assemblies shall be within the king's dominions" (*k*).

1 Eliz. c. 1.

And 1 Eliz. c. 1, "An Act to restore to the Crown the ancient Jurisdiction over the Estate Ecclesiastical and Spiritual, and abolishing all Foreign Powers repugnant to the same," enacts as follows:—

Ecclesiastical jurisdiction annexed to the crown.

Sect. 8. "And that also it may likewise please your highness, that it may be established and enacted by the authority aforesaid, that such jurisdictions, privileges, superiorities and pre-eminences spiritual and ecclesiastical, as by any spiritual or ecclesiastical power or authority hath heretofore been, or may lawfully be exercised or used for the visitation of the ecclesiastical state and persons, and for reformation, order and correction of the same, and of all manner of errors, heresies, schisms, abuses, offences, contempts, and enormities, shall for ever by authority of this present parliament be united and annexed to the imperial crown of this realm.

The queen may assign commissioners to exercise ecclesiastical jurisdiction.

"[And (*l*) that your highness, your heirs and successors, kings or queens of this realm, shall have full power and authority by virtue of this act, by letters patents under the great seal of England, to assign, name and authorize, when and as often as your highness, your heirs or successors, shall think meet and convenient, and for such and so long time as shall please your highness, your heirs or successors, such person or persons being natural-born subjects to your highness, your heirs or successors, as your majesty, your heirs or successors, shall think meet, to exercise, use, occupy and execute under your highness, your heirs and successors, all manner of jurisdictions, privileges and pre-eminences, in anywise touching or concerning any spiritual or ecclesiastical jurisdiction, within these your realms of England and Ireland, or any other your highness' dominions and countries: and to visit, reform, redress, order, correct and

(*k*) See also 37 Hen. 8, c. 17, s. 3, now repealed.

(*l*) The part in brackets is now repealed.

amend all such errors, heresies, schisms, abuses, offences, contempts and enormities whatsoever, which by any manner of spiritual or ecclesiastical power, authority or jurisdiction can or may lawfully be reformed, ordered, redressed, corrected, restrained or amended, to the pleasure of Almighty God, the increase of virtue, and the conservation of the peace and unity of this realm; and that such person or persons so to be named, assigned, authorized and appointed by your highness, your heirs or successors, after the said letters patents to him or them made and delivered, as is aforesaid, shall have full power and authority by virtue of this act, and of the said letters patents under your highness, your heirs and successors, to exercise, use and execute all the premises, according to the tenor and effect of the said letters patents; any matter or cause to the contrary in anywise notwithstanding."]

To assign, name, and authorize.]—Lord Coke said, it was resolved by all the judges, that if this act had never been made, the king or queen of England for the time being might have made such an ecclesiastical commission by the ancient prerogative and law of England (*m*); but Bishop Stillingfleet (*n*) denies that "our ancient law doth give the king a power, by virtue of his ecclesiastical jurisdiction, to appoint commissioners, by an extraordinary way of jurisdiction, to proceed *in primâ instantiâ* against parsons by ecclesiastical censures;" and Bishop Gibson agrees with this learned prelate.

To visit.]—"This branch was enacted out of necessity, for that the bishops and most of the clergy being then popish, it was necessary to raise a commission to deprive them who would not deprive themselves, and to have a more summary proceeding than by the ordinary and prolix course of law is required." To this effect my Lord Coke. But Bishop Stillingfleet believes that they were deprived by a particular commission for that purpose; which the queen might grant in virtue of this act by the same reason that she issued particular commissions into every county to execute the powers contained and specified in the said act.

Ireland.

Mr. Cunningham observes that, "In Ireland, so early as the thirteenth century, a visitation was made of the archdiocese of Dublin, the record of which visitation is generally styled the '*Crede Mihi;*' copies of this document still exist, and by one of them, in the British Museum, it appears that the original was written about the

(*m*) *Caudrey's case*, 5 Co. 1. (*n*) Eccles. Cases, part 2, p. 67.

Ireland.

"end of the reign of Henry III. Soon after, a general survey or valuation of the churches of Ireland was instituted, as is found by some fragments of the valuation still remaining in the Exchequer in England: the valuation so made is generally called 'Pope Nicholas' Taxation,' and was executed in the reign of Edward I.: there is a writ from King Edward III. ordering a new visitation of the diocese of Ireland to be made, though no such visitation has as yet been discovered. The most important document of that description which next occurs, is the '*Repertorium Viride*,' or account of the former and present state of his own archdiocese, made by John Alan, Archbishop of Dublin, in the reign of Henry VIII. The original record, thus compiled, has continued in the possession of the archbishop's successors; and when we find copies of it were made for preservation in the libraries of Christ Church and Saint Patrick's Cathedrals, Trinity College, &c., where they now remain, we may fairly presume it was formerly a document in considerable estimation. During the reign of Queen Elizabeth, many visitations of the dioceses of Ireland were made; some of them pursuant to order of state, and records of most of them are still to be seen in the Manuscript Library of Trinity College. In the time of her successor, James I., viz. in the years 1607, 1612, and 1615, visitations were made throughout the kingdom, some of them pursuant to a commission now enrolled on the rolls of Chancery, and agreeably to instructions issued in writing for holding those visitations, as may be seen by a copy of those instructions, annexed to the visitations themselves, in the prerogative registry; but in 1622 the same king, by a commission under the great seal of England, empowered a certain number of persons, some of them leading members of the English parliament, to inquire into and report upon the state of the Church in Ireland, as well as to do and perform the many other high and arduous duties which are minutely detailed in that commission. Copies of some of the visitations and returns made accordingly will be found in the British Museum, St. Patrick's Library, and amongst the manuscripts in the College Library, Dublin. Soon after those returns, viz. in the year 1623, King James issued his 'Rules and Orders' for the Church of Ireland, a copy of which will be found in St. Patrick's Library. A new regal visitation was made in the years 1633, 1634, and this, with the 'Munster Visitation' records of the same period, both now remaining in the prerogative registry, seem to be almost the fullest specimens

Pope Nicholas' Taxation.

"of ancient ecclesiastical returns or reports now existing. In the preparing of these last visitations, besides the names of the parishes, incumbents, patrons, impropriators, or 'farmers,' as they frequently style the grantees of the dissolved monasteries, much useful information, taken from the bishop's registry, then extant, will be found annexed to most of the returns respecting the collations, presentations, nominations, admissions, institutions, inductions, &c. of the several incumbents and curates. The triennial visitations of the Deans of Kilmore, Ardagh, Dromore and Connor, made in the year 1673, are also preserved in the same registry. No other general visitations appear to have been made in Ireland until after the Revolution, when in or about the year 1693, the lords justices issued directions to the archbishops and bishops throughout the kingdom, and reports and returns were made in consequence; copies of some of those returns are preserved in St. Patrick's Library, Dublin, and also in the primatial registry at Armagh. The above are the principal ecclesiastical returns, surveys, or visitations heretofore made in Ireland, but of course they do not include those annual and triennial visitations made of the respective sees, many of which are still to be seen in the diocesan registries; several other miscellaneous ecclesiastical returns and documents are preserved amongst the archiepiscopal records in Lambeth Palace, and amongst the Clarendon and other collections in the British Museum; the surveys of the impropriate tithes, made under the commonwealth government, are preserved at Bective House, in the county Meath, with the other valuable and interesting records belonging to the most noble the Marquess of Headfort, and some of them are also at present in the Castle of Dublin. Most of the original valuations of spiritual benefices made in the reign of Henry VIII. and his successors, for ascertaining the first fruits payable to the crown out of such benefices, will be found amongst the inquisitions in the Chief Remembrancer's Office, and from those inquisitions, held specially for the purpose, an abstract compilation was at a more recent period formed, which has since been termed the '*Valor Beneficiorum.*'

"On the escheat of the northern counties in the reign of James I., inquisitions were also held, which afford most curious and useful information as to the situation, division and application of tithes and other church property in those counties, at and before that period" (*o*).

(*o*) Cunningham's Ecclesiastical Precedents and Practice. Appendix, p 369.

CHAPTER X.

ECCLESIASTICAL CENSURES.

SECT. 1.—*Censuræ sive Coercitiones Ecclesiasticæ.*
2.—*Admonition.*
3.—*Penance.*
4.—*Suspension.*
5.—*Sequestration.*
6.—*Deprivation.*
7.—*Degradation.*
8.—*Excommunication.*

SECT. 1.—*Censuræ sive Coercitiones Ecclesiasticæ.*

What spiritual punishments are.

SPIRITUAL punishments (*a*) consist in withdrawing from the baptized person a certain privilege, or certain privileges, which the church has given him, or in wholly expelling him from the Christian communion. A simple ecclesiastical censure is the gentlest,—excommunication is the severest form of punishment. All classes of spiritual punishments known to this country, however, may be ranged under the general head or category of censures—*censuræ* (*b*).

As to clergy and laity.

There are some censures applicable to the whole church, clergy and laity; others applicable only to one of these classes.

Classes of censures.

The censures to which both clergy and laity are subject may, for the purposes of this work, be considered as follows:—

1. Admonition, or monition.
2. Penance.
3. Suspension *ab ingressu ecclesiæ.*
4. Excommunication, with the spiritual and temporal consequences incident to it.

(*a*) Greg. v. 37, 89; Sext. v. 9, 10, 11; Clem. v. 8; Extr. Comm. v. 8, 9, 10; Lind. De Purgatione Canonicâ, l. 5, t. 14, p. 312—De pœnis, l. 5, t. 15, p. 314; Walter, s. 191, &c.; Müller, Lex. Kirchen-Strafen, B. 3, 439; Ayl. Par. 155—Of Ecclesiastical Censures; Zouch, Descriptio Jur. Eccles. pars 3, s. vii.—De Coercitione Ecclesiasticâ et de Excommunicatione.

(*b*) "Coercitio Ecclesiastica est censura sive pœna," &c., Zouch, ib.

Those to which the clergy alone are subject may be considered as—

1. Suspension.
2. Sequestration.
3. Deprivation.
4. Degradation.

Sect. 2.—*Admonition.*

Admonition, or monition, is the first and lightest form of ecclesiastical censure, whether to clergymen or laymen. It is to be observed, that when an admonition has been duly served, after a trial, upon the admonished person, disobedience to it entails the penalties incident to a contempt of the order of a lawful court.

In the ordination services the clerk solemnly binds himself to reverently obey "his ordinary, and to follow with a glad mind and will their godly admonitions,"—an obligation binding, no doubt, *in foro conscientiæ*, but distinct from the legal admonition to be enforced *in foro externo.*

Sect. 3.—*Penance.*

Of penance and commutation in general.

Penance (*c*) is said to be an ecclesiastical punishment, used in the discipline of the church, which affects the body of the penitent; by which he is obliged to give a public satisfaction to the church for the scandal he has given by his evil example. So in the primitive times, they were to give testimonies of their reformation, before they were re-admitted to partake of the mysteries of the church. In the case of incest, or incontinency, the sinner is usually enjoined to do a public penance in the cathedral or parish church, or public market, barelegged and bareheaded, in a white sheet, and to make an open confession of his crime in a prescribed form of words; which is augmented or moderated according to the quality of the fault, and the discretion of the judge. So in smaller faults and scandals, a public satisfaction or penance, as the judge shall decree, is to be made before the minister,

(*c*) Lind., De pœnitentiis et remissionibus, l. 5, p. 326; Zouch, Descr. Jur. Eccles.—De Pœnitentiâ, pars 3, s. ix.: Pœnitentia est cum quis crimen confiteri et lugere publicè compellitur. See the whole chapter.

Of penance and commutation in general.

churchwardens, or some of the parishioners, respect being had to the quality of the offence, and circumstances of the fact: as was instanced in the case of defamation, or laying violent hands on a minister, or the like (*d*), when the ecclesiastical courts had jurisdiction in these matters (*e*).

And as these censures may be moderated by the judge's discretion, according to the nature of the offence; so also they may be totally altered by a commutation of penance; and this has been the ancient privilege of the ecclesiastical judge, to admit that an oblation of a sum of money for pious uses shall be accepted in satisfaction of public penance (*f*).

But penance must be first enjoined, before there can be a commutation; or otherwise it is a commutation for nothing (*g*).

Divers kinds of penance.

Lindwood and other canonists mention three sorts of penance:—

(1.) Private—enjoined by any priest in hearing confessions.

(2.) Public—enjoined by the priest for any notorious crime, either with or without the bishop's licence, according to the custom of the country.

(3.) Solemn penance—concerning which it is ordained by a constitution of Archbishop Peccham as follows: "Whereas, according to the sacred canons, greater sins, such as incest and the like, which by their scandal raise a clamour in the whole city, are to be chastised with solemn penance; yet such penance seemeth to be buried in oblivion by the negligence of some, and the boldness of such criminals is thereby increased; we do ordain, that such solemn penance be for the future imposed, according to the canonical sanctions" (*h*).

And this penance could be enjoined by the bishop only; and did continue for two, three, or more years. But in latter ages, for how many years soever this penance was inflicted, it was performed in Lent only. At the beginning of every Lent, during these years, the offender was formally turned out of the church; the first year, by the

(*d*) God. Append. 18.

(*e*) The penance judicially imposed is spoken of in this chapter. It does not affect the power of absolution given to the priest on a general or special confession of sin. Thus, Zouch, ib. pars 1, s. 3, "Denique in singulis parochiis, sine dignitate et jurisdictione Rectores constituuntur, quibus Ecclesiæ curandæ regendæque committuntur. Et in foro pœnitentiæ ligandi absolvendique potestatem habent."

(*f*) God. Append. 19.

(*g*) God. 89.

(*h*) Lindw. 339.

bishop; the following year, by the bishop or priest. On every Maundy Thursday, the offender was reconciled and absolved, and received the sacrament on Easter-day, and on any other day till Low Sunday: this was done either by the bishop or priest. But the last final reconciliation or absolution could be passed regularly by none but the bishop. And it is observable, that even down to Lindwood's time, there was a notion prevalent, that this solemn penance could be done but once. If any man relapsed after such penance, he was to be thrust into a monastery, or was not owned by the church; or, however, ought not to be owned according to the strictness of the canon: though there is reason to apprehend that it was often otherwise in fact. And indeed this solemn penance was so rare in those days, that all which has been said on this subject was rather theory than practice, except perhaps in the case of heresy (*i*).

By old constitutions.

A constitution of Boniface says: "We do ordain, that laymen shall be compelled by the sentence of excommunication to submit to canonical penances, as well corporal as pecuniary, inflicted on them by their prelates. And they who hinder the same from being performed, shall be coerced by the sentences of interdict and excommunication. And if distresses shall be made on the prelates upon this account, the distrainers shall be proceeded against by the like penalties" (*k*).

Which corporal penances Lindwood specifies in divers instances; as thrusting them into a monastery, branding, fustigation, imprisonment (*l*).

"We do decree," says another constitution, "that the archdeacons for any mortal and notorious crime, or from whence scandal may arise, shall not take money for the same of the offenders, but shall inflict upon them condign punishment" (*m*).

"And because the offender hath no dread of his fault, when money buys off the punishment: and the archdeacons, and their officials, and some that are their superiors, when their subjects of the clergy or laity commit relapses into adultery, fornication, or other notorious excesses, do for the sake of money remit that corporal penance, which should be inflicted for a terror to others: and they who receive the money apply to the use of themselves, and not of the poor, or to pious uses; which is the occasion of grievous scandal, and ill example: Therefore

(*i*) Johns. Pecch.
(*k*) Boniface, Lindw. 321.
(*l*) Ibid.
(*m*) Othob. Athon 125.

By old constitutions.

we do ordain, that no money be in any wise received for notorious sin, in case the offender hath relapsed more than twice; on pain of restoring double of what shall have been so received within one month after the receipt thereof, to be applied to the fabric of the cathedral church; and of suspension *ab officio*, which they who receive the same, and do not restore double thereof within one month as aforesaid, shall *ipso facto* incur. And in commutations of corporal penances for money (which we forbid to be made without great and urgent cause), the ordinaries of the places shall use so much moderation, as not to lay such grievous and excessive public corporal penances on offenders, as indirectly to force them to redeem the same with a large sum of money. But such commutations, when they shall hereafter be thought fit to be made, shall be so modest, that the receiver be not thought rapacious, nor the payer too much aggrieved; under the penalties before mentioned" (*m*).

By statute 13 Edw. 1, st. 4.

By the statute of *Circumspectè agatis,* already referred to (*n*), the king orders his judges: "Use yourselves circumspectly concerning the bishops and their clergy, not punishing them if they hold plea in court christian of such things as be merely spiritual, that is to wit, of penances enjoined by prelates for deadly sin, as fornication, adultery, and such like; for the which sometimes corporal penance, and sometimes pecuniary, is enjoined (*o*): in which cases the spiritual judge shall have power to take knowledge, notwithstanding the king's prohibition."

By statute 9 Edw. 2, st. 1, c. 2.

By the statute of *Articuli Cleri,* 9 Edw. 2, st. 1, c. 2, if a prelate enjoin a penance pecuniary to a man for his offence, and it be demanded, the king's prohibition shall hold place: but if prelates enjoin a penance corporal, and they which be so punished will redeem upon their own accord such penances by money; if money be demanded before a spiritual judge, the king's prohibition shall hold no place.

Before the Prelate.]—It seems to be agreed by the canonists, that *archdeacons* may not inflict pecuniary penalties, unless warranted by prescription (*p*).

Disposal of the commutation money.

Ayliffe says, that anciently the commutation money was to be applied to the use of the church, as fines in cases of civil punishment are converted to the use of the public (*q*).

By several of the canons made in the time of Queen

(*m*) Stratford, Lindw. 323.

(*n*) *Vide supra*, p. 1081.

(*o*) *Case of Dr. Barker* in Camerâ Stellatâ, 2 Rol. Rep. 384.

(*p*) Gibs. 1046.

(*q*) Ayl. Par. 413.

Elizabeth, and in the year 1640, it was to be applied to pious and charitable uses; and the *Reformatio Legum* directed that it should be to the use of the poor of the parish where the offence was committed or the offender dwelled. And there was to be no commutation at all but for very weighty reasons and in cases very particular. And when commutation was made, it was to be with the privity and advice of the bishop. In Archbishop Whitgift's register we find that the commutation of penance without the bishop's privity was complained of in parliament. And it was one of King William's injunctions, that commutation be not made but by the express order and direction of the bishop himself declared in open court. And by the Canons of 1640, if in any case the chancellor, commissary, or official, should commute penance without the privity of the bishop, he was at least to give a just account yearly to the bishop of all commutation money in that year, on pain of one year's suspension (*r*).

Convocation in Queen Anne's time.

In the reign of Queen Anne this matter was taken into consideration by the convocation, who made the following regulations, viz. That no commutation of penance be hereafter accepted or allowed of by any ecclesiastical judge, without an express consent given in writing by the bishop of the diocese or other ordinary having exempt jurisdiction, or by some person or persons to be especially deputed by them for that purpose; and that all commutations, or pretended commutations, accepted or allowed otherwise than is hereby directed, be *ipso facto* null and void. And that no sum of money given or received for any commutation of penance, or any part thereof, shall be disposed of to any use without the like consent and direction in writing of the bishop or other ordinary having exempt jurisdiction, if the cause has been prosecuted in their courts; or of the archdeacon if the cause has been prosecuted in his court. And all money received for commutation pursuant to the foregoing directions, shall be disposed of to pious and charitable uses by the respective ordinaries above named: whereof at the least one-third part shall by them be disposed of in the parish where the offenders dwell: and that a register be kept in every ecclesiastical court, of all such commutations, and of the particular uses to which such money has been applied: and that the account so registered be every year laid before the bishop or other ordinary exempt having episcopal jurisdiction, in order to

(*r*) Gibs. 1045.

be audited by them: and that any ecclesiastical judge or officer offending in any of the premises be suspended for three months for the said offence (*s*).

Oughton's opinion.

Oughton says, generally commutation money is to be given to the poor where the offence was committed, or applied to other pious uses at the discretion of the judge (*t*).

Case in 1735.

About the year 1735, Dr. Burn says, the Bishop of Chester cited his chancellor to the archbishop's court at York, to exhibit an account of the money received for commutations, and to show cause why an inhibition should not go against him, that for the future he should not presume to dispose of any sum or sums received on that account without the consent of the bishop. In obedience to this, an account was exhibited without oath; and that being objected to, a fuller was exhibited upon oath. And upon the hearing several of the sums in the last account were objected to as not allowable, and an inhibition prayed to the effect above. But the archbishop's chancellor refused to grant such inhibition, and was of opinion that the bishop could only oblige an account: and so dismissed the chancellor without costs.

It is expedient to make a special reference to some modern decisions on this subject.

Penance may be remitted.

Where a party has been convicted of incest, penance has been (*u*) remitted where it was shown that the health of the party ordered to perform it would have been endangered thereby, and where the promoter expressed his concurrence with the prayer for such remission. Lord Stowell said, "In the older canons, which perhaps can hardly be said as carrying with them all their first authority, a *solennis penitentia* is enjoined before the bishop of the diocese. This however, as I have just remarked, is now softened down. Attending then to what I think is the most material point, the removing of such a scandal, and looking to the age and infirmity of the party, and what might be the consequence of such a punishment, the court will not think it necessary to inflict the public penance: but condemn him in the *full* costs of this prosecution, accompanying this with the injunction that the same intercourse must not continue, but must be *bonâ fide* and substantially removed." This was the case of a party proceeded against for incest. But where the

(*s*) Gibs. 1046.
(*t*) 1 Ought. 213.
(*u*) *Chick* v. *Ramsdale*, 1 Curt. 36; *Burgess* v. *Burgess*, 1 Consist. 393.

penance enjoined for defamation has been to acknowledge the defamation and ask for the forgiveness of the party defamed in the vestry room before the clergyman and churchwardens, the exact form of retractation of the defamatory words enjoined by the court has been compelled by the court (*x*).

Schedule of penance must be given to the party.

Where a writ *de contumace capiendo*, issued under 53 Geo. 3, c. 127, expressed "that the defendant had been pronounced guilty of contumacy and contempt of the law and jurisdiction ecclesiastical in not having obeyed a decree made upon him to perform the usual penance in the parish church of St. M. N. in a certain cause of defamation," and it appeared that at the time the sentence was pronounced a schedule of penance was made out, which, by the practice of the Ecclesiastical Court, could not be delivered to the defendant until he paid the costs of the suit: it was holden, that he ought to have had the decree exhibited to him in its more perfect form before he could be considered as being in contempt, especially as the costs were not mentioned in the *significavit*, and that he was consequently entitled to be discharged (*y*). But where an application was made to set aside a writ *de contumace capiendo* on the ground that the defendant had not been admonished to take out a schedule of penance, and that he was sentenced to perform penance in the minister's house, which he had no right to enter—it appearing, nevertheless, that there was an order for the party to pay costs, for the not doing which he was in contempt, and for which in fact the *significavit* had issued—the application was rejected, for the sentence awarded payment of a precise sum, 25*l.* costs; and if the proceedings of the court had been, as was suggested, defective, the costs would not be thereby decreased (*z*).

Party in contempt for non-payment of costs.

In the Consistorial Court of Chichester, on the 17th of June, 1856, the present judge of the Arches Court, then chancellor of the diocese, gave the following judgment, in which the question of penance is referred to (*a*):

(*x*) *Courtail* v. *Homfray*, 2 Hagg. 1; *Thorp* v. *Brider*, 2 Phill. 359; *Cleaver* v. *Woodridge*, 2 Phill. 362, note.

(*y*) *Rex* v. *Maby*, 3 D. & R. 570, per Lord Tenterden.

(*z*) *Kington* v. *Hack*, 7 Ad. & Ell. 708, per Lord Denman; S. C. 3 Nev. & Per. 6.

(*a*) This judgment was delivered before the act was passed which establishes the present court for divorce and matrimonial causes (20 & 21 Vict. c. 85, *supra*, p. 829); but that act, though it took away the power of the ecclesiastical court to pronounce the nullity of the marriage, left untouched the jurisdiction to censure the incestuous cohabitation. *Vide supra*, pp. 738, 892.

Randall v. Vowles and Vowles.

"This is a proceeding of great importance, both as regards the individuals who are the subject of it, and the interests of the civil and religious community of which they are members. It is a criminal suit brought against two persons, by name Joseph and Elizabeth Vowles, who are alleged to have *de facto* intermarried with each other, and to be cohabiting together; their relation to each other rendering such marriage null and void, and such cohabitation incestuous and wicked.

"The object of the suit is twofold; to obtain a declaratory sentence of the nullity of the *de facto* marriage had between the parties; and a decree against them to abstain from incestuous cohabitation for the future.

"The promoter of the suit is the incumbent of the parish in which these persons were, at the time of the institution of the suit, resident. The incumbent and the churchwardens are the lawful guardians of the moral purity of the parishioners. I do not know that a more proper promoter of the office of the judge, in a suit of this grave and highly penal character, could have been found.

"The articles have been very carefully drawn, and are signed by an experienced and eminent advocate practising in Doctors' Commons. Every link in the chain of evidence taken upon these articles is, I lament to say, scrupulously and fully established by the testimony of witnesses, and, in addition to this proof, in itself ample and sufficient, I find the confession of the guilty parties. It is proved that Elizabeth Tonsett married John Vowles, and had by him a child, now living; that her husband is dead; and that she is now cohabiting in incestuous intercourse with her late husband's father, Joseph Vowles, both the guilty parties having contrived to obtain, by a fraudulent suppression of their mutual relationship, the performance of the marriage service in a parish in London, where they were not known, over this unhallowed and revolting union. It is painful to add that the consequences of their sin have travelled beyond themselves. It appears that of this unnatural as well as unchristian cohabitation, a child has been the fruit.

"From some portions of the evidence I had hoped that the remorse and contrition from which sooner or later they cannot escape, had already overtaken these unhappy persons, and that they had determined to abstain from future intercourse with each other. I learn, however, that such is not the case; and it only remains for me to give sentence according to the law upon the facts which are proved before me.

"I pronounce the marriage which has been *de facto* solemnized between these parties null and void. I follow the example of my Lord Stowell in the case of *Burgess* v. *Burgess* (*a*), in not enjoining public penance to be performed by them; but, remembering that the effect of such a prosecution as this ought to be remedial as well as penal, I admonish the parties to abstain from further incestuous intercourse, and to live separate and apart in different habitations. It is my duty to warn them that if this admonition of the court be disobeyed, the ordinary, upon due application being made to him, will be compelled to pronounce a sentence of *excommunication* against them. I am, moreover, bound to condemn them in the costs of this suit."

SECT. 4.—*Suspension.*

Two kinds.

In the laws of the church, we read of two sorts of suspension; one relating solely to the clergy, the other extending also to the laity (*b*).

Deprivation.

That which relates solely to the clergy, is suspension from office and benefice jointly, or from office or benefice singly; and may be called a temporary degradation, or deprivation of both. So we find it described by John of Athon: a person *deposed*, is he who is deprived of his office and benefice, although not solemnly; a person *degraded*, is he who is deprived of both solemnly, the ensigns of his order being taken from him; a person *suspended*, is he who is deprived of them both for a time, but not for ever (*c*).

Degradation.

And the penalty upon a clergyman officiating after suspension, if he shall persist therein after a reproof from the bishop, is (by the ancient canon law) that he shall be excommunicated all manner of ways, and every person who communicates with him shall be excommunicated also (*d*).

By whom suspension may be pronounced.

The difference between suspension and deprivation (*e*) consists in this, that the former may be pronounced by the chancellor of the diocese, the latter by the bishop alone.

The other sort of suspension, which extends also to the laity, is suspension *ab ingressu ecclesiæ*, or from the hearing of divine service, and receiving the holy sacrament,

(*a*) 1 Consist. 393.
(*b*) Gibs. 1047. *Et vide post*, Sect. 6, note to Deprivation.
(*c*) Gibs. 1047.
(*d*) Ibid.
(*e*) *Watson* v. *Thorp*, 1 Phill. 277.

which may therefore be called a temporary excommunication (*f*).

Parishioners suspended *ab ingressu ecclesiæ.*

Recent instances are furnished by the Reports of the Ecclesiastical Courts of parishioners suspended *ab ingressu ecclesiæ*, for brawling in a church, and in a vestry holden in a room within the church, before the passing of 23 & 24 Vict. c. 32 (*g*); this sentence being attended by condemnation in costs of a sum *nomine expensarum.*

When such suspension is to be inflicted.

Which two sorts of suspension, the one relating to the clergy alone, and the other to the laity also, do herein agree, that both are inflicted for crimes of an inferior nature, such as in the first case deserve not deprivation, and such as in the second case deserve not excommunication; that both, in practice at least, are temporary; both also terminated, either at a certain time when inflicted for such time, or upon satisfaction given to the judge when inflicted until something be performed which he has enjoined: and, lastly, both (if unduly performed) are attended with further penalties; that of the clergy, with irregularity, if they act in the meantime; and that of the laity (as it seems) with excommunication, if they either presume to join in communion during their suspension, or do not in due time perform those things which the suspension was intended to enforce the performance of (*h*).

Previous admonition necessary.

By the ancient canon law, sentence of suspension ought not to be given without a previous admonition; unless where the offence is such, as in its own nature requires an immediate suspension: and if sentence of suspension, in ordinary cases, be given without such previous admonition, there may be cause of appeal (*i*).

The following is extracted from the case of *Johnstone* v. *Sutton*, 1 T. R. 526, and there said to be taken from a manuscript book in the handwriting of Sir E. Simpson, formerly king's advocate and judge of the admiralty.

Intermediate profits between charge and acquittal.

"Offence—Undoubted rule in admiralty and ecclesiastical courts, that persons suspended for an offence supposed, of which he is afterwards acquitted in proper court, is entitled to all the intermediate profits. Thus, in case of capture of prize at sea, the officer in arrest being actually on board, and afterwards duly acquitted, or restored to his station, shall share the prize-money. So in civil causes in admiralty: if a master turns his mate without just cause before the mast, and he sue for wages as mate for the whole time, he may recover, though he did not do the duty. So if a clergyman be suspended *ab officio et beneficio*, and

(*f*) Gibs. 1047.
(*g*) *Vide supra*, p. 940.
(*h*) Gibs. 1047.
(*i*) Gibs. 1046.

upon an appeal declared innocent, he will recover the profits of the living.

"Profits—Persons suspended from an office, entitled to intermediate profits, if innocent."

Suspension for contempt.

The judicial committee of the privy council have on two recent occasions, in the cases of *Mr. Mackonochie* and *Mr. Purchas* (*k*), thought themselves warranted by the law in inflicting the punishment of suspension for disobedience to their orders. But for these decisions it would have seemed that these contempts of court would be punished, as contempts of all courts are, by *committing*, or, in the case of ecclesiastical courts, *signifying* (*l*), the offender.

Suspension accompanied by sequestration.

The sentence of suspension is generally followed by a decree of sequestration, which provides for the performance of the duties of the benefice, etc. during the period of suspension. Where the benefice is already under sequestration, as, for instance, under a writ of *sequestrari facias*, the sequestration issuing upon the suspension takes precedence, and the previous sequestration is suspended as long as the sentence of suspension lasts (*m*).

Suspended clerk cannot maintain action for profits.

As to the condition of an incumbent who has been suspended from his benefice, it has been decided that when a clergyman has been suspended *ab officio et a beneficio*, he is not entitled to any of the profits of the benefice, and cannot recover them by action during the continuance of the suspension, although no sequestration may have issued (*n*).

And where, under a suspension, a sequestration was issued, it was holden by V.-C. Bacon, that the fruits of the benefice sequestered belonged to the bishop as chief pastor of the church, subject to the duty of providing for the services (*o*).

SECT. 5.—*Sequestration* (*p*).

When the writ of sequestration issues.

The Commissioners for inquiring into the Practice and

(*k*) *Martin* v. *Mackonochie*, L. R., 3 P. C. 409. *Vide supra*, p. 1263.

(*l*) *Vide post*, Sect. 8, "Excommunication."

(*m*) *Bunter* v. *Cresswell*, 14 Jur. 692; *vide infra*, p. 1387.

(*n*) *Morris* v. *Ogden*, L. R., 4 C. P. 687.

(*o*) *Re Thakcham Sequestration Moneys*, L. R., 12 Eq. 494; 19 W. R. 1001. It can, however, hardly be thought that the bishop is entitled to put this money in his pocket; he is morally, at any rate, if not legally, bound to apply the money to some other ecclesiastical or charitable purpose.

(*p*) The origin of this term is

Jurisdiction of the Ecclesiastical Courts say in their Report (*q*):

When the writ of sequestration issues.

"Sequestrations issue under the following circumstances: 1st, In obedience to writs from the courts of common law, whereby the bishop is directed to levy certain sums in pursuance of the statutes regulating Queen's Anne's bounty; 2dly, Under the various provisions contained in the statute 57 Geo. 3, c. 99, and [1 & 2 Vict. c. 106, which has repealed 57 Geo. 3,] and in cases of outlawry; 3dly, In pursuance of decrees or orders emanating from the ecclesiastical courts, in cases where clergymen are proceeded against before those jurisdictions; and, lastly, during vacancies.

"In all these cases, we apprehend the law clearly to be, that before any proportion of the profits of the benefice can be applied in payment of debts, or for any other purpose, the service of the church must first be provided for, out of those profits; and when this has been done, the buildings and fences in the glebe, and the chancel also when the incumbent repairs, ought to be sustained and kept in proper order. The right of nominating the sequestrator lies with the bishop; but when the sequestration issues on account of debts, it may often happen that the sequestration is committed to the creditor, or his nominee; in all other cases, the bishop exercises his right of nomination by selecting according to his own judgment.

"By the existing law, the sequestrator has no power to compound for tithes; and his right of action for the recovery of the profits of the benefice is most inconveniently restricted."

Sequestration as a punishment.

Sequestration, as a punishment, is inflicted under the powers of 1 & 2 Vict. c. 106, s. 54, for non-residence (*r*), and of 3 & 4 Vict. c. 33, s. 4, for the offences there specified (*s*). It is inflicted, partly as a punishment, and partly as a means of obtaining a debt, under the powers of 1 & 2 Vict. c. 106, s. 67, and 34 & 35 Vict. c. 43, for dilapidations, etc. (*t*). It is the means by which an incumbent

derived from the Roman law: "Sequester dicitur apud quem plures eandem rem de quâ controversia est, deposuerunt. Dictus ab eo quod recurrenti aut quasi sequenti eos qui contendunt, committitur." (Dig. de Verb. signif. l. 110.) It was much disputed by the earlier canonists whether the sequestrator had not a right to present to the benefice; but the negative is now universally adopted. See for a clear exposition of the canon law on this subject the titles "Usufruit," "Possession," "Séquestre," in M. de Maillane's Dict. de Droit Canon.

(*q*) Page 52.

(*r*) *Vide supra*, p. 1303.

(*s*) *Vide supra*, p. 1188.

(*t*) *Vide infra*, Part V. Ch. V.

may be compelled to pay the salary of his curate (*u*); and it is generally a part or consequence of the punishment of suspension, though apparently not always necessary for this end (*x*).

During the vacancy of a benefice.

When a living becomes void by the death of an incumbent, or otherwise, the ordinary is to send out his sequestration, to have the cure supplied, and to preserve the profits (after the expenses deducted) for the use of the successor (*y*).

Where none will accept the benefice.

Sometimes a benefice is kept under sequestration for many years together, or wholly; namely, when it is of so small value, that no clergyman fit to serve the cure will be at the charge of taking it by institution. In which case, the sequestration is committed sometimes to the curate only, sometimes to the curate and churchwardens jointly (*z*).

During suit.

Sometimes the fruits and profits of a living which is in controversy, either by the consent of parties, or the judge's authority, are sequestered and placed for safety, in a third hand. And thus where two different titles are set on foot, the rights are carefully preserved, and given to him for whom the cause is adjudged (*a*).

And the judge is also wont to appoint some minister to serve the cure, for the time that the controversy shall depend; and to command those to whom the sequestration is committed, to allow such salary as he shall assign out of the profits of the church to the parson that he orders to attend the cure (*b*).

Neglect of duty.

Sometimes for neglect of serving the cure, the profits of the living are to be sequestered (*c*).

Outlawry.

Sequestrations issue in cases of outlawry. In cases of outlawry on civil process, a writ of sequestration will issue on a special *capias utlagatum*, finding that the defendant was possessed of a ecclesiastical benefice, but of no lay fee (*d*). But where the sheriff's return to such a writ was that the defendant had no lay goods, nor any lay fee, but that he was a beneficed clergyman, not stating the name or situation of the benefice, the court refused a writ of sequestration, but suggested a motion for a rule calling upon the sheriff to amend his return (*e*).

(*u*) *Vide supra*, p. 571.

(*x*) *Vide supra*, p. 1377; *Morris* v. *Ogden*, L. R., 4 C. P. 687.

(*y*) God. Append. 14.

(*z*) Johns. 121.

(*a*) God. Append. 14.

(*b*) Watson, c. 30.

(*c*) Ibid. 15.

(*d*) *Re Hind*, 1 Tyrw. 347; 1 C. & J. 389.

(*e*) *Rex* v. *Powell*, 1 Mees. & Wels. 321; *Rex* v. *Armstrong*, 3 C., M. & R. 205.

Debt.

Sometimes a sequestration issues upon the queen's writ to the bishop to satisfy the debts of the incumbent (*f*).

And this is, where a judgment has been obtained against a clergyman, and upon a *fieri facias*, directed to the sheriff to levy the debt and damages, he returns that the defendant is a clerk beneficed having no lay fee. Whereupon a *levari facias* is directed to the bishop to levy the same of his ecclesiastical goods, and by virtue thereof the profits of the benefice should be sequestered.

And in this case the bishop may name the sequestrators himself, or may grant the sequestration to such persons as shall be named by the party who obtained the writ.

If the sequestration be laid and executed before the day of the return of the writ, the mean profits may be taken by virtue of the sequestration, after the writ is made returnable, otherwise not (*g*).

Appeal.

Stratford. "If an appeal be made against a sentence of sequestration, and lawfully prosecuted, the party sequestered shall enjoy the profits pending the appeal" (*h*).

Case of transferred portions of a diocese. Registry of the old diocese retains the writ. Bishop of the new diocese issues it.

The writ must be issued by the bishop, where the living is situate in a portion of his diocese recently transferred to him, even when the registrar is the officer to the former bishop. Thus, the archdeaconry of Dorset was, in 1836, transferred from the diocese of Bristol to the diocese of Salisbury; and S., who had been registrar of the archdeaconry under the Bishop of Bristol, continued to act as registrar under the Bishop of Salisbury. In 1840, a writ of sequestration against the rector of a parish in the archdeaconry was directed to the then Bishop of Salisbury, and delivered to S. Sequestrators were appointed under the seal of the Bishop of Salisbury, and the writ remained in the office of S. It was holden that the present Bishop of Salisbury was liable to return the writ (*i*).

Nature of writ.

The sequestration (*k*) is a continuing execution, and the sequestrator must continue in possession until the debt is levied, and the bishop must return not the writ but the amount levied from time to time.

Arbuckle v. *Cowtan*.

The history and nature of the writ are very clearly stated in *Arbuckle* v. *Cowtan* (*l*). This case was as follows:—

"By articles of agreement in writing, dated the 17th

(*f*) Wats. c. 30.

(*g*) 3 Bl. Com. 418.

(*h*) Lind. 104.

(*i*) *Phelps* v. *St. John*, 3 C. L. R. 478.

(*k*) *Marsh* v. *Fawcett*, 2 H. Bl. 582.

(*l*) 3 Bos. & Pull. 322, 326.

"day of March, 1785, between the Rev. Henry Poole, clerk, then and still being vicar of the parish of Hernhill, in the county of Kent, of the one part, and the above-named defendant on the other part, it was agreed, that from Michaelmas 1784 the said Henry Poole, in consideration of the said defendant paying him 90*l.* a-year, on or before the 10th of December, and 30*l.* a-year to the curate, in two payments, viz. on the 9th of February and the 9th of August, and one guinea to the widows of clergymen in Kent, and 17*s.* in part of the tenths and the land-tax and parochial rates, should invest the said defendant with every claim he had as vicar of Hernhill aforesaid on the several occupiers of lands, wood, fruit, &c., together with the vicarage house, garden, orchard and glebe land, except all surplice fees and churchyard dues; but with proviso that necessary repairs to the vicarage house, barn, stable, and fences of the yard, and garden gates and styles, should be at the costs and charges of the said Henry Poole, as well as any land-tax or poor's rates other than what the said vicarage was then charged with; and that the said defendant should suffer one John Groombridge, the then tenant of the vicarage house, to continue as long as he paid the yearly rent of 8*l.*; and that the said agreement should continue until either of the parties thereto should give notice to the contrary three months at least before Michaelmas, at which time of the year and no other the said agreement should cease and determine." By virtue of this agreement, the defendant, on the 17th day of March, 1785, aforesaid, entered upon the said premises in the said agreement mentioned, and hath continued from thence hitherto to hold and enjoy the same, under and by virtue of the said agreement, and hath duly performed the said agreement in all things therein contained on his part to be done up to Michaelmas, 1797. On the 3rd day of October, 1797, the said Henry Poole, being a prisoner in the custody of the warden of his majesty's prison of the Fleet, at the suit of divers persons, for debts amounting in the whole to a less sum than 1,200*l.*, and being entitled to the benefit of the act of parliament passed in the 37th year of his present majesty's reign, intituled, 'An Act for the relief of certain Insolvent Debtors,' he the said Henry Poole was, on the said 3rd day of October, 1797, at the general quarter sessions of the peace for the city of London, duly discharged from his said imprisonment by virtue of the said act, and did then and there deliver in a schedule of his real and personal estate, according to the directions of the said act, in which schedule the said Henry Poole

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"did (amongst other particulars of his estate and effects) insert the following article, viz.—' The vicarage of Hernhill in Kent, the tithes of which have been paid to me to Michaelmas, 1796, which I have applied for the support of myself and family.' By a deed-poll, dated the 10th day of February, 1798, William Rix, Esq., then being clerk of the peace for the city of London, did by virtue of the said act assign and convey all and singular the estate and effects of the said Henry Poole to the above-named plaintiffs, in trust, for the benefit of themselves and the rest of the creditors of the said Henry Poole. On the 11th of May, 1795, the said Henry Poole was directed by the Archbishop of Canterbury to augment the curate's salary from 30*l.* to 35*l.* a-year, whereupon the said defendant was requested to pay the additional 5*l.*, and to deduct it from the 90*l.* annual rent; so that the net rent payable by the said defendant from Michaelmas, 1797, was 85*l.* a-year only. The question reserved for the opinion of the court was, whether under the circumstances above stated the plaintiffs were entitled to recover any, and what, sum of money from the defendant in this action? If the court should be of opinion that the plaintiffs were entitled to recover any sum of money from the defendant, a verdict to be entered for the plaintiffs for that sum, subject to the further directions of the Court of Chancery. If, on the contrary, the court should be of opinion that the plaintiffs were not entitled to recover anything in this action, then a verdict to be entered for the defendant, subject as aforesaid.

How debts may be enforced against ecclesiastics at common law.

" Lord Alvanley, C. J.—With respect to all sums of money which had become due to the insolvent at the time when he took the benefit of the Insolvent Act, it is admitted that the plaintiffs are entitled to recover. Unquestionably every right and interest in possession, which had vested in the insolvent previous to the passing of the 37th of Geo. 3, c. 112, was by that act immediately transferred to the assignees; and whatever action might have been brought by the insolvent, may be maintained by the assignees. So long as the defendant continued in the occupation of the vicarage, he was liable to the payment of the stipulated sum; as far, therefore, as the action extends to the arrears which were due at the time when the insolvent took the benefit of the act, the claim of the assignees may be maintained. Supposing a commission of bankrupt to extend to persons in holy orders, still the question will be, Whether the assignees under this Insolvent Act have succeeded to the rights of the insolvent in

"all the revenues of the church of which he was vicar? for it is impossible to contend that they are entitled under the agreement, without also contending that if there had been no agreement they would have been in the same situation as the vicar himself, and would have been entitled to demand from the possessors of the glebe lands and from the terre-tenants of the parish the rent and tithes due to the vicar of Hernhill. In short, it must be argued, that although the Insolvent Act does not expressly make the assignees vicars, yet that it invests them with all the ecclesiastical rights of the vicar. It is material to consider how the common law stood with respect to the rights with which creditors of persons in holy orders and beneficed clerks were clothed. No one is ignorant that, at common law, land could not be taken into the hands of the creditor himself; the profits only could be taken by a writ of *levari facias* directed to the sheriff, who was thereby empowered to levy the profits arising from time to time for the benefit of the creditor. The common law was extremely jealous of obtruding any new tenant on the lord; it did not allow, therefore, any possession to be taken under the *levari facias*, but only the profits to be levied. By the statute of Westm. 2, which gave the writ of *elegit*, an alteration was introduced in this respect. By that act the creditor was permitted to make use of a process by which he was put into possession of the land itself. At all times, however, the king was entitled to take possession under an extent, for the objection to changing the tenant did not apply to the case of the king. His right was independent of the statute of Westm. 2: but it must not be forgotten, that, while the common law remained unaltered, the king never claimed any authority to take possession of ecclesiastical rights or dues by the hands of his own ministers the sheriffs. He was always obliged to have recourse to a writ to the bishop, under which the lands were sequestered. Under that writ possession was not given, but the ordinary was bound to take care that out of the revenues of the church the duties of the church should be provided for. We find in 2 Inst. p. 4, that Lord Coke says, 'If a person be bound in a recognizance in the chancery, or in any other court, &c., and he pay not the sum at the day, by the common law, if the person had nothing but ecclesiastical goods, the recognizee could not have had a *levari facias* to the sheriff to levy the same of those goods, but the writ ought to be directed to the bishop of the diocese to levy the same of his ecclesiastical goods.' In Gilbert on Executions,

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"p. 40, it is said, '*Elegit* does not lie of the glebe belonging to the parsonage or vicarage, nor to the churchyard; for these are each *solum Deo consecratum;*' and for this is cited Jenkins' Rep. 207, where the same doctrine is laid down; and also that no *capias* or *fieri facias* can issue against a clerk if it appears that he has no lay fee, but only a *levari facias* to the bishop. Jenkins refers to two cases from the Year-books, viz. 29 Edw. 3, 44, and 21 Edw. 4, 45. We have therefore complete authority for saying, that at common law no process ever issued to a sheriff to levy on ecclesiastical property the debt due in an action, and Gilbert is well warranted in saying that no *elegit* lies. Sir Wm. Blackstone, in the third volume of the Commentaries, p. 418, gives an account of the writ of sequestration to the bishop of the diocese, which he says is in the nature of a *levari* or *fieri facias* to levy the debt and damages *de bonis ecclesiasticis*, which are not to be touched by lay hands. The same account is given of the writ in Burn's Eccl. Law, tit. "Sequestration." There has been much argument respecting the power which a clergyman had over his own benefice. It has never been contended, however, that a parson was ever seised in fee; he had only a qualified right in his living, and at common law could make no lease to bind his successor, unless confirmed by the patron and ordinary. In the reigns of Henry the Eighth and Elizabeth, several statutes were passed, introducing further restrictions with respect to the power of ecclesiastics over their benefices. Until the 13 Eliz. c. 20, they all appear to have been made for the benefit of the successor: so great was the anxiety of the legislature, however, to prevent ecclesiastics from divesting their own rights, that the statute of 13 Eliz. c. 20, explained by 18 Eliz. c. 11, empowers them to take advantage of their own non-residence to defeat leases made by themselves. Such has been determined to be the effect of that statute in the late case of *Frogmorton* d. *Fleming* v. *Scott* (*m*). It is now clearly established that the half-pay of an officer is not assignable, and unquestionably any salary paid for the performance of a public duty ought not to be perverted to other uses than those for which it is intended. Notwithstanding the case of *Steuart* v. *Tucker* (*n*), in which it was held that the half-pay of an officer was assignable in equity, it was expressly decided in *Flarty* v. *Odlum*, that it was not assignable at all, which decision met with general approbation. This doctrine is very analogous to that which has been

(*m*) 2 East, 467. (*n*) 2 Bla. 1137.

"adopted with respect to ecclesiastics; the same policy is applicable to both cases. Having considered in what manner debts might be enforced against ecclesiastics at common law, I will now consider whether the statutes relative to bankrupts and insolvents have introduced any alteration in this respect. That a private creditor should be able to avail himself of a writ of sequestration for the purpose of satisfying his debt out of the benefice of a clergyman, and yet that where the legislature has vested the whole property of the debtor in assignees for the benefit of the creditors in general, those assignees should not have any power to affect his benefice, would certainly be an anomaly in the law. Whether there be any means of obviating this anomaly, I will not pretend to say. Lord Hardwicke, in the case *Ex parte Meymot* (o), abstains from laying down decisively in what manner the claims of the assignees upon such property might be made available. He seems, however, to think, that in a writ to the bishop, the assignees might have the same remedy as any other creditor. But he never hints at an idea that they could not take possession of the benefice in the same manner as they might of lay property. The only question in that case was, whether a clergyman could be made a bankrupt. Mr. Wilbraham, in arguing for the negative, insisted that his living could not be assigned by the commission, for that the assignees must take all or none; and if they took all, nothing would be left to provide for the service of the cure. Lord Hardwicke, who inclined to think that a clergyman might be a bankrupt, after noticing this objection, and stating the common rule with respect to sequestration, says, 'I do not see (but I give no opinion) why the same method may not be followed under the commission of bankruptcy, for it does not appear to me that this would supersede the bishop's authority.' As a long time has elapsed since this opinion was thrown out, during which some clergymen most probably have rendered themselves obnoxious to commissions of bankrupt, I desired inquiries to be made respecting the mode of proceeding adopted under those commissions. But these inquiries have not produced any instance in which proceedings against a benefice have taken place. Nor shall I undertake to point out in what manner the assignees in this case must proceed. But although there may be difficulties in the mode of proceeding, we are not therefore to hold that the nature of the property which a clergyman has in his benefice is changed by the operation of an insolvent act, or

Under the earlier insolvent acts.

(o) 1 Atk. 196.

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"that the assignees under such an act will be entitled to demand and receive ecclesiastical dues. The agreement in this case is a mere letter of attorney given by the clergyman to the defendant. If this agreement could be deemed a lease, it would be void upon the face of it. It would be a lease on the parsonage-house, with a covenant that the new tenant should occupy: this would be *felo de se*. Whatever advantage might be derived through the intervention of the ordinary, I am of opinion that by no conveyance of the party himself could he divest himself of his benefice. The same reasons which have induced the common law to prevent execution against a benefice by the hands of the king's civil ministers, may be urged with equal force against the action now brought by the assignees. We are therefore of opinion that the action is not maintainable so far as it relates to the rent which has accrued subsequent to the assignment under the Insolvent Act."

Sequestration of ecclesiastical benefice, under present bankruptcy act.

By "The Bankruptcy Act, 1869," 32 & 33 Vict. c. 71, s. 88, "Where a bankrupt is a beneficed clergyman, the trustee may apply for a sequestration of the profits of the benefice, and the certificate of the appointment of the trustee shall be sufficient authority for the granting of sequestration without any writ or other proceeding, and the same shall accordingly be issued as on a writ of *levari facias* founded on a judgment against the bankrupt, and shall have priority over any other sequestration issued after the commencement of the bankruptcy, except a sequestration issued before the date of the order of adjudication by or on behalf of a person who at the time of the issue thereof had not notice of an act of bankruptcy committed by the bankrupt, and available against him for adjudication; but the sequestrator shall allow out of the profits of the benefice to the bankrupt, while he performs the duties of the parish or place, such an annual sum, payable quarterly, as the bishop of the diocese in which the benefice is situate directs; and the bishop may appoint to the bankrupt such or the like stipend as he might by law have appointed to a curate duly licensed to serve the benefice in case the bankrupt had been non-resident."

The following decisions relate to the right of priority in cases where several sequestrations have been issued.

Case in which a later takes precedence of an earlier sequestration.

Sequestration when part of an ecclesiastical punishment takes precedence, though later in date, of a sequestration issued at the instance of a creditor. Thus where upon a writ of *sequestrari facias*, issued from the Court of Queen's Bench at the suit of a creditor, a sequestration was duly issued and published by the bishop, under which the

sequestrator appointed by him entered into the rectory, and received the profits of it; and where, *afterwards*, and *before* the creditor's claim was satisfied, or the sequestration was amoved, the bishop, in pursuance of a sentence of suspension for eighteen months, duly adjudged in the Ecclesiastical Court, under the Church Discipline Act, against the same rector, issued and published another sequestration appointing another sequestrator,—It was holden, that the effect of the first sequestration was suspended during the continuance of the second, so that, during that time, the creditor could not call upon the bishop to account for any of the profits of the living (*o*).

Writs of sequestration issued in the order in which writs of *levari facias* are delivered.

As a general rule, the law requires that when several writs of *levari facias* are delivered to the bishop's officer, he should issue the writs of sequestration thereon in the order of time in which the writs of *levari facias* were delivered to him to be executed, and not according to the date of their teste.

Where, therefore, writs of *levari facias* issued against W. were delivered to the deputy registrar of the bishop in 1847, with directions to suspend the execution of them until further instructions, and with a request that notice should be given of any subsequent writ being lodged and sequestration applied for; and on the 30th March, 1853, W. having become insolvent, the petition of the provisional assignee was lodged with the deputy registrar to be executed, and with directions that sequestration thereon should be immediately issued, and notice thereof having been given by the deputy registrar, directions were given on the 31st March to issue sequestration upon the writs of *levari facias*,—It was holden, that the petition of the provisional assignee was entitled to priority over the writs of *levari facias* (*p*).

Sequestration of judgment creditors entitled to priority over sequestration by assignee of bankrupt incumbent.

It was holden by the Exchequer Chamber, affirming the judgment of the Queen's Bench, that if a judgment creditor of a beneficed clergyman issue a sequestration, and, the clergyman becoming bankrupt, his assignee under the bankruptcy issue a second sequestration, the former sequestration will remain valid and have priority, even though it were not published till after the filing of the petition in bankruptcy (*q*).

Bond of sequestrator.

It is usual for the ecclesiastical judge to take bond of

(*o*) *Bunter* v. *Cresswell*, 14 Jur. 692.

(*p*) *Sturgis* v. *Bishop of London*, 3 Jur. 864.

(*q*) *Hopkins* v. *Clarke*, 33 L. J. (N. S.) Q. B. 93, 334. See remarks of Lord Stowell in *Campbell* v. *Whitehead*, cited in *Hubbard* v. *Beckford*, 1 Consist. 307.

the sequestrators, well and truly to gather and receive the tithes, fruits, and other profits; and to render a just account (*r*).

His duties.

And those to whom the sequestration is committed, were to cause the same to be published in the respective churches, in the time of divine service (*s*).

It was decided not to be necessary that a writ of sequestration should be published before the return day of the *levari facius* on which it is founded, or that a copy should be fixed to the church door where that is not the usual mode of publication in the diocese of the sequestered benefice (*t*).

It is best and most legal for the sequestrators to receive the tithes and dues in kind.

A sequestrator is not entitled to charge the benefice, if the incumbent forbids it, with the expense of audit dinners to the tithepayers; but the expense will be allowed, if it has been usual, and the incumbent did not forbid it. The bishop is not bound to appoint as sequestrator the person who will act on the cheapest terms (*u*).

How and where he is to maintain an action for tithes.

But the sequestrators cannot maintain an action for tithes in their own name, at the common law, nor in any of the king's temporal courts; but only in the spiritual court or before the justices of the peace where they have power by law to take cognizance (*x*).

Thus, in *Berwick* v. *Swanton*, in 1692, it was resolved in the Court of Exchequer that a sequestrator cannot bring a bill alone for tithes, because he is but as a bailiff, and accountable to the bishop, and has no interest (*y*).

Sequestrator mere bailiff of bishop cannot maintain action for profits.

And in *Harding* v. *Hall* (*z*) it was said, that the sequestrator of a benefice, appointed by the bishop under a writ of *sequestrari facias*, is the mere bailiff or agent of the bishop, and has no such interest in the profits as will enable him to maintain an action at law against a party who wrongfully receives them.

Application of profits.

After the sequestrators have performed the duty required, the sequestration is to be taken off, and application of the profits to be made according to the direction of the ordinary. And he shall allow to them a reasonable sum out of the profits, according to the trouble they shall have

(*r*) Wats. c. 30.

(*s*) Ibid.: *vide supra*, p. 1032.

(*t*) *Bennett* v. *Apperley*, 6 B. & C. 630; 9 D. & R. 673. As to the effect of such writs in finding property, see *Giles* v. *Grover*, 1 Cl. & Finn. 71—177; *Lucas* v. *Nockells*, 10 Bing. 182.

(*u*) *Sanders* v. *Penlease*, 1 L. T., N. S. 54.

(*x*) Johns. 122.

(*y*) Bunb. 192.

(*z*) 10 Mee. & Wel. 42.

had in gathering the tithes. And he is also to allow for the supply of the cure, what shall be convenient, relation being had to the charge and to the profits, and likewise for the maintenance of the incumbent and of his family (in case where there is an incumbent), if he has not otherwise sufficient to maintain them.

To what he is entitled.

The sequestrator is entitled to all the future profits, but not to the amount of the sequestrated living (*a*); so it has been holden, that a rector whose glebe was sequestered was entitled to a verdict in ejectment upon a demise laid before the sequestration took effect, but he could not have an "*habere facias possessionem*," because he was no longer entitled to possession (*b*).

In *Re Parker* (*c*), where a testator in 1763 gave a legacy in trust for the vicar of N. for the time being, he annually preaching a sermon on a particular day, to be paid in augmentation of the vicarage; it was holden that the gift was an augmentation of the vicarage and not a mere legacy to the then vicar, and that it passed to the sequestrator.

Amenable to ecclesiastical judge.

If the sequestrators refuse to deliver up their charge, they shall be compelled thereunto by the ecclesiastical judge: and if they shall, being called thereunto, delay to give an account, it is usual for the judge to deliver unto the party grieved the bond given, with a warrant of attorney to sue for the penalty thereof to his own use at the common law (*d*).

Therefore, if the incumbent is not satisfied with what the sequestrators have done in the execution of their charge, his proper remedy is by application to the spiritual judge; and if he shall think himself aggrieved by the determination of such judge, he may appeal to a superior jurisdiction.

As to suits in equity.

Sometimes a bill in equity has been brought, which yet, as it seems, ought not to be brought against the sequestrators solely, for that they are only bailiffs or receivers, and have no interest. As in *Jones* v. *Barret*, in 1724 (*e*), on a bill by the vicar of West Dean, in the county of Sussex, against the defendant, who was sequestrator, for an account of the profits received during the vacation, it was objected for the defendant, that the bishop ought to have been made a party, since the sequestrator is accountable to him for what he receives, and the court seemed to think the bishop

(*a*) *Waite* v. *Bishop*, 1 C. M. & R. 507; *Rex* v. *Armstrong*, 2 C. M. & R. 205.

(*b*) *Doe* d. *Morgan* v. *Black*, 3 Camp. 447; 6 B. & C. 630.

(*c*) 32 Beav. 654.

(*d*) Wats. c. 30.

(*e*) Bunb. 192.

should have been a party, but by consent, the cause was referred to the bishop of the diocese.

In *Williams* v. *Irimey* (*e*), the court held that no bill would lie against a sequestrator.

As to application to common law court.

Besides his remedy in the Ecclesiastical Court, a clerk whose benefice is under sequestration for debt has a right to come to the court of common law, from which the writ of *levari facias* issued, from time to time, to see that the sequestration is being properly executed; but, if he delays for several years after the sequestration has been satisfied, he cannot require an inquiry to be then made (*f*).

A sequestrator is liable for dilapidations (*g*).

As to residuary profits.

Where there is a sequestration issuing on a suspension for an ecclesiastical offence, it is said that the bishop is entitled to take the profits of the sequestered benefice, subject to due provision for performance of the duties thereof (*h*).

Pack v. *Tarpley*. Vicar sequestered and licensed as curate disqualified to act as magistrate.

The power and character of the sequestrator, and the legal status of the incumbent whose living is sequestered, underwent much discussion in the Court of Queen's Bench in 1839. The bishop had issued a sequestration to the vicar, and at the same time licensed him as stipendiary curate, assigning to him the vicarage-house and grounds as a residence, directing the sequestrator to pay him 120*l*. a year. The question was, whether the vicar had then such a possession of his ecclesiastical benefice as qualified him to act as a magistrate under 18 Geo. 2, c. 20, which requires a freehold estate of the *clear* yearly value of 100*l*. It will be seen by the judgment why it was holden that he was *not* qualified (*i*). Lord Denman delivered the opinion of the court as follows:

"This was an action brought upon the statute 18 Geo. 2, c. 20, for a penalty of 100*l*. against the defendant for acting as a justice of the peace without a proper qualification. By the 3rd section of the act, the proof of qualification lies on the defendant; and that qualification is contained in the first section, which enacts: [His lordship here read the section.] The case finds that the defendant is incumbent of a vicarage of the annual value of 500*l*.;

(*e*) L. R. Weekly Notes (1870), p. 182.

(*f*) *Billing* v. *St. Aubyn*, 7 Jur., N. S. 775.

(*g*) *Hubbard* v. *Beckford*, 1 Consist. 307; *Winfield* v. *Watkins*, 2 Phillim. 8. *Vide infra*, Part V., Chap. V., on Waste and Dilapidations.

(*h*) *Re Thakeham Sequestration Moneys*, L. R., 12 Eq. 494; 19 W. R. 1001. *Sed vide supra*, p. 1377.

(*i*) *Pack* v. *Tarpley*, 9 Ad. & Ell. 482. The arguments of counsel—Sir William Follett for plaintiff, and Mr. Waddington for defendant—refer to almost all the then decided cases on sequestration.

"that a writ of *sequestrari facias* was issued against him on the 8th April, 1834, at the suit of one Watkins, for 2,270*l.* 6*d.*; that the bishop issued a sequestration, which was published on the 13th April, 1834, and possession taken under it; that the sequestrator has ever since received the rents and profits of the vicarage, but has not applied them to this, but to a previous sequestration, which was not given in evidence; that the bishop, by his licence, assigned to the defendant the vicarage-house as a residence, and the sum of 120*l.* *per annum* for serving the church as stipendiary curate, which stipend the defendant has received, and has resided in the vicarage-house before and since the sequestration, performing the duty; and that the vicarage-house *and grounds* were worth above 100*l.* a year. It was objected, on the part of the defendant, that the writ of *sequestrari facias* was not admissible in evidence, because the judgment roll in *Watkins* v. *Tarpley* contained no entry of an award of the writ; but no authority was shown for the necessity of such entry, nor do we think it at all important.

"Again, it was objected that nothing was applied by the sequestrator under this writ, and that it was not shown by any legal evidence how the profits of the vicarage were disposed of. The answer is, that the sequestrator is shown to have been in possession under the writ, and to have received the profits; whether he has disposed of them properly is immaterial to the present question. Much discussion took place as to the meaning of the words in 'possession,' in the first section of the act; whether they are used solely in contradistinction to the words 'in reversion or remainder,' in the latter part of the clause, or have reference to the actual possession also; and the words 'to his own use and benefit' were also much commented on. But as our decision turns upon the part of the clause relating to incumbrances and charges, it is not necessary to give any opinion on the other parts. The question is, whether it appears by the facts found, that the defendant has an estate for life of the clear yearly value of 100*l.* over and above what will satisfy and discharge all incumbrances that affect the same.

"Now, whatever may be the true construction of the statute of 13 Eliz. c. 20, as to charges upon benefices, and whatever may be the proper rule to be established from the various cases decided under that act, we can have no hesitation in holding that a sequestration is an incumbrance that affects the defendant's estate for life in his vicarage within the meaning of the act of parliament. The clear yearly value of 100*l.* contemplated by the act.

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"is plainly that which comes into the pocket of the owner of the estate as such, after all other demands upon it are satisfied; and we are to see whether, upon the facts stated, such clear yearly sum of 100*l.* does come into the defendant's pocket as vicar. The difficulty in the case arises from his continuing to reside and occupy the house and grounds, which are found to be above the yearly value of 100*l.* If he be in the occupation of them by right as vicar, notwithstanding the sequestration, and could not be put out from them or compelled to pay any rent for them by any proceeding whatever, it is impossible to say that he has not an estate for life in them, or say that they are affected by the sequestration; and if not, their value is sufficient. Now, with respect to the house, it seems clear that the defendant is in the occupation as vicar, and that the assignment of it to him as a residence by the bishop is merely void, inasmuch as the incumbent is bound to reside notwithstanding any sequestration, and the bishop could not turn him out, nor change his character from that of vicar to that of stipendiary curate. But it is not found by the case that the house alone is of the yearly value of 100*l.*; and as the onus lies on the defendant, we cannot presume it to be so. The grounds and stipend must therefore be taken into consideration, and with respect to them the case is very different. The sequestrator might undoubtedly let the grounds as well as any other part of the glebe, and raise a profit towards the purposes of the writ: and though they are not so let, but assigned to the defendant by the bishop, they, as well as the stipend of 120*l.* also assigned him by the bishop, are by no means enjoyed by him simply as vicar in his own right. The amount of the stipend seems to be in the discretion of the bishop, though probably that discretion would be exercised with reference to the salaries specified in the Stipendiary Curates Acts, in which case the stipend could not be less in respect of the vicarage in question than 120*l.* (*j*): and though the bishop cannot appoint any person to serve the church either instead of, or in addition to, the vicar (*k*), and cannot by his licence alter the vicar's character, and must assign to him the proper stipend out of the profits of the living, prior to any other payments, yet we are of opinion that the defendant, as regards the grounds and stipend, takes under the bishop, and not simply as vicar, and that his enjoyment of the grounds and stipend arises out of, and is under, the sequestration; so that it cannot be said in fact or in law that the defendant has an estate

(*j*) See 57 Geo. 3, c. 99, ss. 55, 56, repealed by 1 & 2 Vict. c. 106.

(*k*) See 1 & 2 Vict. c. 106, s. 99.

"of the clear yearly value of 100*l.* *over and above* all incumbrances that affect the same. For these reasons we are of opinion that the defendant has failed to establish his qualification, and our judgment must be for the plaintiff." Judgment for the plaintiff (*l*).

Sequestrations under 1 & 2 Vict. c. 106.

It has been said that, under 1 & 2 Vict. c. 106, the bishop is empowered to sequester the profits of an ecclesiastical benefice in several cases, by way of punishment. Sequestrations under this statute are to have priority over all others; and the provisions of this act are engrafted on the more recent act which follows.

By 34 & 35 Vict. c. 45, The Sequestration Act, 1871:—

On sequestration bishop to appoint curate and assign stipend.

Sect. 1. "Where after the thirty-first day of August one thousand eight hundred and seventy-one, under a judgment recovered against the incumbent of a benefice as defined in the Incumbents' Resignation Act, 1871 (*m*), or under the bankruptcy of such incumbent, a sequestration issues and the same remains in force for a period of six months, the bishop of the diocese shall from and after the expiration of such period of six months, and as long as the sequestration remains in force, take order for the due performance of the services of the church of the benefice, and shall have power to appoint and license for this purpose such curate or curates, or additional curate or curates, as the case may require, with such stipend in each case as the bishop thinks fit, the amount thereof to be specified in the licence, and the bishop may at any time revoke any such appointment and licence: provided always, that such stipend or stipends shall not exceed in the whole the following sums; that is to say, if the population shall not exceed five hundred, the sum of two hundred pounds yearly; if the population shall exceed five hundred but not one thousand, the sum of three hundred pounds yearly; if the population shall exceed one thousand but not three thousand, the sum of five hundred pounds yearly; if the population shall exceed three thousand, the sum of six hundred pounds yearly: provided also, that such stipend or stipends shall not exceed in the whole two-thirds of the annual value of the benefice as defined in the last-mentioned act."

Amount of stipend.

Application of enactments in Schedule, Part 1.

Sect. 2. "Such of the provisions of the act specified in the schedule to this act as are described in Part I. of that schedule and all provisions of that act relative thereto shall have effect for purposes of this act as if they were here re-enacted."

Payment of stipend.

Sect. 3. "Every stipend assigned under this act shall

(*l*) 9 Ad. & Ell. 482.

(*m*) 34 & 35 Vict. c. 44. *Vide supra*, p. 522.

31 & 35 Vict. c. 45.

be paid by the sequestrator out of moneys coming to his hands under the sequestration, as long as the sequestration is in force, in priority to all sums payable by virtue of the judgment or the bankruptcy under which the sequestration issues, but not in priority of liabilities in respect of charges on the benefice."

Application of enactments in Schedule, Part 2.

Sect. 4. "Such of the provisions of the act specified in the schedule to this act as are described in Part II. of that schedule and all provisions of that act relative thereto shall apply in every case where a curate is appointed under this act."

Power for bishop to inhibit in certain cases.

Sect. 5. "In case any such sequestration remains in force for more than six months, the bishop, if it appears to him that scandal or inconvenience is likely to arise from the incumbent continuing to perform the services of the church while the sequestration remains in force, may, from and after the expiration of such period, inhibit the incumbent from performing any services of the church within the diocese as long as the sequestration shall remain in force, and the bishop may at any time withdraw such inhibition."

Presentation to benefices suspended during sequestration.

Sect. 6. "During such time as any sequestration remains in force, the incumbent shall be absolutely disabled from presenting or nominating to any benefice then vacant, of which he may be patron in right of the benefice under sequestration, and the right of presentation or nomination to such vacant benefice shall be exercised by the bishop of the diocese in which such vacant benefice is locally situate."

Incumbent of sequestrated benefice not to accept other benefice but with leave.

Sect. 7. "During the continuance of any sequestration it shall not be lawful for the incumbent of the benefice under sequestration to accept or be instituted or licensed to any other benefice or preferment, the acceptance of or insititution or licensing to which would avoid or vacate the benefice so under sequestration, unless with the consent in writing of the bishop of the diocese and the sequestrator."

The schedule is as follows:—

"1 & 2 Vict. c. 106.—An Act to abridge the holding of benefices in plurality, and to make better provision for the residence of the clergy.

"ENACTMENTS APPLIED.

"PART I.

"Section one hundred and seven.	Provisions relating to bishops to appply to archbishops in their own dioceses.
Section one hundred and eight.	Power of archbishops and bishops as to exempt or peculiar benefices, &c.

" Section one hundred and nine.	Where jurisdiction is given to bishops, &c. all concurrent jurisdiction to cease.

" PART II.

" Section seventy-five.	Non-resident incumbents neglecting to appoint curates, the bishop to appoint	As far as the same relates to the residence of curates.
Section seventy-six.	Curates to reside on benefices under certain circumstances.	
Section eighty-two.	Fee for licence.	
Section ninety-seven.	Curate not to quit curacy without three months' notice to incumbent and bishop, under a penalty.	
Section one hundred and two.	Licences to curates and revocations thereof to be entered in the registry of the diocese."	

SECT. 6.—*Deprivation.*

Deprivation (*n*) or deposition is an ecclesiastical censure, whereby a clergyman is deposed of his parsonage, vicarage, or other spiritual promotion or dignity (*o*).

The causes of deprivation may be classed under two heads: I. Such as have been allowed by the common law, or created by statute; II. Such as depend upon the canon law only.

I. *Causes of Deprivation allowed by the Common Law, or created by Statute.*

1. *Want of Orders.*—Before 14 Car. 2, c. 4, s. 10, if a layman was presented, instituted, and inducted, he was parson *de facto*, and acts done by him while parson (*p*), such as marriages, leases, &c., were valid; but he might be deprived (*q*). Now the above-mentioned statute enacts, that no one shall be capable to be admitted to any benefice who is not *ordained priest.*

(*n*) *Depositus* dicitur qui privatus est beneficio et officio, licet non solenniter . . . . *Degradatus* dicitur qui utroque est privatus, solenniter insigniis sibi ablatis . . . . *Suspensus* autem dicitur qui est privatus utroque ad tempus, non in perpetuum. Secundum quosdem differentia est inter depositionem et suspensionem, sicut inter deportationem, quæ est perpetua, et relegationem, quæ est temporalis. Const. Othonis, Lindw. p. 45, De concubinis clericis removendis, gloss on "Suspensi." See the learned note of Dr. Robertson to *Clarke* v. *H.*, 1 Robertson, p. 380; *et vide supra*, p. 83.

(*o*) Deg. p. 1, c. 9.

(*p*) Cro. Eliz. 775.

(*q*) Hob. 149; Cro. Car. 65; Dy. 292, 353.

Causes of deprivation at common law and by statute.

2. *Illiteracy.*—Which, Lord Hobart says, subjects a person to deprivation, being *malum in se* (*r*).

3. *Want of Age.*—Now regulated by 13 Eliz. c. 12, which declares admissions, institutions, and inductions, contrary to the act, *void* (*s*).

4. *Simony*—Was a crime at the common law (*t*), and is now regulated by 31 Eliz. c. 6, which declares the presentation, institution, and induction so obtained, *utterly void* (*u*).

5. *Plurality.*—Formerly by 21 Hen. 8, c. 13, and now by 1 & 2 Vict. c. 106, s. 11 (*x*), but before either statute the first benefice was void by cession, if the parson took a second without dispensation (*y*). Yet, though the patron might present thereto if he would, he was not compellable to take notice till deprivation (*z*). Plurality was forbidden by the ancient canon law (*a*), and by the constitutions of Othobon and Archbishop Peccham (*b*).

6. *Conviction of Treason, Murder, or Felony, by the Temporal Courts.*—On which conviction the ecclesiastical courts may build a sentence of deprivation (*c*).

7. *Incumbent refusing to use the Book of Common Prayer, or Speaking or Preaching anything in Derogation thereof, or using any other Rite or Ceremony, being thereof twice convicted,*—shall *ipso facto* be deprived (*d*).

8. *Incumbent not publicly reading the Thirty-nine Articles of Religion in the Church of his Benefice, with Declaration of Assent,*—shall absolutely forfeit his benefice (*e*).

9. *Incumbent advisedly maintaining or affirming any Doctrine contrary to the Thirty-nine Articles, and when convented before the Bishop or Commissioners, persisting therein, and being thereof lawfully convicted,*—is cause for the ordinary to deprive by sentence (*f*).

10. *Infidelity and Miscreancy.*—Under which heads may be contained atheism, blasphemy, heresy, schism, and the like, which the laws of the church have always punished with deprivation (*g*). The jurisdiction of the Ecclesiastical Court, in these cases, is reserved by 29 Car. 2, c. 9, which takes away the writ *de heretico comburendo.*

(*r*) Hob. 149.

(*s*) March. 119; Gibs. 1068.

(*t*) Cro. Eliz. 686, 789; Cro. Car. 361.

(*u*) *Vide supra*, p. 1110.

(*x*) *Vide supra*, p. 1175.

(*y*) F. N. B. 34 L.

(*z*) Cro. Car. 357.

(*a*) 6°. 1, 6, 15; X. 3, 4, 3.

(*b*) Ath. 126; Lind. 136; Gibs. 903, 905, 913.

(*c*) Hob. 121; see 33 & 34 Vict. c. 23, s. 2.

(*d*) 2 & 3 Edw. 6, c. 1; and 1 Eliz. c. 2. *Vide supra*, pp. 957, 1077, 1102.

(*e*) 28 & 29 Vict. c. 122, s. 7.

(*f*) 13 Eliz. c. 12, s. 2; Can. 38 of 1603. *Vide supra*, pp. 1096—1102.

(*g*) Gibs. 1068; 5 Co. 58 b; *Specot's case*, 5 Co. 2, 54.

11. *Incontinence* (*i*).

12. *Drunkenness* (*k*).

13. *Disobedience to the Orders and Constitutions made for the Government of the Church.*—Agreed by all the justices (*l*).

14. *Conviction of Perjury in the Temporal or Ecclesiastical Court* (*m*).

15. *Non-payment of Tenths, according to 26 Hen. 8, c. 3, s. 15. Certified by the Bishop.*—By 2 & 3 Edw. 6, c. 20, the incumbent was to be adjudged *ipso facto* deprived of that benefice, whereof such certificate was made. But now by 3 Geo. 1, c. 10, s. 2, the defaulter is to forfeit double the value of the tenths; and the bishop is discharged from receiving them, and a collector appointed in his room (*n*).

16. *Dilapidation or Alienation.*—Lord Coke says, that dilapidation of ecclesiastical palaces, houses, and buildings, is a good cause of deprivation (*o*). But Dr. Gibson doubts whether the punishment was ever inflicted, and observes that the books of canon law speak of *alienations* only (*p*).

17. *Non-residence.*

II. *Causes of Deprivation by the Canon Law.*

1. *Disclosing Confessions*—From anger, hatred, or even fear of death, was punished with degradation (*q*).

2. *Wearing Arms*—Was punished with excommunication, and if the party remained contumacious, he was *ipso facto* deprived (*r*).

3. *Non-residence* (*s*).

4. *Demanding Money for Sacraments*—Was considered as a species of simony, by C. 1, 1, 103, and punished as such by Otho (*t*).

5. *Obstinacy in an Intruder, where Institution had not been obtained, or where the prior Incumbent was proved alive*—Was punished by Othobon with the loss of all benefices within the kingdom (*u*).

(*i*) 6 Co. 13 b; Hob. 291; Cro. Eliz. 41; *Bonwell* v. *Bishop of London*, 14 Moo. P. C. 395.

(*k*) 2 Brownl. 37; *Parker's case*, 1 Brownl. 70; and Can. Apost. 41.

(*l*) In 2 Jac. 1; Cro. Jac. 37.

(*m*) 5 Edw. 4, 3; 5 Co. 58; Ayl. Par. 208; Gibs. 1068.

(*n*) *Vide infra*, Part V., Chap. VIII.

(*o*) 3 Inst. p. 204, and quotes 29 Edw. 3, 16; 2 Hen. 4, 3; 9 Edw. 4, 34; S. P. Godb. 279; *Bagge's case*, 11 Co. 99; *vide infra*, Part V., Chap. V.

(*p*) Caus. 10, 2, 8, 12, 2, 13; Inst. J. C. 2, 27; Lind. 148.

(*q*) Walter, Lind. 354.

(*r*) Othobon, Ath. 85.

(*s*) Stephanus, Lind. 64; X. 1, 28, 2; Gibs. s. 10.

(*t*) Ath. 81.

(*u*) Ath. 96; Gibs. 781.

Causes of deprivation by canon law.

6. *Violating a Sanctuary*—Was punished by Othobon with excommunication, *ipso facto*; and if satisfaction were not made within a limited time, with deprivation (*v*).

7. *Marriage and, à fortiori, Bigamy.*—By 31 Hen. 8, c. 14, s. 9, now repealed, a priest keeping company with a wife was to suffer as a felon (*x*).

8. *Concubinage*—Was punished by degradation by Alexander II. (*y*). And by 31 Hen. 8, c. 14, s. 10, now repealed, a priest keeping a concubine forfeited his goods, chattels, and promotions, and was to suffer imprisonment at the king's will.

9. *Contumacy in wearing an irregular Habit*—After monition was punished with suspension, *ab officio et beneficio*, by Archbishop Stratford, which could only be redeemed by payment of a fifth part of the profits of the benefice for one year to the poor (*z*).

10. *Officiating after Excommunication without Absolution* (*a*).

11. *Keeping solemn Fasts other than such as are appointed by Law*—Either publicly or privately, without the licence and direction of the bishop under his hand and seal, or being wittingly present at any of them, is punished with suspension for the first fault, excommunication for the second, and deposition from the ministry for the third (*b*).

By whom to be pronounced.

By Can. 122 of 1603, "When any minister is complained of in any ecclesiastical court, belonging to any bishop of his province, for any crime, the chancellor, commissary, official, or any other having ecclesiastical jurisdiction to whom it shall appertain, shall expedite the cause by processes and other proceedings against him: and upon contumacy continuing, excommunicate him. But if he appear, and submit himself to the course of law, then the matter being ready for sentence, and the merits of his offence exacting by law, either deprivation from his living, or deposition from the ministry, no such sentence shall be pronounced by any person whosoever, but only by the bishop, with the assistance of his chancellor and dean (if they may conveniently be had), and some of the prebendaries, if the court be kept near the cathedral church; or of the archdeacon if he may be had conveniently, and two

(*v*) Ath. 101.
(*x*) Lind. 128; Otho. Ath. 38; X. 3, 3; Dy. 133.
(*y*) Dist. 81, c. 16. See also Lind. 10, 127; Otho. Ath. 47; Othob. Ath. 93.
(*z*) Lind. 122.
(*a*) X. 5, 27, 3 and 6; Gibs. 1049.
(*b*) Can. 72 of 1603.

other at least grave ministers and preachers, to be called by the bishop, when the court is kept in other places."

But the judge of the Court of Arches has authority to deprive without the presence of the bishop or archbishop (*c*).

May be by judge of Arches.

SECT. 7.—*Degradation* (*d*).

Degradation is an ecclesiastical censure, whereby a clergyman is deprived of his holy orders which formerly he had, as of priest or deacon.

And by the canon law, this may be done two ways: either summarily, or by word only; or solemnly, as by divesting the party degraded of the ornaments and ensigns of his order or degree.

Which solemn degradation was anciently performed in this manner, as is set forth in the sixth book of the Decretals. If the offender was a person in inferior orders, then the bishop of the diocese alone; if in higher orders, as priest or deacon, then the bishop of the diocese, together with a certain number of other bishops, sent for the party to come before them. He was brought in, having on his sacred robes, and having in his hands a book, vessel or other instrument or ornament appertaining to his order, as if he were about to officiate in his function. Then the bishop publicly took away from him, one by one, the said instruments and vestments belonging to his office, saying to this effect, This and this we take from thee, and do deprive thee of the honour of priesthood; and, finally, in taking away the last sacerdotal vestment, saying thus, By the authority of God Almighty, the Father, the Son, and the Holy Ghost, and of us, we do take from thee the clerical habit, and do depose, degrade, despoil, and deprive thee of all order, benefit, and privilege of the clergy.

And this seems to have been done in the most disgraceful manner possible; of which there seems to be some remains, in the common expression of *pulling a man's gown over his ears*.

A deposition, or degradation from the ministry, necessarily includes deprivation of benefice; though a man may be deprived of his benefice without being degraded from the ministry. The statute 23 Hen. 8, c. 1, s. 6, now repealed, reserved to the ordinary the power of degrading

(*c*) *Burgoyne* v. *Free*, 1 Add. 405; 2 Hagg. 406; *Hussey* v. *Radcliffe*, 5 Jur., N. S. 1014; *Bishop of London* v. *Boswell*, 14 Moo. P. C. 395; *Bishop of Norwich* v. *Pearce*, L. R., 2 Adm. & Eccl. 281.

(*d*) *Vide supra*, p. 1395.

clerks convict of treason, petit treason, murder and certain other felonies there mentioned, before judgment. And Dr. Gibson observes, that in the judgment given against Dr. Leighton, for publishing a seditious book, it is said as follows:—"And in respect the defendant hath heretofore entered into the ministry, and this court, for the reverence of that calling, doth not use to inflict any corporal or ignominious punishment upon any person so long as they continue in orders; the court doth refer him to the high commission, there to be degraded of his ministry." Which being accordingly done, he was set in the pillory, whipped, &c. (*e*).

SECT. 8.—*Excommunication* (*f*).

It is very necessary to bear in mind the distinction between excommunication purely spiritual and excommunication enforced by statute and the civil law.

What.

As to the first, excommunication is an ecclesiastical censure, whereby the person against whom it is pronounced is, for the time, cast out of the communion of the church (*g*).

Lesser.

And it is of two kinds, the lesser and the greater: The lesser excommunication is, the depriving the offender of the use of the sacraments and divine worship; and this sentence is passed by judges ecclesiastical, on such persons as are guilty of obstinacy or disobedience, in not appearing upon a citation, or not submitting to penance, or other injunctions of the court (*h*).

Greater.

The greater excommunication is that whereby men are deprived, not only of the sacraments, and the benefit of divine offices, but of the society and conversation of the faithful (*i*).

If a person be excommunicated generally; as if the judge say, *I excommunicate such a person*; this shall be understood of the greater excommunication (*k*).

(*e*) Gibs. 1066; 2 Rushw. 56.

(*f*) Lind., De Sententiâ Excommunicationis, l. 5, t. 17, p. 345, gloss on *Excommunicamus*. "Similem modum, &c., ubi patet quod pro futuris culpis sententia excommunicationis ferri non debet, nec pro præsentibus, nec pro præteritis, nisi monitione canonicâ præmissâ. Solutio--illud locum habet in sententiâ excommunicationis quæ fertur ab homine. Istud loquitur in sententiâ excommunicationis latâ a statuto perpetuo. In quo casu potest ferri sententia excommunicationis etiam pro futuris culpis." Walter, s. 191 a.

(*g*) God. 624.

(*h*) Johns. 168.

(*i*) Ibid.

(*k*) Lind. 78.

Ipso facto.

The law in many cases inflicts the censure of excommunication *ipso facto* upon offenders; which nevertheless is not intended so as to condemn any person without a lawful trial for his offence: but he must first be found guilty in the proper court; and then the law gives that judgment. Thus by 5 & 6 Edw. 6, c. 4, s. 2, every person who shall smite or lay violent hands upon another in any church or churchyard, was to be deemed *ipso facto* excommunicate; yet a defendant could not while that statute was in force plead excommunication in a plaintiff without showing either a sentence of excommunication by the ordinary, or a conviction at law (*l*); and where the canonists speak of an excommunication *ipso facto*, they are unanimous that a declaratory sentence is necessary (*m*).

And there are divers provincial constitutions, by which it is provided, that this censure shall not be pronounced (in ordinary cases) without previous monition or notice to the parties, which also is agreeable to the ancient canon law (*n*). And the Court of Arches has decided, that in every case an excommunication *ipso facto* requires a *sententia declaratoria* (*o*).

Body corporate cannot be excommunicated.

A body corporate, or whole society together, cannot be excommunicated, for this might involve the innocent with the guilty; but such persons only of the society as are guilty of the crime are to be excommunicated severally (*p*).

Excommunicate person deprived of christian communion.

By a constitution of Archbishop Stratford: "Excommunicate persons shall be inhibited to the commerce and communion of the faithful; and they who communicate with them shall be punished by ecclesiastical censure" (*q*).

Commerce.]—That is, buying or selling, or other interchange of wares or merchandize (*r*).

By Ecclesiastical Censure.]—That is, by the lesser excommunication, if they have not been admonished to desist; and by the greater excommunication, if they have been admonished, and have not desisted (*s*).

And by Art. 33, "That person which by open denunciation of the church is rightly cut off from the unity of the church, and excommunicated, ought to be taken, of

(*l*) Cases *tempore* Hardwicke, 190; 1 Burr. 244.

(*m*) Gibs. 1049.

(*n*) Gibs. 1046, 1048; Lind. 348; *sed vide infra*, 53 Geo. 3, c. 127.

(*o*) *Vide Mastin* v. *Escott*, 2 Curt. 692; 4 Moo. P. C. 104; *supra*, p. 1251; *Titchmarsh* v. *Chapman*, 3 Notes of Cases, 387.

(*p*) Gibs. 1048; 6º., 5, 11, 5.

(*q*) Lind. 266.

(*r*) Ibid.

(*s*) Ibid.

Excommunicate person deprived of Christian communion.

the whole multitude of the faithful, as an heathen and publican; until he be openly reconciled by penance, and received into the church by a judge that hath authority thereunto."

And this is according to the ancient rule of the church: And it was further ordained by many other ancient constitutions of the church, that if a person excommunicated in one city or diocese went to another, whoever received him to communion, should be also excommunicate: for which reason no strangers were to be received to communion, till they showed their letters of recommendation. This rule was incorporated into our law by the council of London, in the year 1126, that no person shall presume to receive to communion any stranger excommunicate; and if any shall knowingly do so, he himself shall be deprived of Christian communion (*t*).

To be kept out of the church.

By Can. 85 of 1603, "The churchwardens or questmen especially shall see that all persons excommunicated, and so denounced, be kept out of the church."

And if a *clergyman* presume to officiate, after he is excommunicated, the canon law orders him to be deprived (*u*).

To be publicly denounced every six months.

In the ancient church, the sentence of the greater excommunication was solemnly promulged four times in the year; with candles lighted, bells tolling, the cross and other solemnities (*x*).

By Can. 65, "All ordinaries shall, in their several jurisdictions, carefully see and give order, that as well those who for obstinate refusing to frequent divine service established by public authority within this realm of England, as those also (especially those of the better sort and condition) who for notorious contumacy or other notable crimes stand lawfully excommunicate (unless within three months immediately after the said sentence of excommunication pronounced against them, they reform themselves, and obtain the benefit of absolution,) be every six months ensuing, as well in the parish church as in the cathedral church of the dioceses in which they remain, by the minister openly in time of divine service upon some Sunday, denounced and declared excommunicate, that others may be thereby both admonished to refrain their company and society, and excited the rather to procure out a writ *de excommunicato capiendo*, thereby to bring and reduce

(*t*) Gibs. 1049.

(*u*) Gibs. 1049; X. 5, 27, 3 and 6.

(*x*) "Candelis accensis et pulsatis campanis, cum cruce et aliis solennitatibus, prout decet." — Lind. 355.

them into due order and obedience. Likewise the register of every ecclesiastical court, shall yearly, between Michaelmas and Christmas, duly certify the archbishop of the province of all and singular the premises aforesaid."

Who may certify excommunication.

Lord Coke says, none can certify excommunication but only the bishop, unless the bishop be beyond sea or in parts remote; or one that has ordinary jurisdiction, and is immediate officer to the king's courts; as the archdeacon of Richmond, or the dean and chapter in time of vacation. But in ancient time, every official or commissary might testify excommunication to the king's court; and for the mischief that ensued thereupon it was ordained by parliament, that none should testify excommunication but the bishop only (*y*).

Of this power, as restrained to the bishop, Lindwood writes thus: At the request of inferior prelates, the king uses not to write for the taking of excommunicates. Wherefore, if any be excommunicated by a person inferior to the bishop, as by the dean, or archdeacon, the invocation of the king's majesty ought to be made by the bishop; for they who are inferior to bishops cannot call in the secular arm, but the bishops shall execute their sentences; and if the bishops will not do this, they may be compelled thereunto by the archbishop (*z*).

May not be presented to a benefice.

The rule of the canon law is, that an excommunicate person shall not be presented to a benefice; and he who knowingly shall present an excommunicate person, shall be suspended from presenting to any benefice, until he shall have obtained absolution (*a*). Whatever may have been the civil disqualifications incident to excommunication, they are now removed by 53 Geo. 3, c. 127.

May not have burial office.

By Can. 68, "If the minister refuse to bury any corpse, except the party deceased were denounced excommunicated by the greater excommunication, for some grievous and notorious crime, and no man able to testify of his repentance; he shall be suspended by the bishop from his ministry for the space of three months" (*b*).

And by the rubric in the Book of Common Prayer, *The burial office shall not be used for any that die excommunicate.*

Writ *de excommunicato capiendo.*

Upon this head it is proper to take notice of a confusion which runs through almost all the books, by reason of the

(*y*) 1 Inst. 134.
(*z*) Lind. 350.
(*a*) Gibs. 1050.
(*b*) *Vide Mastin* v. *Escott*, 2 Curt. 692; 4 Moo. P. C. 104; p. 1251, *supra*.

Writ *de excommunicato capiendo.*

ambiguous sense in which the word *significavit* is used; sometimes to denote the bishop's certificate of the excommunication into the Court of Chancery, in order to obtain the writ *de excommunicato capiendo;* sometimes to denote the writ itself. In this latter sense it seems more properly to be applied: the writ having received its name from this same word in the beginning of it.

By the law and custom of this realm, the person who remains forty days under the sentence of excommunication, shall, at the request of his proper diocesan, be arrested and imprisoned by a writ of *de excommunicato capiendo* directed to the sheriff; but first there ought to be a certificate from such diocesan under his episcopal seal, signifying to the Court of Chancery the contempt of the party to holy church (*c*).

Which forty days are to be accounted after the minister has published the excommunication in the church; which is done by virtue of an instrument he has for that purpose, under the seal of the ecclesiastical court: and then if the person excommunicated does not submit within forty days after the said publication, he may (after such certificate so made as aforesaid) be arrested upon the *excommunicato capiendo* (*d*).

But though the bishop may certify not only an excommunication made by himself, but also an excommunication made by his commissary or official who does it in his right, and by his archdeacon, whose jurisdiction is derived from him (in which case the rule in the register is, that when the bishop signifies any one to be excommunicate by authority of the archdeacon or official, it ought always to be said in the writ to be by the authority of that bishop or him who so certifies); yet he may not certify that which has been done in another court: and therefore a certificate that another bishop has certified him, or that he has seen a sentence of excommunication made by another bishop, is of no force (*e*).

And if the bishop make a wrong certificate, he shall be liable to be made a party, and to pay costs (*f*).

At the common law, a certificate of the bishop, whereupon a *significavit* was to be granted, ought to express the cause, and the suit against him, specially in the certificate: to the end the temporal judges may see, whether the spiritual court has cognizance of the original cause, and whether the excommunication be according to law;

(*c*) Lind. 350; Swin. 109.
(*d*) Swin. 109.
(*e*) Gibs. 1050; 1 Inst. 134.
(*f*) Str. 1190.

that if it be otherwise, they may write to them to absolve the party (*g*).

For since it affects the liberty of a man's person, therefore it concerns a temporal interest (*h*).

And the bishop having certified the excommunication under seal, albeit he dies, yet the certificate shall serve (*i*).

Lord Coke says, the writ of *excommunicato capiendo* proceeds only *ex gratiâ regis* (*k*).

On the contrary, Lindwood says, this writ is grantable of right, *ex debito* (*l*).

And by a constitution of Archbishop Boniface, delivered in the wonted strain of that archbishop's constitutions, If the king deny the accustomed writ *de excommunicato capiendo*, his cities, castles, towns, and villages within that diocese, shall by the bishop be put under an interdict until the same shall be granted (*m*).

Dr. Cosin (with more moderation) says concerning this writ, that it is a liberty or privilege peculiar to the Church of England, above all the realms in Christendom that he has read of, that although the assistance of the secular arm has ever been afforded to the church in most other Christian countries, as well as this, yet in no instance is it perhaps so surely and so effectually reached out, as in the execution of this writ, which is *debitum justitiæ*, and not made to depend upon the pleasure of the prince. For though in one place it is said by the king in the register, that it proceeds on his grace; yet a note in the same book upon the same words teaches us, that such clause is only used in honour of the king, albeit he is bound to grant it *de jure:* and it is expressly said in the aforesaid writ, and in divers others, to issue according to the custom of England; or in other words, according to the common law of the realm (*n*).

And this seems to be agreeable to the tenure of the chapter now repealed in the statute of *Articuli Cleri*, 9 Edw. 2, st. 1, c. 12, where, to the complaint of the clergy in this respect, the king makes answer, that the said writ was never yet denied, nor shall be hereafter.

5 Eliz. c. 23.

By 5 Eliz. c. 23, " Forasmuch as divers persons offending in many great crimes and offences, appertaining merely to the jurisdiction and determination of the ecclesiastical courts and judges of this realm, are many times unpunished for want of due execution of the writ *de ex-*

(*g*) 2 Inst. 623.
(*h*) 1 Hale's Hist. 409.
(*i*) 1 Inst. 134.
(*k*) 2 Inst. 621.
(*l*) Lind. 351.
(*m*) Ibid.
(*n*) Cos. Apol. 8.

5 Eliz. c. 23.

communicato capiendo: the great abuse whereof, as it should seem, hath grown, for that the said writ is not returnable into any court that might have the judgment of the well executing and serving the said writ; but hitherto hath been left only to the discretion of the sheriffs and their deputies, by whose negligences and defaults for the most part the said writ is not executed upon the offenders as it ought to be; by reason whereof, such offenders be greatly encouraged to continue their sinful and criminous life, to the displeasure of Almighty God, and to the great contempt of the ecclesiastical laws of this realm:"

All such writs shall be made in term time, returnable into the King's Bench, and opened and delivered of record to the sheriff, who is to be fined for neglect.

It is enacted, that, sect. 1, "Every writ of *excommunicato capiendo*, that shall be granted out of the High Court of Chancery, shall be made in the time of the term, and returnable in the King's Bench in the next term after the teste of the same writ; and the same writ shall be made to contain at least twenty days between the teste and the return thereof: and after the same writ shall be so made and sealed, it shall be forthwith brought into the Court of King's Bench, and there in presence of the justices shall be opened and delivered of record to the sheriff or other officer to whom the serving and execution thereof shall appertain, or to his or their deputy or deputies; and if afterwards it shall appear to the justices of the same court, that the same writ so delivered of record be not duly returned before them at the day of the return thereof, or that any other default or negligence hath been used or had in the not well serving and executing of the said writ, the said justices shall assess such amerciament upon the said sheriff or other officer in whom such default shall appear, as to them shall seem meet, the same to be estreated into the Exchequer, as other amerciaments have been used."

Sheriff not compellable to bring in body; if he return *non est inventus, capias* to issue, with proclamation to surrender under forfeiture; and on default, forfeiture to be estreated and fresh *capias*, with further forfeiture to be awarded, and so on.

Sect. 2. "The sheriff or other officer to whom such writ of *excommunicato capiendo*, or other process by virtue of this act shall be directed, shall not in any wise be compelled to bring the body of such person as shall be named in the said writ or process, unto the Court of King's Bench at the day of the return thereof; but shall only return the same writ and process thither, with declaration briefly how and in what manner he hath served and executed the same.

"And if such sheriff or other officer shall return that the party cannot be found within his bailiwick; the said justices of the King's Bench shall award a writ of *capias* against the person named in the said writ of *excommunicato capiendo;* returnable in the same court in the term time, within two months at least after the teste thereof;

with a proclamation to be contained in the said writ of *capias*, that the sheriff or other officer as aforesaid, in the full county court, or at the assizes or quarter sessions within the said county, shall make open proclamation ten days at least before the return, that the party named in the said writ shall, within six days next after such proclamation, yield his body to the prison of the said sheriff or other such officer, there to remain as a prisoner, according to the tenor and effect of the first writ of *excommunicato capiendo*, upon pain of forfeiture of 10*l.* And thereupon, after such proclamation had, and the said six days past and expired, the said sheriff or other officer shall make return of the same writ of *capias* into the said Court of King's Bench, of all that he hath done in the execution thereof, and whether the party named in the said writ have yielded his body to prison or not.

" And if upon the return of the said sheriff it shall appear, that the party named in the same writ of *capias* hath not yielded his body to the gaol and prison of the said sheriff or other officer, according to the effect of the same proclamation ; every such person that shall so make default, shall for every such default forfeit to the king 10*l.* ; to be estreated into the exchequer as fines and amerciaments there taxed and assessed are used to be.

" And thereupon the said justices of the King's Bench, shall also award forth one other writ of *capias* against the said person that so shall be returned to have made default, with such like proclamation as was contained in the first *capias*, and a pain of 20*l.* to be mentioned in the said second writ and proclamation. And the sheriff or other officer to whom the said second writ of *capias* shall be so directed, shall serve and execute the said writ in such like manner and form as before is expressed for the serving and executing of the said first writ of *capias*. And if the sheriff or other officer shall return upon the said second *capias*, that he hath made the proclamation according to the tenor and effect of the same writ, and that the party hath not yielded his body to prison according to the tenor of the said proclamation ; then the said party that shall so make default, shall for such his contempt and default forfeit to the king the sum of 20*l.* to be estreated into the exchequer as aforesaid.

" And then the said justices shall likewise award forth one other writ of *capias* against the said party, with such like proclamation and pain of forfeiture as was contained in the said second writ of *capias :* And the sheriff or other officer to whom the said third writ of *capias* shall so be

5 Eliz. c. 23.

directed, shall serve and execute the said third writ of *capias*, in such like manner and form as before in this act is expressed for the serving and executing of the said first and second writs of *capias*: And if the sheriff or other officer to whom the execution of the said third writ shall appertain, do make return of the said third writ of *capias*, that the party upon such proclamation hath not yielded his body to prison, according to the tenor thereof; every such party, for every such contempt and default, shall likewise forfeit to the king other 20*l.* to be estreated in manner aforesaid. And thereupon the said justices of the King's Bench shall likewise award forth one writ of *capias* against the said party, with like proclamation, and like pain of forfeiture of 20*l.* And also the said justices shall have authority infinitely to award such process of *capias*, with such like proclamation and pain of forfeiture of 20*l.* as is before limited, against the said party that so shall make default in yielding of his body to the prison of the sheriff; until such time as by return of some of the said writs before the said justices, it shall appear, that the said party hath yielded himself to the custody of the said sheriff or other officer, according to the tenor of the said proclamation: and the party upon every default and contempt by him made against the proclamation of any of the said writs so infinitely to be awarded against him, shall incur like pain and forfeiture of 20*l.* to be estreated in like manner."

Party surrendering to be kept in custody.

Sect. 3. "When any person shall yield his body to the hands of the sheriff or other officer, upon any of the said writs of *capias*; he shall remain in the prison and custody of the said sheriff or other officer, without bail, in such manner and form as he should have done if he had been apprehended upon the writ of *excommunicato capiendo*."

Penalty of 40*l.* for false return.

Sect. 4. "If any sheriff or other officer by whom the said writs of *capias* or any of them shall be returned as is aforesaid, do make an untrue return upon any of the said writs, that the party named in the said writ hath not yielded his body upon the said proclamations or any of them, where indeed the party did yield himself according to the effect of the same; every such sheriff or other officer, for every such false and untrue return, shall forfeit to the party grieved the sum of 40*l.* to be recovered in any of the king's courts of record."

Process against offenders in Wales, counties palatine and Cinque Ports.

Sect. 6. "Provided always, that in Wales, and the counties palatine of Lancaster, Chester, Durham and Ely, and in the Cinque Ports, being jurisdictions and places exempt, where the king's writ doth not run, and process

of *capias* from thence not returnable into the King's Bench; after any *significavit* being of record in the said Court of Chancery, the tenor of such *significavit* by *mittimus* shall be sent to such of the head officers of the said country of Wales, counties palatine, and places exempt, within whose jurisdiction the offenders shall be resiant; that is to say, to the chancellor or chamberlain for the said county palatine of Lancaster and Chester, and for the Cinque Ports to the lord warden of the same, and for Wales and Ely, and the county palatine of Durham, to the chief justice or justices there: and thereupon every of the said justices and officers to whom such tenor of *significavit* with *mittimus* shall be directed and delivered, shall have power to make like process to the inferior officers to whom the execution of process there doth appertain, returnable before the justices there, at their next sessions or courts, two months at the least after the teste of every such process: so always, as in every degree they shall proceed in their sessions and courts against the offenders, as the justices of the said Court of King's Bench are limited by the tenor of this act in term times to do and execute."

Proviso for prisoners, infants, femes covert and other disabled persons.

Sect. 7. "Provided also, that any person at the time of any process of *capias* afore-mentioned awarded, being in prison, or out of this realm in the parts beyond the sea, or within age, or of non-sane memory, or woman covert, shall not incur any of the pains or forfeitures afore-mentioned, which shall grow by any return or default happening, during such time of non-age, imprisonment, being beyond sea, or non-sane memory; and the party grieved may plead every such cause or matter in bar of and upon the distress or other process that shall be made for levying of any of the said pains or forfeitures."

Addition to name of offender.

Cause of offence to be specified in *significavit*.

"And if the offender against whom any such writ of *excommunicato capiendo* shall be awarded, shall not in the same writ have a sufficient and lawful addition; or if in the *significavit* it be not contained, that the excommunication doth proceed upon some cause or contempt of some original matter of heresy, or refusing to have his child baptized, or to receive the holy communion as it is now commonly used to be received in the Church of England, or to come to divine service now commonly used in the said Church of England, or error in matters of religion or doctrine now received and allowed in the said Church of England, incontinency, usury, simony, perjury in the ecclesiastical court, or idolatry: that then all and every the pains and forfeitures limited against such persons ex-

5 Eliz. c. 23.

communicate by this statute, by reason of such writ of *excommunicato capiendo* wanting sufficient addition, or of such *significavit* wanting all the causes afore-mentioned, shall be utterly void in law; and by way of plea, to be allowed to the party grieved.

If addition be *nuper* of the place, first proclamation to be without penalty or forfeiture.

"If the addition shall be with a *nuper* of the place, in every such case at the awarding of the first *capias* with proclamation according to the form mentioned, one writ of proclamation (without any pain expressed) shall be awarded into the county where the offender shall be most commonly resiant at the time of the awarding of the said first *capias* with pain, in the same writ of proclamation, to be returnable the day of the return of the said first *capias* with pain and proclamation thereupon, at some one such time and court, as is prescribed for the proclamation upon the said first *capias* with pain: and if such proclamation be not made in the county where the offender shall be most commonly resiant in such cases of addition of *nuper;* every such offender shall sustain no pain or forfeiture by virtue of this statute, for not yielding his body according to the tenor afore-mentioned; anything before specified, and to the contrary hereof in anywise notwithstanding."

Sect. 1. *It shall be forthwith brought into the Court of King's Bench, &c.*]—It has been often adjudged that this form of taking out the writ, and the several steps therein (as contained in this clause of the act), ought to be precisely pursued; and for default thereof many persons have been discharged (*o*).

Into the Court of King's Bench.]—In *Reg.* v. *Bishop of St. Davids*, in 1 Anne, it was declared, that before this statute, the writ was returnable into Chancery; and there the *significavit* was quashed, if undue; but now the judgment of that, by this statute, is devolved on the Court of King's Bench (*p*).

Sect. 3. *Capias.*]—The penalties of this act being inflicted upon none but those who are excommunicated for some of the causes specified in sect. 7, the *capias* accordingly must not be with penalty in any other case: or if it issue so by mistake, the court will grant a *supersedeas* upon motion: and, if the party be taken, will upon pleading (after the *habeas corpus* is granted and returned and so the matter is judicially before them) discharge him from the penalties, though not from the imprisonment. In con-

(*o*) Gibs. 1056; Cro. Jac. 566; Cro. Car. 583; Siderf. 165, 285.

(*p*) Forrest. 57. *Vide supra*, p. 90.

sideration of which pleading, and the trouble and charge that attends it; it is said, that he may have an attachment against the plaintiff (q).

He shall remain in the Custody of the said Sheriff.]—In the case of *Slipper* v. *Mason*, in 1 Anne, the plaintiff obtained sentence against the defendant for 210*l.* for non-payment of tithes and costs. The defendant for non-payment was excommunicated, and arrested upon an *excommunicato capiendo*, and the sheriff let him escape, The plaintiff brought a special action against the sheriff, and had a verdict against him for the 210*l.* It was moved in arrest of judgment, that the action would not lie. But by the court it was adjudged that the action well lay: and they relied much upon the case where it was held that an action lies against the sheriff for suffering a man to escape, being arrested upon a *capias utlagatum* after outlawry upon mesne process (r).

Without Bail.]—By 3 Edw. 1, c. 15, now repealed, persons excommunicate, taken at the request of the bishop, shall be in nowise replevisable by the common writ, nor without writ.

That is to say, he that is certified into the chancery by the bishop to be excommunicated, and after is taken by force of the king's writ of *excommunicato capiendo*, is not bailable; for in ancient time men were excommunicated only for heresies *propter lepram animæ*, or other heinous causes of ecclesiastical cognizance, and not for small or petty causes; and therefore in those cases the party was not bailable by the sheriff or gaoler without the king's writ; but if the party offered sufficient caution *de parendo mandatis ecclesiæ in forma juris*, then should the party have the king's writ to the bishop to accept his caution, and to cause him to be delivered. And if the bishop will not send to the sheriff to deliver him, then shall he have a writ out of the chancery to the sheriff for his delivery; or if he be excommunicated for a temporal cause, or for a matter whereof the ecclesiastical court has no cognizance, he shall be delivered by the king's writ without any satisfaction (s).

Sect. 7. *Shall not in the same Writ have a sufficient and lawful Addition.*]—In *Reg.* v. *Sangway*, in 1 Anne, the defendant was excommunicated for a certain cause of jactitation of marriage, and taken upon a *capias* and brought up by *habeas corpus;* and exception was taken

(q) Gibs. 1056; 1 Salk. 294.
(r) 2 Lord Raym. 788.
(s) 2 Inst. 188.

5 Eliz. c. 23.

to the writ, that therein no addition was given to the defendant: but the court held, that for any of the causes mentioned in the statute, the defendant's addition ought to be in the writ, but that in other cases no addition is necessary (*t*).

As to showing cause of excommunication in writ.

If in the significavit *it be not contained, &c.*]—By Holt, Chief Justice: At the common law the cause had no need to be shown in the writ of *excommunicato capiendo;* but it was sufficient to say that the party was excommunicate for manifest contumacy; but in the bishop's certificate it ought to be shown. And now, since 5 Eliz. c. 23, the cause ought to be shown in the writ (*u*).

In *Rex* v. *Fowler*, in 12 Will. 3, on a *habeas corpus* the return was, that Fowler was taken and in custody by a writ of *excommunicato capiendo,* and the excommunication was in the writ recited to be for certain causes of subtraction of tithes or other ecclesiastical rights; and because this return was uncertain, the court was moved that he might be discharged; and the question was, whether this return was uncertain, and whether that uncertainty would vitiate the writ: and the court resolved, 1, that the return was uncertain, for that the *other rights* might be such matters as were out of their jurisdiction, and they ought to show the matter was within their jurisdiction, for of that the king's courts are to be judges, and not they themselves: 2, the cause of excommunication must be set forth in the writ. At common law, the writ *de excommunicato capiendo* was always general, for contumacy, not containing a special cause. And the writ was returnable in chancery, and founded on a certificate of the bishop, which certificate set forth the cause before, and the party could not be discharged but by *supersedeas* in chancery, if the cause were insufficient. But now the cause must be set forth in the writ *de excommunicato capiendo* itself, because by 5 Eliz. c. 23, the writ is made returnable in this court, which would be to no purpose if the cause were not to be set forth in the writ, and this court judge of that cause. The court held they might discharge the party upon the insufficiency of the return. Before 5 Eliz. c. 23, there were no discharges in this court on *excommunicato capiendo's,* but where a man was excommunicated pending a prohibition: now the case is altered; for this court may quash the writ of *excommunicato capiendo* or award a *supersedeas;* because this court are judges of the cause, and have it before them, and the party cannot go into chancery for a *super-*

(*t*) 1 Salk. 294. (*u*) 1 Ld. Raym. 619.

sedeas now, because the writ is returnable here. Accordingly the writ was quashed, and this special entry made on the *habeas corpus*, that the party was discharged because the writ *de excommunicato capiendo* was quashed (*x*).

In *Reg.* v. *The Bishop of St. Davids*, already cited, the defendant having been arrested upon an *excommunicato capiendo*, was brought into court by *habeas corpus*. And upon the return it appeared that he was excommunicated for non-payment of costs, in which he was condemned by commissioners delegate *in a certain cause* of office or correction, at the promotion of Lucy. And this by the court was holden to be ill, because it did not appear that these costs were adjudged in a cause of ecclesiastical cognizance; and it is plain, since 5 Eliz. c. 23, that the cause ought to appear in the writ; for otherwise how can this court make judgment of the several causes specified in that statute, in order to award several processes with penalties? And the court quashed the writ of *excommunicato capiendo*, and discharged the defendant (*y*).

So in the Court of Chancery, in 10 Geo. 2, in *Rex* v. *Eyre*, two *significavits* were quashed, being only said to be in a cause which came by appeal concerning a matter merely spiritual. For by Lord Talbot: We are not to lend our assistance but where it appears clearly they have jurisdiction, and are not to trust them to determine what is a matter merely spiritual; in *Rex* v. *Fowler* it was, in causes of ecclesiastical rights, and holden not sufficient (*z*).

In *Rex* v. *Payton*, in 37 Geo. 3, it was holden that a writ *de excommunicato capiendo*, which stated that the defendant was excommunicated in a cause of *defamation and slander merely spiritual*, was good. If the sentence of the greater, instead of the lesser, excommunication be pronounced, it is only a ground of *appeal*, and the Court of King's Bench will not quash a writ *de excommunicato capiendo* for that objection. It is not necessary that the defendant should be resident in the diocese at the time of the excommunication: it is sufficient if he were there at the time of the citation (*a*).

Erroneous process.

The case of *Adams* v. *Dugger* has established the principle, that if a party for non-payment of costs be committed under an *erroneous process* (which cannot fairly be ascribed

(*x*) 1 Salk. 293; Str. 1067.

(*y*) Lord Raym. 817. *Vide supra*, pp. 90, 1410; *et vide* 5 B. & A. 791; 1 B. & C. 655.

(*z*) Str. 1067. See 1 Salk. 293; 3 Atk. 479.

(*a*) 7 T. R. 153. See 2 B. & A. 139, for the modern method of proceeding to obtain the discharge of a party. See also, however, *Rex* v. *Hewitt*, 6 Ad. & Ell. 547; 1 Nev. & Per. 689.

5 Eliz. c. 23.

to the party suing it out, or be shown to have occasioned the other party material or any inconvenience), and be in consequence released, the court is bound, at the application of the party to whom they are still due, to issue a new monition for the payment of such costs (*b*).

Absolution and discharge.

A party could not be discharged from this writ by showing that the sum for which he was attached was less than the 20*l.* prescribed by 48 Geo. 3, c. 123, now repealed; because he was committed for contempt (*c*).

In 5 Eliz. c. 23, s. 5, there is a saving, "to all archbishops and bishops and all others having authority to certify any person excommunicated, the like authority to accept and receive the submission and satisfaction of the said person so excommunicated, in manner and form heretofore used; and him to absolve and release, and the same to signify, as heretofore it hath been accustomed, to the king's majesty in the High Court of Chancery; and thereupon to have such writs for the deliverance of the said person so absolved and released from the sheriff's custody or prison, as heretofore they or any of them had, or of right ought or might have had; anything in this statute to the contrary notwithstanding."

In which case, if due caution be offered by the party excommunicated, and admitted by the bishop, then the bishop may command the sheriff to deliver him out of prison (*d*).

What is due caution.

The language of the writs, when they speak of absolving and delivering an excommunicate, is *facta satisfactione, aut præstita cautione, prout moris est, de parendo mandatis ecclesiæ*, that is, either making present satisfaction at or upon his absolution, or putting in caution that he will hereafter perform that which the bishop shall reasonably and according to law enjoin him. Which caution, in the civil law, is of three sorts: 1, *fide jussoria*, as where a man binds himself with sureties to perform somewhat; 2, *pignoratitia* or *realis cautio*, as when a man engages goods, or mortgages lands, for the performance; 3, *juratoria*, when the party which is to perform anything, takes a corporal oath to do it (*e*).

If good and sufficient caution is offered and not ad-

(*b*) Sir John Nicholl, 1 Add. 307. See 5 Barn. & Ald. 791; 1 Dowl. & Ry. 460.

(*c*) See 1 B. & A. 652.

(*d*) Gibs. 1063.

(*e*) Ibid. For the doctrine of the civil law on the subject of putting in cautions, see Justinian's Inst. lib. 4, tit. 11, with the Commentaries of Vinnius and Huber. Of these cautions Bishop Gibson observes, that "the last of them, viz. an oath *de parendo juri et stando mandatis ecclesiæ in*

mitted, then a writ to the bishop is provided in the register, to command him (after having taken sufficient caution), to order the person to be delivered (*f*).

And if the bishop did not deliver him upon the said writ, then the party might have another writ to the sheriff, to command him to apply personally to the bishop, and admonish him to deliver the party after having taken sufficient caution; and if the bishop would not do the same in presence of the sheriff, then the sheriff to deliver him (*g*).

And the reason thereof was, for that by the excommunication the party was disabled to sue any action, or to have any remedy for any wrong done unto him so long as he shall remain excommunicate. And also the party grieved might have his action upon his case against the bishop; in like manner as he might when the bishop excommunicated him for a matter which belonged not to ecclesiastical cognizance. Also the bishop in those cases might be indicted at the suit of the king (*h*).

In like manner, if one appeared in the spiritual court, and was excommunicated for refusing to answer, where he was not bound by the law to answer (as, for instance, when he could not obtain a copy of the libel), prohibition was granted, with a clause to absolve and deliver the party (*i*).

Appeal.

But although, in case the party excommunicated rests in the sentence given against him, there is no legal means

forma juris, is that which is often accepted by ordinaries; and as to the second, it is expressly mentioned in the ancient Register (fo. 66 a, 67), and has always been acknowledged in the temporal courts to be good in law. But as to the first, under which is comprehended the taking of a *bond* for performance, it was declared, 9 Jac. 1 (1 Bulst. 122), to be against law; but as that was a judgment given *by the way* only, so when the same matter came under consideration again, 25 Car. 2, *Bishop of Exon* v. *Star* (per T. Raym. 226; 2 Lev. 36), and it was urged that by the tenor of the writ the choice of the caution is left to the discretion of the ordinary, and that caution by obligation is as much a caution as either of the other two, and more for the ease of the party than a pledge, and the constant use and practice of the ecclesiastical courts; upon this Hale doubted whether it was good or not; but Wild held it was good, saying such bond had been frequent, and that they had been allowed in the Court of Common Pleas. But the cause being moved again, the court would not proceed in it, because the excommunication and offence were taken off by the king's general pardon." Cod. 1063.

(*f*) Gibs. 1063.

(*g*) Ibid. See these writs in the Register, fo. 66, *et seq.* Also F. N. B. 62 (*b*), 63; and 3 Bl. Com. 101, *et seq.*

(*h*) 2 Inst. 623.

(*i*) Gibs. 1063; Siderf. 232; 12 Co. 76; 10 Vin. 527 (G).

Appeal.

for his deliverance, but submission and caution as is aforesaid; yet if he *appeal* from such sentence to a superior ecclesiastical judge, this puts the party in the same state that he was in before the sentence given; which the law orders, by reason of the present doubtfulness whether it was valid or invalid. Add to this, that by appeal the judge *a quo* ceases to be his judge in that cause; and if the party was imprisoned, and were to continue so, he would thereby be hindered from the effectual prosecution of his appeal, which may happen to prove just. Wherefore, upon allegation in behalf of the party against whom the writ is gone out, that he has appealed, and upon proof made thereof by an authentic instrument, a writ of *supersedeas* (without any appearance of a *scire facias* preceding) is provided for him in the register (*k*).

But the usual way (especially in cases where it is doubtful whether objections may not lie against his being delivered) is, the issuing a *scire facias*, to warn the bishop and the party prosecuting to show cause why the sheriff should not surcease from attaching the excommunicate, or why he should not deliver him, if he be in prison. And if the bishop in cases of office, and the prosecutor in cases of instance, do not appear in Chancery, the party is delivered; but if they appear, and not the party, then a reattachment goes forth to imprison him (*l*).

Writ cannot be quashed before day of return.

In *Reg.* v. *Bishop of St. Davids*, the defendant was taken upon a writ of *excommunicato capiendo*, and being in custody in Newgate, prayed a *habeas corpus*, and was brought into court thereupon; and it appeared by the return that the writ of *excommunicato capiendo* was not yet returnable. And the court held that one taken on a writ of *excommunicato capiendo* cannot come into this court but by *habeas corpus*; and if he be brought in before the writ is returnable, he shall not be allowed to plead or move to quash the writ (*m*).

Excommunicato capiendo may be superseded.

But in *Rex* v. *Theed*, in 3 Geo. 1, after the writ had been opened and entered of record, it was delivered out in order to take up the defendant; and before the return, the defendant moved and had it superseded; for the court said they could judge of it by the entry; and since it appeared that the defendant could not be legally detained upon it if he was taken, it was proper to supersede it, to prevent the man's being restrained of his liberty contrary to law;

(*k*) Gibs. 1063; *Powell* v. *Herman*. Moore's Rep.; Oughton, tit. 303.

(*l*) Gibs. 1064; Reg. fo. 68, 69.

(*m*) 1 Salk. 294. *Vide supra*, pp. 90, 1410, 1413.

that the intent of the statute, which directs the writ to be delivered in open court, was to apprise the court of the nature of the cause; that this was now to be considered as a writ that *improvidè emanavit;* and they were not to wait till the return, till all the inconveniences which they should have prevented by not issuing the writ had happened (*n*). The writ *de excommunicato capiendo* in this case was in a suit *pro correctione morum*, generally, and holden to be ill on the authority of *Rex* v. *Gapp* (*o*), which was *in quodam negotio pro reformatione et correctione morum.* And in *Rex* v. *Manning* (*p*) a writ *de excommunicato capiendo* was quashed, being only for not appearing to answer *certis articulis animæ suæ salutem morumque correctionem concernentibus.*

Several excommunications.

If a person be excommunicated by divers excommunications, for divers offences, and produces letters of absolution from one sentence, he shall not be discharged until he be absolved from them all (*q*).

Modern statutes.

The two following acts have wrought a great change in the law of excommunication. The latter greatly extends the practical power of the ecclesiastical courts to enforce the observance of justice.

53 Geo. 3. c. 127.

The first, 53 Geo. 3, c. 127, is entitled "An Act for the better Regulation of Ecclesiastical Courts in England; and for the more easy Recovery of Church Rates and Tithes."

The preamble recites as follows:—"Whereas it is expedient that excommunication, together with all proceedings following thereupon, should, saving in certain cases, be discontinued, and that other proceedings should be substituted in lieu thereof; and that certain other regulations should be made in the proceedings of the ecclesiastical courts; and that more convenient modes of recovering tithes and church rates in certain cases should be provided." It enacts as follows:—Sect. 1. "Excommunication, together with all proceedings following thereupon, shall in all cases, save those hereafter to be specified, be discontinued throughout that part of the united kingdom of Great Britain and Ireland called England; and that in all causes which according to the laws of this realm are cognizable in the ecclesiastical courts, when any person or persons having been duly cited to appear in any ecclesiastical court, or required to comply with the lawful orders or decrees, as well final as interlocutory, of any such court,

Excommunication discontinued, except in certain cases.

(*n*) Str. 43; 10 Mod. 350.
(*o*) Pas. 1 Geo.
(*p*) Str. 76.
(*q*) 1 Inst. 134.

53 Geo. 3, c. 127.

shall neglect or refuse to appear, or neglect or refuse to pay obedience to such lawful orders or decrees, or when any person or persons shall commit a contempt in the face of such court, no sentence of excommunication shall be given or pronounced; saving in the particular cases hereafter to be specified; but instead thereof, it shall be lawful for the judges or judge who issued out the citation, or whose lawful orders or decrees have not been obeyed, or before whom such contempt in the face of the court shall have been committed, to pronounce such person or persons contumacious and in contempt, and within ten days to signify the same, in the form to this act annexed, to his majesty in chancery, as hath heretofore been done in signifying excommunications; and thereupon a writ *de contumace capiendo*, in the form to this act annexed, shall issue from the Court of Chancery, directed to the same persons to whom the writs *de excommunicato capiendo* have heretofore been directed; and the same shall be returnable in like manner as the writ *de excommunicato capiendo* hath been by law returnable heretofore, and shall have the same force and effect as the said writ; and all rules and regulations not hereby altered, now by law applying to the said writ and the proceedings following thereupon, and particularly the several provisions contained in 5 Eliz. c. 23, shall extend and be applied to the said writ *de contumace capiendo* and the proceedings following thereupon, as if the same were herein particularly repeated and enacted; and the proper officers of the said Court of Chancery are hereby authorized and required to issue such writ *de contumace capiendo* accordingly; and all sheriffs, gaolers and other officers are hereby authorized and required to execute the same, by taking and detaining the body of the person against whom the said writ shall be directed to be executed; and upon the due appearance of the party so cited and not having appeared as aforesaid, or the obedience of the party so cited and not having obeyed as aforesaid, or the due submission of the party so having committed a contempt in the face of the court, the judges or judge of such ecclesiastical court shall pronounce such party absolved from the contumacy and contempt aforesaid, and shall forthwith make an order upon the sheriff, gaoler or other officer in whose custody he shall be, in the form to this act annexed, for discharging such party out of custody, and such sheriff, gaoler or other officer shall, on the said order being shown to him, so soon as such party shall have discharged the costs lawfully incurred by

Same as in writ *de excommunicato capiendo.*

reason of such custody and contempt, forthwith discharge him" (*r*).

Then follows an important section.

Sect. 2. " Nothing in this act contained shall prevent any ecclesiastical court from pronouncing or declaring persons to be excommunicated in definitive sentences, or in interlocutory decrees having the force and effect of definitive sentences, such sentences or decrees being pronounced as spiritual censures for offences of ecclesiastical cognizance, in the same manner as such court might lawfully have pronounced or declared the same, had this act not been passed" (*s*).

In what cases excommunication shall continue.

Sect. 3. " No person who shall be so pronounced or declared excommunicate, shall incur any civil penalty or incapacity whatever, in consequence of such excommunication, save such imprisonment, not exceeding six months, as the court pronouncing or declaring such person excommunicate shall direct, and in such case the said excommunication, and the term of such imprisonment, shall be signified or certified to his majesty in chancery, in the same manner as excommunications have been heretofore signified, and thereupon the writ *de excommunicato capiendo* shall issue, and the usual proceedings shall be had, and the party being taken into custody shall remain therein for the term so directed, or until he shall be absolved by such ecclesiastical court."

Proceedings in case of excommunication.

The schedules to this act are as follows:—

Schedule (A.)

" *To his most excellent majesty and our sovereign lord George the Third, by the grace of God of the united kingdom of Great Britain and Ireland king, defender of the faith, —— by Divine Providence, &c. ——. Health in Him by whom kings and princes rule and govern: We hereby notify and signify unto your majesty, that one —— of —— in the county of —— hath been duly pronounced*

Significavit of party being contumacious and in contempt.

(*r*) See on the construction of this section, *Re Baines*. Craig & Phillip's Rep. 31; *Reg.* v. *Thorogood*, 12 Ad. & Ell. 183; *Reg.* v. *Baines*, ibid. 210; *Reg.* v. *Jones*, 10 Ad. & Ell. 576.

(*s*) It seems to be competent to the court to pass this sentence without *signifying*, as in the case of the prosecutor not asking for a *significavit;* in which case, if the excommunicated person remained in that state till his death, according to the rubric preceding the burial service, that service would not be used on his behalf; nor, of course, would he be entitled, while living, to receive the holy communion.

53 Geo. 3, c. 127.

guilty of manifest contumacy and contempt of the law and jurisdiction ecclesiastical, in not [as the case may be] *appearing before* [here set out the style of the ecclesiastical judge, or his representative], or *in not obeying the lawful commands* [here set out the commands] *of* [*such judge or representative*] or *in having committed a contempt in the face of the court of such judge or representative lawfully authorized by* [here set out the nature and manner of such contempt], *on a day and hour now long past, in a certain cause of* [here set out the nature of the cause, and the names of the parties to the same]. *We therefore humbly implore and entreat your said most excellent majesty would vouchsafe to command the body of the said —— to be taken and imprisoned for such contumacy and contempt. Given under the seal of our —— Court, the —— day of ——.*

"A. B., *Registrar* [or, '*Deputy Registrar*,' as the case may be]."

Schedule (B.)

Writ *de contumace capiendo.*

"*George, &c. To the sheriff of —— greeting: The —— hath signified to us, that —— of —— in your county of —— is manifestly contumacious, and contemns the jurisdiction and authority of* [here fully state the non-appearance, disobedience, together with the commands disobeyed, or the contempt in the face of the court, as the case may be], *nor will he submit to the ecclesiastical jurisdiction; but forasmuch as the royal power ought not to be wanting to enforce such jurisdiction, we command you that you attach the said —— by his body, until he shall have made satisfaction for the said contempt; and how you shall execute this our precept notify unto —— and in nowise omit this, and have you there this writ. Witness ourself at Westminster, the —— day of —— in the —— year of our reign.*"

Schedule (C.)

Writ of deliverance.

"*Whereas —— of —— in your county of —— whom lately, at the denouncing of —— for contumacy, and by writ issued thereupon, you attached by his body until he should have made satisfaction for the contempt; now he having submitted himself, and satisfied the said contempt, we hereby empower and command you, that without delay you cause the said —— to be delivered out of the prison in which he is so detained, if upon that occasion and no*

other he shall be detained therein. Given under the seal of our —— of ——.

"A. B., *Registrar* [or, '*Deputy Registrar*,' as the case may be].

"*Extracted by* E. F.
Proctor."

2 & 3 Will. 4, c. 93.

The second act, 2 & 3 Will. 4, c. 93, is entitled "An Act for enforcing the Process upon Contempts in the Courts Ecclesiastical of England and Ireland."

The preamble recites as follows:—"Whereas great inconvenience has been found to arise by reason of the process of the several ecclesiastical courts in England and Ireland being inoperative and unavailable out of the limits of the respective jurisdictions of such courts, and against persons having privilege of peerage, lords of parliament, and members of the house of commons; and in many instances a failure of justice hath thereby ensued: And whereas it is expedient, for remedy thereof, that the process of the said several courts, and the means of enforcing obedience to the same, should be of equal force and have the like operation, as well in that part of the united kingdom of Great Britain and Ireland called England as in that part of the same united kingdom called Ireland, and as well against persons having privilege of peerage, lords of parliament, and members of the house of commons, as against all other his majesty's subjects."

Where persons residing beyond the jurisdiction of any ecclesiastical courts are cited to appear, &c., and refuse obedience, the judge thereof may pronounce them contumacious, and certify the same to the Lord Chancellor, &c. within ten days, and thereupon a writ *de contumace capiendo* shall issue, unless the person be a peer, &c.

It enacts as follows:—Sect. 1, "In all causes which according to the laws of this realm are or may be cognizable in any of the several ecclesiastical courts, as well in that part of the united kingdom of Great Britain and Ireland called England as in that part of the same united kingdom called Ireland, when any person or persons, as well those which have or hereafter shall have privilege of peerage, or are or hereafter may be peers of parliament or members of the house of commons, as all others who shall happen to be domiciled or residing either in England or in Ireland, and beyond the limits of the jurisdiction of the court in which such causes have been or shall have been respectively instituted or commenced, or shall be depending, having been duly cited to appear in any such ecclesiastical court, whether in England or in Ireland, or required to comply with any lawful order or decree, as well final as interlocutory, which hath been or shall have been made by any such court respectively, shall neglect or refuse to pay obedience to any such lawful order or decree, or when any such person or persons shall commit a contempt in

2 & 3 Will. 4, c. 93.

the face of such court, or any other contempt towards such court, or the process thereof, it shall be lawful for the judge or judges out of whose court the citation or process hath already issued or may hereafter issue, or whose lawful orders or decrees have not or shall not have been obeyed, or before whom such contempt in the face of the court shall be committed, or by whose order or authority such process in respect of or towards which any such contempt shall have been committed has been or shall be awarded or issued, or the successor or successors in office of such judge or judges respectively, to pronounce such person or persons contumacious and in contempt, and within ten days after such person or persons shall have been so pronounced to be contumacious and in contempt to signify the same to the lord chancellor, lord keeper, or lords commissioners for the custody of the great seal of England for the time being respectively, whenever the person or persons who shall have been so pronounced contumacious and in contempt shall be domiciled or residing in England, and within the like period of ten days to signify the same to the lord chancellor, lord keeper or lords commissioners for the custody of the great seal of Ireland for the time being respectively, whenever the person or persons who shall have been so pronounced contumacious and in contempt shall be domiciled or residing in Ireland, in the form annexed to 53 Geo. 3, c. 127; and thereupon, and in case the person so reputed to be in contempt shall not be a peer, lord of parliament, or member of the house of commons, a writ *de contumace capiendo* shall issue from his majesty's said High Court of Chancery in England or in Ireland, as the case may happen, to be directed to the same persons to whom writs *de excommunicato capiendo* were by law returnable before the passing of the said act of parliament, and the same shall be returnable in like manner as the writ *de excommunicato capiendo* had been theretofore by law returnable, and shall have the same force and effect as the last-mentioned writ; and all rules and regulations not altered by the said act 53 Geo. 3, c. 127, and which before the passing of the same act applied to the said writ *de excommunicato capiendo*, and the proceedings following thereupon, and particularly the several provisions contained in 5 Eliz. c. 23, shall extend and be applied to the said writ *de contumace capiendo*, and the proceedings following thereupon, as if the same were herein particularly repeated and enacted; and the proper officers of the said two several High Courts of Chancery in England and Ireland, as the case may

All regulations and provisions applying to the writ *de excommunicato*, and proceedings thereupon, shall be applied to the writ *de contumace*.

happen to be, are hereby authorized and required to issue such writ *de contumace capiendo* accordingly; and all sheriffs, gaolers, and other officers in England and in Ireland, as the case may happen to be, are hereby required and authorized to execute the same, by taking and detaining the body of the person or persons against whom the said writ shall be so directed to be executed; and upon the due appearance of the party or parties so cited and not having obeyed as aforesaid, or the due submission of the party or parties so having committed a contempt in the face of the court, or otherwise, as hereinbefore is mentioned, the judge or judges of such ecclesiastical court, whether in England or in Ireland, as the case may be, shall pronounce such party or parties absolved from the contumacy and contempt aforesaid, and shall forthwith make an order upon the sheriff, gaoler, or other officer in whose custody he, she, or they shall be, in the form to 53 Geo. 3, c. 127, annexed, for discharging such party or parties out of custody; and such sheriff, gaoler, and other officer shall, on the said order being shown to him, so soon as such party or parties shall have discharged the costs lawfully incurred by reason of such custody and contempt, forthwith discharge, him, her, or them."

Upon the appearance or submission of the party, the judge may order him to be absolved or discharged.

Sect. 2. "In all such cases as are hereinbefore mentioned, and which are or may be cognizable in any or either of the several hereinbefore mentioned courts, when any person or persons, as well such person or persons as have or shall hereafter have privilege of peerage, or are or shall hereafter be lords of parliament or members of the House of Commons, as others who shall happen to be domiciled or residing either in England or in Ireland, have been or shall have been ordered or required, by the lawful order or decree, final or interlocutory, of any such court respectively, to pay any sum or sums of money, and when any such person or persons, after having been duly monished, shall refuse or neglect to comply with such monition, and to pay the sum or sums of money therein ordered to be paid by him or them, within the time and in the manner in any such order or decree mentioned or expressed, or a peer or lord of parliament or member of the House of Commons shall refuse or withhold obedience, or shall in any way neglect to perform or shall not perform any decree or order, final or interlocutory, of such courts as aforesaid, it shall be lawful for the judge or judges who shall have made such order or decree, or his or their successor or successors in office, to pronounce the person or persons so neglecting or refusing to comply with such

Where persons possessed of estates, &c. in England neglect to pay money ordered by the said courts, the judges may pronounce such persons contumacious, and certify the same to the Lord Chancellor, who shall cause process of sequestration to issue against the estate of the party in England.

2 & 3 Will. 4, c. 93.

order or decree contumacious and in contempt, and within ten days after such person or persons shall have been so pronounced contumacious and in contempt to cause a copy of such order or decree, under the seal of the court wherein the same shall have been made, or under the hand or hands of such judge or judges, or one of them, to be exemplified, and certified to the lord chancellor, lord keeper, or lords commissioners for the custody of the great seal of England for the time being respectively, whenever the person or persons who shall have been so pronounced contumacious shall be domiciled or residing, or shall be seised or possessed of or entitled to any real or personal estate, goods, chattels, or effects, situate, lying, or being in England; and the said lord chancellor, lord keeper, or lords commissioners for the custody of the great seal of England, shall forthwith cause such copy of such order or decree, when it shall be presented to them respectively, so exemplified, to be enrolled in the rolls of the High Court of Chancery in England, and shall thereupon cause process of sequestration to issue against the real and personal estate, goods, chattels, and effects, in England, of the party or parties against whom such order or decree shall have been made, in order to enforce obedience to and performance of the same, in the same manner and form, and with the like power and effect, as if the cause wherein such order or decree shall have been made had been originally cognizable by and instituted in the said Court of Chancery in England, and as if all and every the process of the said Court of Chancery in England ordinarily issuing in causes there pending antecedent to process of sequestration had been duly issued and returned in the last-mentioned court; and it shall and may be lawful for the said lord chancellor, lord keeper, or lords commissioners of the great seal in England, to make such order and orders in respect of or consequent upon such sequestration, or in respect of the real or personal estate, goods, chattels, or effects sequestrated by virtue thereof, as he or they shall from time to time think fit, or for payment of all or any of the monies levied or received by virtue thereof into the Bank of England, with the privity of the accountant-general of the said Court of Chancery in England, to the credit and for the benefit of the party or parties who shall have obtained such order or decree, if the same was for payment of money, or, if not, to the credit of the High Court of Chancery; and the governor and company of the Bank of England are hereby authorized and required to receive and hold all such monies, subject to the

orders of the said Court of Chancery: provided always, that no such monies shall be charged with or subject to poundage when the same shall be paid out by order of the said court" (*t*).

The like provision as to persons possessed of estates, &c. in Ireland.

Sect. 3. "In all such causes as are hereinbefore mentioned, and which are or may be cognizable in any or either of the several hereinbefore mentioned courts, when any person or persons, as well such person or persons as have or shall hereafter have privilege of peerage, or are or shall hereafter be lords of parliament or members of the House of Commons, as others, who shall happen to be domiciled or residing either in England or in Ireland, hath or have been or shall have been ordered or required by the lawful order or decree, final or interlocutory, of any such court respectively, to pay any sum or sums of money, or to do any other act or thing, and when any such person or persons, after having been duly personally served with a copy or copies of such order or decree, shall refuse or neglect to comply therewith, or to pay the sum or sums of money therein ordered to be paid by him or them, or to do the act or thing required by such order to be done, within the time and in the manner in any such order or decree mentioned or expressed, it shall be lawful for the judge or judges who shall have made such order or decree, or his or their successor or successors in office, to pronounce the person or persons so neglecting or refusing to comply with such order or decree contumacious and in contempt, and within ten days after such person or persons shall have been so pronounced contumacious and in contempt to cause a copy of such order or decree, under the seal of the court wherein the same shall have been made, or under the hand or hands of such judge or judges, or one of them, to be exemplified, and certified to the lord chancellor, lord keeper, or lords commissioners for the custody of the great seal of Ireland for the time being respectively, whenever the person or persons who shall have been so pronounced contumacious and in contempt shall be domiciled or residing, or shall be seised or possessed of or entitled to any real or personal estate, goods, chattels, or effects, situate, lying, or being in Ireland, and within the like period of ten days and after such last-mentioned person or persons shall have been pronounced contumacious and in contempt to cause a copy of such

(*t*) For the practice of the Court of Chancery, see *Cooper* v. *Dodd*, 15 Jur. 69; Daniell's Chancery Practice (ed. 1871), p. 933.

2 & 3 Will. 4, c. 93.

order or decree to be exemplified, and certified in manner hereinbefore mentioned to the barons of his majesty's Court of Exchequer in that part of the united kingdom called Ireland, whenever the person or persons who shall have been so pronounced contumacious and in contempt shall be domiciled or residing, or shall be seised or possessed of or entitled to any real or personal estate, goods, chattels, or effects, situate, lying, or being in Ireland; and the said lord chancellor, lord keeper, or lords commissioners for the custody of the great seal of Ireland, shall forthwith cause such copy of such order or decree, when it shall be presented to them respectively, so exemplified, to be enrolled in the rolls of the High Court of Chancery in Ireland, and shall thereupon cause process of sequestration to issue against the real and personal estate, goods, chattels, and effects, in Ireland, of the party or parties against whom such order or decree shall have been made, in order to enforce obedience to and performance of the same, in the same manner and form, and with the like power and effect, as if the cause wherein such order or decree shall have been made had been originally cognizable by and instituted in the said Court of Chancery in Ireland, and as if all and every the process of the said Court of Chancery in Ireland ordinarily issuing in causes there pending antecedent to process of sequestration had been duly issued and returned in the last-mentioned court; and it shall and may be lawful for the said lord chancellor, lord keeper, or lords commissioners of the great seal in Ireland, to make such order or orders in respect of or consequent upon such sequestration, or in respect of the real or personal estate, goods, chattels, or effects sequestered by virtue thereof, as he or they shall from time to time think fit, or for payment of all or any of the monies levied or received by virtue thereof into the bank of Ireland, with the privity of the accountant-general of the said Court of Chancery in Ireland, to the credit and for the benefit of the party or parties who shall have obtained such order or decree, if the same was for the payment of money, or if not, then to the credit of the said High Court of Chancery; and the governor and company of the said bank of Ireland are hereby authorized and required to receive and hold all such monies, subject to the orders of the said Court of Chancery in Ireland: provided always, that no such monies shall be charged with or subject to poundage for the usher of the said Court of Chancery in Ireland, or otherwise, when the same shall be paid out by order of the last-mentioned court."

Sect. 4 provides that the act shall not extend to orders made six years before.

Sect. 5 places several restrictions on actions brought for anything done in pursuance of this act.

Release by 3 & 4 Vict. c. 93.

The act 3 & 4 Vict. c. 93, empowering the ecclesiastical courts to order the release in certain cases of persons imprisoned under the writ *de contumace capiendo* has been already mentioned (*u*).

Pardon.

With respect to the effect of a general pardon issued by the king, it seems to have been always agreed, that the king's pardon will discharge any suit in the spiritual court *ex officio:* also it seems to have been settled, that it will likewise discharge any suit in such court *ad instantiam partis pro reformatione morum* or *salute animæ*, as for defamation, or laying violent hands on a clerk, or such like; for such suits are in truth the suits of the king, though prosecuted by the party (*x*).

Also it seems to be agreed, that if the time to which such pardon has relation be prior to the award of costs to the party, it shall discharge them: and it seems to be the general tenor of the books, that though it be subsequent to the award of the costs, yet if it be prior to the taxation of them, it shall discharge them, because nothing appears in certain to be due for costs before they are taxed (*y*).

Also, if after a person is excommunicate there comes a general act of pardon, it seems that the offence is taken away without any formal absolution (*z*).

Also, if a person be imprisoned on a writ *de excommunicato capiendo*, for his contumacy in not paying costs, and afterwards the king pardons all contempts, it seems that he shall be discharged of such imprisonment without any *scire facias* against the party; because it is grounded on the contempt, which is wholly pardoned; and the party must begin anew to compel a payment of the costs (*a*).

But it seems agreed, that a pardon would not discharge a suit in the spiritual court, any more than in a temporal, for a matter of interest or property in the plaintiff; as for tithes, legacies, matrimonial contracts, and such like. Also it is agreed, that after costs are taxed in a suit in such court at the prosecution of the party, whether for a matter of private interest, or *pro reformatione morum* or *salute animæ*, as for defamation, or the like, they shall not be discharged by a subsequent pardon (*b*).

(*u*) *Vide supra*, p. 1261.
(*x*) 2 Haw. 394.
(*y*) Ibid.
(*z*) 2 Bac. Abr. 326.
(*a*) 2 Haw. 394.
(*b*) Ibid.

Pardon.

A person admitted to the benefit of clergy was not to be deprived in the spiritual court for the crime for which he had had his clergy. For a pardon frees the party from all subsequent punishment, and consequently from deprivation (*c*).

By 20 Geo. 2, c. 52, which is the last act of general pardon, all contempts in the ecclesiastical court in matters of correction are pardoned; but not in causes which have been commenced for matters of right (*d*).

(*c*) 2 Haw. 364.

(*d*) *Whiston's case*, begun in Queen Anne's reign, never came to a final decision, it is believed, on account of the Pardon Act on the accession of George the First. *Vide supra*, p. 1096.

CHAPTER XI.

PROHIBITION AND MANDAMUS.

SECT. 1.—*Early and late Jurisdiction of Ecclesiastical Courts.*
2.—*Prohibition.*
3.—*Mandamus.*

SECT. 1.—*Early and late Jurisdiction of Ecclesiastical Courts.*

Origin of the ecclesiastical jurisdiction in general.

FOR the first 300 years after Christ (*a*), the distinction of ecclesiastical or spiritual causes, in point of jurisdiction, did not begin; for at that time no such distinction was heard of in the Christian world; for the causes of testaments, matrimony, bastardy, adultery, and the rest, which are called ecclesiastical or spiritual causes, were merely civil, and determined by the rules of the civil law, and subject only to the jurisdiction of the civil magistrate. But after the emperors were become Christian, out of a zeal and desire they had to grace and honour the learned and godly bishops of that time, they were pleased to single out certain special causes, wherein they granted jurisdiction to bishops; namely, in cases of tithes, because paid to men of the church; in causes of matrimony, because marriages were for the most part solemnized in the church; in causes testamentary, because testaments were many times made *in extremis*, when churchmen were present giving spiritual comfort to the testator, and therefore they were thought the fittest persons to take the probates of such testaments: and so of the rest. Yet these bishops did not then proceed in these causes according to the canons and decrees of the church (for the canon law was not then made), but according to the rules of the imperial law, and as the civil magistrate proceeded in other causes (*b*).

Origin thereof

Accordingly in this kingdom, in the Saxon times, before

(*a*) These introductory remarks, as to the ecclesiastical jurisdiction, are taken, with slight alterations, from the title "Courts" in Phillimore's edition of Burn.

(*b*) Dav. 95.

within this realm in particular.

the Norman Conquest, there was no distinction of jurisdictions; but all matters, as well spiritual as temporal, were determined in the county court, called the sheriff's tourn, where the bishop and earl (or in his absence the sheriff) sat together; or else in the hundred court, which was held in like manner before the lord of the hundred and ecclesiastical judge (*c*).

For the ecclesiastical officers took their limits of jurisdiction from a like extent of the civil powers. Most of the old Saxon bishoprics were of equal bounds with the distinct kingdoms. The archdeaconries, when first settled into local districts, were commonly fitted to the respective counties. And rural deanries, before the Conquest, were correspondent to the political tithings. Their spiritual courts were holden with a like reference to the administration of civil justice. The synods of each province and diocese were holden at the discretion of the metropolitan and the bishop, as great councils at the pleasure of the prince. The visitations were first united to the civil inquisitions in each county; and afterwards, when the courts of the earl and bishop were separated, yet still the visitations were held, like the sheriff's tourns, twice a year, and like them too after Easter and Michaelmas, and still with nearer likeness the greater of them was at Easter. The rural chapters were also holden, like the inferior courts of the hundred, every three weeks; then, and like them too, they were changed into monthly, and at last into quarterly meetings. Nay, and a prime visitation was holden commonly, like the prime folemote or sheriff's tourn, on the very calends of May (*d*).

And accordingly Sir Henry Spelman observes, that the bishop and the earl sat together in one court, and heard jointly the causes of church and commonwealth; as they yet do in parliament. And as the bishop had twice in the year two general synods, wherein all the clergy of his diocese of all sorts were bound to resort for matters concerning the church; so also there was twice in the year a general assembly of all the shire for matters concerning the commonwealth, wherein without exception all kinds of estates were required to be present: dukes, earls, barons, and so downward of the laity; and especially the bishop of that diocese among the clergy. For in those days the temporal lords did often sit in synods with the bishops,

(*c*) Examin. of the Scheme of Ch. Pow. 15; Duck. 307; 1 Warn. 274; 2 Still 14; God. 96; Johns. 246.

(*d*) Ken. Eccl. Syn. 233, 4.

and the bishops in like manner in the courts of the temporalty, and were therein not only necessary, but the principal judges themselves. Thus by the laws of King Canutus, "the shyre-gemot (for so the Saxons called this assembly of the whole shire) shall be kept twice a year and oftener if need require, wherein the bishop and the alderman of the shire shall be present, the one to teach the laws of God, the other the law of the land." And among the laws of King Henry I. it is ordained, "first, let the laws of true Christianity (which we call the ecclesiastical) be fully executed with due satisfaction; then let the pleas concerning the king be dealt with; and, lastly, those between party and party: and whomsoever the church synod shall find at variance, let them either make accord between them in love, or sequester them by their sentence of excommunication." Whereby it appears, that ecclesiastical causes were at that time under the cognizance of this court. But these, he says, he takes to be such ecclesiastical causes as were grounded upon the ecclesiastical laws made by the kings themselves for the government of the church (for many such there were in almost every king's reign), and not for matters rising out of the Roman canons, which haply were determinable only before the bishop and his ministers. And the bishop first gave a solemn charge to the people touching ecclesiastical matters, opening unto them the rights and reverence of the church, and their duty therein towards God and the king, according to the word of God. Then the alderman in like manner related unto them the laws of the land, and their duty towards God, the king and commonwealth, according to the rule and tenure thereof (*e*).

William the Conqueror's charter of separation.

The separation of the ecclesiastical from the temporal courts was made by William the Conqueror. And as from thence we are to date this great alteration in our constitution, it is judged necessary to recite the charter of separation verbatim; which is as follows:

"WILLIELMUS, Dei gratia rex Anglorum, R. Bainardo et G. de Magnavilla, et P. de Valoines, cæterisque meis fidelibus de Essex et Hertfordschire et de Middlesex, salutem. Sciatis vos omnes, et cæteri mei fideles qui in Anglia manent, quod episcopales leges, quæ non bene, nec secundum sanctorum canonum præcepta, usque ad mea tempora in regno Anglorum fuerunt, communi concilio et concilio archiepiscoporum [meorum] et [cæterorum (*f*)] episcopo-

(*e*) Reliquiæ Spelm. 13, 53, 54.

(*f*) Wilkins' Leg. Ang. Sax. 292.

rum, et abbatum, et omnium principium regni mei, emendandas judicavi. Propterea mando, et regia auctoritate præcipio, ut nullus episcopus, vel archidiaconus, de legibus episcopalibus amplius in Hundret placita teneant; nec causam quæ ad regimen animarum pertinet, ad judicium secularium hominum adducant: sed quicunque secundum episcopales leges, de quacunque causa vel culpa interpellatus fuerit, ad locum quem ad hoc episcopus elegerit, et nominaverit, veniat; ibique de causa vel culpa sua respondeat, et non secundum Hundret, sed secundum canones et episcopales leges, et rectum Deo et episcopo suo faciat. Si vero aliquis, per superbiam elatus, ad justitiam episcopalem venire contempserit, et noluerit; vocetur semel, et secundo, et tertio: Quod si nec sic ad emendationem venerit, excommunicetur; et si opus fuerit ad hoc vindicandum, fortitudo et justitia regis vel vicecomitis adhibeatur: Ille autem qui vocatus ad justitiam episcopi venire noluerit, pro unaquaque vocatione legem episcopalem emendabit. Hoc etiam defendo, et mea auctoritate interdico, ne ullus vicecomes aut præpositus, seu minister regis, nec aliquis laicus homo, de legibus quæ ad episcopum pertinent, se intromittat; nec aliquis laicus homo alium hominem sine justitia episcopi ad judicium adducat: Judicium vero in nullo loco portetur, nisi in episcopali sede, aut in illo loco, quem episcopus ad hoc constituerit" (*g*).

This charter, Mr. Selden says, was recited in a close roll of King Richard II., and then confirmed (*h*).

Papal encroachments after the Conquest.

For upon the conquest made by the Normans, the pope took the opportunity to usurp upon the liberties of the crown of England. For the Conqueror came in with the pope's banner, and under it won the battle. Whereupon the pope sent two legates into England, with whom the Conqueror called a synod, deposed Stigand, Archbishop of Canterbury, because he had not purchased his pall from Rome, and displaced may bishops and abbots to make room for his Normans. This admission of the pope's legates first led the way to his usurped jurisdiction in England; yet no decrees passed or were put in execution, touching matters ecclesiastical, without the royal assent; nor would the king submit himself in point of fealty to the pope, as appears by his epistle to Gregory VII. Yet in his next successor's time, namely, in the time of king William Rufus, the pope by Anselm, Archbishop of Canterbury, attempted to draw appeals to Rome, but prevailed not. Upon this occasion it was, that

(*g*) Spelm. vol. ii. p. 14. (*h*) Str. 669.

the king told Anselm, that none of his bishops ought to be subject to the pope, but the pope himself ought to be subject to the emperor; and that the king of England had the same absolute liberty in his dominions, as the emperor had in the empire. Yet in the time of the next king, to wit, King Henry I., the pope usurped the patronage and donation of bishoprics, and of all other benefices ecclesiastical. At which time Anselm told the king, that the patronage and investiture of bishops was not his right, because Pope Urban had lately made a decree, that no lay person should give any ecclesiastical benefice. And after this, at a synod holden at London, in the year 1107, a decree was made, unto which the king assented (says Matthew Paris), that from henceforth no person should be invested in a bishopric by the giving of a ring and pastoral staff (as had been before), nor by any lay hand. Hereupon the pope granted, that the Archbishop of Canterbury for the time being should be for ever *legatus natus*: and Anselm for the honour of his see obtained, that the Archbishop of Canterbury should in all general councils sit at the pope's foot, as *alterius orbis papa*, or pope of this part of the world. Yet after Anselm's death, this same king gave the Archbishopric of Canterbury to Rodolph, Bishop of London, and invested him by the ring and pastoral staff; and this, because the succeeding popes had broken Pope Urban's promise, touching the not sending of legates into England, unless the king should require it. And in the time of the next succeeding king, to wit, King Stephen, the pope gained appeals to the court of Rome; for in a synod at London, convened by Henry, Bishop of Winchester, the pope's legate, it was decreed that appeals should be made from provincial councils to the pope; before which time appeals to Rome were not in use. Thus did the pope usurp three main points of jurisdiction, upon three several kings after the Conquest (for of King William Rufus he could gain nothing), viz. upon the Conqueror, the sending of the legates or commissioners to hear and determine ecclesiastical causes; upon Henry I., the donation and investiture of bishoprics and other benefices; and upon King Stephen, the appeals to the court of Rome. And in the time of King Henry II., the pope claimed exemption of clerks from the secular power. And, finally, in the time of King John, he took the crown from off the king's head, and compelled him to accept his kingdom from the pope's donation (*i*).

(*i*) God. 96.

Opposed by the statutes of provisors.

Nevertheless all this obtained not without violent struggle and opposition: and this caused the statutes of provisors to be made, in the reigns of King Edward III. and King Richard II., by the former of which (namely, 27 Edw. 3, st. 1, c. 1) it is enacted as follows: "Because it is shewed to our lord the king, by the grievous and clamorous complaints of the great men and commons of the realm, how that divers of the people be drawn out of the realm, to answer of things whereof the cognizance pertaineth to the king's court; and also that the judgments given in the same court be impeached in another court, in prejudice and disherison of our lord the king, and of his crown, and of all the people of his said realm, and to the undoing and destruction of the common law of the same realm at all times used: whereupon, upon good deliberation had with the great men and other men of his said council, it is assented and accorded that all the people of the king's ligeance of what condition that they be, which shall draw any out of the realm in plea, whereof the cognizance pertaineth to the king's court, or of things whereof judgments be given in the king's court, or which do sue *in any other court* to defeat or impeach the judgments given in the king's court, shall have a day, containing a space of two months, by a warning to be made to them, to appear before the king and his council, or in his chancery, or before the king's justices of the one bench or the other, or before other the king's justices, which to the same shall be deputed, to answer in their proper persons to the king, of the contempt done in this behalf. And if they come not at the said day in their proper person to be at the law; they, their procurators, attornies, executors, notaries, and maintainers, shall from that day forth be put out of the king's protection, their lands and goods forfeit to the king, and their bodies wheresoever they may be found shall be taken and imprisoned and ransomed at the king's will, and upon the same a writ shall be made to take them by their bodies, and to seize their lands, goods and possessions into the king's hands: and if it be returned that they be not found, they shall be put in exigent and outlawed. Provided, that at what time they come before they be outlawed, and will yield them to the king's prison to be justified by the law, and to receive that which the court shall award in this behalf, they shall be thereto received; the forfeiture of lands and goods abiding in their force, if they do not yield them within the said two months, as is aforesaid."

And by the other statute, viz. 16 Ric. 2, c. 5 (which

the pope called *execrabile statutum*, and the passing thereof *fœdum et turpe facinus*), it is enacted, that "if any shall purchase or pursue, or cause to be purchased or pursued, in the court of Rome *or elsewhere*, any translations of prelates, processes, sentences of excommunication, bulls, instruments, or any other things whatsoever which touch the king, against him, his crown and his regality, or his realm; and they which bring within the realm or them receive, or make thereof notification, or any other execution whatsoever within the said realm or without; they, their notaries, procurators, maintainers, abettors, fautors, and counsellors, shall be put out of the king's protection, and their lands and goods forfeited to the king, and they shall be attached by their bodies if they may be found, and brought before the king and his council, there to answer to the cases aforesaid, or process shall be made against them by *præmunire facias*, in manner as it is contained in other statutes of provisors; and other which do sue in any other court in derogation of the regality of our lord the king."

They are called *other courts* (Lord Coke says) either because they proceed by the rules of other laws, as by the canon or civil law; or by other trials than the common law warrants. For the trial warranted by the law of England for matters of fact, is by verdict of twelve men before the judges of the common law of matters pertaining to the common law, and not upon examination of witnesses in any court of equity. So as those *other courts* are either such as are governed by *other laws*, or such as draw the party to *another kind of trial* (*k*).

And where 16 Ric. 2, c. 5, says, "in the court of Rome *or elsewhere*" (although it may seem to be meant and conceived of the places of remove which the popes used in those days, being sometimes at Rome in Italy, sometimes at Avignon in France, sometimes in other places, as by the date of the bulls and other proceedings in that age may be seen): yet this expression, he says, includes also the ecclesiastical and other courts within this realm, for matters which belong to the cognizance of the common law; as where a bishop deprives an incumbent of a donative; or excommunicates a man for hunting in his parks; or where commissioners of sewers imprison a man for not releasing a judgment at law (*l*).

But it seems, that the suit in these courts for a matter

(*k*) 3 Inst. 120.

(*l*) 3 Inst. 120; Rid. 167; 1 Hawk. 51.

Opposed by the statutes of provisors.

which appears not by the libel itself, but only by the defendant's plea or other matter subsequent to be of temporal cognizance (as where a plaintiff libels for tithes, and the defendant pleads that they were severed from the nine parts, by which they become a lay fee), is not within the statute, because it appears not that either the plaintiff or the judge knew that they were severed (*m*).

Abolished in the reign of King Henry VIII.

Afterwards, by 24 Hen. 8, c. 12, it is recited: "Where by divers sundry old authentic histories and chronicles, it is manifestly declared and expressed that this realm of England is an empire, and so hath been accepted in the world, governed by one supreme head and king, having dignity and royal estate of the imperial crown of the same; unto whom a body politick compact of all sorts and degrees of people, divided in terms and by names of spiritualty and temporalty, been bounden and owen to bear, next to God, a natural and humble obedience; he being also institute and furnished, by the goodness and sufferance of Almighty God, with plenary, whole and intire power, pre-eminence, authority, prerogative, and jurisdiction, to render and yield justice and final determination, to all manner of folk resiants or subjects within this his realm, in all causes, matters, debates, and contentions happening to occur, insurge, or begin within the limits thereof, without restraint or provocation to any foreign princes or potentates of the world; the body spiritual whereof having power, when any cause of the law divine happened to come in question, or of spiritual learning, that it was declared, interpreted and shewed by that part of the said body politick, called the spiritualty, now being usually called the English Church, which always hath been reputed, and also found of that sort, that both for knowledge, integrity and sufficiency of number, it hath always been thought, and is also at this hour, sufficient and meet of itself, without the intermeddling of any exterior person or persons, to declare and determine all such doubts, and to administer all such offices and duties, as to their rooms spiritual doth appertain: for the due administration whereof, and to keep them from corruption and sinister affection, the king's most noble progenitors, and the antecessors of the nobles of this realm, have sufficiently endowed the said church, both with honour and possessions: and the laws temporal for trial of property of lands and goods, and for the conservation of the people of this realm in unity and peace, without rapine or spoil, were

(*m*) 1 Hawk. 52.

and yet are administered, adjudged, and executed by sundry judges and ministers of the other parts of the said body politick, called the temporalty; and both their authorities and jurisdictions do conjoin together in the due administration of justice, the one to help the other" (*n*).

"And certain it is," says Lord Coke, "that this kingdom hath been best governed, and peace and quiet preserved, when both parties, that is, when the justices of the temporal courts, and the ecclesiastical judges, have kept themselves within their proper jurisdiction, without encroaching or usurping one upon another; and where such encroachments or usurpations have been made, they have been the seeds of great trouble and inconvenience" (*o*).

Canon and civil law.

And in the preamble of the statute of 25 Hen. 8, c. 21, it is recited, that "this realm, recognizing no superior under God but only the king, hath been and is free from subjection to any man's laws, but only to such as have been devised, made, and obtained 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 amongst 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 accustomed and ancient laws of this realm, originally established as laws of the same, by the said sufferance, consents and custom, and none otherwise."

And according hereunto, Lord Hale says, that neither the canon nor the civil law have any obligations as laws within this realm, upon any account that the popes or emperors made those laws, canons, rescripts or determinations, or because Justinian compiled their body of the civil law, and by his edicts confirmed and published the same as authentical, or because this or that council or pope made those or these canons or decrees, or because Gratian or Gregory, or Boniface or Clement did (as much as in them lay) authenticate this or that body of canons or constitutions; for the king of England does not recognize any for authority as superior or equal to him in this kingdom, neither do any laws of the pope or emperor, as they are such, bind here: but all the strength that either the papal or imperial laws have obtained in

(*n*) See too *Caudrey's case*, 5 Co. 1.

(*o*) 4 Inst. 321. See *Middleton* v. *Crofts*, 3 Atkins, 649.

Canon and civil law.

this kingdom, is only because they have been received and admitted either by the consent of parliament, and so are part of the statute laws of the kingdom, or else by immemorial usage and custom in some particular cases and courts, and no otherwise; and therefore so far as such laws are received and allowed of here, so far they obtain and no farther; and the authority and force they have here is not founded on, or derived from themselves, for so they bind no more with us, than our laws bind in Rome or Italy. But their authority is founded merely on their being admitted and received by us, which alone gives them their authoritative essence and qualifies their obligation (*p*).

And hence it is, that even in those courts where the use of those laws is indulged, according to that reception which has been allowed: if they exceed the bounds of that reception by extending themselves to other matters than has been allowed to them, or if those courts proceed according to that law when it is controlled by the common law of the kingdom, the common law does and may prohibit them.

Sect. 2.—*Prohibition.*

First use of prohibitions.

The power of the temporal court to restrain the ecclesiastical court within the limits of its jurisdiction is of very ancient date in this country—the power is exercised by a writ of prohibition, two of which are noticed by Glanville, who wrote about the 31 Hen. 1; and the subject is fully treated by Bracton, who wrote about 52 Hen. 3. The clergy complained much of these writs, and exhibited their grievances, under the guidance of Archbishop Boniface, A.D. 1267, in the form of *articuli cleri*, and *articuli contra prohibitionem regis*.

Not grantable in cases merely spiritual. General principles on which it is grantable. 13 Edw. 1.

By the statute of *Circumspectè agatis*, 13 Edw. 1, the king to his judges sendeth greeting: Use yourselves circumspectly in all matters concerning the Bishop of Norwich and his clergy, not punishing them if they hold plea in Court Christian of such things as be mere spiritual, that is to wit, of penance enjoined by prelates for deadly sin, as fornication, adultery, and such like, for the which sometimes corporal penance, and sometimes pecuniary is enjoined, especially if a freeman be convict of such things: Also if prelates do punish for leaving the churchyard unclosed, or for that the church is uncovered, or not conve-

(*p*) Hale's Hist. of the Common L. 27.

niently decked: in which case none other penance can be enjoined but pecuniary: *Item*, if a parson demand of his parishioners oblations or tithes due and accustomed; or if any parson do sue against another parson for tithes greater or smaller, so that the fourth part of the value of the benefice be not demanded: *Item*, if a parson demand mortuaries (*q*), in places where a mortuary hath been used to be given: *Item*, if a prelate of a church, or a patron, demand of a parson a pension due to him; all such demands are to be made in a spiritual court. [And for laying violent hands on a clerk, and in cause of defamation, it hath been granted already, that it shall be tried in a spiritual court, when money is not demanded, but a thing done for punishment of sin] (*r*); and likewise for breaking an oath: In all cases afore rehearsed, the spiritual judge shall have power to take knowledge, notwithstanding the king's prohibition.

The Bishop of Norwich is here put only for example; but it extends to all the bishops within this realm (*s*); the said act having been on petition of the Bishop of Norwich; as, generally, acts of parliament in ancient times were founded on antecedent petitions.

This statute is in the form of a writ from the king to his justices.

This adjustment of the claims of spiritual and temporal jurisdiction continues to this day (*t*).

Consultation.

In the eighteenth year of the same king there was another statute upon the subject of ecclesiastical jurisdiction, called the Statute of the Writ of Consultation.

Consultation is a writ, whereby a cause being formerly removed by prohibition out of the ecclesiastical court, or Court Christian, to the king's court, is returned thither again. For if the judges of the king's court, comparing the libel with the suggestion of the party, find the suggestion false, or not proved, and therefore the cause to be wrongfully called from the Court Christian; then, upon this *consultation* or deliberation, they decree it to be returned again; whereupon the writ in this case obtained is called a *consultation* (*u*).

Stat. 18 Edw. 1.

Concerning which it is thus enacted by the statute:— "Whereas ecclesiastical judges have often surceased to

(*q*) *Johnson* v. *Oldham*, Ld. Raym. 609.

(*r*) The passage in brackets is now repealed.

(*s*) 2 Inst. 487.

(*t*) Though Archbishop Boniface seems to have suggested the evasion of the restraining part of it. See Lindw. p. 314; Lib. v. Tit. 15.

(*u*) Terms of the Law.

Stat. 18 Edw. 1.

proceed in causes moved before them, by force of the king's writ of prohibition, in cases where remedy could not be given to complainants in the king's court, by any writ out of chancery, because that such plaintiffs were deferred of their right and remedy in both courts, as well temporal as spiritual, to their great damage, like as the king hath been advertised by the grievous complaint of his subjects; our lord the king willeth and commandeth, that where ecclesiastical judges do surcease in the aforesaid cases, by the king's prohibition directed unto them, that the chancellor or the chief justice of our lord the king for the time being, upon sight of the libel of the same matter, at the instance of the plaintiff, (if they can see that the case cannot be redressed by any writ out of the chancery, but that the spiritual court ought to determine the matters,) shall write to the ecclesiastical judges before whom the cause was first moved that they proceed therein, notwithstanding the king's prohibition directed to them before" (*v*).

For what causes prohibition goes.

This prohibition may issue either in respect of the court, or in respect of the matter of the suit, or in respect of an obvious denial of justice in the conduct of a suit. But the fact that there is an appeal to the judicial committee of the privy council from all acts of the ecclesiastical court is borne in mind by the judges of the temporal courts when an application for a prohibition is made to them; though these courts prohibited the court of delegates (*x*), and claim a power—never yet, I believe, exercised—to prohibit the judicial committee (*y*).

When prohibition should not be granted.

Prohibition ought not to be granted where the temporal and the spiritual court have concurrent jurisdiction (*z*); nor where the spiritual court proceeds according to its own rules and canons in a matter triable before it (*a*). The

(*v*) See *Stroud* v. *Hoskins*, Cro. Car. 208; Vaugh. 323; Hob. 115, 194; 12 Co. 44; *Fuller's case*, Gibs. 1030; *Sibley* v. *Crawley*, Cro. Eliz. 736; *Brock* v. *Richardson*, 1 T. R. 428; *Dorwood* v. *Brikinden*, 2 Keble, 719; 2 Brownl. 26; *Tey* v. *Cox*, 2 Brownl. 35.

(*x*) *Rebow* v. *Bickerton*, 4 Inst. 341; Bunb. 61; *Brabin* v. *Tradiman*, 2 Roll. 24.

(*y*) *Reg.* v. *J. C. of P. C.*, 3 Nev. & Per. 15.

(*z*) The jurisdiction of the Ecclesiastical Court is now so much curtailed and limited, that cases of this description are not likely to occur. Some of the cases, afterwards cited on this subject, are referred to as illustrating the principles which govern the issue of a prohibition.

(*a*) *Nicholas* v. *Nicholas*, Prec. Chanc. 546; *Jolly* v. *Baines*, 12 Ad. & Ell. 201; Viner's Abr. "Prohibition;" Com. Dig. "Prohibition;" 2 Roll. Rep. 166; 2 Vern. 31; Cro. Eliz. 675.

proper remedy is appeal (*b*). Nor where several matters are before the ecclesiastical court, some triable some alleged not to be triable by it, and no intimation has been given as to the course which the court will pursue, and no question raised before it as to its jurisdiction over any particular matter (*c*).

The question whether a particular place is or is not a parish is a fact not triable by the ecclesiastical court (*d*).

Where a court has jurisdiction over a suit, mere irregularities in the proceedings in the suit do not afford any ground for a prohibition (*e*).

It is no ground for prohibiting a cause before the chancellor of the diocese in the consistorial court of the diocese, that the bishop of the diocese is interested in the cause (*f*).

Not for trying temporal incidents by the rules of the temporal law.

In case the principal matter belong to the cognizance of the spiritual court, all matters incidental (though otherwise of a temporal nature) are also cognizable there; and no prohibition will lie, provided they proceed in the trial of such temporal incident, according to the rules of the temporal law; but if otherwise, it lies even after the sentence, although the objection do not appear upon the face of the libel, but is collected from the whole of the proceedings (*g*). But it lies on the party applying for the writ to show the excess of jurisdiction (*h*).

Not for temporal consequential loss.

A temporal loss, ensuing upon a spiritual sentence, is not of itself cause of prohibition (*i*).

(*b*) But see *The Braintree Church Rate case* (*Burder* v. *Veley*), and C. J. Tindal's remarks as to power of appeal not preventing prohibition, 12 Ad. & Ell. 233; 4 Jur. 383; 10 L. J., N. S., Ex. 532.

(*c*) *Hallack* v. *Univ. of Cambridge*, 1 Ad & Ell., N. S. 593; *Reg.* v. *Twiss*, L. R., 4 Q. B. 407.

(*d*) *Duke of Rutland* v. *Bagshaw*, 14 Ad. & Ell., N. S. 869 (1850).

(*e*) *Ex parte Story*, 8 Ex. 195 (1852).

(*f*) *Ex parte Medwin and Hurst*, 1 Ell. & Bl. 609 (1853).

(*g*) *Gould* v. *Gapper*, 5 East, 345; this is an important case. *Shorter* v. *Friend*, 2 Salk. 547; Ld. Raym. 220.

(*h*) *Ex parte Mary Evans*, 7 Jur. 420 (1843).

(*i*) *Baker* v. *Rogers*, Cro. Eliz. 789; *Chamberlaine* v. *Hewson*, 3 Mod. 70; *Galizard* v. *Rigault*, 2 Salk. 552. But the following cases especially should be consulted on this important point: *Slater* v. *Smallbrooke*, 16 Car. 2, in B. R.; 1 Lev. 138; 1 Sid. 217; prosecution of a clergyman in the spiritual court for forged letters of orders to obtain a benefice—prohibition prayed and refused. *Townsend* v. *Thorpe*, 2 Ld. Raym. 507; 2 Stra. 776; *Newcombe* v. *Higgs*, Fitz. 189. But in truth the cases, and all the learning on the subject, are collected in *Free* v. *Burgoyne*; 9 D. & R. 14; 2 Bligh, N. S. 65; brought by writ of error to the House of Lords—note Mr. Campbell's argument, and the Lord Chancellor's judgment

Not for temporal consequential loss.

It was holden by the Arches Court, in the case of *Burder* v. *Hodgson*, that the court could entertain a suit against a clerk for the purpose of deprivation or suspension by reason of a public scandal existing against him, although the scandal originated from a charge which, if true, would constitute a criminal offence at common law, and although the suit was brought before any conviction at law.

A prohibition was applied for to the Queen's Bench and a rule nisi obtained; but the rule was afterwards discharged, the Lord Chief Justice giving it as the unanimous opinion of the court, that they were not satisfied that the offence charged could be made the subject of an indictment. The question whether, if the offence had been clearly indictable, the Ecclesiastical Court would still have had jurisdiction, was therefore not determined by the Queen's Bench (*j*).

A similar decision was given by the Privy Council, reversing a writ in the nature of a prohibition sent by the Royal Court of Jersey to the Ecclesiastical Court of that island (*k*).

On trial of custom, modus or prescription.

It has also been ruled, that if a man libel for two distinct things, the one of which is of ecclesiastical cognizance, and the other not, a prohibition shall be granted as to that which is of temporal cognizance, and the Court Christian shall proceed for the other (*l*).

In the case of *The Churchwardens* v. *The Rector of Market Bosworth*, in 10 Will. 3, "The churchwardens libel against the rector, that there hath been time out of mind, and is, a chapel of ease within the same parish; and that the rector of the said parish for time out of mind hath repaired and ought to repair the chancel of the said chapel; and that the chancel being out of repair, the defendant being rector hath not repaired it. The rector in the said court denied the custom. And a decree was made for the rector, that there was no such custom, and costs were taxed there for the said rector. The churchwardens moved for a prohibition; and it was argued for the prohibition that it ought to be granted, because it appears that the libel is upon a custom, which the defendant had denied; and it may be the question was in the spi-

(1828); Proceedings against the Bishop of Clogher in the Metropolitan Court of Armagh, Annual Register for 1822, p. 252.

(*j*) *Burder* v. *H.* or *Hodgson*, 3 Curt. Eccl. 822; 4 Notes of Cases, 483.

(*k*) *Dean of Jersey* v. *Rector of* ——, 3 Moo. P. C. 229.

(*l*) *Pense* v. *Prouse*, Ld. Raym. 59; *Free* v. *Burgoyne*, 6 B. & C. 538; *Carslatee* v. *Mapledoram*, 2 T. R. 473.

ritual court, custom or not, which is not triable there, but at the common law; and then this appearing upon the libel, that the court hath not jurisdiction, a prohibition may be granted after sentence. But all the court held the contrary. For by Holt, Chief Justice: The reason for which the spiritual court ought not to try customs is, because they have different notions of customs, as to the time which creates them, from those that the common law hath: For in some cases the usage of ten years, in some twenty, in some thirty years, make a custom in the spiritual court; whereas by the common law it must be for time immemorial. And therefore since there is so much difference between the laws, the common law will not permit that court to adjudge upon customs, by which in many cases the inheritances of persons may be bound. But in this case, that reason fails: for the spiritual court is so far from adjudging that there is any such custom which the common law allows, that they have adjudged that there hath not been any custom allowed by their law, which allows a less time than the common law to make a custom. And the plaintiffs having grounded their libel upon a custom which was well grounded if the custom had not been denied (for libels there may be upon customs), but the custom being denied and found no custom, it is not reason to prohibit the court in executing their sentence against the plaintiffs. For the design of a motion for a prohibition is only to excuse the plaintiffs from costs. And there is no reason but that they ought to pay them; since it appears, that they have vexed the defendant without cause. And therefore a prohibition was denied" (*m*).

Where a custom for a church rate was pleaded in the ecclesiastical court, and the plea admitted, it was ruled that it might proceed to try the custom; but if denied, a prohibition lies (*n*).

In *Jones* v. *Stone* (*o*), in 12 Will. 3, David Jones, the vicar of N., was libelled against in the spiritual court, for that by custom time out of mind, the vicars of N. had, by themselves or others, said and performed divine service in the chapel of Chawbury, for which there was such a recompense, and that he neglected. The defendant came for a prohibition, and without traversing this custom, suggested that all customs were triable at common law. And

(*m*) Ld. Raym. 435.

(*n*) *Dunn* v. *Coates*, 1 Atk. 288; 5 B. & C. 1; *Hallack* v. *Univ. of Cambridge*, 1 Ad. & Ell., N. S. 593, an important case.

(*o*) 2 Salk. 550. But see *Burdeaux* v. *Dr. Lancaster*, 1 Salk. 333; *French* v. *Trask*, 10 East, 348; and *Dolby* v. *Remington*, 9 Q. B. 179 (1848).

On trial of custom, modus or prescription.

it was urged, that it was enough for a prohibition, that a custom appeared to charge the vicar with a duty, for which he was not liable of common right. But by Holt, Chief Justice: A parson may be bound to an ecclesiastical duty by custom, and when he is bound by custom, the spiritual court may punish him if he neglects that duty; the custom might have a reasonable commencement by composition in the spiritual court, and begin by an ecclesiastical act; and a bare prescription only is not a sufficient ground for a prohibition, unless it concerns a layman; whereas here it is an ecclesiastical right, an ecclesiastical person, and an ecclesiastical duty, and the prescription not denied.

Whether statute takes away jurisdiction.

An act of parliament being in the affirmative does not abrogate or take away the jurisdiction ecclesiastical, unless words in the negative be added, as *and not otherwise*, or *in no other manner or form*, or to the like effect (*p*). And generally, where the suit is cognizable by the ecclesiastical court, it will be presumed by the temporal courts that they will administer the law correctly (*q*).

When grantable.

27 Geo. 3, c. 44, limiting the proceedings in the Ecclesiastical Courts for incontinence to eight months from the time of the offence committed, applies to laymen and clergymen; but where a clergyman was proceeded against for incontinence after this period had elapsed, a prohibition was awarded as to proceedings for reformation of manners, but a consultation granted for deprivation (*r*).

For misconstruction of act of parliament.

It has been held as settled law, since Lord Ellenborough's elaborate judgment in *Gould* v. *Gapper* (*s*), that the misconstruction of an act of parliament by the Ecclesiastical Courts in the decision of a case within their jurisdiction, is matter of prohibition, and not of appeal (*t*). It seems also to be established, that such prohibition will not be granted before the decision of the ecclesiastical judge has been actually given, as the temporal courts will not presume that it will be an erroneous construction of

(*p*) Gibs. 1028.

(*q*) *Griffin* v. *Ellis*, 3 Per. & D. 398. Prohibitions are not to be granted on the last day of the term. So is the rule set down in the books: to which Rolle adds, nor on the last day save one: and the reason of both is, that there would not be time for notice to be given to the other side. But it is added in Latch, that upon motion, on the last day of the term, there may be a rule to stay proceedings till the next term. Gibs. 1029.

(*r*) *Free* v. *Burgoyne*, 9 D. & R. 14; 2 Bligh, N. S. 65.

(*s*) 3 East, 472; 5 East, 345. This case contains a reference to all the preceding cases on this subject.

(*t*) Though it may also be matter of appeal; *Denison* v. *Ditcher*, 11 Moo. P. C. 324.

the statute; nor will they presume that it will exceed its jurisdiction (*u*).

Where a party cited as resident within the ecclesiastical jurisdiction had appeared and pleaded without objection, he was not allowed afterwards to put the fact in issue, nor in such a case was an intervener allowed to raise an objection on this ground to the jurisdiction (*x*).

When prohibition will be immediately granted.

But if it appear *on the face of the proceedings* in the Ecclesiastical Court, that they are about to exceed their jurisdiction, and try matters which are triable only at common law, the court of common law will grant immediate prohibition, and not wait till the parties have incurred the expense of further proceedings (*y*).

Where statutes create the jurisdiction of the Ecclesiastical Court.

Where the power of the Ecclesiastical Court is derived from a statute, the exercise of it is strictly limited. Thus as to the requisition by 21 Hen. 8, c. 5, s. 2, that the executor shall "make a true and perfect inventory, and deliver it into the keeping of the ordinary;" it was ruled that the bishop's office was merely ministerial, and that he could not hear objections to the inventory, for had the statute meant to invest him with larger power, it would have said so in direct words (*z*).

On a refusal of a copy of the libel.

In a case in 2 Anne, Holt, Chief Justice, said that it was formerly holden by all the judges of England, that when there was a proceeding *ex officio* in the Ecclesiastical Court, they were not bound to give the party a copy of the articles; but the law is otherwise, for in such cases, if they refuse to give a copy of the articles, a prohibition shall go until they deliver it; and accordingly upon motion, a prohibition was granted in the like case by Holt, Chief Justice, and the court (*a*).

Such a prohibition is usually called a prohibition *quousque*, as distinguished from an absolute prohibition to proceed at all in the matter (*b*).

On a collateral surmise.

Prohibition may be granted upon a collateral surmise; that is, upon a surmise of some fact or matter not appearing in the libel. It was heretofore a petition of the clergy to the king in parliament, that no prohibition might be

(*u*) *Blackett* v. *Blizzard*, 9 B. & C. 851; compare with *Hall* v. *Maule*, 7 Ad. & Ell. 721; 3 Nev. & Per. 459; *Ex parte Law*, 2 Ad. & Ell. 45; but see also the case of *Blunt* v. *Harwood*, 3 Nev. & Per. 577.

(*x*) *Chichester* v. *Donegal*, 6 Madd. 375.

(*y*) *Byerley* v. *Windus*, per Bailey, J., 5 B. & C. 21; *French* v. *Trask*, 10 East, 350.

(*z*) *Griffiths* v. *Antony*, 5 Ad. & Ell. 623.

(*a*) *Anon.*, Ld. Raym. 442; *Anon.*, 6 Mod. 308.

(*b*) 10 East, 350.

On a collateral surmise.

granted, without first showing the libel; and it was a complaint of Archbishop Bancroft, in the time of King James the First, that prohibitions were granted without sight of the libel, which (as it was there said) is the only rule and direction for the due granting of a prohibition; because upon diligent consideration thereof it will easily appear, whether the cause belong to the temporal or ecclesiastical cognizance; as, on the other side, without sight of the libel, the prohibition must needs range and rove with strange and foreign suggestions, at the will and pleasure of the deviser, nothing pertinent to the matter in demand. To this charge of granting prohibitions without sight of the libel, the judges in their answer say nothing; but as to granting them upon suggestion of matters not contained in the libel, their words are these:—"Though in the libel there appear no matter to grant a prohibition, yet upon a collateral surmise the prohibition is to be granted; as, where one is sued in the spiritual court for tithes of *sylva cædua*, the party may suggest, that they were gross or great trees, and have a prohibition, yet no such matter appeareth in the libel; so if one be sued there for violent hands laid on a minister by an officer, as a constable, he may suggest that the plaintiff made an affray upon another, and he to preserve the peace laid hands on him, and so have a prohibition: and so in very many other like cases; and yet upon the libel no matter appeareth why a prohibition should be granted" (*c*).

Before application for prohibition question must be raised in spiritual court.

The suggestion must have been moved and rejected in the spiritual court, before it can be admitted in the temporal court. In *The Bishop of Winchester's case* (*d*) it was holden, that in a suit for tithes in the spiritual court a man may have a prohibition, suggesting a prescription or modus, before or without pleading; but this seems not to be law. For in the 12 Will. 3, a prohibition was moved for, suggesting a custom. But it was denied by Holt, Chief Justice, and the court, unless they pleaded it below, because perhaps they might admit the plea. Also in the 10 Will. 3, it was said, by Holt, Chief Justice, that if a modus be pleaded in the spiritual court, and admitted, no prohibition shall go: but if the question be, whether a modus or no modus, a prohibition shall go; and so is the law, viz. wherever the matter which you suggest for a prohibition is foreign to the libel, you must plead it below

(*c*) Gibs. 1027; *vide* 2 Inst. 607; *Blackett* v. *Blizzard*, 9 B. & C. 851: compare with *Hall* v. *Maule*, 7 Ad. & Ell. 721.

(*d*) 2 Co. 45.

before you can have a prohibition; otherwise, where the cause of prohibition appears on the face of the libel (*e*).

Affidavit to be made of the suggestion.

In *Burdett* v. *Newell* (*f*), in 4 Anne, a rule was made to show cause why a prohibition should not be granted to stay a suit against the plaintiff in the court of the archdeacon of Lichfield for not going to his parish church nor any other church on Sundays or holidays, nor receiving the sacrament thrice a year, upon suggestion of the statute of Elizabeth and the Toleration Act, and then qualifying himself within that act, and alleging that he pleaded it below, and that they refused to receive his plea. It was showed for cause, that this fact was false, and the plaintiff was not a dissenter, nor had qualified himself as above, and therefore it was moved, that the court will not allow the rule to stand, unless they had an affidavit of the fact; for by that means any person might come and suggest a false fact, and oust the spiritual court of their jurisdiction. Which was agreed to by the court, and therefore the rule was discharged.

And, by Holt, Chief Justice, the distinction is this:— Where the matter suggested appears upon the face of the libel, we never insist upon an affidavit; but, unless it appear upon the face of the libel, or if you move for a prohibition as to more than appears on the face of the libel to be out of their jurisdiction, you ought to have affidavit of the truth of the suggestion (*g*). Where it is necessary to suggest a particular fact to the court, as a custom, it must be verified by affidavit (*h*).

Strict proof of the suggestion not necessary.

It is said, the suggestion need not be precisely proved in order to obtain a prohibition. For where the suggestion was for a modus for lamb and wool, though the proof failed as to the wool, and it was urged that therefore they had failed in the whole, yet a prohibition was granted. And in the case of *Austen* v. *Pigot*, it was said, that the proof in a prohibition need not be so precise, but if it appears that the Court Christian ought not to hold plea thereof, it suffices (*i*). For the court will refuse a consultation if any modus be found, though different from that laid; but, at the same time, if the modus be not proved as laid by the plaintiff in prohibition, there must be a verdict for the defendant, who is entitled to costs (*k*).

But if the suggestion appears to the court to be noto-

(*e*) *Jones* v. *Stone*, 2 Salk. 550; *Anon.*, ibid. 551: *vide supra*, p. 1443.

(*f*) Ld. Raym. 1211; see also *Johnson* v. *Oldham*, ibid. 609.

(*g*) 2 Salk. 549.

(*h*) *Caton* v. *Burton*, Cowp. 330.

(*i*) Gibs. 1029; Cro. Eliz. 736.

(*k*) *Brock* v. *Richardson*, 1 T. R. 427.

riously false, they will not grant a prohibition; for, by Holt, Chief Justice, they ought to examine into the truth of the suggestion, and see what foundation it has (*l*).

Suggestion traversable.

Lord Coke says, the suggestion for a prohibition may be traversed in the temporal court (*m*).

And Dr. Watson says, if the suggestion for a prohibition contains no other matter upon which a prohibition ought to be granted to the spiritual court besides the refusal of a plea there, which by the common law is a good plea and ought to have been allowed, in such case the refusal is traversable. Therefore supposing that a *modus decimandi*, or a prescription of a manner of tithing, is triable in the spiritual court; if in a suit there for a *modus decimandi* another modus be pleaded, or that there is no such modus, and that plea is refused; or if in a suit for tithes of lands not tithe free, a prescription is pleaded as to the manner of tithing, and that plea is refused; and a prohibition is moved for upon suggestion of such refusal, the refusal being the principal matter of the suggestion, is therefore traversable (*n*).

May be after sentence.

In the case of *Gardner* v. *Booth* (*o*), in 10 Will. 3, it was holden, that where it appears in the libel, or by the proceedings in the cause, that the cognizance of the cause does not belong to the spiritual court, a prohibition may be moved for and granted after sentence; and this holds in all cases but where one is sued out of his diocese, for there, if he does not take advantage of it before sentence, he shall not have a prohibition after sentence; and the reason is, for that the cause belongs to the spiritual court, and though it does not belong to that spiritual court, it belongs to some other, and not to the king's temporal court.

So in the case of *Parker* v. *Clarke*, in 3 Anne (*p*), the clerk of a parish libelled against the churchwardens, for so much money due to him by custom every year, and to be levied by them on the respective inhabitants in the said parish; and after sentence in the spiritual court, the defendants suggested for a prohibition, that there was no such custom as the plaintiff had set forth in his libel. It was objected against granting the prohibition, that it was now too late, because it was after sentence, especially since the custom was not denied: for if it had, and that court

(*l*) *Smith* v. *Wallett*, Ld. Raym. 587. It was holden in this case that a spiritual court cannot try the existence of a vicarage.

(*m*) 2 Inst. 611.

(*n*) Wats. c. 57, *in fine*. See also *Peters* v. *Prideaux*, 3 Keb. 332.

(*o*) 2 Salk. 548.

(*p*) 6 Mod. 252; 3 Salk. 87.

had proceeded, then, and not before, it had been proper to move for a prohibition. But by Holt, Chief Justice:— It is never too late to move the King's Bench for a prohibition where the spiritual court has no original jurisdiction, as they had not in this case, because the clerk of a parish is neither a spiritual person, nor is this duty in demand spiritual, for it is founded on a custom, and by consequence triable at law; and therefore the clerk may have an action on the case against the churchwardens for neglecting to make a rate, and to levy it, or if it had been levied, and not paid by them to the plaintiff.

General rule as to granting prohibition after sentence.

It is a general rule that a prohibition cannot be had after sentence, unless the want of jurisdiction in the court below appears on the face of the proceedings in it (*q*). But if it appear on the face of the proceedings that the court has exceeded its jurisdiction, a prohibition will be granted even after sentence. Thus, the consistorial court of the Bishop of Norwich having ordered certain churchwardens to deliver in their accounts, but having afterwards examined the accounts and struck a balance, which, they refusing to pay, the judge pronounced them contumacious and excommunicated them, the Court of King's Bench being moved for a prohibition, granted it; for the ecclesiastical court may compel churchwardens to deliver in their accounts, but cannot proceed to examine the different articles (*r*). And where the plaintiff in prohibition properly pleaded a modus to a suit for tithes in the ecclesiastical court of the dean of the cathedral church of Sarum; but the judge of the court by an interlocutory sentence decreed him to answer more fully, from which sentence he appealed, and his appeal was dismissed with costs; the Court of King's Bench granted a prohibition to both courts, in order to stay execution for the costs, for the sentence was not *final;* and it also appeared on the face of the proceedings that the jurisdiction of the ecclesiastical court ceased when the modus was pleaded, and could not re-commence till there was a verdict for the defendant, and a consultation awarded (*s*). But the rule above mentioned is applicable to those cases only where prohibitions are granted for want of original jurisdiction in the courts below, and not to those cases where they may be had if duly applied for, on account of defect of trial. For where a matter collateral and incidental to a suit

When grantable after sentence, when spiritual court incidentally determines any matter of common law.

(*q*) *Argyle* v. *Hunt*, Stra. 187; *Blaquiere* v. *Hawkins*, Doug. 378; *Ladbroke* v. *Cricket*, 2 T. R. 649.

(*r*) *Leman* v. *Goulty*, 3 T. R. 3.

(*s*) *Darley* v. *Cosens*, 1 T. R. 552.

Prohibition when grantable after sentence.

arises, which is properly triable at common law as a modus, though the courts of common law would have granted a prohibition before sentence on account of the defect of trial in the ecclesiastical court, they will not grant it after sentence if the defendant there pleaded the modus, and submitted to the trial of it, for by so doing he has waived the benefit of a trial at common law (*t*); and to oust the ecclesiastical court of its jurisdiction it is not enough that a custom or prescription be stated, except it be denied by the other side and the court are proceeding to try it: for it may be immaterial to the question (*u*).

A declaration in prohibition set out a libel in a cause of defamation and slander in the Consistory Court of St. David's, at Carmarthen, and stated that the defendant below charged the plaintiff below with intoxication and indecency: it was ruled upon demurrer to the declaration that there was ground for the writ of prohibition, as it sufficiently appeared, though after sentence, that the words of the libel imputed, and the sentence had partly proceeded upon, a charge of assault, which was only cognizable in the temporal court.

Quære, Whether where words are actionable there may not, in some cases, be a concurrent jurisdiction in the spiritual and temporal court.

But, *semble*, at all events, to give jurisdiction in such case to the spiritual court, the words must be spoken of an ecclesiastical person and relate to an ecclesiastical matter (*x*).

In *Gould* v. *Gapper* (*y*), in 44 Geo. 3, which has been already referred to, the defendant instituted a suit in the archidiaconal court of Wells, for tithes which he claimed as rector of High Ham, and the court decided in favour of his claim. The plaintiff applied for a prohibition on the ground of a misconstruction of an act of parliament, and the Court of King's Bench held, that where the spiritual court *incidentally* determines any matter of common law cognizance, such as the construction of an act of parliament, otherwise than the common law requires, prohibition lies *after* sentence, although the objection do not appear on the *face of the libel*, but is collected from the whole of the proceedings below. This case was cited by the counsel for both parties in the case of *Regina* v. *The Archbishop*

(*t*) *Full* v. *Hutchins*, Cowp. 442.

(*u*) *Dutens* v. *Robson*, 1 H. Bla. 100.

(*x*) *Evans* v. *Gwyn*, 13 L. J. (N. S.) Q. B. 222; 5 Q. B. 844.

(*y*) 3 East, 472; 5 East, 345.

of York (*z*), as the leading case on the question of prohibitions after sentence.

In *Hart* v. *Marsh*, Mr. Justice Patteson said, "It is laid down by several authorities and not denied now, that after sentence, unless the want of jurisdiction be manifest, this court will not interfere (*a*).

In *Ricketts* v. *Bodenham* (*b*), it would seem that the Consistorial Courts, the Court of Arches and Delegates, are superior courts; and after sentence, unless defect of jurisdiction be apparent on the face of the proceedings, it will not be intended.

Dean of York's case.

In *Regina* v. *Archbishop of York*, prohibition was granted after sentence. The court observed, "It had been argued that the sentence was final, and that there was nothing now remaining which this court could prohibit from being done, and that there was not even a continuing court to which our writ could be addressed. These arguments, for obvious reasons, require to be narrowly watched, for they would give effect to unlawful proceedings merely because they were brought to a conclusion. But to the present case they are inapplicable, for on looking to the sentence we find that it admonishes the party not to exercise the functions of dean on pain of the greater excommunication (and we find, too, that the court was adjourned only when this motion was made), the inflicting of which pain would be the mode of enforcing the sentence, and this we may prohibit. We may also require a revocation of that sentence, according to the several forms, and it is plain that the dean could not apply before sentence, for the sentence of deprivation is the only thing done which is beyond the jurisdiction of the archbishop. Up to that point, his grace unquestionably had power to inquire with a view to ulterior proceedings, and it seems that the lord chancellor discharged an application for a prohibition that had been made to him before sentence upon that very ground" (*c*).

Plaintiff may have a prohibition.

The plaintiff as well as defendant, in the spiritual court, may have a prohibition to stay his own suit. To this purpose when Archbishop Bancroft alleged that the plaintiff's having made choice thereof, and brought his adversary there into trial, should by all intendment of law and reason, and by the usage of all other judicial places, thereby con-

(*z*) See below.

(*a*) 5 Ad. & Ell. 602; 5 Dowl. P. C. 424; and 1 Nev. & Per. 424.

(*b*) 4 Ad. & Ell 433.

(*c*) 2 G. & D. 202; 2 Q. B. 2; 6 Jur. 412: see *Burder* v. *Veley*, 12 Ad. & Ell. 233; 4 Jur. 383; 10 L. J. (N. S.) Ex. 532.

Plaintiff may have a prohibition.

clude himself in that behalf; yet the answer of the judges was, that none may pursue in the Ecclesiastical Court, for that which the king's court ought to hold plea of; but upon information thereof given to the king's courts, either by the plaintiff or by any mere stranger, they are to be prohibited, because they deal in that which appertains not to their own jurisdiction (*c*). And in the case of *Worts* v. *Clyston*, in 12 Jac. 1, the same thing was declared and adjudged in the Court of King's Bench (*d*).

In *Paxton* v. *Knight* (*e*), in 30 Geo. 2, the question was whether a prohibition should be granted to stay proceedings in an ecclesiastical court, in a suit by a Quaker, for a seat in a church, founding his title upon a prescriptive right. In which suit the Ecclesiastical Court had determined against him. And now he came, after sentence below, for prohibition. (Note, an immemorial prescription was alleged on both sides.) On showing cause against the prohibition, it was urged, that the court will not, after sentence, grant a prohibition, unless the defect of jurisdiction appears upon the face of the libel. And the case of Market Bosworth was insisted on, where the spiritual court had adjudged against the custom set up; though their law allows a less time than the common law to make a custom: but the prohibition was denied. So here, if the spiritual court will admit less evidence of a prescription than the temporal courts will, and the prescription is nevertheless found to be groundless, it is certain that the party who sets it up can have no reason to come for a prohibition after sentence: and his only reason for it can be (as the court observed in the aforesaid cause) to get clear of those costs, which he has by his own vexatious suit rendered himself liable to, and which (as was there adjudged) he ought to pay. But the court seemed to think, that if the sentence of the ecclesiastical court was a nullity, their award of costs must be so too. And here are reciprocal prescriptions alleged. And the prescriptive right of the one is determined *for*, though that of the other is determined *against*. They have adjudged the adverse prescription to be a good one, which they could not try, and which they will establish upon less evidence than the common law requires. And Lord Mansfield said, that though he was very sorry that the court were obliged to grant the prohibition (because the party applied for it only to get rid of paying the costs occasioned by his own vexa-

(*c*) 2 Inst. 607.
(*d*) Gibs. 1027; Cro. Jac. 350.
(*e*) Burr. 314.

tious suit), yet he thought they could not avoid doing it. And the rule for a prohibition was made absolute.

Declaration in prohibition.

But a declaration in prohibition will always be directed on the application of the party against whom the *prohibition is brought* (*f*).

Party dying.

If the defendant in a prohibition die, his executors may proceed in the spiritual court, and the judges of that court out of which the prohibition was granted, will also in such case make a rule to the spiritual court to proceed; but the plaintiff may, if he pleases, have a new prohibition against the executors (*g*).

Costs.

A prohibition takes off the costs assessed upon an appeal, where the cause is returned to the inferior court. This was adjudged in 7 Car. 1, in the case of *Crompton* v. *Waterford*, where an appeal had been to the Delegates, who overruled it, and assessed costs for the wrong appeal: And the court agreed with Richardson, that because a prohibition stays all proceedings, the costs were taken away; and added, that if the party was excommunicate he should be absolved (*h*).

In a case in the Consistorial Court of Rochester, an application was made that the costs incurred by fruitless attempts to obtain a prohibition might be included in the costs of proceedings for a church rate in the Ecclesiastical Court, and be paid before the person in contempt was discharged. The judge (*i*) refused the application. (Nov. 1840.)

The procedure in prohibitions is now regulated by 1 Will. 4, c. 21. Some provisions as to the costs of suits in prohibition are also contained in 8 & 9 Will. 3, c. 11, s. 3. The common law courts are empowered by these acts to award costs to the successful applicant for a prohibition (*k*).

SECT. 3.—*Mandamus.*

Object of.

As a writ of *prohibition* will issue to prevent the Ecclesiastical Court from over-stepping its bounds, so a writ

(*f*) *Remington* v. *Dolby*, 9 Q. B. 176; 14 L. J. (N. S.) Q. B. 5.

(*g*) Wats. c. 55.

(*h*) Hetl. 167; Litt. 365; Gibs. 1029.

(*i*) Dr. Lushington.

(*k*) See *Free* v. *Burgoyne*, 2 Bligh, N. S. 65. For a summary of the mode of proceeding to obtain a prohibition, see 3 Stephen's Commentaries (ed. 1858), pp. 704—706.

of *mandamus* will issue commanding them to do justice whenever the same is refused or unreasonably delayed (*l*).

Statutes.

The statutes regulating the procedure on prerogative writs of *mandamus* are, 9 Anne, c. 20; 1 Will. 4, c. 21; and 6 & 7 Vict. c. 67.

When granted.

A *mandamus* has been granted to the archbishop, upon an appeal to him, under sect. 98 of 1 & 2 Vict. c. 106, against the revocation, by the bishop, of a curate's licence, to compel the archbishop to inquire into and hear the appeal, and decide the merits thereof (*m*).

(*l*) For an account of this writ, see 3 Stephen's Commentaries (ed. 1858), pp. 697—702.

(*m*) *Reg.* v. *Archbishop of Canterbury*. 28 L. J., Q. B. 154; 7 W. R. 212. Other instances of mandamuses to ecclesiastical judges are, *Reg.* v. *Abp. of Canterbury*, 6 El. & Bl. 546; 2 Jur., N. S. 835; *Reg.* v. *Dodson*, 7 El. & Bl. 315; 3 Jur., N. S. 439.

PART V.

PROPERTY OF THE CHURCH.

CHAPTER I.

INTRODUCTORY.

Jural persons.

JURAL persons, as distinguished from natural persons, are a fiction of law (*a*).

Jural persons are divided into two great classes:—

Corporations.

Endowed or Charitable Institutions.

The substratum of the former is a union of *persons*,—of the latter, the existence of *property*. The former is governed by the will of all the members or of a certain number of them,—the latter by the will of the endower or founder. It may be difficult to distinguish between a corporation and a charitable institution; and what is originally a charitable institution may become a corporation. Another division of this subject is into secular and religious jural persons. This is to be ascertained by the end which the institution has in view, namely, either a secular or an exclusively religious end (*b*).

Beginning of church property.

The first beginning of church property arose from the bag into which contributions were placed, and from which our Lord and His apostles supplied their earthly needs.

After the Ascension of our Lord, the faithful had their goods in common. The church—*ecclesia*—of Jerusalem might be considered the jural person in whom these small beginnings of property were vested. But when the apostles, in the execution of their office, planted the church in various and distant places of the earth, the local unity of church property at Jerusalem was necessarily at an end.

(*a*) Das Eigenthum am Kirchenvermögen, Heinrich von Poschinger, München, 1871.

(*b*) Extrav. John XXII. l. 14, c. 1, 4, 5.

Beginning of church property.

Their successors, the bishops, collected the contributions of the faithful, in the first instance at least, for separate dioceses. The religious societies of Christians, it must be remembered, did not before the time of Constantine constitute a "*collegium licitum*," though particular societies or churches were said "*religionis causâ coire*," and if dissolved by a legal order might have liberty to divide their common stock, "*pecunias communes*." This was, however, the "*jus singulorum*," and not "*universæ ecclesiæ*."

Individual congregations appear to have had their own religious places of worship, "*conventiculæ*," and their own burying places, "*cœmeteria*." To a certain extent, therefore, and for short periods, the churches may be said to have been more than tolerated, almost legalized, even before the time of Constantine.

This was the state of the law and the practice at the beginning of the fourth century. The persecution of Diocletian (A.D. 303) was accompanied by a confiscation of church property, but this ceased A.D. 305, and shortly afterwards the property of the church was distinctly placed under the protection of the law.

The era of Constantine.

The edicts of restitution by Constantine and Licinius, and the edicts of toleration, allowed the Christians to rebuild their churches, and repossess their sites and dwellings, which had been confiscated (*c*), *ad jus fisci devoluta.*

The recognition of the Christian church by the state; the restitution of her property by the *fiscus;* the immunity of her priests from secular burdens; her special privilege (*d*) of being the subject of testamentary bequests, combined with the perfect peace which had succeeded to the terrible storms, concurred to cause the rapid increase of her property.

Between the reigns of these emperors and that of Justinian some restraints were placed and afterwards removed on the capacity of the church to be the legatee of bequeathed property; but before the reign of Justinian the capacity of the church to represent a jural person, a particular saint, prophet or angel, to whom property had been *nominatim* bequeathed, was recognized. But by the legislation of Justinian (in A.D. 530) all doubt on the subject was removed (*e*).

(*c*) Lactantius de morte pers., c. 34, c. 48; Euseb. H. Eccl. (x. 10, x. 5), cited by Poschinger, pp. 30, 31.

(*d*) "Collegium si nullo speciali privilegio subnixum est, hereditatem capere non potest." L. 8, C. Just. de instit. et substit. ii. 24.

(*e*) "Quoniam in plerisque

From this period it has been the practice of all Christian states to allow, under certain restrictions, the church to acquire property. But the state has maintained, especially in modern times, her right and duty, after a certain lapse of time, to control, vary, and perhaps apply to other purposes.

Modern practice.

The landed property of the clergy in England may be said to consist of the estates attached to the sees of bishops; the estates of deans and chapters; the separate estates of single prebendaries and other church dignitaries; the estates of minor cathedral corporations, of archdeacons; and, lastly, the glebe lands or estates of the parochial

Estates of the various classes of the clergy.

nuper testamentis invenimus hujusmodi institutiones, quibus ex asse quis scripserat Dominum nostrum Jesum Christum heredem, non adjiciens oratorium aut templum ullum, aut ipsum Dominum Jesum Christum ex semisse, vel aliis inæqualibus partibus, alium vero quempiam ex dimidia, vel alia portione (jam enim in complura hujusmodi testamenta incidimus), cum videremus multam exinde incertitudinem secundum veteres leges exoriri. Nos hoc etiam emendantes sancimus; si quidem Dominum nostrum Jesum Christum scripsit quis heredem vel ex asse, vel pro parte, manifeste videri ipsius civitatis, vel castelli, vel agri, in quo constitutus erat defunctus, ecclesiam sanctissimam institutam esse heredem, et hereditatem peti debere per Deo amantissimos ejus œconomos ex asse, vel pro parte, ex qua heres institutus est: eodem obtinente, et si legatum vel fideicommissum relictum sit: ut ipsa competant sanctissimis ecclesiis ad hoc quidem, ut ad pauperem alimoniam conferant. § 1. Si vero unius ex Archangelis meminerit, vel venerandorum martyrium, nulla facta ædis mentione (quod quidem etiam novimus à quodam factum, qui ex illustribus erat, et in omni verborum et legum doctrina spectatissimus): si quidem aliquis sit in illa civitate, vel vicinia ejus, venerabilis locus in honorem illius reverendissimi Archangeli vel martyris constructus, videri ipsum scriptum esse heredem: si vero nullus talis locus est in illa civitate viciniave ejus, tunc venerabilia loca, quæ in metropoli ejus sunt, videri instituta: et si quidem in ipsa metropoli inventus fuerit talis aliquis locus, illi proculdubio videri relictam, vel hereditatem, vel legatum, vel fideicommissum: si vero illic nullus talis locus apparet, denuo ecclesias quæ in illo loco sunt, capere id debere. Sane sanctissimis ecclesiis omnes aliæ domus cedunt; nisi constet, defunctum aliud nomen sensisse et voluisse adjicere, et aliud dixisse: nam tale quid accidisse et nos scimus in cujusdam Pontici testamento, et tunc etiam constitutum fuisse, ut contra scriptum veritas obtineret. § 2. Si autem testator certum locum non apposuerit, multa autem templa ejusdem tituli aut nominis in illa civitate inventa fuerint, vel ejus vicinia: siquidem in aliquo illorum defunctus frequenter versabatur, et majorem erga illud habebat affectionem, illi templo videri legatum relictum: si vero nihil tale invenietur, maxime ei templo ex multis ejusdem nominis videatur relictum legatum, vel hereditas, quod est cæteris indigentius, et magis opis et eleemosynæ egens." — Cod. Lib. i. Tit. ii. l. 26.

clergy. Tithes, which by our law are to be treated as a kind of landed property, may also be holden by any of the ecclesiastical persons above mentioned.

The ecclesiastical commissioners.

Many of these estates, especially those of the bishops and most deans and chapters, are now under the management of the Ecclesiastical Commissioners, who deal with them in accordance with divers statutory powers and restrictions conferred or imposed upon them. Such of these as relate to the actual working and leasing of the lands will be mentioned later in this Part, and the others will be found arranged under the chapter on The Ecclesiastical Commissioners.

Terriers.

By Can. 87 of 1603, "The archbishops and all bishops within their several dioceses shall procure (as much as in them lieth) that a true note and terrier of all the glebes, lands, meadows, gardens, orchards, houses, stocks, implements, tenements, and portions of tithes lying out of their parishes, which belong to any parsonage, vicarage, or rural prebend, be taken by the view of honest men in every parish, by the appointment of the bishop, whereof the minister to be one; and to be laid up in the bishop's registry, there to be for a perpetual memory thereof."

It may be convenient also to have a copy of the same exemplified, to be kept in the church chest (*f*).

These terriers are of greater authority in the ecclesiastical courts than they are in the temporal; for the ecclesiastical courts are not allowed to be courts of record: and yet even in the temporal courts these terriers are of some weight, when duly attested by the register (*g*).

Especially if they be signed, not only by the parson and churchwardens, but also by the substantial inhabitants; but if they be signed by the parson only, they can be no evidence for him; so neither (as it seemeth) if they be signed only by the parson and churchwardens, if the churchwardens are of his nomination. But in all cases they are certainly strong evidence against the parson (*h*).

Terriers, though signed by the churchwardens only, are admissible as evidence, and they are also admissible against the rector, though signed by none claiming under or acting for him (*i*).

Terriers alone are not sufficient to prove a *modus* (*k*).

(*f*) God. Append. 12.

(*g*) Johns. 242.

(*h*) Theory of Evidence, 45; *Miller* v. *Foster*, 1 Anstr. 387. See also *Atkyns* v. *Hatton*, ib.

(*i*) *Illingworth* v. *Leigh*, 4 Gwill. 1615.

(*k*) 1 Jac. & W. 20. A complete form of terrier is given in Philimore's edition of Burn's Ecclesiastical Law, vol. iii.

CHAPTER II.

RESIDENCE HOUSES.

SECT. 1.—*Of the Parochial Clergy.*
2.—*Of Bishops, Deans and Canons.*

EVERY church of common right is entitled to house and glebe. And the assigning of these at the first was of such absolute necessity that without them no church could be regularly consecrated (*a*).

Every church to have house and glebe.

The house and glebe are both comprehended under the word *manse,* of which the rule of the canon law is, *sancitum est ut unicuique ecclesiæ unus mansus integer absque ullo servitio tribuatur* (*b*).

This house must be kept in good order and repair by the occupant, that is, the incumbent of the benefice; and if he allow it or the other buildings of the benefice to fall into ruin or to incur *dilapidations,* as it is called, he can be punished for so doing in the ecclesiastical courts, and compelled by an action at common law to make good to his successor in the benefice the damages which have arisen from his neglect. He can also be compelled to restore or repair the buildings of his benefice while his incumbency still subsists.

Repair of house.

Of late years several statutes have been passed for the purpose of providing residence houses or of enlarging them, or of exchanging the old ones for new and better ones, not only in the cases of the parochial clergy, but also in those of members of cathedral and collegiate churches, and of bishops and archbishops.

Acts for providing residence houses.

SECT. 1.—*Of the Parochial Clergy.*

The acts relating strictly to the building of residence houses for the parochial clergy are as follows:—

(1.) 17 Geo. 3, c. 53 (*c*). (2.) 1 & 2 Vict. c. 23 (*d*).

(*a*) Gibs. 661.

(*b*) Spelm. in verb. x. 3, 39, 1; Lind. 254.

(*c*) Some clauses of 21 Geo. 3, c. 66, as to the form of some instruments to be framed under 17 Geo. 3, c. 53, also remain in the statute book.

(*d*) Both these acts, with 1 & 2 Vict. c. 29, passed to supply a

These statutes relate chiefly to the *power of the incumbent* to raise money by mortgage for building or repairing the residence house on his living; though 17 Geo. 3, c. 53, also empowers the ordinary, in certain circumstances, to compel an incumbent to avail himself of the provisions of this act. (3.) But the next enactment, 1 & 2 Vict. c. 106, not only empowers, but *requires the bishop* to enforce its provisions. Indeed, throughout this statute the single authority of the bishop is substituted for that of the ordinary, patron and incumbent in the former acts. (4.) 28 & 29 Vict. c. 69.

Consent of ecclesiastical commissioners, when required.

By 5 & 6 Vict. c. 26, s. 13, no incumbent whose living has been augmented by the ecclesiastical commissioners under 3 & 4 Vict. c. 113, may raise money by mortgage of his benefice, without the consent of the commissioners.

Building by mortgage under 17 Geo. 3, c. 53.

As to building by mortgage, under 17 Geo. 3, c. 53:—"Whereas many of the parochial clergy, for want of proper habitations, are induced to reside at a distance from their benefices, by which means the parishioners lose the advantage of their instruction and hospitality, which were great objects in the original distribution of tithes and glebes for the endowment of churches:" it is enacted as follows:—sect. 1. "Whenever the parson, vicar, or other incumbent, of any ecclesiastical living, parochial benefice, chapelry, or perpetual curacy, being under the jurisdiction of the bishop or other ecclesiastical ordinary, whereon there is no house of habitation, or such house is become so ruinous and decayed, or is so mean, that one year's net income and produce of such living will not be sufficient to build, rebuild, or put the same, with the necessary offices belonging thereto, in sufficient repair, shall think fit to apply for the aid and assistance intended to be given by this act, it shall and may be lawful for every such parson, vicar, or incumbent (after having procured, from some skilful and experienced workman or surveyor, a certificate containing a state of the condition of the buildings on their respective glebes, and of the value of the timber and other materials thereupon fit to be employed in such buildings or repairs or to be sold, and also a plan and estimate of the work proposed to be done (such state and estimate to be verified upon oath, taken before some justice of the peace, or master in chancery, ordinary or extraordinary), and laid the same, together with a just and par-

Incumbent of any ecclesiastical living, whereon there is no house, &c.

gap in one clause of the latter. 2 & 3 Vict. c. 49, and other acts dealing with the sale or exchange of glebe lands and residence houses, are in this respect treated of in the subsequent Chapter VI., The Leasing and Alienation of Church Property: Sect. 2.

ticular account in writing, signed by him, and verified upon oath, taken as aforesaid, of the annual profits of such living, before the ordinary and patron of the living, and obtained their consent to such proposed new buildings or repairs, by writing under their respective hands, in the form for that purpose contained in the schedule hereunto annexed), to borrow and take up at interest, in the manner hereafter mentioned, such sum or sums of money as the said estimate shall amount unto, after deducting the value of timber or other materials which may be thought proper to be sold, not exceeding two years' net income and produce of such living, after deducting all rents, stipends, taxes, and other outgoings, excepting only the salaries to the assistant curate, where such a curate is necessary; and as a security for the money so to be borrowed, to mortgage the glebe, tithes, rents, and other profits and emoluments, arising or to arise from such living, to such person or persons who shall advance the same, by one or more deed or deeds, for the term of twenty-five years, or until the money so to be borrowed, with interest for the same, and such costs and charges as may attend the recovery thereof, shall be fully paid and satisfied, according to the terms, conditions, true intent and meaning of this act; which mortgage deed or deeds shall be made in the forms or to the effect for that purpose contained in the said schedule, and shall bind every succeeding parson, vicar, or incumbent of such living, until the principal and interest, costs and charges, shall be paid off and discharged, as fully and effectually as if such successor had executed the same."

(with the consent of the ordinary and patron), may borrow money to build one,

and mortgage the glebe, tithes, &c. for twenty-five years.

This will authorize raising money to build additional rooms only (*c*).

An incumbent may under this act, with proper consents, advance his own money and take a charge on the living (*d*). But the bishop, who has to consent, may not advance his own money and take the charge (*e*).

Sect. 2. "Every such mortgagee shall execute a counterpart of every such mortgage, to be kept by the incumbent for the time being; and a copy of every such deed of mortgage shall be registered in the office of the registrar of the bishop of the diocese where the parish lies, or other ordinary having episcopal jurisdiction therein for the time being, after having been first examined by him with the original; which officer shall register the same, and be entitled to demand and receive the sum of five shillings, and

Every mortgagee to execute a counterpart of the mortgage, to be kept by the incumbent, &c.

(*c*) *Boyd* v. *Barker*, 5 Jur., N. S. 234; 4 Drew. 582.

(*d*) Ibid.

(*e*) *Greenlaw* v. *King*, 3 Beav. 49.

17 Geo. 3, c. 53.

no more, for such register; and every such deed shall be referred to upon all necessary occasions, the person inspecting the same paying one shilling for every such search; and the said deed, or a copy thereof, certified under the hand of the registrar, shall be allowed as legal evidence, in case any such mortgage deed shall happen to be lost or destroyed."

This section is transcribed verbatim into sect. 64 of 1 & 2 Vict. c. 106, with this difference, that in place of the words "in the office of the registrar," down to "jurisdiction therein," are inserted the words "in the office of the bishop of the diocese," there being a provision in this latter act that no peculiars shall be exempt from its operation.

Money borrowed to be paid to such persons as the ordinary, &c. shall appoint;

Sect. 4. "The money so to be borrowed shall be paid into the hands of such person or persons as shall be nominated and appointed to receive and apply the same for the purposes aforesaid, by the ordinary, patron, and incumbent, by writing under their respective hands, in the form for that purpose contained in the said schedule, after such nominee (*f*) shall have given a bond to the ordinary, with sufficient surety, in double the sum so to be borrowed or raised, with condition of his duly applying and accounting for the same according to the directions of this act; and the receipt of the person or persons so to be nominated shall be a sufficient discharge to the person or persons who shall advance and pay the money: and the person or persons, so to be nominated, shall enter into contracts with proper persons for such buildings or repairs as shall be approved by the ordinary, patron, and incumbent, and shall be specified in an instrument written upon parchment, and signed by them, in the form for that purpose contained in the said schedule; and shall inspect and have the care of the execution of such contracts, and shall pay the money for such buildings and repairs, according to the terms of such agreements, and shall take proper receipts and vouchers for the same; and as soon as such buildings or repairs shall be completed, and the money paid, shall make out an account of his receipts and payments, together with the vouchers for the same, and enter them in a book, fairly written, which shall be signed by him, and laid before the ordinary, patron, and incumbent, and examined by them: and when allowed, by writing under

who shall contract for the buildings, &c. and see the same executed, and pay for them, &c.

(*f*) By sect. 19, the patron, ordinary and incumbent may agree, in writing, to allow the nominee a sum not exceeding five per cent. on the monies laid out and expended.

their respective hands, in the form for that purpose contained in the said schedule, such allowance shall be a full discharge to the person so nominated, in respect to the said accounts; and if any balance shall remain in the hands of such nominee or nominees, the same shall be laid out in some further lasting improvements in building upon such glebe, or shall be paid and applied in discharge of so much of the said principal debt as such balance will extend to pay, at the discretion of the said ordinary, patron, and incumbent, or two of them, of which the said ordinary to be one, by order signed by them, in the form for that purpose contained in the said schedule; and an account shall also be kept, made out, and allowed, of such further disbursements, in manner aforesaid: all which accounts, when made out, completed, and allowed, shall be deposited, with the vouchers, in the hands of the said registrar, and kept by him for the use and benefit of the incumbents of such living for the time being, who shall have a right to inspect the same whenever occasion shall require, paying to such registrar, or deputy registrar, the sum of one shilling for every such inspection."

How the balance remaining shall be disposed of.

Sect. 66 of 1 & 2 Vict. c. 106, contains an exact transcript of this provision, except, as has been already remarked, that "bishop" in the latter stands throughout in the place of "ordinary, patron, and incumbent," in the former act; and that after the words "terms of such agreement," it inserts "and also the expenses of preparing the mortgage deed, and incident thereto, and making such certificate, plan, estimate, and copies thereof as aforesaid."

Sect. 5. "Provided always, that every such ordinary, before he or they shall signify his or their consent, in manner aforesaid, shall cause an inquiry to be made, and certified to him or them by the archdeacon, chancellor of the diocese, or other proper persons living in or near the parish where such buildings are proposed to be made or repaired, in the forms for that purpose specified in the said schedule, of the state and condition of such buildings at the time the incumbent entered upon such living or benefice, how long such incumbent had enjoyed such living or benefice, what money he had received, or may be entitled to receive, for dilapidations, and how and in what manner he had laid out what he had so received; and if it shall appear to them that such incumbent had, by wilful negligence, suffered such buildings to go out of repair, then to certify the same to the said ordinary, and also the amount of the damage which such buildings had

Ordinary to cause inquiry to be made of the condition of the buildings when the incumbent entered on the living, &c.

17 Geo. 3, c. 53.

sustained by the wilful neglect of such incumbent; and such incumbent, if the ordinary require it, shall pay the same into the hands of the nominee or nominees to be appointed under the authority of this act, towards defraying the expenses of buildings or repairs, before the ordinary shall give his consent as aforesaid."

The ordinary of any living worth 100*l.* per annum, which has no proper house of habitation, may (if the incumbent neglect to make application, &c.) procure an estimate, &c. and proceed in the execution of this act, in such manner as the parson is directed to proceed.

Sect. 8. "Where there shall be no house of habitation upon any ecclesiastical living or benefice, so described as aforesaid, exceeding in clear yearly value one hundred pounds per annum, or being one, the same shall be so mean, or in such a state of decay as aforesaid, and the incumbent shall not reside in the parish twenty weeks within any year, computing the same from the first day of January, it shall be lawful for the ordinary of such living or benefice, with the consent of the patron (in case the incumbent shall not think fit to lay out one year's income, where the same may be sufficient, to put the house and buildings in proper and sufficient repair, or to make such application as aforesaid, for building, repairing, or rebuilding such parsonage house), to procure such plan, estimate and certificate, as herein directed, and at any time within the course of the succeeding year to proceed in the execution of the several purposes of this act, in such manner as the parson, vicar, or incumbent, is hereby authorized and directed to proceed, and to make and execute such mortgage as aforesaid; which shall be binding upon the incumbent and his successors, and he and they shall be and are hereby made liable to the payment of the interest, principal, and costs; and every such incumbent, and his representatives, shall be and are hereby also made respectively liable to the proportion of the payments for the year which shall be growing at time of the death of such incumbent, or avoidance of such living, according to the directions aforesaid; which said interest, principal, and costs, and proportion of payments growing at the time of the death of such incumbent or avoidance, shall and may be recovered against such incumbent, his successors or representatives, respectively, by action of debt, in any court of record."

1 & 2 Vict. c. 106.

As to building by mortgage under 1 & 2 Vict. c. 106.

1 & 2 Vict. c. 106, enacts as follows:—

On avoidance of benefice not having fit house of residence, bishop to raise money to build one by mortgage of glebe, &c. for thirty-five years.

Sect. 62. "Upon or at any time after the avoidance of any benefice it shall be lawful for the bishop, and he is hereby required, to issue a commission to four beneficed clergymen of his diocese, or if the benefice be within his peculiar jurisdiction, but locally situate in another diocese, then to four beneficed clergymen of such last-mentioned diocese, one of whom shall be the rural dean (if any) of

the rural deanery or district wherein such benefice shall be situate, directing them to inquire whether there is a fit house of residence within such benefice, and what are the annual profits of such benefice, and if the clear annual profits of such benefice exceed one hundred pounds, whether a fit house of residence can be conveniently provided on the glebe of such benefice, or otherwise; and if the said commissioners, or any three of them, shall report in writing under their hands to the said bishop that there is no fit house of residence within such benefice, and that the clear annual profits of such benefice exceed one hundred pounds, and that a fit house of residence can be conveniently provided on the glebe of such benefice, or on any land which can be conveniently procured for the site of such house of residence, it shall be lawful for the said bishop, and he is hereby required, to procure from some skilful or experienced workman or surveyor a certificate containing a statement of the condition of the buildings (if any), and of the value of the timber and other materials (if any) thereupon fit to be employed in building or repairing or to be sold, and also a plan or estimate of the work fit and proper to be done for building or repairing such house of residence, with all necessary and convenient offices, and thereupon, by mortgage of the glebe, tithes, rents, rent-charges, and other profits and emoluments, arising or to arise from such benefice, to levy and raise such sum or sums as the said estimate shall amount to, after deducting the value of any timber or other materials which may be thought proper to be sold, not exceeding four years' net income and produce of such benefice, after deducting all outgoings (except only the salary of the assistant curate where such a curate is necessary), which mortgage shall be made to the person or persons who shall advance the money so to be levied and raised for the term of thirty-five years, or until the money so to be raised, with interest for the same, and such costs and charges as may attend the recovery thereof, shall be fully paid and satisfied according to the provisions of this act; and the same mortgage shall be made by one or more deed or deeds in the form or to the effect for that purpose contained in the second schedule to this act, and shall bind the incumbent of such benefice for the time being, and his successors, until the principal and interest, costs and charges, shall be fully paid off and satisfied, and every incumbent for the time being is hereby made liable to the payment of so much of the principal, interest and costs as under the directions hereinafter contained shall become payable during the

Building by mortgage under 1 & 2 Vict. c. 106.

time he shall be such incumbent, and every such incumbent and his representatives shall be and are hereby also made respectively liable to the proportion of the payments for the year which shall be growing at the time of the death of such incumbent or avoidance of such benefice according to the directions hereinafter contained, which said principal, interest and costs, and the proportion of payment growing at the time of the death of such incumbent or of such avoidance, shall and may be recovered by action of debt in any court of record."

The schedule is as follows:—

"*Form of the Mortgage.*

"*This indenture, made the —— day of —— in the year of our Lord ——, between the right reverend father in God, ——, lord bishop of ——, of the one part, and —— of the other part: Whereas the said bishop, pursuant to the directions of an act passed in the second year of the reign of her Majesty Queen Victoria, intituled 'An Act to abridge the holding of Benefices in Plurality, and to make better Provision for the Residence of the Clergy,' hath determined to levy and raise the sum of —— pounds, to be laid out and expended in building, rebuilding* or *repairing* [as the case shall be] *the parsonage house and other necessary offices upon the glebe belonging to the rectory, vicarage,* &c. *of* —— [describing it], [or, *in purchasing a house and land for the residence and occupation of the incumbent of the rectory,* &c.]: *And whereas the said —— hath agreed to lend and advance the sum of —— pounds, upon a mortgage of the glebe, tithes, rent-charges, rents, and other profits and emoluments of the said benefice, pursuant to the directions and the true intent and meaning of the said act. Now this indenture witnesseth, That the said bishop, in consideration of the sum of —— pounds, paid at or before the sealing and delivery hereof into the hands of —— (a person* or *persons* [as the case shall be] *nominated by the said bishop to receive the same, pursuant to the directions of the said act (which nomination is hereunto annexed), and which receipt of the said sum of —— pounds the said —— have* or *hath acknowledged by an indorsement on this deed), hath granted, bargained, sold, and demised, and by these presents doth grant, bargain, sell, and demise, unto the said —— his executors, administrators, and assigns, all the glebe lands, tithes, rent-charges, rents, moduses, compositions for tithes, salaries, stipends, fees, gratuities, and other profits and emoluments whatsoever, arising, coming, growing, renewing,*

or payable to the incumbent of the said benefice in respect thereof, with all and every the rights, members, and appurtenances thereunto belonging, To have, hold, receive, take and enjoy the said premises and their appurtenances unto the said —— his executors, administrators, and assigns, from henceforth for the term of thirty-five years, fully to be complete and ended: Provided always, that if the incumbent for the time being of the said benefice and his successors shall, from and after the expiration of the first year of the said term, yearly and every year (such year to be computed from the date hereof), pay to the said —— his executors, administrators, and assigns, one-thirtieth part of the sum of —— pounds, until the whole thereof shall be repaid, and at the end of the first and each succeeding year pay interest at the rate of —— per cent. per annum on the said sum of —— pounds, or so much thereof as shall from time to time remain unpaid, according to the true intent and meaning of the said act and of these presents, and also all costs and charges which shall be occasioned by the nonpayment thereof, these presents and everything herein contained shall be void: Provided also, that it shall be lawful for the incumbent for the time being of the said benefice, and his successors, peaceably and quietly to hold and enjoy the said glebe lands, tithes, rent-charges, rents, moduses, compositions for tithes, stipends, fees, gratuities, and other emoluments and profits whatsoever, arising or to arise from or in respect of the said benefice, until default shall be made by him or them respectively in the payment of the interest and principal, or some part thereof, at the times and in the manner aforesaid. In witness, &c.

"*Appointment of the Nominee* (*g*) (*to be written on Parchment*).

"*I, the right reverend father in God, ——, lord bishop of ——, do hereby nominate and appoint —— of —— to receive the money authorized to be raised by an act passed in the second year of the reign of her Majesty Queen Victoria, intituled 'An Act to abridge the holding of Benefices in Plurality, and to make better Provision for the Residence of the Clergy,' for the purpose of building, rebuilding, repairing,* or *purchasing the parsonage-house,* &c. [as the case may be], *to the rectory, vicarage,* &c. *of* ——

(*g*) By sect. 74, the bishop may, by writing under his hand, make an allowance to the nominee not exceeding 5 per cent. on the monies laid out and expended.

Building by mortgage under 1 & 2 Vict. c. 106.

belonging, and to pay and apply the same, and to enter into contracts with proper persons for such buildings or *repairs, and to inspect and to take care of the execution of such contracts, and to take such receipts and vouchers, keep such accounts, and do and perform all such other matters and things which nominees are authorized and required to do and perform in and by the said act, the said —— having given security for the due application thereof, according to the directions of the said act. Given under my hand this —— day of ——.*

" *Form of the Deed of Purchase of Buildings or Lands to be annexed to the Benefice.*

" *This indenture, made the —— day of —— in the year of our Lord ——, between A. B. of —— of the one part, the right reverend father in God ——, lord bishop of —— and E. F. of ——, patron of the rectory,* &c. *of —— of the other part: Whereas there is no fit parsonage-house belonging to the said rectory,* &c., *and whereas a contract hath been made, by the direction of the said bishop, with the said A. B. for the absolute purchase of the house, buildings, and lands hereinafter described, for the price or sum of —— pounds, pursuant to the directions of an act passed in the second year of the reign of her Majesty Queen Victoria, intituled 'An Act to abridge the holding of Benefices in Plurality, and to make better Provision for the Residence of the Clergy.' Now this indenture witnesseth, That the said A. B., in consideration of the sum of —— pounds to him in hand paid for the purchase aforesaid, the receipt of which sum the said A. B. hath admitted by an endorsement on the back of this deed, hath granted, bargained and sold, and by these presents doth grant, bargain, and sell, unto the said E. F. and his heirs, all,* &c. [here insert a full description of the buildings or lands so intended to be conveyed, with their and every of their rights, privileges, and appurtenances], *to hold unto the said E. F. and his heirs* or *successors* [as the case may be] *in trust for the sole use and benefit of the incumbent of the said benefice and his successors, rectors, vicars,* &c. [as the case may be], *of the said benefice for the time being, for ever.* [Usual covenants for title to be added.] *In witness,* &c."

Bishop to transmit copies of report, &c. to patron and incumbent,

Sect. 63. " The said bishop shall cause to be transmitted to the patron and the incumbent (if any) of such benefice, copies of the report so to be made by such commissioners, and of the plan, estimate, and certificate so to be made by

such workman, or surveyor, two calendar months at the least before making any such mortgage as aforesaid; and that in case the patron and the incumbent, or either of them, shall object to the proposed site for a residence, or to the proposed plan for erecting or repairing such residence, or to the amount proposed to be raised, and shall deliver such objections in writing to the said bishop before the expiration of such period of two calendar months, the said bishop shall have full power to direct that the plan proposed to be carried into effect shall be altered or modified in such manner as he may think fit: provided also, that if the bishop shall, after receiving the report to be made by such commissioners, be of opinion that it is not expedient, under the special circumstances of any such benefice, to levy and raise any sum or sums of money by mortgage as hereinbefore required, or otherwise to take measures for providing a fit house of residence for such benefice, he shall state in detail such special circumstances and the grounds of his opinion in the next annual return to be made by him to her Majesty in council, according to the directions hereinbefore contained" (*e*).

who may object within two months; and, if so, bishop may order plan to be modified or abandoned.

Section 64 contains a provision as to the counterpart of the mortgage similar, as has been said, to that of 17 Geo. 3, c. 53, s. 2.

Section 66 contains provisions, as to the nominees of the bishop for securing the borrowed money, similar, as has been said, to those contained in 17 Geo. 3, c. 53, s. 4.

As to building by mortgage under 28 & 29 Vict. c. 69.

28 & 29 Vict. c. 69.

Section 1 of this act, which is of a generally amending and extending character, enacts as follows:—"The incumbent of any benefice may, according to the provisions of and with the consents required by the said acts, and by any act or acts amending or referring to the same, borrow and take up at interest on mortgage as provided by the same acts (*f*), or any of them, for the purposes of the same acts or any of them, or for the purposes of the act 55 Geo. 3, c. 147, or for the purpose of purchasing any lands or hereditaments not exceeding twelve acres, contiguous to or desirable to be used or occupied with the parsonage-house or glebe belonging to such benefice, or for the purpose of building any offices, stables, or outbuildings, or fences necessary for the occupation or protection of such parsonage, or for the purpose of restoring, rebuilding, or

Extension of provisions of earlier acts.

(*e*) By sect. 53: *vide supra*, p. 1160.

(*f*) 17 Geo. 53, c. 3; 1 & 2 Vict. c. 23, &c.

Building by mortgage under 28 & 29 Vict. c. 69.

repairing the fabric of the chancel of the church of such benefice (in any case where such incumbent is or shall be liable to repair or sustain the fabric of such chancel), or for the purpose of building, improving, enlarging, or purchasing any farm-house or farm buildings, or labourers dwelling-houses, with the appurtenances belonging to or desirable to be acquired for any farm or lands pertaining to such benefice, any sum or sums of money not being less than 100*l.*, and not exceeding three years' net income of such benefice; and out of the sum to be borrowed it shall be lawful to pay the charges and expenses of the architect or surveyor who shall be employed in or about any of the purposes aforesaid, and also the costs and expenses of and incidental to the preparation of the mortgage deed or deeds, and of and incidental to any purchase by the said acts or this act authorized to be made."

Repayment.

As to repayment of principal and interest, 17 Geo. 3, c. 53, provided as follows:—

On failure of payment of principal and interest for forty days after due, mortgagee may distrain.

Sect. 3. "Whenever the principal and interest, directed to be paid to the mortgagee under the several provisions of this act, shall be in arrear and unpaid, for the space of forty days after the same shall become due, it shall and may be lawful for such mortgagee, his executors, administrators, or assigns, to recover the same, and the costs and charges attending the recovery thereof, by distress and sale in such manner as rents may be recovered by landlords or lessors from their tenants by the laws in being."

This section is transcribed almost verbatim into sect. 65 of 1 & 2 Vict. c. 106.

Directions for payment of the principal and interest of the mortgages.

By sect. 6, as first amended by 5 Geo. 4, c. 89, s. 6, and then by 1 & 2 Vict. c. 23, s. 2, the incumbent of every such living or benefice, in cases where such mortgage or mortgages shall be made as aforesaid, and his successors for the time being, shall, and he and they is and are hereby required to pay the interest arising upon every such mortgage, yearly, as the same shall become due, or within one month after, and also five pounds per centum per annum, of the principal remaining due, by yearly payments; such payments to be respectively made at the same time such interest shall be paid, until the whole principal money and interest shall be fully paid and discharged; and every such incumbent shall, annually, at his own expense, from the time such buildings, authorized to be made by this act, shall be completed, insure, at one of the public offices established in London or Westminster for insurance of houses and buildings, the house and other

buildings upon such glebe, against accidents by fire, at such sum of money as shall be agreed upon by the ordinary, patron, and incumbent; and in default of the payment of either the principal or interest, in manner aforesaid, or neglect of the incumbent to make such insurance, the ordinary shall have power to sequester the profits of the living till such payment or insurance shall be made (*g*).

By 17 Geo. 3, c. 53, s. 7, "In order that the payment of such year may be justly and equitably ascertained and adjusted, between the successor, and the parson, vicar, or incumbent, avoiding such living or benefice by death or otherwise, or his representatives, in case of death or other avoidance, in such proportions as the profits of such living shall have been received by them respectively, for the year in which such death or avoidance shall happen: . . . . In case any difference shall arise in adjusting or settling the proportions aforesaid, the same shall be determined by two indifferent persons, the one to be named by the said successor, and the other by the person making such avoidance, or his representatives, in case of his death; and in case such nominees shall not be appointed within the space of two calendar months next after such death or avoidance, or if they cannot agree in adjusting such proportions within the space of one calendar month after they shall have been appointed, the same shall be determined by some neighbouring clergyman, to be nominated by the ordinary, whose determination shall be final and conclusive between the parties; which nominations and determinations shall be made according to the forms for that purpose contained in the said schedule, as near as conveniently may be."

Clause for proportioning the annual payment in case of death or other avoidance.

A similar provision is contained in 1 & 2 Vict. c. 106, s. 68.

By 1 & 2 Vict. c. 23, s. 1, "It shall be lawful for the incumbent of any benefice to borrow and take up at interest for the purposes of the said acts, and also for the purpose of buying or procuring, if necessary, a proper site for a house and other necessary buildings, or for the purposes of the said acts only, any sum or sums of money not exceeding three years net income of such benefice, and to take all such proceedings as are required in and by the said acts (so far as the same are applicable for that pur-

Extension of the provisions of recited acts relating to the repairing and building of houses of residence.

(*g*) 1 & 2 Vict. c. 106, s. 67, contains a similar provision as to insurance. See now the general rules as to insurance contained in The Ecclesiastical Dilapidations Act, 1871, 34 & 35 Vict. c. 43; *infra*, Part V., Chap. V.

Repayment.

pose), and, as a security for the money so to be borrowed, to mortgage the glebe, tithe, rent-charges, rents and other profits and emoluments belonging to such benefice, to such person or persons, corporation or corporations aggregate or sole, as shall lend the same money, by one or more deed or deeds, for the term of thirty-five years, or until the money so to be borrowed, with interest for the same, and such costs and charges as may attend the recovery thereof, shall be fully paid and satisfied, according to the terms and conditions of the said acts (so far as the same are applicable, and not hereby repealed or altered); and that from and after the expiration of the first year of the said term (in which year no part of the principal sum borrowed shall be repayable) the incumbent shall yearly and every year (such year to be computed from the day of the date of the mortgage) pay to the mortgagee one thirtieth part of the said principal sum, until the whole thereof shall be repaid, and shall at the end of the first and each succeeding year pay the yearly interest on the said principal sum, or on so much thereof as shall from time to time remain unpaid, in each case according to the terms and conditions of the said acts, except so far as the same are hereby repealed or altered; and such mortgage deed or deeds shall be made as nearly as may be in the form or to the effect of the form contained in the schedule to the said acts or one of them, and shall bind every succeeding incumbent of such benefice until the principal and interest, costs and charges, shall be paid off and discharged, as fully and effectually as if such successor had made and executed the same."

The yearly instalments of principal sums secured by existing mortgages to the governors of Queen Anne's Bounty reduced.

Sect. 3. "For the future, as to every mortgage which has been made to the governors of the bounty of Queen Anne for the augmentation of the maintenance of the poor clergy, by any bishop, under the powers of an act of parliament specially enabling him, whereby a greater yearly instalment than one thirtieth part of the principal sum is stipulated to be paid, or by the incumbent of a benefice, by virtue of the two before-mentioned acts, the instalment of the principal sum to be paid in every year to the said governors or their assigns by such bishop or by the incumbent (whether such incumbent shall have been resident for the space of twenty weeks in the year for which such instalment shall be payable, or not, and without the production of any certificate of such residence (*h*)) shall

(*h*) This relates to some provisions in repealed acts and clauses of acts.

be one thirtieth part of the principal sum originally advanced on such mortgage, in lieu of the yearly instalment thereby stipulated to be paid, until the whole of the said principal sum shall be fully discharged and paid, such substituted yearly instalment to commence and be paid in each case on the day when the next yearly instalment by virtue of the said mortgage shall become due; and the mortgages made to the said governors of the estates of any bishopric, or of the glebe, tithes, rents and other profits and emoluments of any benefice, shall in every case be and remain in force as a security for the yearly instalments of the principal by the said mortgages agreed to be paid, as well as for the payment of the interest arising on such mortgages, and with all the powers and remedies for enforcing the same given by the said respective acts, until the money borrowed, and all interest for the same, and also all costs and charges which shall be occasioned by the nonpayment thereof, shall be fully paid and discharged, in like manner as if such substituted yearly instalments had been expressly mentioned in and secured by the said mortgages, the expiration of the term of years granted by the said mortgages, or any other cause or matter whatsoever, notwithstanding."

1 & 2 Vict. c. 106, enacts as follows:—

Sect. 65 contains provisions as to distress upon nonpayment almost identical, as has been said, with those in 17 Geo. 3, c. 53, s. 3.

Directions for payment of principal and interest of the mortgages.

Sect. 67. " The incumbent of every such benefice, in cases where such mortgage or mortgages shall be made as aforesaid, and his successors for the time being, shall, from and after the expiration of the first year of the said term (in which year no part of the principal sum borrowed shall be repayable) yearly and every year (such year to be computed from the date of such mortgage) pay to the mortgagee one thirtieth part of the principal sum until the whole thereof shall be repaid, and shall at the end of the first and each succeeding year pay the yearly interest on the principal sum, or so much thereof as shall from time to time remain unpaid; and that every such incumbent shall annually, at his own expense, from the time such buildings authorized to be made by this act shall be completed, insure, at one of the public offices established in London or Westminster for insurance of houses and buildings, the house and other buildings upon such glebe against accidents by fire, at such sum of money as shall be determined upon by the bishop; and in default of the payment of either the principal or interest in manner aforesaid, or

As soon as the buildings are completed, incumbent to insure them against fire.

Repayment.

neglect of the incumbent to make such insurance, the bishop shall have power to sequester the profits of the benefice till such payment or insurance shall be made" (*i*).

Section 68 contains provisions for the apportionment of the annual payment in cases of death, or other avoidance, similar to those mentioned above of 17 Geo. 3, c. 53, s. 7.

Loans.

As to powers of governors of Queen Anne's Bounty, and of corporate bodies, to lend money on mortgage.

Governors of Queen Anne's Bounty empowered to lend certain sums to promote the execution of this act.

By 17 Geo. 3, c. 53, s. 16, "It shall and may be lawful for the governors authorized or appointed to regulate and superintend the bounty given by her late majesty Queen Anne for the augmentation of the maintenance of the poor clergy, to advance and lend any sum or sums of money, not exceeding the sum of one hundred pounds, in respect of each living or benefice, out of the money which has arisen, or shall from time to time arise, from that bounty, for promoting and assisting the several purposes of this act, with respect to any such livings or benefices as shall not exceed the clear annual improved value of fifty pounds; and such mortgage and security shall be made for the repayment of the principal sums so to be advanced, as are hereinbefore mentioned, but no interest shall be paid for the same; and in cases where the annual value of such living or benefice shall exceed the sum of fifty pounds, that it shall and may be lawful for the said governors to advance and lend, for the purposes of this act, any sum not exceeding two years income of such living or benefice upon such mortgage and security as aforesaid, and subject to the several regulations of this act, and to receive interest for the same, not exceeding four pounds for one hundred pounds by the year."

Governors of Queen Anne's Bounty may lend monies to promote the execution of this act.

By 1 & 2 Vict. c. 23, s. 4, "It shall be lawful for the said governors to advance and lend any sum or sums of money not exceeding the sum of one hundred pounds in respect of each benefice, out of the money which has arisen or shall from time to time arise from the said bounty, for promoting and assisting the several purposes of the said acts and of this act, with respect to any such benefices as shall not exceed the clear annual improved value of fifty pounds, and such mortgage and security shall be made for the repayment of the principal sums so to be advanced as are hereinbefore mentioned, but no interest shall be paid

(*i*) See *Black* v. *Hodgson*, 5 Notes of Cases, 167; 11 Jur. 191; *infra*, p. 1475. As to insurance see now the general rules contained in The Ecclesiastical Dilapidations Act, 1871, 34 & 35 Vict. c. 43; *infra*, Part V., Chap. V.

for the same; and in cases where the annual value of such benefice shall exceed the sum of fifty pounds, that it shall and may be lawful for the said governors to advance and lend for the same purposes any sum or sums of money to the extent authorized by this act to be borrowed, upon such mortgage and security as aforesaid, and subject to the several regulations of this act, and to receive interest for the same not exceeding four pounds for one hundred pounds by the year."

Governors of Queen Anne's Bounty empowered to lend certain sums to promote the execution of this act.

And by 1 & 2 Vict. c. 106, s. 72, "It shall be lawful for the governors authorized or appointed to regulate and superintend the bounty given by her late majesty Queen Anne, for the augmentation of the maintenance of the poor clergy, to advance and lend out of the money which has arisen or shall from time to time arise from that bounty, for promoting and assisting the purposes of this act, any sum not exceeding the amount hereby authorized to be raised upon such mortgage and security as aforesaid, and subject to the several regulations of this act, and to receive interest for the same not exceeding four pounds for one hundred pounds by the year" (*k*).

Colleges in Oxford and Cambridge and other corporate bodies, patrons of livings, may lend any sums, without interest, to aid the execution of this act.

By 17 Geo. 3, c. 53, s. 13, "It shall and may be lawful for any college or hall, within the universities of Oxford and Cambridge, or for any other corporate bodies possessed of the patronage of ecclesiastical livings or benefices, to advance and lend any sum or sums of money, of which they have the power of disposing, in order to aid and assist the several purposes of this act, for the building, rebuilding, repairing, or purchasing of any houses or buildings for the habitation and convenience of the clergy, upon livings or benefices under the patronage of such college or hall, upon the mortgage and security directed by this act for the repayment of the principal, without taking any interest for the same."

Colleges, &c. may advance money, interest free, to benefices in their patronage for houses.

By 1 & 2 Vict. c. 23, s. 5, "It shall be lawful for any college or hall within the universities of Oxford or Cambridge, or for any other corporate bodies possessed of the patronage of ecclesiastical benefices, to advance and lend any sum or sums of money of which they have the power of disposing in order to aid and assist the several purposes of this act, for the building, rebuilding, repairing, or purchasing of any houses or buildings for the habitation or convenience of the clergy, or sites for such houses and

(*k*) But they must sue out a sequestration for the instalments in their corporate name, and not in the name of their treasurer; *Bluck* v. *Hodgson*, 5 Notes of Cases, 167; 11 Jur. 191 (1847).

Loans.

buildings, upon benefices in the patronage of such colleges or halls respectively, upon the mortgage and security directed by this act for the repayment of the principal, without taking any interest for the same."

Colleges in Oxford, &c. may lend any sums, without interest, to aid the execution of this act.

And by 1 & 2 Vict. c. 106, s. 73, "It shall be lawful for any college or hall within the universities of Oxford and Cambridge, or for any other corporate bodies possessed of the patronage of ecclesiastical benefices, to advance and lend any sum or sums of money of which they have the power of disposing in order to aid and assist the several purposes of this act for the building, rebuilding, repairing, or purchasing of any houses or buildings for the habitation and convenience of the clergy, upon benefices under the patronage of such college or hall, upon the mortgage and security directed by this act for the repayment of the principal, without taking any interest for the same."

Consent of patrons.

As to consent of patrons to the execution of the provisions of these statutes.

Sects. 14, 20 of 17 Geo. 3, c. 53; sects. 10, 12 of 1 & 2 Vict. c. 23; and sects. 125 to 128 of 1 & 2 Vict. c. 106, contain provisions for determining who is the patron for the purposes of these acts, and how the consent of such patron, being the crown, a minor, idiot, lunatic or *feme covert*, shall be given and testified.

In certain cases the consent of the patron of the rectory necessary.

By 17 Geo. 3, c. 53, s. 17, "Where the incumbent of any chapelry or perpetual cure shall be nominated by the rector or vicar of the parish wherein the same is situated, in every such case the consent of such rector or vicar, together with the consent of the patron of such rectory, shall be necessary in all such matters wherein the consent of the patron is required by the former provisions of this act."

The clauses in 1 & 2 Vict. c. 106, referred to above, are as follows:—

Who to be considered patron.

Sect. 125. "In every case in which the consent of, or the execution of any deed or deeds, instrument or instruments by the patron of any cathedral preferment or of any benefice, sinecure rectory, or vicarage, or the owner or impropriator of any lands, tithes, tenements, or hereditaments, is required for carrying into effect any of the purposes of this act, and also in every case in which it may be necessary to give any notice to any such patron for any of the said purposes, the consent or execution by or notice to the patron or person entitled to make donation or present or nominate to such cathedral preferment, benefice, sinecure rectory, or vicarage, in case the same were then vacant, or the person or persons who shall be in the actual possession, receipt,

or perception of the rents, proceeds, or profits of such lands, tithes, tenements, or hereditaments, for any estate or interest not less than an estate for life, shall respectively be sufficient."

How consent of patron to be testified, where patronage in the crown.

Sect. 126. " In any case in which the consent of the patron of any benefice shall be required to the exercise of any power given by this act, or in which any notice shall be required by this act to be given to the patron of any benefice, and the patronage of such benefice shall be in the crown, the consent of the crown to the exercise of such power shall be testified and such notice shall be given respectively in the manner hereinafter mentioned; (that is to say,) if such benefice shall be above the yearly value of twenty pounds in the queen's books, the instrument by which the power shall be exercised shall be executed by and any such notice shall be given to the lord high treasurer or first lord commissioner of the treasury for the time being; and if such benefice shall not exceed the yearly value of twenty pounds in the queen's books, such instrument shall be executed by and any such notice shall be given to the lord high chancellor, lord keeper or lords commissioners of the great seal, for the time being; and if such benefice shall be within the patronage of the crown in right of the duchy of Lancaster, such instrument shall be executed by and any such notice shall be given to the chancellor of the said duchy for the time being; and the execution of such instrument by and any such notice given to such person or persons shall be deemed and taken for the purposes of this act to be an execution by and a sufficient notice to the patron of the benefice."

How, where person is an incapacitated person.

Sect. 127. " In any case in which the consent of the patron of any benefice shall be required to the exercise of any power given by this act, and the patron of such benefice shall be a minor, idiot, lunatic, or *feme covert*, it shall be lawful for the guardian or guardians, committee or committees, or husband of such patron (but in case of a *feme covert* with her consent in writing), to execute the instrument by which such power shall be exercised in testimony of the consent of such patron; and such execution shall for the purposes of this act be deemed and taken to be an execution by the patron of the benefice."

How, where patronage is attached to the duchy of Cornwall.

Sect. 128. " In any case in which the consent of the patron of any benefice shall be required to the exercise of any power given by this act, or in which any notice shall be required by this act to be given to the patron of any benefice, and the advowson and right of patronage of such benefice shall be part of the possessions of the duchy of

Patrons.

Cornwall, the consent of the patron of such benefice to the exercise of such power shall be testified and such notice shall be given respectively in the manner hereinafter mentioned; (that is to say,) the instrument by which the power shall be exercised shall be executed by and any notice shall be given to the Duke of Cornwall for the time being, if of full age, but if such benefice shall be within the patronage of the crown in right of the duchy of Cornwall, such instrument shall be executed by and any such notice shall be given to the same person or persons who is or are by this act authorized to testify the consent of the crown to the exercise of any power given by this act in respect of any benefice in the patronage of the crown; and the execution of such instrument by and any such notice given to such person or persons shall be deemed and taken for the purposes of this act to be an execution by and a sufficient notice to the patron of the benefice."

As to parishioners who are patrons.

By 19 & 20 Vict. c. 50, s. 15, parishioners and others forming a numerous class, who are patrons of a living, may give their consent at a meeting called under the provisions of the act, as patrons for the purposes of these acts (*l*).

As to money recovered for dilapidations.

Dilapidation moneys.

By 17 Geo. 3, c. 53, s. 9, all money received for dilapidations was to be applied in part of the payments under the estimate for rebuilding made in pursuance of the act, or in making additional buildings and improvements.

An almost identical provision is contained in 1 & 2 Vict. c. 105, s. 69. These provisions have been, however, practically superseded by the enactments in The Ecclesiastical Dilapidations Act, 1871, 34 & 35 Vict. c. 43 (*m*).

The power of converting useless residence-houses into farm buildings, etc., given by 1 & 2 Vict. c. 23, s. 6, will be noticed hereafter (*n*).

Grant of sites.

As to grants of land or money for residence-houses.

Lords of manors, which contain any waste lands convenient for the purposes of this act, may grant a part thereof in perpetuity, &c.

17 Geo. 3, c. 53, enacts by sect. 21, "That it shall and may be lawful for any archbishop or bishop of any diocese, and also for any ecclesiastical corporation sole or aggregate, being lord or lords of any manor within which there shall be any waste or common lands, parcel of the demesnes of such manor, lying convenient for the house and buildings, and other the purposes of this act, to grant a part or

(*l*) *Vide supra*, pp. 365, 366.

(*m*) *Vide infra*, Part V., Chap. V.

(*n*) *Vide infra*, Part V., Chap. VI., Sect. 2.

parts of such waste or common lands in perpetuity for the several purposes of this act, leaving sufficient common for the several persons having right of common upon such wastes or commons, and obtaining the consent of the lessee of such lands, if the same shall be in lease."

Powers under other statutes.

The provisions in 43 Geo. 3, c. 108, and 51 Geo. 3, c. 115, enabling persons, by deed inrolled or by will, to give lands not exceeding five acres, or chattels not exceeding in value 500*l.*, for the purpose, *inter alia*, of supplying mansion houses with glebes for the residence of ministers officiating in churches and chapels, and further enabling any lord of the manor to grant land not more than five acres of the waste of the manor for the same purposes, will be noticed more particularly hereafter (*o*). Reference should also be made to the provisions of 28 & 29 Vict. c. 69, noticed in a later chapter (*p*), enabling persons under disability to sell or *give* lands to the governors of Queen Anne's Bounty for residence-houses, gardens, etc.

Sect. 2.—*Of Bishops, Deans and Canons.*

Disposal of residence houses.

The 18th section of 4 & 5 Vict. c. 39, which repeals a former provision of sect. 58 of 3 & 4 Vict. c. 113, on the same subject, and also a clause of 2 & 3 Will. 4, c. 10, relating to the annexation of a house of residence to the archdeaconry of Durham, enacts, "That the dean and chapter of any cathedral or collegiate church, with the consent of their visitor, may from time to time sanction and confirm the exchange of houses of residence, or of houses attached to any dignities, offices, or prebends in the precincts of such church, among the canons of such church, or may make any such arrangement to take effect at any future time, or may assign any one of such houses being vacant to any canon willing to accept the same in lieu of the house theretofore occupied by him, and thereupon any house no longer required by any canon may by the said dean and chapter be disposed of, in such way as they shall deem fit, with the consent of their visitor, and of the ecclesiastical commissioners for England, signified under their common seal; provided that all acts, matters and things relating to any such house already done under the last-mentioned provisions of the said secondly recited act shall be valid and effectual to all intents and purposes."

(*o*) *Vide post*, Chapter on Augmentation of Benefices.

(*p*) *Vide infra*, Part V., Chap. VI., Sect. 2.

By 5 & 6 Vict. c. 26, s. 7, the provisions as to disposal may be applied where there has been no exchange.

1 & 2 Vict. c. 23, relating to residence-houses, to apply to deans and canons.

3 & 4 Vict. c. 113, s. 59, enacts, "That it shall be lawful for the ecclesiastical commissioners to authorize any dean or canon of any cathedral church to raise moneys on his deanery or canonry, for the purpose of building, enlarging, or otherwise improving the residence-house thereof, on such terms and conditions as the said commissioners, with the concurrence of the bishop and the chapter, shall approve; and all the provisions of 1 & 2 Vict. c. 23 shall be applied, *mutatis mutandis*, to all such cases in which any dean or canon shall be authorized as aforesaid to raise moneys on his deanery or canonry for the purpose aforesaid."

6 & 7 Will. 4, c. 77. Bishops houses.

6 & 7 Will. 4, c. 77, recommended "That fit residences be provided for the Bishops of Lincoln, Llandaff, Rochester, Manchester, and Ripon; and that, for the purpose of providing the bishop of any diocese with a more suitable and convenient residence than that which now belongs to his see, sanction be given for purchases or exchanges of houses or lands, or for the sale of lands belonging to the respective sees, and also, where it may be necessary, for the borrowing by any bishop of a sum not exceeding two years income of his see, upon such terms as shall appear to be fit and proper; and that the governors of the bounty of Queen Anne be empowered to lend money upon mortgage."

2 & 3 Vict. c. 18, the first act passed on this subject, was repealed by 5 & 6 Vict. c. 26; but all mortgages made under it are not affected by the repeal.

By 5 & 6 Vict. c. 26, the existing statute, it is provided as follows:—

Episcopal house may in certain cases be taken down and sold, or may be rebuilt or altered.

Sect. 1. "It shall be lawful, by the authority provided in 6 & 7 Will. 4, c. 77 (*q*), with the consent, under the hand and episcopal seal of the bishop, to make such arrangements as may by such authority be deemed most expedient, for selling and conveying to such person or body corporate, and for such consideration as may be approved by the like authority, any episcopal house of residence then belonging to the see of such bishop, or for taking down the same or any part thereof, and selling the site or the materials thereof (as the circumstances may render expedient); or for adding to, altering, improving, or taking down and rebuilding any episcopal house of residence; or for improving the demesnes adjoining to any such house by the purchase of any land, tenement or hereditament in the

(*q*) That is, the ecclesiastical commissioners, submitting a scheme to the queen in council, and the order in council thereon.

immediate neighbourhood or within the view thereof; or for building a new episcopal house of residence for any see on any site to be approved by the like authority; and for applying the proceeds of any such sale as aforesaid, or any part thereof, to any of such purposes, or to any such other purposes, and in such manner as shall appear to be most conducive to the permanent benefit of the see; and that so much of the said act as relates to the providing of any bishop with a more suitable and convenient residence, shall be extended so as to include and apply to any of the purposes of this act."

Provisions of 6 & 7 Will. 4, c. 77, s. 1, made applicable thereto.

Sect. 2. "In any scheme which shall be laid before her majesty in council by the Ecclesiastical Commissioners for England under this act, recommending any arrangement for taking down or selling any episcopal residence, or changing the site thereof, the said commissioners shall set forth particularly the grounds and reasons upon which they deem it expedient to offer such recommendation."

Commissioners to state their reasons for the alteration.

Sect. 5. "It shall be lawful for the dean and chapter, or for the dean, or for any canon of any cathedral church, under the authority aforesaid, to purchase any episcopal house of residence sold under the provisions of this act, or the site of any such house, or any other house or site, being contiguous or near to such cathedral church, or any part of such house or site, and to add to, alter or improve any such house or to take down the same, and to build another house or more houses than one upon the site thereof, or to apply the site of any such house, or any part thereof, by and with the authority aforesaid, to the improvement of the cathedral, or the precincts thereof; and that so much of 3 & 4 Vict. c. 113, as relates to the raising of moneys by any dean or canon for the purpose of building, enlarging or otherwise improving the residence-house of his deanery or canonry, shall be extended so as to make lawful the raising of moneys, in the manner and with the authority therein provided, by any dean and chapter, dean or canon, for any purpose of this act."

Chapters, deans and canons may purchase and alter, take down or rebuild.

Provisions of 3 & 4 Vict. c. 113, s. 59, made applicable thereto.

Sect. 6. "Any house so purchased by the dean and chapter, dean or canon, of any cathedral church, or any house erected upon any site so purchased, may, by the authority aforesaid, and with the consent of the dean and chapter, be made the deanery, or the house of residence for any canon of such church; and the house theretofore occupied as the deanery, or any house no longer required as the house of residence of any canon, may be so applied or disposed of, as may by the same authority and with the like consent be determined on."

Episcopal house may be made the deanery or a canonical house.

By sect. 8, the purposes of this act are to be within the provisions of 3 & 4 Vict. c. 113, s. 68 (*r*).

Fixtures.

By sects. 9, 10, articles in any house sold or taken down may be sold, or removed to the new house, and provision is made for certain fixtures being catalogued and made part of the freehold and irremoveable.

Insurance.

By sect. 11, provision may be made directing that any residence-houses bought, built or improved under this act shall be insured against fire (*s*).

Purchase from persons under disability.

By sect. 12, corporations and persons having a limited interest or under disability may sell lands for the purposes of this act, the amount to be paid into the bank of England in the name and with the privity of the accountant-general of the Court of Chancery, if over 200*l.*, with other provisions similar to those contained in The Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18).

(*r*) *Vide supra*, p. 232.
(*s*) *Vide infra*, Part V., Chap. V.

CHAPTER III.

TITHES AND RENT-CHARGES.

SECT. 1.—*Origin of Tithes in England.*
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SECT. 1.—*Origin of Tithes in England.*

WHAT was paid to the church for several of the first ages after Christ, was all brought to them by way of offerings; and these were made either at the altar, or at the collections, or else occasionally (*a*).

Afterwards, about the year 794, Offa king of Mercia (the most potent of all the Saxon kings of his time in this island), made a law, whereby he gave unto the church the tithes of all his kingdom; which, the historians tell us, was done to expiate the death of Ethelbert, king of the East

(*a*) Prideaux on Tithes, 139. Thomassini Vetus et Nova Ecclesiæ Disciplina, vol. 3, c. 1, 2d. ed. fol.

Angles, whom in the year preceding he had caused basely to be murdered (*b*).

But that tithes were before paid in England by way of offerings, according to the ancient usage and decrees of the church, appears from the canons of Egbert, Archbishop of York, about the year 750; and from an epistle of Boniface, Archbishop of Maintz, which he wrote to Cuthbert, Archbishop of Canterbury about the same time; and from the seventeenth canon of the general council, holden for the whole kingdom at Chalchuth, in the year 787. But this law of Offa was that which first gave the church a civil right in them in this land by way of property and inheritance, and enabled the clergy to gather and recover them as their legal due, by the coercion of the civil power (*c*).

Yet this establishment of Offa reached no further than to the kingdom of Mercia, over which Offa reigned; until Ethelwulph, about sixty years after, enlarged it for the whole realm of England (*d*).

SECT. 2.—*Their several kinds before the Tithe Commutation Acts.*

Division of tithes into prædial, mixt and personal.

Tithes, with regard to the several kinds or natures, are divided into *prædial, mixt and personal.*

Prædial.

Prædial tithes are such as arise merely and immediately from the ground; as grain of all sorts, hay, wood, fruits, herbs: for a piece of land or ground being called in Latin *prædium* (whether it be arable, meadow, or pasture), the fruit or produce thereof is called *prædial*, and consequently the tithe payable for such annual produce is called a *prædial* tithe (*e*).

Mixt.

Mixt tithes are those which arise not immediately from the ground, but from things immediately nourished by the ground, as by means of goods depastured thereupon, or otherwise nourished with the fruits thereof; as colts, calves, lambs, chickens, milk, cheese, eggs (*f*).

Personal.

Personal tithes are such profits as do arise by the honest labour and industry of man, employing himself in some personal work, artifice, or negociation; being the tenth part of the clear gain, after charges deducted (*g*).

Division of tithes into great and small tithes.

Tithes, with regard to value, are divided into *great* and *small.*

(*b*) Prideaux on Tithes, 165.
(*c*) Ibid. 167.
(*d*) Ibid.
(*e*) Wats. c. 49.
(*f*) Ibid.
(*g*) Ibid.

Great tithes; as corn, hay and wood (*h*).

Small tithes; as the prædial tithes of other kinds, together with those which are called mixt, and personal (*i*).

But it is said, that this division may be altered, (1) By custom; which will make wood a small tithe, under the general words *minutiæ decimæ*, in the endowment of the vicar. (2) By quantity; which will turn a small tithe into great, if the parish is generally sown with it. (3) By change of place; which makes the same things, as hops, in gardens small tithes, in fields great tithes. But this seems to be contradicted in the case of *Wharton* v. *Lisle*, where the tithe of flax, though sown in great fields, was adjudged to the vicar as a small tithe, Holt, Chief Justice (who was of another opinion), being absent (*k*).

And Dr. Watson is of opinion, that the quantity of land within any parish sowed with any thing, cannot make the tithe of another nature; and that what is called small tithes seems to be in respect to the thing itself, and not from the small quantity of land sowed therewith, whereby the tithes thereof are but small, and of little value; for if that were to be the rule to determine what shall be said to be small tithes, then corn and hay in some places might be accounted small tithes (*l*).

And according to this latter opinion the law is now settled; namely, that the tithes are to be denominated great or small tithes, according to the nature and quality thereof, and not according to the quantity. As in the case of *Smith* v. *Wyatt* (*m*), where a bill was brought by the rector of a parish in Essex for the tithe of potatoes sown in great quantities in the common fields, and therefore claiming it as a great tithe. The defendant, the vicar, insisted, that notwithstanding it is sown in fields, it still continues a small tithe, and the quantity makes no difference. By the Lord Chancellor Hardwicke: "The question is, whether potatoes planted in fields are great or small tithes. Potatoes in their nature are small tithes; then the question will be, whether they receive any alteration of their right, by cultivating in greater or smaller quantities. When the distinction of great and small tithes was at first settled, probably it was upon this foundation, that the former yielded tithes in greater quantities; and the species of tithes, which were called small, produced but in small quantities, though it might be arbitrary at first, yet it hath

(*h*) Degge, Part 2, c. 1.
(*i*) Gibs. 663.
(*k*) 4 Mod. 184; Gibs. 663.
(*l*) Wats. c. 39.
(*m*) 2 Atk. 364.

Division of tithes into great and small tithes.

"grown into a rule, and fixed so for the sake of certainty. If this sort of roots should be called small tithes when planted in gardens, and great when planted in fields, it would introduce the utmost confusion, and must vary in every year in every parish. If the quantity will turn small tithes into great, why will it not turn great tithes into small, when the quantity of great tithes is but small?" Upon the whole, his lordship was of opinion, that the tithe of potatoes, in whatever quantity, is a small tithe; and decreed accordingly.

Tithes restrained to the proper parish.

It is said by Lord Coke and many others, that before the Council of Lateran in the year 1180, a man might have given his tithes to what church or monastery he pleased.

But this Dr. Prideaux utterly denies, for two reasons: 1. Because of the absurdity of the thing; for all the laws which had been made for tithes would have signified nothing, if no one had been certainly invested in a right to them; for in such case, no one could claim them, and in case of non-payment no one could make process in law for them; and consequently no one having a special right to demand them, it must have followed in practice, that what was thus paid to every spiritual person, would in fact and reality be paid to none at all. 2. Because before the said council there were in this land many appropriations, whereby the tithes of whole parishes were assigned to convents or other spiritual corporations; all which would have signified nothing, if the parishioners had been at liberty to pay their tithes to what spiritual person they should think fit (*n*).

But be that as it will, it is certain that now tithes of common right do belong to that church, within the precincts of whose parish they arise. This regulation, corresponding with the ancient law of the land, was enjoined by a decretal epistle of Innocent III. to the Archbishop of Canterbury in the year 1200 (*o*).

Portion of tithes within another parish.

Yet notwithstanding, one person may prescribe to have tithes within the parish of another, and this is what is called a *portion of tithes* (*p*).

One reason of which might be, the lord of a manor's having his estate extending into what is now apportioned into distinct parishes; for there were tithes before the present distribution of parishes took place.

But whatever origin these portions might have, they

(*n*) Prideaux on Tithes, 302. Com. 27.
(*o*) See 2 Inst. 641; and 2 Bl. (*p*) Gibs. 663.

were in law so distinct from the rectory, that if one who had them purchased the rectory, the portion was not extinct, but remained grantable; but as to the cognizance thereof, the case being between parson and parson, and concerning a spiritual matter, that belonged, like the cognizance of other tithes, to the ecclesiastical court (*q*).

If a portion of tithes were possessed for 150 years, or such a length of time as to make the right doubtful, a court of equity would not assist the plaintiff by directing an issue, but he must have established his right at law (*r*). Where a portion of tithes had been possessed for 250 years by the owners of the lands, the court presumed a grant of them before 13 Eliz. c. 10, though *tithes* were not specifically mentioned in the title deed, under which the lands were claimed (*s*).

Tithes in extra-parochial places.

Tithes extra-parochial (*t*), or within the compass of no certain parish, belonged to the crown. By the canon law, they were to be disposed of at the discretion of the bishop; but, by the law of England, all extra-parochial tithes, as in several forests, do belong to the king, and may be granted to whom he will; and, accordingly, they have been actually adjudged to him, not only by several resolutions of law, but also in parliament, in the case of the prior and bishop of Carlisle, in the 18 Edw. 1, concerning tithes in Inglewood Forest, that the king in his forest aforesaid may build towns, assart lands (or make them fit for tillage), and confer those churches, with the tithes thereof, at his pleasure, upon whomsoever he pleases; because that the same forest is not within the limits of any parish (*u*).

In the case of *Parry* v. *Gibbs* (*x*), it was held, that under a grant of tithes arising from lands *de novo assartatis et assartandis* within the extra-parochial parts of a forest, the grantee was not entitled to the tithes of those

(*q*) Gibs. 663.

(*r*) *Scott* v. *Airey*, 1779, cited in 1 Anst. 311.

(*s*) *Oxenden, Bart.* v. *Skinner*, 4 Gwill. 1513; see further on this subject, *Dean and Chapter of Bristol's case*, 1 E. & Y. 51; *Sir E. Coke's case*, 2 Roll. Rep. 161; 1 E. & Y. 314; *Futter* v. *Borome*, 1 E. & Y. 86; *Downes* v. *Moorman*, 1 E. & Y. 803; *Hungerford* v. *Howland*, 1 E. & Y. 103; *Wolley* v. *Platt*, M'Clel. 468; 3 E. & Y. 1167; *Boulton* v. *Richards*, 9 Price, 671; 3 E. & Y. 1068; *Pellatt* v. *Ferrars*, 2 Bos. & P. 542; 2 E. & Y. 494; *Bishop of Carlisle* v. *Blain*, 1 Y. & Jerv. 123; *Pritchett* v. *Honeybourne*, 1 Y. & Jerv. 135; *Wyld* v. *Ward*, 3 Y. & Jerv. 192; *Lewis* v. *Bridgman*, 2 Cl. & Fin. 738; *Lewis* v. *Young*, 3 E. & Y. 1135.

(*t*) By common law even extra-parochial places were not exempt from tithes; *Page* v. *Wilson*, 2 J. & W. 328.

(*u*) 1 Roll. Abr. 657; 2 Inst. 647.

(*x*) 4 Gwill. 1490.

Tithes in extra-parochial places.

lands in the occupation of the keepers of the forest, nor of lands enclosed by a private person by incroachment upon the forest.

By custom a parson or vicar might be entitled to the tithes of extra-parochial lands (*y*). By 2 & 3 Edw. 6, c. 13, s. 3, every person having any cattle tithable depasturing on any waste or common ground whereof the parish is not certainly known, shall pay their tithes for the increase of such cattle to the parson, vicar, &c. of the parish where the owner of the cattle dwells (*z*). Tithes of agistment for cattle fed upon the common were not within this statute (*a*).

Sect. 3.—*Of what things Tithes were paid, and of Exemptions before the Tithe Commutation Acts.*

Things that renew yearly.

Of common right, tithes are to be paid for such things only as do yield a yearly increase by the act of God (*b*).

Yet this rule admits of some exceptions: as, for instance, tithe is due of saffron, though gathered but once in three years; and concerning *sylva cædua*, there is an entry in the register, that consultations shall be granted thereof, notwithstanding that it is not renewed every year (*c*). But "great wood of the age of twenty years or of greater age" is not tithable (*d*).

(*y*) Com. Dig. Dismes (C. 3); 1 E. & Y. 29.

(*z*) 2 Inst. 651.

(*a*) *Ellis* v. *Saal*, 1 Anstr. 332; 2 E. & Y. 360; and generally, on the subject of extra-parochial places, see *Page* v. *Wilson*, 2 J. & W. 328; *Att.-Gen.* v. *Lord Eardley*, 3 E. & Y. 986; *Banister* v. *Wright*, Sty. 137; 1 E. & Y. 404; *Williams* v. *Peeke*, 1 E. & Y. 1237; *Att.-Gen.* v. *Oldys*, 1 E. & Y. 564; *Compost* v. ——, 1 E. & Y. 437; *Morant* v. *Cumming*, Cro. Car. 94; 1 E. & Y. 359.

(*b*) Wats. c. 46; 1 Rolle's Abr. 641. The earlier editions of Burn contained the following catalogue of the several particulars tithable:—1, *Corn and other grain, as beans, peas, tares, vetches;* 2, *Hay and other like herbs and seeds, as clover, rape, wood, broom, heath, furze;* 3, *Agistment or pasturage;* 4, *Wood;* 5, *Flax and hemp;* 6, *Madder;* 7, *Hops;* 8, *Roots and garden herbs and seeds, as turnips, parsley, cabbage, saffron, and such like;* 9, *Fruits of trees, as apples, pears, acorns;* 10, *Calves, colts, kids, pigs;* 11, *Wool and lamb;* 12, *Milk and cheese;* 13, *Deer and conies;* 14, *Fowl;* 15, *Bees;* 16, *Mills, fishings, and other personal tithes.* It will be seen below that fishing and other personal tithes are not *necessarily* included under the operation of the Tithe Commutation Acts, 6 & 7 Will. 4, c. 71, s. 90, and 2 & 3 Vict. c. 62, s. 9.

(*c*) Gibs. 669.

(*d*) 45 Edw. 3, c. 3. There is a various reading of forty for twenty years.

Generally, of things increasing yearly, tithes shall be paid only once in the year.

Once in the year.

But this rule also is not universally true: and it is evidently against the rule of the canon law, which requires, that if seeds be sown upon the same ground, and renewed oftener than once in the year, the tithes thereof shall be paid so often as they renew (*e*). And this seems to have been the law; as in the case of clover, for instance, which renews oftener than once in the year, tithes thereof were to be paid as often as it renewed.

Things of the substance of the earth.

Of common right, no tithes are to be made of quarries of stone or slate, for that they are parcel of the freehold, and the parson has tithe of the grass or corn which grow upon the surface of the land in which the quarry is; so, also, not for coal, turf, flags, tin, lead, brick, tile, earthern pots, lime, marle, chalk, and such like, because they are not the increase, but of the substance of the earth. And the like has been resolved of houses (considered separately from the soil), as having no annual increase. But, by particular custom, tithes of any of these may be payable (*f*).

Things *feræ naturæ*.

By the common law of England, there is no tithe due for things that are *feræ naturæ*, and therefore it has been resolved, that no tithe shall be paid for fish taken out of the sea, or out of a river, unless by custom, as in Wales, Ireland, Yarmouth, and other places: neither, for the same reason, is any tithe due of deer, conies, or the like. But if the tithe thereof be due by custom, it must be paid (*g*).

Things tame.

No tithe is due for fowls or eggs of fowls in a decoy (*h*), or for hounds, or for animals kept for pleasure or curiosity.

Barren land.

By 2 & 3 Edw. 6, c. 13, s. 5, "All such barren heath

(*e*) Gibs. 669. The passage of the canon law quoted by Dr. Gibson for this opinion is a decree of Clement III. to be found in X. 3, 30, 21, "Ex parte canonicorum ecclesiæ tuæ nobis est querela proposita quod quidam agricultores, cum simul vel diversis temporibus anni, in eodem horto vel agro diversa semina sparserint, non nisi de unius illorum seminum fructibus decimas persolvunt. Mandamus quatenus si noveris rem taliter se habere, agricultores illos ut de omnibus prædiorum fructibus decimas absque diminutione persolvant, ecclesiastica censura compellas." But the complaint there made is for sowing different seeds in the same ground, and paying tithes of the produce of one only, and not for refusing to pay different tithes of the produce of the same seed; so that the authority does not support the position.

(*f*) 2 Inst. 651: *vide infra*, p. 1538.

(*g*) Deg. p. 2, c. 8; 1 Inst. 651, 664.

(*h*) *Cannell* v. *Ward*, 1 E. & Y. 530; 1 Eag. on Tithes, 427.

Barren land.

or waste ground, other than such as be discharged from the payment of tithes by act of parliament, which before this time have lain barren, and paid no tithes by reason of the same barrenness, and now be or hereafter shall be improved and converted into arable ground or meadow, shall, after the end and term of seven years next after such improvement fully ended and determined, pay tithe for the corn and hay growing upon the same."

Sect. 6. "Provided, that if any such barren, waste or heath ground hath before this time been charged with the payment of any tithes, and the same be hereafter improved or converted into arable ground or meadow, the owner thereof shall, during the seven years next after the said improvement, pay such kind of tithe as was paid for the same before the said improvement."

Barren.]—Although it yields some fruit, and pays tithes for wool, and lamb, or the like; yet if it be barren land as to agriculture or tillage, which this clause meant to advance, it is within this act (*i*).

But yet if the ground be not apt for tillage, yet if it be not of its own nature barren, it is not within this act. As if a wood be stubbed and grubbed, and made fit for the plough, and employed thereunto, yet it shall pay tithes presently, for wood ground is fertile, and not barren (*k*).

In the case of *Stockwell* v. *Terry*, in 1748 (*l*), it was holden by Lord Hardwicke, that such land only is within this clause, as, above the necessary expense of enclosing and clearing, requires also expense in manuring, before it can be made proper for agriculture; and he decreed tithe to be paid, on its being proved that the land bore better corn than the arable land in the parish, without any extraordinary expense of manure.

In a case in prohibition of *Sharington* v. *Fleetwood*, in 38 Eliz. (*m*), for tithes in Orwell, in the county of Lancaster, it was resolved, that if marsh meadow, or other land, for not cleansing of the trenches or sewers, or by sudden accident, or inundation of waters, be surrounded; or by ill husbandry or unprofitable negligence, any land become overrun with bushes, furze, whins, and briars; yet are not they or any of them said to be barren land within this statute, because, of their own nature, they are fruitful; and the parson shall not by this act be barred of his tithes, by the ill husbandry or negligence of the owner or possessor.

(*i*) 2 Inst. 655.
(*k*) 2 Inst. 656; Bunb. 159.
(*l*) 1 Ves. 115.
(*m*) 2 Inst. 656.

Shall, after the end and term of seven years next after such Improvement, fully ended and determined, pay Tithe.]—Note, here are no express words of discharge of the tithes during the seven years, but by reasonable construction it impliedly amounts to a discharge during the seven years: and the seven years are to be accounted next after the improvement (*n*).

The trial whether the lands are barren or not within the statute, must be in the temporal, and not in the spiritual court. And, therefore, in a suit for tithes in the spiritual court, if the defendant plead that it is barren land, and that plea be refused, or issue taken upon it, there a prohibition shall be granted. But a prohibition shall not be granted upon a suggestion only that it is barren land, before it be pleaded in the spiritual court (*o*).

Forest land.

As lands which are in no parish pay tithes to the king, so lands lying within the precincts of a forest (though also in a parish), if they be in the hands of the king, do pay no tithes. And this privilege extends to the king's lessee, but not to his feoffee. But if the forest be disafforested, and be within any parish, then they ought to pay tithes in the hands of the king's lessee (*p*).

It has been questioned, where a park has paid a modus, and is disparked, whether the modus shall continue or be discharged, and tithes paid in kind; and all the books are clear, that if the modus was a certain consideration in money for all the tithes of such a park, such modus shall hold, notwithstanding it be disparked; but if the modus was for the deer and herbage of such a park, the modus is gone upon disparking (*q*).

In like manner, if the modus has been to pay a buck and a doe for all the tithes of such a park, and the park is disparked, the modus shall continue, and the owner may give a buck and a doe out of another park; but if it was to pay the shoulder of every deer, or expressly a buck and a doe out of the same park, the modus is gone (*r*).

But where the modus was part in money and part in venison out of the park (namely, two shillings and the shoulder of every deer), the court was divided; two being of opinion that the two shillings continued, and that the spiritual court should assign an equitable recompence for

(*n*) 2 Inst. 656.

(*o*) Deg. p. 2, c. 12; 1 Keb. 253; 1 Ves. 117. See *post*, 6 & 7 Will. 4, c. 71, s. 67. Sect. 43 of that act related to the mode of effecting the rent-charge on these lands.

(*p*) Boh. 163, 177; Gibs. 680.

(*q*) Gibs. 684; Wats. c. 47; Moore, 909; 1 Roll. 176.

(*r*) Gibs 684; Wats. c. 47.

the shoulders, according to the number that had been usually paid; and the other two, that the money and venison making one entire modus, the one being gone, the whole was dissolved (*s*).

Glebe land.

Glebe lands in the hands of the parson shall not pay tithe to the vicar, though endowed generally of the tithes of all lands within the parish; not being in the hands of the vicar, they shall pay tithe to the parson; and this is according to the known maxim of the canon law, that the church shall not pay tithes to the church (*t*). *Non enim Levitæ a Levitis decimas accepisse leguntur* (*u*). But this exemption does not extend to the lessee or feoffee of the vicar (*x*). But if the vicar be specially endowed of the small tithes of the glebe lands of the parsonage, then he shall have them, though they are in the hands of the appropriator (*y*).

If a parson lease his glebe lands, and do not also grant the tithes thereof, the tenant shall pay the tithes thereof to the parson (*z*).

And if a parson lets his rectory, reserving the glebe lands, he shall pay the tithes thereof to his lessee (*a*).

If a parson sow his glebe, and dies before severance, and afterwards his successor is inducted, and his executor or vendee severs the corn, the successor shall have the tithe thereof; for although the executor represent the person of the testator, yet he cannot represent him as parson, inasmuch as another is inducted (*b*).

Otherwise, if the parson dies after severance from the ground, and before the corn is carried off; in this case the successor shall have no tithe; because, though it was not set out, yet a right to it was vested in the deceased parson by the severance from the ground. The same is true in case of deprivation, or resignation, after glebe sown: the successor shall have the tithe, if the corn was not severed at the time of his coming in; otherwise if severed (*c*).

Sect. 43 of 6 & 7 Will. 4, c. 71, provides the mode of fixing a *contingent* rent-charge on glebe not in the hands of the owner. Sect. 6 of 2 & 3 Vict. c. 62, provides for the merger of such *contingent* rent-charge in land.

(*s*) Gibs. 684; Wats. c. 47; *Cowper* v. *Andrews*, Hob. 39; Moore, 863; 1 Roll. Rep. 120.

(*t*) Moore, 457, 479, 910; 1 Brownl. 69; Sav. 3; Cro. Eliz. 479, 578.

(*u*) X. 30, 2.

(*x*) Brownl. 69; 17 Viner's Ab. 297.

(*y*) Gibs. 661; Deg. p. 2, c. 2.

(*z*) Deg. p. 2, c. 2; 1 Roll. Abr. 655.

(*a*) Gibs. 661.

(*b*) 1 Roll. Abr. 655.

(*c*) Gibs. 662; *Moyle* v. *Ewer*, 2 Bulst. 183; 1 Roll. Abr. 655.

Abbey land.

All abbots and priors and other chief monks originally paid tithes as well as other men, until Pope Paschal II. exempted generally all the religious from paying tithes of lands in their own hands. And this continued as a general discharge till the time of King Henry II., when Pope Hadrian IV. restrained this exemption to the three religious orders only of Cistercians, Templars, and Hospitalers; unto which Pope Innocent III. added a fourth, to wit, the Præmonstratenses. And this made up the four orders which are commonly called the privileged orders; for that they claimed a privilege to be discharged of tithes by the pope's establishment.

Then came the general Council of Lateran in the year 1215, and further restrained the said exemption from tithes of lands in their own occupation to those lands which they were in possession of before that council.

But the Cistercians, as it appears, in process of time procured bulls to exempt also their lands which were let to farm; for the restraining of which practice the statute of 2 Hen. 4, c. 4, was made; by which it was enacted, that as well they of the said order as all other religious and seculars which should put the said bulls in execution, or from thenceforth should purchase other such bulls, or by colour thereof should take advantage in any manner, should incur a *præmunire*.

So that this statute restrained them from purchasing any such exemptions for the future; and as to the rest, left their privileges as they were before the said statute; that is to say, under a limitation to such lands only as they had before the Lateran Council aforesaid; and it is certain they obtained many lands after that council, which, therefore, were in no wise exempted. And also the said statute left them as it found them, subject to the payment of divers compositions for tithes of their demesne lands made with particular rectors, who contesting their privileges even under that head, brought them to compound. Which two restraints were also followed by a third at the time of the dissolution; when as many of them as did not fall under the statute 31 Hen. 8, c. 13, lost their exemptions, there being no saving clause in the acts of their dissolution or surrender to preserve or to revive them.

31 Hen. 8, c. 13.

But as to those which were dissolved by 31 Hen. 8, c. 13, s. 21, it is enacted as follows; viz. "Where divers abbots, priors, and other ecclesiastical governors of the monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friars, and other religious and ecclesiastical

Abbey land.

houses and places dissolved by this act, have had divers parsonages appropriated, tithes, pensions, and portions, and also were acquitted and discharged of the payment of tithes for their monasteries or other religious and ecclesiastical houses and places as aforesaid, manors, messuages, lands, tenements, and hereditaments; it is enacted, that as well the king our sovereign lord, his heirs and successors, as all other persons, their heirs and assigns, who shall have any of the said monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friars, or other ecclesiastical houses or places, sites, circuits, precincts, of the same or any of them, or any manors, messuages, parsonages appropriate, tithes, pensions, portions, or other hereditaments, which belonged to any such religious house, shall hold and enjoy as well the said parsonages appropriate, tithes, pensions, and portions of the said monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friars, and other religious and ecclesiastical houses and places, sites, circuits, precincts, manors, meases, lands, tenements, and other hereditaments, according to their estates and titles, discharged and acquitted of payment of tithes, as freely and in as large and ample manner as the said late abbots, priors, and other ecclesiastical governors, held and enjoyed the same."

By reason of which discharge from tithes of lands which were given to the king by this act, and which were discharged in the hands of the religious, it has been more strictly inquired what were the houses dissolved by this act, than by any other of the acts of dissolution; which will best appear by the following catalogue.

Alien priories.

The possession of alien priories was given to the crown by 4 Hen. 5, in which there were no words to restrain their privileges (*d*).

(*d*) *Penfold* v. *Groome*, 2 Jac. & W. 534; 2 E. & Y. 536; *Page* v. *Wilson*, 2 Jac. & W. 513. The number of alien priories is said to have been 146. See Account of Alien Priories, by J. Nicholls: London, 1797.

Catalogue of Monasteries of the yearly value of 200*l. or upwards, dissolved by the statute of* 31 *Hen.* 8, *c.* 13, *and by that means capable of being discharged of tithes ; in which are the following abbreviations :—*

Ab. Abbey; Pr. Priory; C. Aust. Canons of St. Austin; Bl. M. Black Monks; Wh. C. White Canons; Ben. Benedictines; Gilb. Gilbertines; Præm. Præmonstratenses; Carth. Carthusians; Mon. Monks; Clun. Cluniacks; Cist. Cistertians; T. in the time of ; Ab. about the year.

Monasteries.	Order.	Founded.	Value. £	s.	d.
	Berkshire.				
Reading	Ben.	T. Hen. 1	1938	14	3
Busleham Ab.	C. Aust.	13 Edw. 3	285	0	0
Abington Ab.	Ben.	720	1876	10	9
	Bedfordshire.				
Newnham Pr.	C. Aust.	T. Hen. 1	293	15	11
Elmeston Ab.	Ben.	T. W. Conq.	284	12	11
Wardon Ab.	Cist.	1139	389	16	6
Chicksand Pr.	Wh. C. / Gilb.	T. W. Rufus	212	3	5
Dunstable Ab.	C. Aust.	T. Hen. 1	344	13	3
Wooburn Ab.	Cist.	T. John	391	18	2
	Buckinghamshire.				
Ashrug Coll.	C. Aust.	T. Edw. 1	416	16	4
Notley Ab.	C. Aust.	1112	437	6	8
Missenden Ab.	Ben.	1293	261	14	6
	Cambridgeshire.				
Thorney Ab.	Ben.	972	411	12	11
Barnewell Pr.	C. Aust.	1092	256	11	10
	Cheshire.				
St. Werburge Ab.	Ben.	1095	1003	5	11
Combermeer Ab.	Cist.	1134	225	9	7
	Cornwall.				
Bodmin Pr.	C. Aust.	936	270	0	11
Launceston Ab.	C. Aust.	T. W. Conq.	354	0	11
St. Germans Ab.	C. Aust.	T. Ethelstan	243	8	0
	Cumberland.				
Carlisle Pr.	C. Aust.	T. W. Rufus	418	3	4
Holme Coltrom Ab.	Cist.	1135	427	19	3
	Derbyshire.				
Darley Ab.	C. Aust.	T. Hen. 2	238	14	5
	Devonshire.				
Ford Ab.	Cist.	1133	374	10	6
Newnham Ab.	Cist.	Ab. 1246	227	7	8
Dinkeswel Ab.	Cist.	1201	294	18	6
Hertland Ab.	C. Aust.	T. Hen. 2	306	3	2
Torre Ab.	Præm.	T. Ric. 1	396	0	11
Buckfast Ab.	Cist.	T. Hen. 2	460	11	2
Plimpton Ab.	Cist.	T. Edw. 1	241	17	9
Tavestock Ab.	Ben.	961	902	5	7
Exon Pr.	Clun.	T. Hen. 1	502	12	9
	Dorsetshire.				
Abbotsbury	Ben.	Ab. 1016	390	19	2
Middleton Ab.	Ben.	T. Ethelstan	538	13	11

Monasteries.	Order.	Founded.	Value. £	s.	d.
Tarrent Ab.	Cist.	By Hen. 3	214	7	9
Shafton Ab.	Ben.	941	1166	8	9
Cerne Ab.	Ben.	T. Edgar	515	17	10
Sherburn Ab.	Ben.	Ab. 370	682	14	7
Durham.					
St. Cuthbert Ab.	Ben.	Ab. 842	1366	10	9
Tinmouth Pr.	Ben.	——	397	11	5
Essex.					
Berking Ab.	Ben.	680	862	12	5
Stratford Langthorne Ab.	Cist.	1135	511	16	3
Waltham Ab.	C. Aust.	Ab. 1060	900	4	3
Walden Ab.	Ben.	1136	372	18	1
St. Oswith Ab.	C. Aust.	1120	677	1	2
Colchester Ab.	C. Aust.	T. Hen. 1	523	17	0
Gloucestershire.					
Bristol Ab.	C. Aust.	T. Hen. 1	670	13	11
Hayles Ab.	Cist.	1246	357	7	8
Winchcomb Ab.	Ben.	787	759	11	9
Tewkesbury Ab.	Ben.	715	1598	1	5
Cirencester Ab.	C. Aust.	T. Hen. 1	1051	7	1
Kingswood Ab.	Cist.	1139	244	11	2
Gloucester Ab.	Ben.	680	1946	5	9
Lanthony Pr.	C. Aust.	1136	641	19	11
Hampshire.					
St. Swithin's Winton Ab.	Ben.	634	1507	17	2
Hyde Ab.	Ben.	By Alfred	865	18	0
Wherwell Ab.	Ben.	By Edgar	339	8	7
Romsey Mon.	Ben.	907	393	10	10
Twinham Pr.	C. Aust.	Before 1042	312	7	0
Belloloco Ab.	Cist.	1024	326	13	2
Southwick Pr.	C. Aust.	T. Hen. 1	257	4	4
Tichfield Ab.	Præm.	T. Hen. 3	249	16	1
Hertfordshire.					
St. Alban's Ab.	Ben.	755	2102	7	1
Huntingdonshire.					
St. Neot's Ab.	Ben.	Ab. t. Hen. 1	241	11	4
Ramsey Ab.	Ben.	969	1716	12	4
Kent.					
St. Austin's Cant.	Ben.	605	1413	4	11
Ledis Pr.	C. Aust.	1119	362	7	7
Feversham Ab.	Clun.	1147	286	12	6
Boxley Ab.	Cist.	1144	204	4	11
Roffen Ab.	Ben.	600	486	11	5
Malling Ab.	Ben.	By Edmund	218	4	2
Dertford Ab.	C. Aust.	1372	380	0	0
Lancashire.					
Whalley Ab.	Cist.	1172	321	9	1
Leicestershire.					
Leicester Ab.	C. Aust.	1143	951	14	5
Croxden Ab.	Præm.	Ab. R. 1	385	0	10
Launday Ab.	C. Aust.	T. W. Rufus	399	3	3
Lincolnshire.					
Lincoln St. Cath. Pr.	Gilb.	T. Hen. 2	202	5	0
Kirksteed Ab.	Cist.	1129	286	2	7
Revesley Ab.	Cist.	1142	217	2	4

Monasteries.	Order.	Founded.	Value. £	s.	d.
Thornton Ab.	C. Aust.	1139	594	17	10
Barney Ab.	Ben.	712	366	6	1
Croyland Ab.	Ben.	716	1803	15	10
Spalding Ab.	Ben.	1052	761	8	11
Sempringham Ab.	Gilb.	1148	317	4	1
Epworth Mon.	Carth.	1386	237	15	2
London and Middlesex.					
St. John Jerusalem Pr.		1100	2385	12	8
St. Barth. Smithfield	C. Aust.	1102	653	15	0
St. Mary Bishopsgate Pr.		1187	478	6	6
Clerkenwell Pr.	Ben.	T. Stephen	262	19	0
London Minors	Ben.	T. Edw. 1	318	8	5
Westminster Ab.	Ben.	T. Edgar	3471	0	2
Sion Ab.	C. Aust.	By Hen. 5	1731	8	4
London, a house of	Carth.	T. Edw. 3	642	0	4
St. Clare witht. Aldg. Mon.		1292	418	8	5
St. Mary charter house	Carth.	1379	736	2	7
St. John Holiwell	Bl. M.	1318	347	1	3
St. Mary East Smithf. Ab.	Cist.	1360	602	11	10
Norfolk.					
Thetford Ab.	Clun.	1103	312	14	4
Wymundham Ab.	Ben.	1139	211	16	6
Hulmo Ab.	Ben.	By Canute	583	17	0
Westerham Ab.	Præm.	T. Hen. 2.	228	0	0
Walsingham Ab.	C. Aust.	Ab. t. Stephen	391	11	6
Castle-acre Ab.	Clun.	1090	306	11	4
West-acre Ab.	Clun.	T. W. Rufus	260	13	7
Northamptonshire.					
Burg. St. Peter Ab.	Ben.	By Rosere, kg. of Mercia	1721	14	0
Pipewell Ab.	Cist.	1143	286	11	8
St. Andrews Pr.	Clun.	1067	263	7	1
Sulby Ab.	Præm.	T. Stephen	258	8	5
Northumberland.					
Tinmouth, a cell to St. Alban's, a nunnery			511	4	1
Nottinghamshire.					
Lenton Pr.	Clun.	T. Hen. 1.	329	5	10
Thurgarton Pr.	C. Aust.	T. Hen. 1.	259	9	4
Welbeck Ab.	C. Aust.	T. Stephen	249	6	3
Warsop Pr.	C. Aust.		239	10	5
Bella Valla Pr.	Carth.	Ab. 16 Edw. 3	227	8	0
Newsteed Pr.	C. Aust.	T. Edw. 3	219	18	8
The two last are under value in Dugdale, but thus by Speed.					
Oxfordshire.					
Godstow Ab.	Ben.	T. Stephen	274	5	10
Eynesham Ab.	Ben.	By Ethelred	441	12	2
Osney Ab.	C. Aust.	T. Hen. 1.	654	10	2
Thame Ab.	Cist.	T. Hen. 1.	256	13	11
Oxford Pr.		Bef. Conq.	224	4	8
Dorchester Ab.	C. Aust.	635	219	12	0
Shropshire.					
Haghmond Ab.	C. Aust.	1100	259	13	7
Lilleshull Ab.	C. Aust.	By Elfleda, kg. of Mercia	229	3	1
Wigmore Ab.	C. Aust.	1172	207	2	10

Monasteries.	Order.	Founded.	Value. £	s.	d.
Wenlock Pr.	Clun.	1181, or before	401	0	7
Salop Ab.	C. Aust.	1081	615	4	3
Hales Owen Ab.	Præm.	T. John	337	15	6
Somersetshire.					
Glassenbury Ab.	Ben.	About 300	3311	7	4
Brewton Ab.	C. Aust.	Ab. t. Conq.	439	6	8
Henton Pr.	Carth.	T. Hen. 3.	248	19	2
Witham Pr.	Carth.	By Hen. 2	205	15	0
Taunton Pr.	C. Aust.	T. Hen. 1	286	8	10
Bath Ab.	Ben.	T. Hen. 3.	617	2	3
Keynsham Ab.	C. Aust.	T. Hen. 1	419	14	3
Michelney Ab.	Ben.	740	447	4	11
Buckland Pr.	Cist.	T. Edw. 1	223	7	4
Staffordshire.					
Dela Cres Ab.	Cist.	1153	227	5	0
Burton-upon-Trent	Ben.	T. Eadred	267	14	3
Croxden Ab.	Cist.	—	—		
Suffolk.					
St. Edmundsbury Ab.	Ben.	1020	1659	13	11
Butley Ab.	C. Aust.	1171	318	17	2
Sibeton Ab.	Cist.	1150	250	15	7
Ixworth Pr.	C. Aust.	T. W. Conq.	280	9	5
Surrey.					
Merton Pr.	C. Aust.	1414	957	19	5
Shene Pr.	Carth.	1414	777	12	0
Chertsey Ab.	Ben.	666	659	15	8
Newark Pr.	—	—	258	11	11
St. Mary Overs Ab.	C. Aust.	1106	625	6	6
Bermundsey Ab.	C. Aust.	1106	474	14	4
Sussex.					
Lewes Ab.	Clun.	T. W. Ruf.	920	4	6
Robert's Bridge Ab.	Cist.	T. Hen. 2.	248	10	6
Battaile Ab.	Bl. M.	1066	987	0	11
Warwickshire.					
Combe Ab.	Cist.	T. Steph.	311	15	1
Kenelworth Ab.	C. Aust.	T. Hen. 1.	538	19	0
Meryval Ab.	Cist.	1148	254	1	8
Nuneaton Mon.	Ben.	T. Hen. 2.	253	14	5
Wiltshire.					
Malmsbury Ab.	Ben.	Ab. 670	803	17	7
Bradenstock Pr.	C. Aust.	T. W. Conq.	212	19	3
Edington Pr.	C. Aust.	1352	442	19	7
Ambresbury Ab.	Ben.	1177	494	15	2
Wilton Ab.	Ben.	T. Ethelwolf	601	1	1
Fairley, a cell to Lewes	Clun.	1125	217	0	4
Laycock Ab.	C. Aust.	1232	203	12	3
Worcestershire.					
Malverne Ab.	Ben.	1083	308	1	3
Evesham Ab.	Ben.	T. Offa.	1783	12	9
Pershore Ab.	Cist.	—	643	4	5
Hales Owen Ab.	Præm.	T. John	282	13	4
Bordesly Ab.	Cist.	1138	388	1	1
Yorkshire.					
St. Mary's York Ab.	Ben.	1088	1550	7	0
Selby Ab.	Ben.	T. W. Conq.	720	12	10

Monasteries.	Order.	Founded.	Value. £	s.	d.
Kirkstal Ab.	Cist.	1147	329	2	11
De Rupe Ab.	Cist.	1147	224	2	5
Monks Burton Ab.	Clun.	Ab. 1186	239	3	6
Nostel Ab.	C. Aust.	T. Hen. 1	492	18	2
Pomfrait Ab.	Clun.	T. W. Conq.	237	14	8
Gisbourn Ab.	C. Aust.	T. Steph.	628	3	4
Whitby Ab.	Ben.	T. W. Conq.	437	2	9
Montegratiæ Ab.	Carth.	Ab. 1396	323	2	10
Newburge Pr.	C. Aust.	1145	367	8	3
Belland Ab.	Cist.	1134	238	9	4
Kirkham Ab.	C. Aust.	T. Hen. 1	269	5	9
Melsa Ab.	Cist.	1136	299	6	4
Brilington	C. Aust.	T. Hen. 1	547	6	11
Walton Ab.	Gilb.	T. Steph.	360	16	10
Bolton in Craven Pr.	C. Aust.	T. Hen. 1	212	3	4
Raval Ab.	Cist.	1132	278	10	2
Jerval Ab.	Cist.	T. Steph.	234	18	5
Furnes Ab.	Cist.	1127	805	16	5
De Fontibus	Cist.	1132	998	6	8
Warter Pr.	C. Aust.	T. Hen. 1	221	3	10
Richal	—	—	351	14	6
Old Maulton Ab.	—	T. Steph.	257	7	0
St. Michael near Hull	Carth.	1377	231	17	3
In Wales.					
Valle de Sancta Cruce in Denbighshire	Cist.	T. Edw. 1	214	3	5
Strata Florida in Cardiganshire	Cist. or Clun	T. W. Conq.	1226	6	0

How the religious were discharged from payment of tithes.

At the time of the dissolution, the religious were discharged from payment of tithes three several ways; either by the pope's bulls, or by their order as aforesaid, or by composition: which discharges would have vanished and expired with the spiritual bodies whereunto they were annexed, if they had not been continued by the special clause above mentioned (as it happened to those which were dissolved by the other statutes of dissolution, for want of such clause). And by the said clause also is created a new discharge, which was not before at the common law, that is, *unity of the possession* of the parsonage and land tithable in the same hand: for if the monastery at the time of the dissolution was seised of the lands and rectory, and had paid no tithes within the memory of man for the lands, those lands shall now be exempted from payment of tithe, by a supposed perpetual unity of possession; because the same persons that had the lands, having also the parsonage, they could not pay tithes to themselves (*e*).

But though by such union the persons so possessed were discharged from the payment of tithes, yet the lands

(*e*) God. 383; Bob. 241, 248.

How the religions were discharged from payment of tithes.

were not absolutely discharged of the tithes: for upon any disunion that might happen, the payment of tithes again revived: so that the union only suspended the payment, but was no absolute discharge of the tithes themselves. And therefore such union was not to be pleaded as a discharge from tithes, but only as a discharge from the payment of tithes (*f*).

And such union must appear to have had these four qualities: First, it must have been *just;* that is, claimed by right, and good and lawful title; and not by disseisin or other tortious, unjust, or unlawful act: for such an union would not have been a good discharge within the statute. Secondly, it must have been *equal;* that is, there must have been a fee-simple both in the lands and in the tithes; as well of the lands upon which the tithes are, as of the parsonage or rectory: for if those religious persons had holden but by lease, that had not been such a unity as the statute intended. Thirdly, it must have been *free;* that is, free from the payment of any tithes in any manner: for if the abbots, or their farmers, or their tenants at will or for years, had paid any manner of tithes before the dissolution, it may be alleged as a sufficient bar to avoid the unity pleaded in discharge of tithes. Fourthly, it must have been *perpetual*, time out of mind, that such religious houses were endowed, and such religious persons must have had in their hands both the rectory and lands united, perpetually, and without interruption, before the memory of man, or (as it seems according to the rule of the common law) before the first year of King Richard I., discharged of tithes: for if by any records or ancient deeds, or other legal evidence, it can be made to appear, that either the lands or the rectory came to the abbey since the said first year of King Richard I., such union cannot be said to be perpetual (*g*).

And, moreover, the lands of such houses dissolved as aforesaid, shall be free from the payment of tithes only so far as they were free in the hands of the churchmen, namely, whilst they are in the hands and manurance of the owners thereof: and therefore it is necessary for the party who would have the advantage of this privilege, expressly to show and aver, that the lands are in his hands and manurance: for to say that he is seised of the lands is not sufficient: for he may be seised thereof and yet another manure them (*h*).

(*f*) Bob. 248.

(*g*) Bob. 250.

(*h*) Comyns, 498: *Fox* v. *Bardwell*, E., 8 Geo. 2; Wood, b. 2, c. 2.

It has been holden also, that a tenant in tail, who has an estate of inheritance, shall be discharged in virtue of the clause aforesaid, so long as he occupies the same himself; but that unity of possession does not discharge a copyholder (though a prior in that case was seised in fee of the manor of which it was parcel, and was also impropriator); much less a tenant for life or years (i). For in such case, the possession is in the copyholder or other tenant, and not in the landlord or lessor; and consequently it is not a unity of possession (k). But in the case of *Hett* v. *Meeds* (l), it was holden that the lands of *a tenant for life under a settlement* were exempt from tithes.

But it is otherwise with regard to the king; whose farmers shall be discharged of such tithes, as the spiritual persons were, because the king cannot cultivate the lands himself. And so long as the king has the freehold, his farmers shall have such privilege: but if after having leased them, he shall sell the same, or shall grant over the reversion, then the farmers shall pay tithes. And it has been said, that this privilege extends no further, than to the king's tenants at will; not to tenants for life or years (m).

Upon the whole, not all lands that belonged to the religious houses in general are discharged from tithes; but only such lands are capable of discharge, as belonged to the houses which were dissolved by the statute 31 Hen. 8, c. 13, and not all those lands, which belonged to religious houses dissolved by that statute, are discharged from tithes; but only such of them as were discharged at the time of their dissolution. But what shall be sufficient evidence of such discharge, that is, whether by order, bull, composition, or unity of possession, at this distance of time seems difficult to determine with precision; as strictness of proof may be more or less requisite, according to the particular circumstances of the case.

SECT. 4.—*Recovery of Tithes before the Tithe Commutation Acts.*

It is not necessary to do more than very slightly mention the old law as to the recovery of tithes.

(i) Gibs. 673.
(k) Hardres, 174; Moore, 219, 534.
(l) 4 Gwill. 1515.
(m) Gibs. 673; Bob. 282, 283; Moore, 915; Hardres, 315.

Incumbent bound to demand.

By a constitution of Archbishop Winchelsea an incumbent was compelled to demand his tithes, that they might not be lost to his successors (*n*).

Who to be sued.

The ordinary course was to bring a suit against the owner of the property to be tithed; but this rule had some exceptions in the case of agistment, and where crops were sold on the ground before they were fully got in (*o*).

An executor might be sued for tithes due from his testator (*p*).

Recoverable in the Ecclesiastical Courts.

Tithes were generally to be recovered in the Ecclesiastical Courts; and the jurisdiction of these courts for that purpose is specially confirmed by 13 Edw. 1, the statute of *Circumspectè agatis*, 9 Edw. 2, st. 1, c. 1, the statute of *Articuli Cleri*, 27 Hen. 8, c. 20, and 32 Hen. 8, c. 7.

By 2 & 3 Edw. 6, c. 13, these statutes were confirmed; and it was further provided that, in the event of the refusal of any person to set out his tithes, double the value might be recovered from him by suit in the Ecclesiastical Court. By the same statute a penalty of treble the value of the tithes was also imposed upon the person so offending; this however was recoverable only in the courts of common law.

Small tithes and tithes owed by Quakers.

Provisions for the recovery of tithes and offerings of a small amount, and of tithes owed by Quakers, by summary proceedings before two justices of the peace, were made by 7 & 8 Will. 3, c. 6; 7 & 8 Will. 3, c. 34; 1 Geo. 1, st. 2, c. 6, s. 2; 53 Geo. 3, c. 127; 7 Geo. 4, c. 15; 5 & 6 Will. 4, c. 74; and 4 & 5 Vict. c. 36. These statutes, which still have their force with respect to offerings, oblations, &c., will be treated of at length in the chapter on those subjects (*q*).

Suits in equity.

Tithes were also sued for in the courts of equity, the equity side of the Court of Exchequer being the favourite court for this purpose.

Modus decimandi.

Under the old system of tithe taking it was not uncommon for a custom to be established whereby some fixed sum of money or quantity of corn or other titheable goods was taken by the tithe-owner instead of the literal tithe of the various titheable objects. This fixed sum or quantity was called a *modus*. There might be a modus for a whole parish or for some particular lands in it only. Moduses might be sued for in the Ecclesiastical Courts (*r*). Bills also

(*n*) Lind. 191.

(*o*) Viner, Abridg. Dismes, L. a; God. 412, 413. See 5 & 6 Will. 4, c. 75, as to tithe of turnips.

(*p*) Boh. 159.

(*q*) *Vide infra*, Part V. Chap. IV.

(*r*) 2 Inst. 400.

might be filed by the tithe-payers in the courts of equity to establish a *modus* as against the tithe-owner (*s*). Provisions for dealing with moduses are made by the various Tithe Commutation Acts (*t*).

London and local tithes.

In the nature of moduses are the customary tithes paid in the city of London, and the various compositions made by many towns and places and confirmed by local acts (*u*).

Shortening of time for claim of modus.

The act 2 & 3 Will. 4, c. 100, provided for the shortening of the period, during which exemption from payment of tithes or a modus or composition for tithes must be proved to have existed, to thirty years, unless there was counter-evidence, and in any case to 60 years, or the tenure of office by two successors in a corporation sole, and three years after the entry into office by a third (sect. 1). The act was not to extend to cases where the tithes had been demised, or where there had been a composition for a term between the tithe-owner and tithe-payer, if a suit was begun within three years after the expiration of such demise or composition (sect. 4); and the time during which the tithes and lands were in the same hands, or during which the tithe-owner was under disability, was not to be reckoned in the 30 or 60 years (sects. 5, 6).

This act was not to extend to any suits then existing or which should be brought within one year (sect. 3). In consequence of this provision a great number of suits were immediately instituted by tithe-owners, temporary provision for which had to be made by 4 & 5 Will. 4, c. 83.

Cases on the act.

Several cases have been decided upon the construction of the clauses of 2 & 3 Will. 4, c. 100. These however are not of much present importance. The principal of them seem to be *Salkeld* v. *Johnson*, 1 Hare, 204, 2 C. B. 749, 2 Ex. 256, 1 Mac. & G. 242; *Fellowes* v. *Clay*, 4 Q. B. 313, 3 G. & D. 443; *Knight* v. *Marquis of Waterford*, 15 M. & W. 419; *Toymbee* v. *Brown*, 3 Ex. 117; and *Young* v. *Master of Clare Hall*, 17 Q. B. 529, 21 L. J., Q. B. 12.

SECT. 5.—*Account of the Tithe Commutation Acts.*

Tithe Commutation Acts;

The principal Tithe Commutation Acts are as follow:— 1. 6 & 7 Will. 4, c. 71, intituled "An Act for the Commutation of Tithes in England and Wales." 2. 7 Will. 4 & 1 Vict. c. 69, intituled "An Act to amend" the foregoing Act. 3. 1 & 2 Vict. c. 64, intituled "An Act to

(*s*) Story on Equity Jurisprudence, s. 520.

(*t*) See 6 & 7 Will. 4, c. 77, ss. 44, 49; 5 & 6 Vict. c. 54, s. 7.

(*u*) *Vide infra*, Sects. 16 and 17.

Tithe Commutation Acts;

facilitate the Merger of Tithes in Land." 4. 2 & 3 Vict. c. 32, intituled "An Act to explain and amend the Acts for the Commutation of Tithes in England and Wales." 5. 3 & 4 Vict. c. 15, intituled "An Act further to explain and amend the Acts for Commutation of Tithes in England and Wales." 6. 5 & 6 Vict. c. 54, intituled "An Act to amend the Acts for the Commutation of Tithes in England and Wales, and to continue the Officers appointed under the said Acts for a Time to be limited." 7. 9 & 10 Vict. c. 73, intituled "An Act further to amend the Acts for the Commutation of Tithes in England and Wales." 8. 23 & 24 Vict. c. 93, intituled "An Act to amend and further extend the Acts for the Commutation of Tithes in England and Wales" (*v*).

Principle of.

These statutes must be considered as constituting one enactment, their principle being to substitute a *corn-rent, payable in money and permanent in quantity, though fluctuating in value, for all tithes*, whether payable under a *modus*, or composition or not, which may have heretofore belonged either to ecclesiastical or lay persons. Such rent-charge is to be paid by two half-yearly payments, namely, on the 1st of July and the 1st of January in every year. Certain commissioners and assistant commissioners were appointed to execute the provisions of this act (*x*). Two modes were allowed of ascertaining the gross amount of the rent-charge, payable in respect of the tithes (*y*) of the whole parish. 1, a voluntary agreement, or after a specified period had elapsed without any such arrangement being adopted, 2, a compulsory award. These acts are not to affect tithes due *before* the commutation (*z*), and make provision for payments due for the period intervening between the end of former compositions and the commutation (*a*). False evidence given before the commissioners under this act was to be esteemed as perjury, and withholding evidence a misdemeanor (*b*).

These provisions in the first acts have been supplemented and in some few respects modified by the later acts. They are all however now rather matters whose importance has passed, as the commutation of the tithes has been some time completed. The following are the several sections bearing upon the procedure to a commutation; 6 & 7 Will. 4, c. 71, ss. 10—28, 32, 35, 39, 44—54, 59—61, 65,

(*v*) The following acts also bear on this subject: 10 & 11 Vict. c. 104; 14 & 15 Vict. c. 53; 31 & 32 Vict. c. 89.

(*x*) *Vide infra*, Sect. 18.

(*y*) Certain exceptions are mentioned below.

(*z*) 6 & 7 Will. 4, c. 71, s. 89.

(*a*) 7 Will. 4 & 1 Vict. c. 69, s. 10.

(*b*) 6 & 7 Will. 4, c. 71, ss. 10. 93. See 3 & 4 Vict. c. 15, s. 24.

73–76; 7 Will. 4 & 1 Vict. c. 69, ss. 1, 4—6, 9, 11; 2 & 3 Vict. c. 62, ss. 8, 10, 22—25; 3 & 4 Vict. c. 15, ss. 1—12 (temporary), 13, 15, 16, 20—24; 5 & 6 Vict. c. 54, ss. 1—4, 9—11.

It should perhaps also be noticed that, questions having often arisen during the process of commutation as to the boundaries of parishes, the commissioners have been empowered to decide on such boundaries in many cases (*c*).

Peculiarities of the new law.

It may be well in this place to observe some of the principal features which discriminate the new from the old law on tithes.

1. Under the old law there could not have been a *distress* for tithes, but under the new law the mode of recovering the rent-charge in arrear is, as will be seen below, by distraining for it in the same manner as a landlord recovers his rent. When the rent-charge has been twenty-one days in arrear its owner may distrain, but not for more than two years' rent-charge; and if the rent-charge shall have been forty days in arrear, possession of the land may be given to the owner of the rent-charge, until the arrears and costs are satisfied (*d*).

2. If the interest of the owner of the rent-charge shall have ceased before the 1st of January or 1st of July (the appointed times of payment), such owner or his representative will be entitled to a proportional part of the rent-charge for the time which may have elapsed from the last day of payment to the time of his interest determining (*e*).

3. If the lands be uncultivated they are nevertheless liable to the rent-charge, but not if they have been wasted away by the sea or otherwise destroyed by any natural casualty (*f*).

4. Where a rent-charge is payable to a spiritual incumbent, a portion of land not exceeding twenty acres may be given in lieu of all or part of the rent-charge (*g*).

5. The rent-charge may at the request of the land-owner (certain forms being observed) be confined to a part of the land, on the whole of which it may have been apportioned; the value of such land being treble the value of the apportioned rent-charge (*h*).

6. Tithes, or rent-charge in lieu thereof, may in certain

(*c*) 7 Will. 4 & 1 Vict. c. 69, ss. 2, 3; 2 & 3 Vict. c. 62, ss. 34, 35, 36; 3 & 4 Vict. c. 15, s. 28.

(*d*) *Vide post*, 6 & 7 Will. 4, c. 71, ss. 81, 82.

(*e*) *Vide post*, 6 & 7 Will. 4, c. 71, s. 86.

(*f*) *Vide post*, 6 & 7 Will. 4, c. 71, s. 85.

(*g*) *Vide post*, 6 & 7 Will. 4, c. 71, ss. 29, 62.

(*h*) *Vide post*, 6 & 7 Will. 4, c. 71, ss. 58. 72.

instances be merged (*i*) in land. Tithes formerly could not have been so merged. But (*k*) "impropriate tithes are still kept distinct from the land, and notwithstanding unity of possession, they continue to be held under separate titles. In conveyances and wills made subsequently to the purchase of the tithes by the owner of the land, they will not pass unless they be expressly named. In consequence of inattention to that circumstance, and an apprehension that after the purchase of the tithes the land was tithe free, the tithes have not in many cases been mentioned in subsequent wills and conveyances; by which omission, the intention that the land should pass discharged of tithes has been defeated, the tithes going in one line, and the land subject to the revived burden of tithes in another. The real property commissioners proposed that the owner, having the legal and beneficial estate in fee in tithes, should have power given to him of merging those tithes in the land, and that the land for ever thereafter should be discharged of tithes (*l*). The above suggestion, however, has not been carried into effect by the recent statutes relating to real property.

Conveyances and wills of tithes.

"The same thing may happen with respect to the rent-charges allotted to impropriators, or purchased by the owners of lands; and unless the tithes or rent-charges be extinguished by a declaration made under the 71st section of the above act (*m*), it will be necessary to name expressly the rent-charge in lieu of tithes in conveying the lands upon which it is charged."

Leases and agreements under Tithe Commutation Acts.

7. In all leases and agreements made subsequently to the commutation of tithes into rent-charge, the *landlord* is liable to the payment of the rent-charge instead of the occupying tenant (*n*).

Redemption of small rent-charges.

8. Small rent-charges may be redeemed by payment of a sum of money not less than twenty-four times the amount of the rent-charge at the time (*o*).

9. Barren or waste land in a parish where the tithes have been commuted does not, on being brought into cultivation, pay tithes under 2 & 3 Edw. 6, c. 13, s. 5 (*p*), except the extraordinary hop or fruit tithe (*q*).

(*i*) *Vide post*, 6 & 7 Will. 4, c. 71, s. 71, and subsequent acts.

(*k*) This is an extract from a valuable note of Mr. Shelford's, in his work on the Tithe Commutation Acts.

(*l*) *Vide* 1st Real Property Rep. pp. 55, 56.

(*m*) *i.e.*, 6 & 7 Will. 4, c. 71.

(*n*) *Vide post*, 6 & 7 Will. 4, c. 71, ss. 70, 79, 80.

(*o*) 9 & 10 Vict. c. 73, ss. 1—12.

(*p*) *Vide supra*, p. 1489.

(*q*) 6 & 7 Will. 4, c. 71, s. 67; *Walsh* v. *Trimmer*, 2 L. R., H. L. 208.

SECT. 6.—*Of the Rent-charge substituted for Tithes.*

6 & 7 Will. 4, c. 71, after providing that the landowners shall appoint the valuers of the tithes to be commuted, enacts as follows: By sect. 33,

"As soon as may be after the choosing of such valuer or valuers, and after the confirmation of the said agreement, the valuer or valuers so chosen shall apportion the total sum agreed to be paid by way of rent-charge instead of tithes, and the expenses of the apportionment, amongst the several lands in the said parish, according to such principles of apportionment as shall be agreed upon at the meeting at which the valuer or valuers shall be chosen, or if no principles shall be then agreed upon for the guidance of the valuer or valuers, then having regard to the average titheable produce and productive quality of the lands, according to his or their discretion and judgment, but subject in each case to the provisions hereinafter contained, and so that in each case the several lands shall have the full benefit of every modus and composition real, prescriptive, and customary payment, and of every exemption from, or non-liability to tithes relating to the said lands respectively, and having regard to the several tithes to which the said lands are severally liable."

Valuers to apportion the rent-charge.

And by sects. 36 and 37:

"After the first day of October, 1838, the commissioners shall proceed in manner hereinafter mentioned, at such time and in such order as to them shall seem fit, either by themselves or by some assistant commissioner, to ascertain and award the total sum to be paid by way of rent-charge instead of the tithes of every parish in England and Wales, in which no such agreement binding upon the whole parish as aforesaid shall have been made and confirmed as aforesaid: provided nevertheless, that if any proceeding shall be had towards making and executing any such agreement after the commissioners shall have given or caused to be given notice of their intention to act as aforesaid in such parish, the commissioners may refrain from acting upon such notice, if they shall think fit, until the result of such proceeding shall appear."

After 1st October, 1838, commissioners may ascertain total value of tithes in any parish in which no previous agreement has been made.

Sect. 37. "In every case in which the commissioners shall intend making such award, notice thereof shall be given in such manner as to them shall seem fit; and after the expiration of twenty-one days after such notice shall have been given, the commissioners or some assistant commissioner shall, except in the cases for which provision is hereinafter made, proceed to ascertain the clear average

Value of tithes to be calculated upon an average of seven years.

value (after making all just deductions on account of the expenses of collecting, preparing for sale and marketing, where such tithes have been taken in kind,) of the tithes of the said parish, according to the average of seven years preceding Christmas in the year 1835: provided, that if during the said period of seven years, or any part thereof, the said tithes or any part thereof shall have been compounded for or demised to the owner or occupier of any of the said lands in consideration of any rent or payment instead of tithes, the amount of such composition, or rent or sum agreed to be paid instead of tithes, shall be taken as the clear value of the tithes included in such composition, demise or agreement, during the time for which the same shall have been made; and the commissioners or assistant commissioners shall award the average annual value of the said seven years so ascertained as the sum to be taken for calculating the rent-charge to be paid as a permanent commutation of the said tithes: provided also, that whenever it shall appear to the commissioners that the party entitled to any such rent or composition shall in any one or more of the said seven years have allowed and made any abatement from the amount of such rent or composition on the ground of the same having in any such year or years been higher than the sum fairly payable by way of compositien for the tithe, but not otherwise, then and in every such case such diminished amount, after making such abatements as aforesaid, shall be deemed and taken to have been the sum agreed to be paid for any such year or years; provided also, that in estimating the value of the said tithes, the commissioners or assistant commissioner shall estimate the same without making any deduction therefrom on account of any parliamentary, parochial, county, and other rates, charges, and assessments, to which the said tithes are liable; and whenever the said tithes shall have been demised or compounded for on the principle of the rent or composition being paid free from all such rates, charges, and assessments, or any part thereof, the said commissioners or assistant commissioner shall have regard to that circumstance, and shall make such an addition on account thereof as shall be an equivalent."

Tithes to be valued without deduction on account of parochial and county rates, &c.

As to rates.

The same rule with respect to rates is directed to be pursued in sections 40, 41, 43. And by sect. 69, the rent-charge is to be liable to the same rates as the tithes commuted have been (*p*).

(*p*) By sect. 38, a power was given to the commissioners to increase or diminish the sum to be paid for commutation, and a

Sect. 55. "A draft of every apportionment shall be made, and shall set forth the agreement or award, as the case may be, upon which such apportionment is founded, and every schedule thereunto annexed; and the said draught or some schedule thereunto annexed, whether made by or under the direction of the valuers or commissioners or assistant commissioners, shall state the name or description and the true or estimated quantity in statute measure of the several lands to be comprised in the apportionment, and shall set forth the names and description of the several proprietors and occupiers thereof, and whether the said several lands are then cultivated as arable, meadow, or pasture land, or as wood land, common land, or howsoever otherwise, and shall refer, by a number set against the description of such lands, to a map or plan to be drawn on paper or parchment, and the same number shall be marked on the representation of such lands in the said map or plan; and the draught of the apportionment shall also state the amount charged upon the said several lands, and to whom and in what right the same shall be respectively payable" (*q*).

Form of apportionment.

In the case of *Re Appledore Tithe Commutation* (*r*), there were in the parish ancient pasture lands, arable lands, and wood lands; and a modus of 1*s*. an acre was payable to the vicar for all tithes except those of corn, the wood land being exempt by custom. An award was made and confirmed. In apportioning the award the valuer imposed upon the pasture land a small charge above the 1*s*. an acre on the ground of the possibility of its being converted into tillage. The commissioners confirmed this apportionment.

Re Appledore Tithe Commutation.

On motion for a prohibition the Court of Queen's Bench held that a prohibition would not lie to the commissioners in the circumstances; but that if it did, the commissioners were right.

By sect. 58, the landowner may have the rent-charge specifically apportioned upon particular lands under certain conditions.

Sect. 72. "If at any time subsequent to the confirmation of any such instrument of apportionment the owner of any lands charged with any such rent-charge shall be desirous that the apportionment thereof shall be altered, it shall be lawful for the commissioners of land tax for the county or place where the said lands are situate, or any

Apportionment may be altered by commissioners of land tax if desired.

report was ordered to be laid before parliament on the mode of exercising this power, which was accordingly done.

(*q*) See 3 & 4 Vict. c. 15, s 21.

(*r*) 8 Q. B. 139.

Mode of effecting this.

three of them, to alter the apportionment in such manner and in such proportion and to the exclusion of such of the lands as the landowner with the consent of two justices of the peace acting for the county, riding, division or other jurisdiction in which the lands are situated, may direct; and such altered apportionment shall be made by an instrument in writing under the hands and seals of the said commissioners of land tax and of the said landowner and justices of the like form and tenor as to the said lands as the original apportionment, and bearing date the day of its execution by the said commissioners of land tax, subject to the provision hereinbefore contained with respect to the value of lands on which any rent-charge may be charged on account of the tithes of any other lands; and every such altered apportionment shall be as valid as if made and confirmed by the tithe commissioners as aforesaid, and shall be taken to be an amendment of the original apportionment; and in every such case two counterparts of the instrument of altered apportionment under the hands and seals of the said commissioners of land tax and justices and landowner, shall be sent, one to the registrar of the diocese, and one to the incumbent and church or chapel-wardens, or other person having the custody of the other copy of the original instrument of apportionment: and one counterpart shall be annexed to the copy of the instrument of apportionment in the custody of the registrar and such other person respectively, and taken to be an amendment thereof; and thenceforward such lands shall be charged only according to such altered apportionment; and all expenses of such alteration shall be borne by the landowner desiring the same."

5 & 6 Vict. c. 54, enacts as follows:—

Power to alter apportionments as between different owners.

Sect. 14. "If at any time after the confirmation of any instrument of apportionment it shall appear that the lands charged with one entire rent-charge belong to or have become vested in several owners, and that any of the owners of such lands shall be desirous that the apportionment thereof should be altered, it shall be lawful for the commissioners of land tax for the county or place where the said lands are situated, or any three of them, to appoint, by notice under their hands, a time and place for hearing the parties to such application, and all other parties interested therein; and upon satisfactory proof of such notice having been served on all parties interested full twenty-one days before the day of hearing, to proceed to alter the apportionment in such manner and in such proportion amongst the said lands as to them shall seem just,

subject nevertheless to the consent of two justices of the peace, as in the said first-recited act provided; and further, that upon such application being made to the said tithe commissioners, they shall have the same power of making such alteration as by the said first-recited act and by this act is vested in the commissioners of land tax, and that without any such consent of two justices of the peace; provided that no alteration of any apportionment shall be made under the first-recited act or this act whereby any rent-charge shall be subdivided, so that any subdivision thereof shall be less than five shillings" (*s*).

Copy of instrument of altered apportionment to be sent to Tithe Office.

Sect. 15. "The registrar of every diocese, as soon as conveniently may be after the passing of this act, shall cause to be made and sent to the office of the tithe commissioners a copy, certified under his hand, of every instrument of altered apportionment in his custody which was made before the passing of this act, the reasonable cost of making and sending which copy shall be defrayed by the tithe commissioners as part of the expense of putting in execution the acts for the commutation of tithes; and after the passing of this act three counterparts shall be made of every instrument of altered apportionment at the expense of the landowner desiring the alteration; and two of the said counterparts shall be sent as provided by the first-recited act, and the third shall be sent to or deposited in the office of the tithe commissioners, or, after the expiration of the tithe commission, shall be sent to and kept by the person having custody of the records and papers of the said commission, and shall be annexed to the instrument of apportionment in the custody of the said commissioners, or the person having the custody of their records and papers."

23 & 24 Vict. c. 93, enacts as follows:—

Rent-charge may be reapportioned and redistributed on the same or on other lands.

Sect. 11. With the consent of the owner or owners of any lands charged with rent-charge under any instrument of apportionment, whether payable to one or more owners of rent-charge, and without regard to the mode in which the same rent-charge is apportioned by the said instrument, the commissioners may by an altered apportionment reapportion and redistribute the same rent-charge over and amongst the said lands or any part thereof, and to the exclusion of any of such lands, but no rent-charge shall be charged upon any land to the exclusion of other land of the same owner, unless the land so charged with rent-charge is held for an estate in fee simple or fee tail in pos-

(*s*) See also 3 & 4 Vict. c. 15, ss. 26, 27; and 9 & 10 Vict. c. 73, ss. 13, 14, *infra*.

session, or unless the same and the land so excluded are settled to the same uses.

Where fences removed rent-charge may be apportioned on land tithe-free jointly with other land.

Sect. 12. "Where, through the removal or alteration of fences between land charged with rent-charge under any instrument of apportionment and land upon which no rent-charge is now charged, or which is tithe-free, it becomes impossible or difficult to distinguish the limits of the land so charged with rent-charge, the commissioners may, with the consent of the owner of the said lands, include the whole of such lands in any instrument of altered apportionment to be made by the said commissioners, and may apportion the rent-charge as well on the said land not heretofore charged as on the said land heretofore liable to the payment thereof, or on any part thereof, provided that the whole of the lands on which such rent-charge is apportioned are held for an estate in fee simple or fee tail in possession, or are settled to the same uses."

Land not to be charged to a different owner than before without consent.

Sect. 13. "No land shall be charged with rent-charge payable to a different owner than the rent-charge previously charged thereon was payable to, without the consent in writing of the owner of the rent-charge so proposed to be charged, except in cases of altered apportionment after inclosure."

Consent of landowner not required where his lands are not charged.

Sect. 14. "It shall not be necessary to obtain the consent of any landowner to an altered apportionment whose lands are not charged with rent-charge by such altered apportionment."

Power to commissioners to alter apportionment where successive alterations have made it inconvenient or difficult, but not to alter amount, &c.

Sect. 15. "Whenever it shall appear to the commissioners that any instrument of apportionment shall have been altered by successive instruments of altered apportionment, so as in the judgment of the commissioners to render the collection of the rent-charge upon the lands included in such apportionment and altered apportionments unreasonably inconvenient or difficult, the commissioners may, upon the application of the person or persons entitled to such rent-charge or any part thereof, and without notice to or the consent of any owner of such lands, make a further instrument of altered apportionment as regards the whole of the said lands, or such portions thereof as to them shall seem fit, but without making any alteration in the amount charged on the lands of any particular owner, and the altered apportionment so made by the commissioners shall be taken to be an amendment of and in substitution for so much of the said original apportionment and altered apportionments as relates to the lands included in the said lastly made altered apportionment."

Power to commissioners to

Sect. 16. "Whenever any new boundaries of parishes

shall have been or shall be set out upon any inclosure or otherwise, and it shall appear to the commissioners that the apportionment of the rent-charge in such parishes is thereby rendered inconvenient, the commissioners may make and confirm an altered instrument of apportionment adapted to the altered distribution of the lands in such parishes or any of them, and to the new boundaries which shall have been so set out, or otherwise the commissioners may, by an order under their hands and seal, declare the lands which shall be affected by such alteration of boundaries, either with or without any other lands comprised in such inclosure, and whether such lands are situate in one or more parishes, to be a separate district for the purposes hereinafter mentioned, and may make and confirm an altered instrument of apportionment adapted to the altered distribution of such lands, with reference to the owners both of the lands and rent-charge in such district, and the commissioners may determine that the amount of rent-charge payable to each of the owners of rent-charge in such district shall be fixed and apportioned upon such particular lands as to them shall seem convenient, so that no lands are charged with more than their due proportion of rent-charge; and every such determination shall be binding and conclusive, and such altered apportionment, when confirmed, shall be annexed to the original apportionment for that parish from which the greatest amount of rent-charge is payable under the altered apportionment, and counterparts thereof shall be annexed to the original apportionment for each of the other parishes comprised in such district, and copies thereof shall be deposited in respect of each several parish comprised in the district, in conformity with the provisions of the said recited acts."

alter apportionment where boundaries of parishes have been altered.

Sect. 17. "All the powers given by the said recited acts or by this act in relation to the alteration of instruments of apportionment shall extend to all altered apportionments and to awards of rent-charge in lieu of corn rents, and to awards under local acts by which any rent-charge is awarded in lieu of tithes, glebe or commonable or other rights or easements."

Powers for altering apportionments or awards.

By 6 & 7 Will. IV. c. 71, s. 56, "Immediately after the passing of this act, and also in the month of January in every year, the comptroller of corn returns for the time being, or such other person as may from time to time be in that behalf authorized by the privy council, shall cause an advertisement to be inserted in the London Gazette, stating what has been, during seven years ending on the Thursday next before Christmas-day then next preceding,

Comptroller of corn returns to publish average price of corn.

the average price of an imperial bushel of British wheat, barley, and oats, computed from the weekly averages of the corn returns."

Rent-charges to be valued according to the average price of corn.

Sect. 57. "Every rent-charge charged upon any lands by any such intended apportionment shall be deemed at the time of the confirmation of such apportionment, as hereinafter provided, to be of the value of such number of imperial bushels, and decimal parts of an imperial bushel of wheat, barley and oats, as the same would have purchased at the prices so ascertained by the advertisement to be published immediately after the passing of this act, in case one-third part of such rent-charge had been invested in the purchase of wheat, one-third part thereof in the purchase of barley, and the remaining third part thereof in the purchase of oats, and the respective quantities of wheat, barley and oats, so ascertained, shall be stated in the draught of every apportionment."

Prices at which conversion from money into corn is to be made.

By 7 Will. 4 & 1 Vict. c. 69, s. 7, these prices are settled to be "The prices at which the conversion from money into corn is to be made, at the time of the confirmation of each apportionment, according to the provisions of the said act, are seven shillings and one farthing for a bushel of wheat (*t*), three shillings and eleven pence halfpenny for a bushel of barley, and two shillings and nine pence for a bushel of oats."

And by 6 & 7 Will. 4, c. 71, it is enacted:

Confirmation by the commissioners.

Sect. 63. "After such proceedings as aforesaid shall have been had, and all such objections, if any, shall have been finally disposed of, the commissioners or assistant commissioner shall cause the instrument of apportionment to be ingrossed on parchment, and shall annex the map or plan thereunto belonging to the ingrossed instrument of apportionment, and shall sign the instrument of apportionment and the map or plan, and shall send both to the office of the commissioners; and if the commissioners shall approve the apportionment, they shall confirm the instrument of apportionment under their hands and seal, and shall add thereunto the date of such confirmation."

Transcripts of the award to be sent to the registrar of the diocese and to the incumbent and churchwardens.

Sect. 64. "Two copies of every confirmed instrument of apportionment, and of every confirmed agreement for giving land instead of any tithes or rent-charge, shall be made and sealed with the seal of the said commissioners, and one such copy shall be deposited in the registry of the diocese within which the parish is situated, to be there kept among the records of the said registry, and the other

(*t*) The Gazette (Dec. 9, 1836) made this 7*s*. 1¼*d*.

copy shall be deposited with the incumbent and church or chapel-wardens of the parish for the time being, or such other fit persons as the commissioners shall approve, to be kept by them and their successors in office with the public books, writings, and papers of the parish; and all persons interested therein may have access to and be furnished with copies of or extracts from any such copy on giving reasonable notice to the person having custody of the same, and on payment of two shillings and sixpence for such inspection, and after the rate of three pence for every seventy-two words contained in such copy or extract; and every recital or statement in or map or plan annexed to such confirmed apportionment or agreement for giving land, or any sealed copy thereof, shall be deemed satisfactory evidence of the matters therein recited or stated, or of the accuracy of such plan."

Confirmed agreements, &c. not to be questioned.

Sect. 66. "No confirmed agreement, award or apportionment, shall be impeached after the confirmation thereof by reason of any mistake or informality therein, or in any proceedings relating thereunto (*u*)."

Clarke v. *Yonge.*

In the case of *Clarke* v. *Yonge* (*x*), it was decided, that though a confirmed award under this section is final as between the tithe-owners and tithe-payers, it does not exclude from further investigation a case between the tithe-owners themselves, in which there was, before the award was made, a just title to a portion of the tithes, which by mistake was not brought forward till after the award was made.

Edwards v. *Bunbury.*

Similarly, it was holden in the case of *Edwards* v. *Bunbury* (*y*), that a commissioner had no jurisdiction in a contested case to decide who was the person entitled to a particular rent-charge.

By 9 & 10 Vict. c. 63, it is thus enacted:—

Supplemental apportionment of a rent-charge as made payable to one owner in respect of tithes belonging to several owners or held in separate rights.

Sect. 15. "Where by any agreement or award made under the provisions of the said acts a rent-charge has been or shall have been agreed or awarded to be paid to any person in lieu of any tithes, and after the apportionment of such rent-charge shall have been made and confirmed under the provisions of the said acts it shall appear that some tithes included in the aggregate tithes in lieu of which such rent-charge shall have been so agreed or awarded to be paid, or some portion or undivided share

(*u*) This section was further confirmed by 10 & 11 Vict. c. 104, s. 2.

(*x*) 5 Beav. 523 (1842).

(*y*) 3 Q. B. 885; 3 G. & D. 229; see also *Reg.* v. *Tithe Commissioners*, 15 Q. B. 620.

9 & 10 Vict. c. 63, s. 15.

of some tithes so included, were or was at the time of such agreement or award the property of some person other than the person to whom the same rent-charge was so agreed or awarded to be paid, or that the whole of the tithes included in the aggregate in respect of which such rent-charge was agreed or awarded to be paid were not held by the person to whom such rent-charge was so agreed or awarded to be paid in the same right and for the same estate, or were not subject after the determination of the estate of such person to the same limitations or estates legal and equitable, it shall be lawful for the commissioners in any of the cases aforesaid, in pursuance of or in accordance with the decree or direction of a court of equity of competent jurisdiction, or on the request in writing of the parties who for the time being in case there had been no commutation would have been the owners of all the tithes included in such aggregate, to make or confirm a supplemental award or apportionment of such rent-charge in such manner that, without altering the aggregate amount of rent-charge to which any owner of land may be subject, separate rent-charges or separate portions of rent-charge may be made payable to the parties who would have been owners of the tithes in case they had not been extinguished in lieu of the several tithes or portions of tithe included in such aggregate which would belong to different persons, or be held in different rights, or be subject to different limitations or estates; and by such supplemental award and apportionment the commissioners, if they shall so think fit, may apportion or award to be paid to one of the respective owners, or to the owner in lieu of one of his respective rights, the whole of any rent-charges payable under the original instrument of apportionment out of specific lands, instead of dividing each rent-charge made payable in lieu of the aggregate of the tithes of each parcel of land between or among the owners of the separate tithes arising out of such parcel; and such supplemental award and apportionment, when confirmed by the commissioners under their hands and seal, shall take effect from the half-yearly day of payment which shall happen next after the confirmation thereof."

Power to make a separate district for special lands.

By sect. 16, the commissioners are empowered to declare that lands as to which before apportionment doubts have arisen, as to whether they are or not exempt from tithe, or subject to some modus, or as to the boundaries of the parish in which they lie, shall be a separate district for commutation, so that the awards may be confirmed as to the other lands in the parish. Supplemental awards may

also be made for contingent rent-charges under 2 & 3 Vict. c. 62, s. 11, and 3 & 4 Vict. c. 15, s. 14, for inclosures of lands, and for other purposes.

Place of deposit of copy of confirmed apportionment may be altered by quarter sessions.

Sect. 17. "Where the place of deposit of the copy of a confirmed instrument of apportionment, which by 6 & 7 Will. 4, c. 71, is directed to be deposited with the incumbent and church or chapel-wardens for the time being, or such other fit person as the commissioners shall approve, shall be alleged to be inconvenient to the majority of the persons interested therein, or otherwise inconvenient or unsafe, it shall be lawful for any person interested in the lands or rent-charge to which such apportionment shall relate to apply to the court of general quarter sessions of the peace for the county, riding, division or place in which such place of deposit shall be situate for an order for the deposit of such copy in some more convenient or secure custody or place, and fourteen days' notice in writing of every such application shall be given to the persons in whose custody such copy shall at the time of such application be deposited; and it shall be lawful for the court at the quarter session for which such notice shall be given to hear and determine such application in a summary way, or they may, if they think fit, adjourn it to the following session; and upon the hearing of such application the court may, if they think fit, order such copy to be removed from the custody of the persons with whom the same shall have been deposited, and to be deposited with such other persons or in such other custody as the court, having reference to the security and due preservation of such copy, and to the convenience of the parties interested therein, may think fit, and may make such order concerning the notice to be given of such removal and deposit, and concerning the costs of such application, or of any opposition thereto, as they may think reasonable."

It is enacted as follows by 23 & 24 Vict. c. 23:—

Justices may order an instrument of apportionment to be restored to proper custody.

Sect. 28. "Whenever any person, other than the persons legally entitled to the possession of the same, shall have possession of the sealed copy of any confirmed instrument of apportionment, it shall be lawful for any two justices of the peace for the county or other jurisdiction within which the lands mentioned in the said apportionment are situate, upon the application of any person interested in the lands or rent-charge, *and upon fourteen days' notice in writing of such application* to the person or persons in whose custody such copy shall be at the time of such application, to hear and determine such application; and upon hearing such application the said justices may order such copy to

23 & 24 Vict. c. 23, s. 28.

be removed from the custody of the person holding the same, and to be deposited in such other custody as the said justices, having reference to the security and due preservation of such copy, and to the convenience of the parties interested therein, may think fit, and may impose a fine, not exceeding twenty shillings, for each day that any such copy shall be retained, contrary to the terms of such order, upon the person so retaining it, and may make such further order concerning the notice to be given of such removal and deposit, and concerning the costs of such application and the said fine, or of any opposition thereto, as they may think reasonable."

A notice under this section must be a notice that an application has been made, not of an intention to apply (*a*).

Map may be detached.

By sect. 26 the commissioners may order the map to be detached in suitable cases from the instrument of apportionment.

Renewal of defaced copy.

By sect. 27, when the original instrument of apportionment has been destroyed or defaced, the commissioners may require the copy deposited in the parish or in the diocesan registry to be delivered up to them for a limited time for the purpose of restoring their defaced instrument, or making a new copy, where it has been lost. Such restorations or copies are to have the force of originals.

Corrections.

By 10 & 11 Vict. c. 104, s. 4, the commissioners could require an erroneous apportionment to be delivered up to them for correction.

6 & 7 Will. 4, c. 71, proceeds to enact as follows:—

Lands to be discharged from tithes, and rent-charge paid in lieu thereof.

Sect. 67. "From the first day of January next following the confirmation of every such apportionment the lands of the said parish shall be absolutely discharged from the payment of all tithes, *except so far as relates to the liability of any tenant at rack-rent dissenting as hereinafter provided*, and instead thereof there shall be payable thenceforth to the person in that behalf mentioned in the said apportionment a sum of money equal in value, according to the prices ascertained by the then next preceding advertisement, to the quantity of wheat, barley and oats, respectively mentioned therein to be payable instead of the said tithes, in the nature of a rent-charge issuing out of the lands charged therewith; and such yearly sum shall be payable by two equal half-yearly payments on the first day of July and the first day of January in every year; the first payment, except in the case of barren reclaimed lands, as hereinafter provided, being on the first day of July next

(*a*) *Reg.* v. *Sayers*, 3 L. T., N. S. 405.

after the lands shall have been discharged from tithes as aforesaid; and such rent-charge may be recovered at the suit of the person entitled thereto, his executors or administrators, by distress and entry as hereinafter mentioned; and after every first day of January the sum of money thenceforth payable in respect of such rent-charge shall vary so as always to consist of the price of the same number of bushels and decimal parts of a bushel of wheat, barley and oats respectively, according to the prices ascertained by the then next preceding advertisement; and any person entitled from time to time to any such varied rent-charge shall have the same powers for enforcing payment thereof as are herein contained concerning the original rent-charge: provided always, that nothing herein contained shall be taken to render any person whomsoever personally liable to the payment of any such rent-charge; provided always, that the rent-charge which shall be apportioned upon any lands in the said parish which, during any part of the said period of seven years preceding Christmas, 1835, were exempted from tithes by reason of having been inclosed under any act of parliament, or converted from barren heath or waste ground, shall be payable for the first time on the first day of July or first day of January next following the confirmation of the apportionment which shall be nearest to the time at which tithes were or would have become payable for the first time in respect of the said lands, if no commutation thereof had taken place."

Payment of rent-charge on reclaimed lands to be postponed until tithes would have been due.

The words in this clause "except so far as relates to the liability of any tenant at rack-rent as hereinafter provided," refer to sect. 79, which is now of no practical importance.

Sect. 80. "Any tenant or occupier at the time of such commutation who shall have signified his dissent from being bound to pay any such rent-charge as aforesaid, or who shall hold his lands under a lease or agreement providing that the same shall be holden and enjoyed by him free of tithes, and every tenant or occupier who shall occupy any lands by any lease or agreement made subsequently to such commutation, and who shall pay any such rent-charge, shall be entitled to deduct the amount thereof from the rent payable by him to his landlord, and shall be allowed the same in account with the said landlord."

Tenant paying rent-charge to be allowed the same in account with his landlord.

By sect. 88, lessees of tithes might surrender their leases under certain conditions. If they did not, they continued liable on their covenant to pay the old rent (*b*).

(*b*) *Tasker* v. *Bullman*, 3 Ex. 351; 18 L. J., Ex. 153 (1841).

By 2 & 3 Vict. c. 62, s. 11, the following power is given to substitute a *fixed* for a *contingent* rent-charge in the cases of exempt and crown lands.

Fixed rent-charge may be substituted for contingent rent-charge on lands partially exempt.

"Where lands are exempted from the payment of tithes, or of rent-charge instead of tithes, whilst in the occupation of the owner of such lands, by reason of having been parcel of the possessions of any privileged order, it shall be lawful for the respective owners of the said lands and tithes or rent-charge, by the parochial agreement for the rent-charge, or by a supplemental agreement in cases where the parochial agreements or any award shall have been confirmed by the said commissioners, to be made in such form as the commissioners shall direct or approve, to agree to the payment, or for the commissioners in the case of a compulsory award, with the consent of the respective owners of the said lands and tithes, to award the payment of a fixed and continuing rent-charge, without regard to the change of occupation or manurance of such lands, equivalent in value, according to the judgment of the commissioners, to such contingent rent-charge; and such lands shall, from the date of the confirmation by the commissioners of such parochial agreement or supplemental agreement or award, as the case may be, or from such date as shall be fixed by the parties, with the approval of the said commissioners, in any such agreement or supplemental agreement, be subject to such fixed rent-charge instead of the contingent tithes or rent-charge to which such lands were subject previous to such agreement or supplemental agreement or award being made; and every such fixed rent-charge shall from such period respectively be paid and recoverable by the means provided in the said acts, in like manner as if the same had been the rent-charge originally fixed in any parochial agreement or award in respect of the said tithes."

Extension of powers to substitute fixed rent-charge instead of contingent rent-charge.

This power is thus extended by 3 & 4 Vict. c. 15, s. 14. After reciting the power given by the last act it provides that—"Such power shall extend to all cases where, by reason of lands being partially exempted from the payment of tithes, by custom or otherwise, or by being subject to a shifting or leaping modus, or other customary payment, or rendered due only on certain contingencies, a contingent rent-charge has been already fixed, or would, according to the provisions of the said firstly-recited act, be fixed in respect of such lands; and it shall be lawful for the said commissioners, with such consent of both land-owners and tithe-owners as in the said lastly-recited act is required in that respect, at any time before the con-

firmation of the apportionment of any rent-charge, by any award, or by a supplemental award, where an award or parochial agreement has been made before the passing of this act, or for the land-owners or tithe-owners by a parochial agreement or supplemental agreement where a parochial agreement or award has already been made in respect of such lands, to exercise such powers in such manner and subject to the same conditions as are given by the said lastly-recited act in cases of lands formerly part of the possessions of a privileged order: provided always, and it is hereby declared, that nothing herein contained extends to cases of change of cultivation only, nor to cases of prescription relating to woodland."

Provisions of 6 & 7 Will. 4, c. 71, ss. 43 and 71, for substituting fixed rent-charge, extended to crown lands.

By 2 & 3 Vict. c. 62, s. 12, "'And whereas certain crown lands, by reason of their being of the tenure of ancient demesne or otherwise, are exempted from payment of tithes whilst in the tenure, occupation, or manurance of her Majesty, her tenants, farmers, or lessees, or their under-tenants, as the case may be, but become subject to tithes when aliened or occupied by subjects not being tenants, farmers, or lessees of the crown, and doubts have arisen how far the provisions of the said first-recited act relating to lands heretofore parcel of the possessions of any privileged order, or in the nature of glebe, or otherwise in like manner privileged and partially exempt, are applicable to such crown lands;' be it declared and enacted, that all and every the said provisions of the said first-recited act do extend to such crown lands, and that the provision lastly in this act contained for substituting a fixed rent-charge instead of a contingent rent-charge on lands partially exempt from tithes shall extend and be applicable to such crown lands as aforesaid: provided always, that no such fixed rent-charge shall be substituted instead of such contingent rent-charge on such crown lands without the consent of the persons or officers who are by the said first-recited act respectively required to be substituted in cases of commutation of tithes where the ownership of lands or tithes is vested in her Majesty" (*c*).

Provisions of Tithe Commutation Acts extended to ecclesiastical commissioners.

4 & 5 Vict. c. 39, "An Act for amending the Acts relating to the Ecclesiastical Commissioners," enacts by sect. 29, that "the term 'tithes' in either of the said acts (*d*) or in this act contained shall extend to and comprehend rents-charges allotted or assigned in lieu of tithes: and the ecclesiastical commissioners for England shall, in

(*c*) This removes certain doubts created by sects. 43 and 71 of 6 & 7 Will. 4, c. 71.

(*d*) 6 & 7 Will. 4, c. 77; 3 & 4 Vict. c. 113.

respect of all lands, tithes, tenements, or other hereditaments, endowments, or emoluments, already vested or liable to be vested in them by or under the provisions of either of the said acts or of this act, be deemed to be the owners or joint owners thereof respectively, as the case may be, for all the purposes of 6 & 7 Will. 4, c. 71, and of the several acts to amend and explain the same."

Power to sell farm buildings and sites.

By 6 & 7 Will. 4, c. 71, s. 87, provision is made for the sale of buildings and the sites thereof rendered useless or unnecessary by the commutation of tithes.

And 2 & 3 Vict. c. 62, s. 15, extends these provisions to collegiate and corporate bodies.

Power to charge expenses of commutation.

By 6 & 7 Will. 4, c. 71, ss. 77, 78, any owner of a limited estate in lands or any ecclesiastical owner of lands may charge the expenses of commuting the tithes on those lands upon the lands themselves for twenty years. By 2 & 3 Vict. c. 62, s. 16, the same power is given to all corporations, cathedral, collegiate, or otherwise; and by sect. 17, colleges or ecclesiastical corporations *aggregate* may, with the consent of the commissioners, charge these expenses on any *other* lands belonging to them.

SECT. 7.—*Rent-charge on Lammas Lands, Commons in Gross, and gated or stinted Pastures.*

By 2 & 3 Vict. c. 62, it is enacted as follows:—

Provision for tithes of lammas lands, &c.

Sect. 13. "'Whereas large tracts of land called lammas lands are in the occupation of certain persons during a portion of the year only, and are liable to the tithes of the produce of the said lands increasing and growing thereon during such occupation, and at other portions of the year are in the occupation of other persons, and in their hands liable to different kinds of tithes arising from the agistment, produce, or increase of cattle or stock thereon; and by reason of such change of occupation such last-mentioned tithes cannot be commuted for a rent-charge issuing out of or fixed upon the said lands, and the said recited acts are thereby rendered inoperative in the several parishes where such lammas lands lie: And whereas the said acts are in like manner inoperative in certain cases where a personal right of commonage, or a right of common in gross, is vested in certain persons by reason of inhabitancy or occupation in the parish where any common may lie, or by custom or vicinage, but without having such right of common so annexed or appurtenant to or arising out or in respect of any lands on which any rent-charge could be

fixed instead of the tithes of the cattle or stock, or their produce, increase, or agistment, on such common, annexed to such personal right;' for remedy thereof be it enacted, that in every case where by reason of the peculiar tenure of such lands, and the change during the year of the occupiers thereof, or of such right of commonage, a rent-charge cannot, in the judgment of the said commissioners, be fixed on the said lands in respect of cattle and stock received and fed thereon, or of the produce and increase of such cattle and stock, at such portion of the year as the said lands are thrown open, or where such right of commonage alone exists, it shall be lawful for the parties interested in such lands or commons and the tithes thereof in the case of a parochial agreement, or for the commissioners in the case of a compulsory award, in every such parochial agreement or award respectively, or by any supplemental agreement in the nature of a parochial agreement, or by a supplemental award, as the case may be, where any parochial agreement or award has been already made, to fix a rent-charge instead of the tithes of such lammas land or commons, to be paid during the separate occupation thereof by the separate occupiers, in like manner as other rent-charges are fixed by the said acts or any of them, and to declare in such agreement or award, or supplemental agreement or award, as the case may be, such a sum or rate per head to be paid for each head of cattle or stock turned on to such lammas land or commons by the parties entitled to the occupation thereof after the same shall have been so thrown open, or by the parties entitled to such right of commonage as aforesaid; and every such sum shall be ascertained and fixed upon a calculation of the tithes received in respect of such last-mentioned occupation or right for the period and according to the provisions for fixing rent-charges in the said recited acts, and shall be due and payable by the owner of such cattle or stock on the same being first turned upon such lands or commons, and shall be recoverable by the persons entitled thereto by distress and impounding of the cattle or stock in respect of which such sum shall be due, in like manner as cattle are distrained and impounded for rent, and be subject to the same provisions as to distress and replevin of the same as are by law provided in cases of distress for rent: provided always, that nothing herein contained shall extend to lammas lands where no tithes or payments instead of tithes have been taken during the seven years ending at Christmas one thousand eight hundred and thirty-five in respect of the cattle or stock received and

fed thereon, or of the produce and increase of such cattle or stock at such portion of the year as the said lands are thrown open."

Rent-charge in respect of tithes of common appurtenant to be a charge on the allotments made in respect of the lands to which right of common attached.

Sect. 14. "'Whereas in certain cases of commons hereafter to be inclosed allotments may be made in respect of tenements and hereditaments to which a right of going on such common is appendant or appurtenant, the tithes whereof would be chargeable on the tenements or heredi-ments in respect of which such allotments may be made, and such tenements or hereditaments are not of themselves an adequate security for the rent-charge to be fixed in respect of such tithes;' be it therefore declared and enacted, that in every such case the rent-charge to be fixed instead of such tithes shall be a charge upon and recoverable out of any allotments to be in future made in respect of such rights, as well as upon such tenements or hereditaments in respect of which such allotments are made, and by the same ways and means as are provided for the recovery of rent-charges by the said acts or any of them, or this act."

Extension of powers in respect of lammas and common lands.

By 3 & 4 Vict. c. 15, s. 15, "'Whereas by the said lastly-recited act certain provisions are made and powers given in respect of the tithes of lammas and common lands, which powers are to be exercised by the land-owners and tithe-owners by parochial agreement, or by a supplemental agreement after a parochial agreement, and by the commissioners by compulsory award, or by a supplemental award after an award;' be it enacted, that such provisions may be carried into effect and such powers exercised at any time before the confirmation of the apportionment of any rent-charge, by the land-owners and tithe-owners by a supplemental agreement after an award, or by the commissioners by a supplemental award after a parochial agreement."

Alteration of apportionment may be made after inclosure, &c.

By 9 & 10 Vict. c. 73, s. 13, it is enacted, that "Where lands now charged or hereafter to be charged with rent-charges or portions of rent-charges under confirmed instruments of apportionment have been or shall be (after the confirmation of such apportionment) inclosed or divided, allotted or exchanged, by agreement or award made under the powers of any general or local act of inclosure (or otherwise), in such manner that the apportionment shall appear to the commissioners to be inconvenient with reference to the altered distribution of the land among the several owners thereof, it shall be lawful for the commissioners, upon the application of the owners of such lands, or the majority in number and value of such owners, or upon the application of the person or persons entitled to such rent-

charges or portions of rent-charges, or any of them, to make or confirm an altered instrument of apportionment adapted to the altered distribution of the lands, in order that the rent-charges or portions of rent-charges originally charged on the several portions of land which shall have been taken or allotted away from the former owners on such inclosure, division, allotment, or exchange, shall be charged on the lands which shall have been allotted or received in the way of substitution or compensation for the lands so taken or allotted away from the former owners thereof, or as near thereto as circumstances will admit; and every such altered apportionment, when confirmed under the hands and seal of the commissioners, shall be valid as from the date of such confirmation, and shall be taken to be an amendment of the original apportionment."

Such alteration, when confirmed, to be valid.

By sect. 14, the expenses of such altered apportionment shall be borne by the owners of the lands to which it relates, and shall be recovered in the same manner as expenses chargeable on such owners for an original apportionment might be recovered.

Expenses of alteration.

By 23 & 24 Vict. c. 93, it is enacted as follows:—

Sect. 18. "In any case in which tithes have been commuted for a sum or rate *per* head to be paid for each head of cattle or stock turned on land subject to common rights or held or enjoyed in common, during the whole of the year, the commissioners may, upon the application in writing of any person entitled to receive such sum or rate *per* head, or of any person who may be liable to pay the same or any part thereof, by a supplemental award and apportionment, by way of supplement to the apportionment under which such rate *per* head shall be now payable, convert the same into a gross rent-charge, to be thereafter payable out of such land."

Tithes commuted for a sum or rate per head may be converted into a rent-charge.

Sect. 19. "Where a gross rent-charge has been made payable in respect of the tithes of any gated or stinted pasture, and such gates or stints are rated to the relief of the poor, the commissioners may, by the instrument of apportionment to be made of such rent-charge, or by a supplemental award and apportionment, where an apportionment shall have been already made, upon the application in writing of the person entitled to such rent-charge, or of any owner of a gate or stint, apportion such gross rent-charge *pro rata* upon the gates or stints, and after such apportionment or supplemental award and apportionment the owner of such rent-charge shall have the same powers for the recovery of any arrears thereof, by distress on the goods and chattels of the person rated to the relief of the

Gross rent-charge may be apportioned on gated or stinted pastures.

poor in respect of the gates or stints the rent-charge upon which is in arrear, as are given by the said recited acts for the recovery of rent-charge in arrear, and such powers of distress may be exercised upon the goods and chattels of such person, whether found upon the said pasture or elsewhere."

Rent-charge on commons may be commuted for a part of the land, or redeemed.

Sect. 20. "In every other case in which a gross rent-charge is charged upon any land subject to common rights, or held or enjoyed in common during the whole of the year, the commissioners shall, upon the application in writing of the person entitled to such rent-charge, or of any person liable to pay the same or any part thereof, convene a meeting of the owners of such land and persons liable to pay such rent-charge, of which twenty-one days' notice shall be given in such manner as to the commissioners shall seem fit; and the majority in value of the persons attending such meeting may determine whether such rent-charge shall be commuted for an equivalent part of the land on which it is chargeable, or be redeemed for a sum equal to twenty-five times the amount of such rent-charge, to be paid by a time to be limited by the commissioners, and may further determine, if the rent-charge is to be redeemed, whether the redemption money shall be raised by rate on the persons liable to such rent-charge, or by sale of a portion of such land: provided always, that if no determination be come to at such meeting the commissioners may proceed to commute the rent-charge for land as hereinafter provided."

If rent-charge is commuted for land, commissioners to set out the land and to vest the same in owner.

Sect. 21. "If the rent-charge is to be commuted for land, the commissioners shall define and set out the land to be so given, and shall vest the same in the owner of the rent-charge by an award, to be made by them in like manner as awards of exchange of glebe for other land are made under the said recited acts, and subject to all the like incidents."

Commissioners to convey land.

By sects. 22, 23, if the rent-charge is to be redeemed for a sum to be raised by the sale of a portion of the land liable to such rent-charge, the commissioners may define and set out the land to be sold, and are to execute the proper conveyances to the purchaser.

Where rate per head is in arrear, the same may be recovered by distress.

Sect. 24. "Wherever a sum or rate *per* head shall be in arrear, the arrears shall be recoverable by distress and impounding of any cattle, stock, goods or chattels belonging to the person in respect of whose cattle or stock such sum or rate *per* head is in arrear, wherever the same may be found."

Upon inclo-

Sect. 25. "Where any lands in respect to the cattle or

stock upon which any sum or rate *per* head shall be payable shall be inclosed, divided, allotted, or exchanged, under the powers of any general or local act of inclosure or otherwise, the commissioners may, by the altered apportionment which may be made by them, adapted to the altered distribution of the said lands, charge a rent-charge equivalent to the amount of the sum or rate *per* head which shall have been previously payable, upon the lands which shall have been allotted under the said inclosure in lieu of the rights in respect of which the said sum or rate *per* head was made payable, which rent-charge shall be thereafter payable out of the same lands, in such manner and proportion as the said altered apportionment shall direct."

sure, rate per head may be converted into rent-charge.

Sect. 8.—*Fruit and Hop Plantations.*

6 & 7 Will. 4, c. 71.

By sect. 40 of 6 & 7 Will. 4, c. 71, the commissioners were empowered to make a separate valuation of the hop grounds, orchards, or gardens, according to the average rate of composition for the tithes of similar lands during seven years preceding Christmas, 1835, within a certain district. By sect. 42 an *ordinary* and extraordinary charge for tithes was to be fixed for hop grounds or market gardens. Hop grounds or market gardens going out of cultivation were to be subject to such *ordinary* charge; but such as were newly cultivated after the commutation, were to undergo the *extraordinary* charge.

How the tithe of hops, fruit, and garden produce is to be valued.

Sect. 40. "In case any of the lands in the parish shall be hop grounds, orchards, or gardens, and notice shall be given by the owner thereof to the commissioners or assistant commissioner acting in that behalf that the tithes thereof shall be separately valued, the commissioners or assistant commissioner shall estimate the value of the tithes thereof according to the average rate of composition for the tithes of hops, fruit, and garden produce respectively during seven years preceding Christmas in the year 1835, within a district to be assigned in each case by the commissioners or assistant commissioner, and estimating the same as chargeable to all parliamentary, parochial, county, and other rates, charges, and assessments to which the said tithes are liable, and shall add the value so estimated to the value of the other tithes of the parish ascertained as aforesaid."

Provision for the change of

Sect. 42. "The amount which shall be charged by any such apportionment as hereinafter provided upon any hop

culture of hop grounds and market gardens.

grounds or market gardens in any district so to be assigned shall be distinguished into two parts, which shall be called the ordinary charge and the extraordinary charge, and the extraordinary charge shall be a rate per imperial acre, and so in proportion for less quantities of ground, according to the discretion of the valuers or commissioners or assistant commissioner by whom the apportionment shall be made as aforesaid; and all lands whereof the tithes shall have been commuted under this act, and which shall cease to be cultivated as hop grounds or market gardens at any time after such commutation, shall be charged after the thirty-first day of December next following such change of cultivation only with the ordinary charge upon such lands; and all lands in any such district the tithes whereof shall have been commuted under this act, and which shall be newly cultivated as hop grounds or market gardens at any time after such commutation, shall be charged with an additional amount of rent-charge per imperial acre, equal to the extraordinary charge per acre upon hop grounds or market gardens respectively in that district; provided always, that no such additional amount shall be charged or payable during the first year, and half only of such additional amount during the second year, of such new cultivation; and an additional rent-charge by way of extraordinary charge upon hop grounds and market gardens, newly cultivated as such, beyond the limits of every district in which any extraordinary charge for hop grounds or market gardens respectively shall have been distinguished as aforesaid at the time of the commutation, shall be charged by the commissioners at the time of such new cultivation, upon the request of any person interested therein, if such new cultivation shall have taken place during the continuance of the commission of the said commissioners, and after the expiration of the commission shall be charged in such manner and by such authority as parliament shall direct, and shall be payable and recoverable in like manner and subject to the same incidents in all respects as an extraordinary charge charged upon any hop grounds or market gardens at the time of commutation."

Walsh v. *Trimmer.*

In the case of *Walsh* v. *Trimmer* (*e*), a commutation of tithes took place in a parish where there was land cultivated for hops, and an extraordinary charge was fixed for this culture. At the time of the commutation there was a large piece of waste land which did not pay tithes. Some years afterwards this waste land was inclosed and

(*e*) L. R., 2 H. L. 208; 36 L. J., Q. B. 318 (1867).

cultivated for hops. It was holden by the House of Lords, reversing the decision of the Exchequer Chamber, and restoring that of the Queen's Bench, that this land had become liable to the extraordinary charge for hop culture.

2 & 3 Vict. c. 62.

But no provision is made in these clauses for the contingency of a change of cultivation in orchards and fruit plantations. 2 & 3 Vict. c. 62, supplied this defect, enacting as follows:—

Provision for dividing the tithe of fruit plantations in certain cases.

Sect. 26. "In case any of the lands in a parish, the tithes whereof shall be in course of commutation under the provisions of the said first recited act, shall be orchards or fruit plantations, and notice in writing, under the hands of any of the owners thereof whose interest therein shall not be less than two-thirds of the whole of the orchards and fruit plantations in such parish, shall be given to the valuers or commissioners, or assistant commissioner, by whom any apportionment provided for by the said act shall be made at any time before the draught of such apportionment shall be framed, that the tithes thereof should be distinguished into two parts, the amount which shall be charged by any such apportionment upon the several orchards and fruit plantations in such parish shall be distinguished into two parts accordingly, and the same shall be called the ordinary charge and the extraordinary fruit charge; and the extraordinary charge shall be a rate per imperial acre, and so in proportion for less quantities of ground, according to the discretion of the valuers or commissioners, or assistant commissioner, by whom such apportionment shall be made as aforesaid."

Newly-cultivated fruit plantations to be charged an additional sum.

Sect. 27. "All lands, the tithes whereof shall have been commuted under the said act, which shall be situate within the limits of any parish in which an extraordinary fruit charge shall have been distinguished as aforesaid at the time of commutation, and which shall be newly cultivated as orchards or fruit plantations at any time after such commutation, shall be charged with an additional amount of rent-charge per imperial acre equal to the extraordinary fruit charge per acre in that parish: provided always, that no such additional amount shall be charged in respect of any plantations of apples, pears, plums, cherries, and filberts, or of any one or more of those fruits, during the first five years, and half only of such additional amount during each of the next succeeding five years, of such new cultivation thereof; and that no such additional amount shall be charged in respect of any plantation of gooseberries, currants, and raspberries, or of any one or more of those fruits during the first two years, and half only of

such additional amount during each of the next succeeding two years, of such new cultivation thereof; and that no such additional amount shall be charged in respect of any mixed plantation of apples, pears, plums, cherries, or filberts, and of gooseberries, currants, or raspberries, during the first three years, and half only of such additional amount during each of the next succeeding three years, of such new cultivation thereof."

Orchards, &c. displanted to be relieved from additional charge.

Sect. 28. "All lands the tithes whereof shall have been commuted as aforesaid, which shall be situated within the limits of any parish in which an extraordinary fruit charge shall have been distinguished as aforesaid, and which shall cease to be cultivated as orchards or fruit plantations at any time after such commutation, shall be charged, after the thirty-first day of December next following such change of cultivation, only with the ordinary charge upon such lands."

Provision for mixed plantations of hops and fruit.

Sect. 29. "In case any lands within the limits of a parish in which an extraordinary fruit charge shall have been distinguished as aforesaid, shall have been or shall at any time be planted with fruit, and also with hops, the same shall, during the continuance of such mixed plantation of hops and fruit, be liable to the extraordinary hop charge only, or to the extraordinary fruit charge only, payable in respect of the same lands, not to both those charges; and that the extraordinary charge to which the lands so planted shall be liable shall be the higher of the two for the time being."

When land subject to rectorial and vicarial tithe, acreable rent-charge to be fixed.

Sect. 30. "Where any land liable to any such extraordinary charge for the tithes of a mixed plantation of hops and fruit shall at the time of the commutation produce both rectorial and vicarial tithes payable to different persons, the apportionment shall set out the same, distinguishing the amount of ordinary and extraordinary charge payable to each tithe-owner, and shall divide the whole acreable extraordinary charge between such tithe-owners, according to the quantity of land producing rectorial tithe, and the quantity producing vicarial tithe."

Provision for future mixed plantations.

Sect. 31. "In all cases in which there shall be hereafter mixed plantations of hops, and of such fruit as aforesaid, in any parish or district in which an extraordinary fruit charge shall have been declared, the rectorial and vicarial tithes whereof but for the commutation would have been payable to different owners, the extraordinary charge payable in respect of the tithes of such mixed plantation shall be divided between such owners in proportion to the extent of land occupied by that produce which would have paid

tithes to each of them respectively: provided always, that payment of the share of each tithe-owner, when so ascertained, shall be taken to be subject to the provisions contained in the said first-recited act and in this act, for lessening the amount of extraordinary charge payable in respect of hop gardens and orchards respectively at the beginning of such cultivation."

How the rent-charge for hops and fruit may be fixed in certain cases.

Sect. 32. "For the purpose of fixing any charge for the tithes of hops or fruit, or of any mixed plantation as aforesaid, the commissioners may, if they see fit, assign the parish or lands in respect of which due notice shall have been given, requiring the tithes thereof to be separately valued, as required by the said first recited act, or any part or parts of such parish or lands, as a district under the provisions of the said act, and may fix a charge upon such lands in respect of the tithes of hops or fruit as the rent-charge to prevail and to be established in respect of the same, without specific reference in the award to any other parish or lands, but having regard nevertheless to the general amount of compositions which they shall find to have prevailed in other parishes of a similar description, and not to the money payments in the parish under consideration, or the value of the tithes in kind therein."

Provision for giving effect to parochial agreements; and proceedings thereon in certain cases of extraordinary charge.

Sect. 33. "The provisions of the said first-recited act for distinguishing rent-charges apportioned upon lands cultivated as hop grounds into two parts, and for relieving lands from and subjecting the same to an extraordinary charge when ceased to be cultivated, and when newly cultivated as such, respectively shall be held to extend to parochial agreements already or hereafter made, and to the proceedings consequent thereupon, and to the lands discharged from tithes by virtue thereof; and every such agreement and proceeding, whereby any district has been or shall be assigned for establishing or distinguishing into two parts any rent-charge in respect of lands, cultivated as aforesaid, shall be deemed valid, operative, and effectual for all the purposes of the said recited acts and of this act; and every district assigned by virtue thereof shall be deemed a district duly assigned, and every rent-charge created thereby a valid rent-charge for the like purposes."

By 3 & 4 Vict. c. 15, it is enacted as follows:—

Power for parties to parochial agreement, and for commissioners, to declare the amount of extraordinary

Sect. 18. "In any case where the parties to a parochial agreement, or the commissioners in the case of an award, shall have proceeded, according to the provisions of the said recited acts, to ascertain and fix a rent-charge in any parish wherein any of the lands shall at the time of making such agreement or award be cultivated as hop grounds or

charge to be payable in respect of hop grounds, &c.

market gardens, and in case of proceeding by award when notice shall have been given that the tithes of any of the lands so cultivated should be separately valued, it shall be lawful for the said parties to declare in such agreement, or for the said commissioners to declare in such award, the amount of extraordinary charge per acre to be in future payable in respect of hop grounds and market gardens respectively in such parish or any district therein; and the rent-charge mentioned in every such agreement or award respectively shall, subject to the addition of such acreable extraordinary charge, consist of the amount agreed for or awarded in respect of the tithes in such parish, other than the tithes of the lands cultivated therein as hop grounds and market gardens respectively, and the ordinary charge in respect of the lands so cultivated as hop grounds and market gardens respectively added thereto: provided always, that no such extraordinary charge shall be payable in respect of any such hop grounds and market gardens during the first year, and only half such extraordinary charge during the second year, in which they shall be newly cultivated as such, whether such new cultivation shall have commenced before or after the making of such parochial agreement or award as aforesaid."

No extraordinary charge payable on hop grounds, &c. for the first year of their being cultivated as such, &c.

Extraordinary rent-charge need not be distinguished on separate lands in apportionment.

Sect. 19. "It shall not be necessary to distinguish in any apportionment the amount of extraordinary rent-charge to be charged upon the lands of each individual landowner which shall be cultivated as hop grounds, market gardens, orchards, fruit plantations, or mixed plantations of hops and fruit, provided that the acreable amount of extraordinary charge for all the lands so cultivated respectively in any district which shall have been assigned, or in any parish wherein any extraordinary rent-charge shall have been declared, previous to the confirmation of the instrument of apportionment, shall be inserted therein."

Formation of district within which extraordinary charges in respect of hop grounds and market gardens shall be payable.

By 23 & 24 Vict. c. 93, s. 42, "Whenever the commissioners are requested in the manner provided by the said recited acts" (that is, all the previous Commutation Acts) "to charge an additional rent-charge by way of extraordinary charge upon any hop grounds or market gardens newly cultivated as such beyond the limits of any district for which an extraordinary charge for hop grounds or market gardens respectively shall have been already distinguished, the commissioners may declare the lands in the parish in which such newly cultivated hop grounds or market gardens are situate a district within which the extraordinary charge to be then fixed by them shall be thereafter payable."

By sect. 43, the commissioners may enter upon land at reasonable times to discover the extent cultivated as hop grounds or market gardens for the purposes of the preceding section.

Power of inspection.

It has been holden, in the case of *Russell* v. *The Tithe Commissioners* (*f*), that, under these sections and sect. 42 of 6 & 7 Will. 4, c. 71, the tithe commissioners have power to create or assign a new district and to impose an extraordinary rent-charge upon lands newly cultivated as market gardens in a parish in which no such district had been assigned at the time of the original commutation.

Russell v. *The Tithe Commissioners.*

SECT. 9.—*Exemption of small Gardens and Tenements.*

By 3 & 4 Vict. c. 15, it is enacted as follows:—

Sect. 25. "Whereas in many cases tithe-owners have, during the seven years of average prescribed by the said first-recited act" (6 & 7 Will. 4, c. 71), "forborne to take the tithes of lands used and occupied as gardens, lawns, or the like, or compositions in lieu thereof, on account of such lands being of small extent, and the tithes thereof being of inconsiderable value: be it enacted, that where in such cases the tithes of a parish or district have been commuted, whether by a parochial agreement or by a compulsory award, and it shall be shown to the satisfaction of the said commissioners that the rent-charge or rent-charges specified in the said agreement or award has or have been based upon the average value of the tithes of the said parish or district during the seven years of average, exclusive of any tithes in respect of such gardens, lawns, or such like small holdings, according to the provisions of the said first-recited act, and that no part of the said rent-charge or rent-charges has been agreed to be given or awarded in respect of the tithes of such gardens, lawns, or other such like small holdings, it shall be lawful for the said commissioners, if they think fit, to order and direct that no part of the said rent-charge or rent-charges shall be apportioned upon such gardens, lawns, or other such like small holdings."

Gardens or lawns of small extent may be exempted from rent-charge.

Sect. 26. "And whereas it hath happened that in cases where, during the seven years of average prescribed by the said first-recited act, tithes shall not have been demanded of certain tenements, by reason of their small extent of or the small amount of such tithes, such tenements

The commissioners to cause a new apportionment to be made in cases in which the apportion-

(*f*) L. R., 6 C. P. 596; 40 L. J., C. P. 265.

ment shall have included tenements from which no tithe has been taken during seven years previous to Christmas, 1835.

have notwithstanding been included in the apportionment of the rent-charge for the parish, whereby the occupiers of such tenements have become liable to have their goods distrained upon, and the tithe-owner has been subjected to much increased difficulty and expense in the collection of the rent-charge, contrary to the true intent and meaning of the said first-recited act; and it is therefore expedient, under certain restrictions, to give relief in such cases: be it enacted, that in any such case in which the apportionment shall have included any number of small tenements, exceeding in the whole one hundred, from which tenements no tithe or composition for tithe shall have been demanded or taken (notwithstanding their liability thereto) during the period of seven years next preceding Christmas in the year 1835, it shall be lawful for the commissioners, and they are hereby authorized, if they shall see fit, upon the application in writing of any ten or more of the owners or occupiers of such small tenements, or of the tithe-owner, and after satisfactory proof shall have been given that no part of the rent-charge has been agreed to be given or awarded in respect of the tithes of such small tenements, to cause a new apportionment to be made of the said rent-charge, and to order and direct that no part thereof shall be apportioned upon such small tenements."

Expenses of new apportionment.

Provision is made by this and the following section (sect. 27), for the making of this new apportionment and the costs thereof:—

"And as to any part of such costs as may be borne by the tithe-owner, such tithe-owner, being an ecclesiastical beneficed person, may charge or assign the rent-charge as a security for the repayment of such costs in like manner as for the costs of the commutation under the said act" of 6 & 7 Will. 4, c. 71.

SECT. 10.—*Personal and Mineral Tithes, how affected by the Tithe Commutation Acts.*

Act not to extend to Easter offerings, &c.

By 6 & 7 Will. 4, c. 71, s. 90, "Nothing in this act contained, unless by special provision to be inserted in some parochial agreement and specially proved by the commissioners, in which case the same shall be valid, shall extend to Easter offerings, mortuaries, or surplice fees (*r*),

(*r*) *Vide* Part V., Chap. IV., *infra*. For Mortuaries, *vide* p. 874, *supra*.

or to the tithes of fish or of fishing, or to any personal tithes other than the tithes of mills, or any mineral tithes" (*s*).

Power after award to make parochial agreement for Easter offerings, &c.

By 2 & 3 Vict. c. 62, s. 9, however, "It shall be lawful, at any time before the confirmation of any apportionment after a compulsory award in any parish, for the land-owners and tithe-owners, having such interest in the lands and tithes of such parish as is required for the making a parochial agreement, to enter into a parochial agreement for the commutation of Easter offerings, mortuaries, or surplice fees, or of the tithes of fish, or fishing, or mineral tithes; and all the provisions, conditions, limitations, and powers of the said recited acts or any of them, relating to parochial agreements, so far as the same shall in the judgment of the commissioners be applicable to the subject of the proposed commutation, shall be observed and applied in every such case as if no previous award had been made; and every such agreement may fix the period at which the rent-charge to be paid under such agreement shall commence, but so nevertheless that the same and the subsequent payments thereof shall be made on some day fixed for the payment of the rent-charge awarded in such parish, and shall be recoverable from time to time by the means provided in the said acts or either of them for the recovery of the rent-charges in the said parish."

Fish in ponds.

It does not seem to be agreed, whether or how far fish in *ponds* or private fisheries are liable to pay tithes; and therefore the same must be referred to the customs of particular places.

Deer. Rabbits. Oysters.

But it seems that of these no tithe can be due, where no profit is made thereof, and where they are kept only for pleasure, or to be spent in the house or family; as fish kept in a pond generally are (*t*); for they are like deer in a park, and rabbits in an inclosed warren, wild in their nature; and partaking of the realty, go to the heir (*u*). Oysters, or oyster lays or beds, are not tithable (*x*).

Fish in rivers.

Also fish taken in common *rivers* are tithable only by custom (*y*).

And in this case Lindwood says it is only a personal tithe, and shall be paid to that church where he who takes them hears divine service and receives the sacraments (*z*).

(*s*) As to the recovery of these tithes when not commuted, *vide infra*, Part V., Chap. IV., sect. 2, pp. 1600—1606.

(*t*) Boh. 135.

(*u*) *Nicholas* v. *Elliott*, Bunb. 19; 2 Br. P. C. 31; 1 Wood, 523; 1 E. & Y. 698; *Flower* v. *Vaughan*, Hett. 147; 1 E. & Y. 370.

(*x*) *Murray* v. *Skinner*, 1 Wood, 541; 1 E. & Y. 706.

(*y*) God. 406; Wood, b. ii. c. 2.

(*z*) Lindw. 195. *Vide post*, sect. 11 of 2 & 3 Edw. 6, c. 13.

Fish in the sea.

Where fish are taken in the *sea*, though they are *feræ naturæ*, and consequently not tithable of common right, yet by the custom of the realm they are tithable as a personal tithe, that is, not by the tenth fish, or in kind, but by some small sum of money in consideration of the profits made thereby after costs deducted (*a*).

By the case of *Rex* v. *Carlyon* (*b*), it appears to be the custom in the parish of Paul, in the county of Cornwall, to pay one-tenth of all the fish caught and brought on shore within the parish: and there the court held that the proprietors of this tithe were rateable to the poor in respect of it (*c*).

Upon which foundation, it is said, that if the owners of a ship do lend it to mariners to go to an island for fish, and are in consideration of such loan to have a certain quantity of fish when they come back; no tithe shall be paid by the mariners for what is given to the owners, because they are only to pay for the clear gain (*d*).

A custom that tithes in kind ought to be paid to the vicar for all sea fish taken or caught with any nets or boats that had been housed or wintered at or in the parish in the interval between the last preceding fishing season and the season during which the fish were caught or taken (whether such nets or boats were the property of parishioners or not) has been established (*e*). Unless there be a clear custom to the contrary, the tithe of fish taken in the sea appears to be payable to the parson of the parish where the fisherman resides (*f*).

Personal tithes.

By a constitution of Archbishop Winchelsea, it is ordained, that "personal tithes shall be paid of artificers and merchandizers, that is, of the gain of their commerce; as also of carpenters, smiths, masons, weavers, inn-keepers, and all other workmen and hirelings, that they pay tithes of their wages; unless such hireling shall give something in certain to the use or for the light of the church, if the rector shall so think proper:" that is to say, they shall pay the tenth part of the profit, deducting first all necessary and reasonable expenses (*g*).

2 & 3 Edw. 6, c. 13.

And by 2 & 3 Edw. 6, c. 13, s. 7, every person exer-

(*a*) 1 Rolle's Abr. 636. See also *Holland* v. *Neale*, Noy, 108; 1 E. & Y. 156; *Stile's case*, 1 E. & Y. 364; *Thompson* v. *Field*, 1 E. & Y. 761; *Gnavas* v. *Kelynack*, Bunb. 239, 256; 2 E. & Y. 1; Gw. 691; *Jones* v. *Cleveden*, 2 Wood, 283; *Earl of Scarborough* v. *Hunter*, Bunb. 43; 1 E. & Y. 747.

(*b*) 3 T. R. 385.

(*c*) For more of this custom, see Bunb. 43, 239, 256.

(*d*) Gibs. 679.

(*e*) *Borlase* v. *Batten*, 2 E. & Y. 300.

(*f*) *Williams* v. *Baron*, 2 E. & Y. 217; Gw. 931.

(*g*) Lind. 195.

cising merchandizes, bargaining and selling, clothing, handicraft or other art or faculty by such kind of persons, and in such places as heretofore within these forty years have accustomably used to pay such personal tithes, or of right ought to pay (other than such as be common day labourers), shall yearly at or before the feast of Easter, pay for his personal tithes the tenth part of his clear gains; his charges and expenses, according to his estate, condition or degree, to be therein abated, allowed and deducted.

Personal tithes.

Sect. 8. Provided, that in all such places where handicraftsmen have used to pay their tithes within these forty years, the same custom of payment of tithes to be observed and continue.

Sect. 9. And if any person refuse to pay his personal tithes in form aforesaid, it shall be lawful to the ordinary of the diocese where the party is dwelling, to call the same party before him, and by his discretion to examine him by all lawful and reasonable means, other than by the party's own corporal oath, concerning the true payment of the said personal tithes.

Sect. 11. Provided, that nothing in this act shall extend to any parish which stands upon and towards the sea coasts, the commodities and occupying whereof consisteth chiefly in fishing, and have by reason thereof used to satisfy their tithes by fish; but that all such parishes shall pay their tithes according to the laudable customs, as they have heretofore of ancient time within these forty years used and accustomed, and shall pay their offerings as is aforesaid.

Tithes of fish.

Sect. 12. Provided also, that nothing in this act shall extend in any wise to the inhabitants of the cities of London and Canterbury, and the suburbs of the same, nor to any other town or place that hath used to pay their tithes by their houses, otherwise than they ought or should have done before the making of this act.

London, Canterbury, &c.

This act restrains the canon law in three things: First, where the canon law was general, that all persons in all places should pay their personal tithes, the act restrains it to such kind of persons only, as have accustomably used to pay the same within forty years before the making of the act. Secondly, whereas by the ecclesiastical laws they might before this act have examined the party upon his oath concerning his gain, this act restrains that course, so that the party cannot be examined upon oath. Thirdly, by this act the day labourer is freed from the payment of his personal tithes (*h*).

Restrictions imposed by this act.

(*h*) Deg. p. 2. c. 22.

2 & 3 Edw. 6, c. 13.

It cannot be intended upon this act, that if such tithes have been sometimes paid within forty years, they are therefore due; but they must have been *accustomably*, that is, constantly, paid for forty years next before the act (*i*).

Cases as to tithes on trade profits.

If it be demanded how such payment must now be proved forty years before the making of the act; the answer is, as in other like cases, *à posteriori;* by what has been done all the time of memory since the act (*k*).

Sir Simon Degge says, the only case that he could find for above a hundred years before his time, where the tithes of the profits of such trades were sued for by any clergyman, was that of *Dolley* v. *Davis*, in 11 Jac. I, which was thus: The parson of a parish in Bristol libelled in the spiritual court against an inn-keeper, to have tithes of the profits of his kitchen, stable, and wine cellar, and did set forth in his libel, that he made great gain in selling of his beer, having bought it for 500*l.* and sold it for 1,000*l.*, of which gain he ought to have tithe by the common law of the realm. Upon which occasion, the clerk of the papers informed the court, that when one had libelled for tithes of the gain of 10*l.* for 100*l.* put out, a prohibition was granted: and the same was also granted in this case (*l*).

And personal tithes are now scarce any where paid in England, unless for mills (*m*), or fish caught at sea; and then payable where the party hears divine service, and receives the sacraments (*n*).

Houses.

Tithes may be payable by custom for houses and other buildings (*o*), although they are generally exempt (*p*).

Substance of the earth.

Tithes are not due of things which are of the substance of the earth (*q*), as for lead ore in Derbyshire, and tin in Devonshire or Cornwall (*r*). A customary payment in lieu of tithe of mines is good (*s*). A lime-kin, though not tithable of common right, may be so by custom (*t*); so may white salt (*u*).

(*i*) Deg. p. 2, c. 22.

(*k*) Ibid.

(*l*) 2 Bulst. 141.

(*m*) Which are *included* in the Tithe Commutation Acts, *vide ante*.

(*n*) Wood. b. 2, c. 22.

(*o*) *Kinaston* v. *Piercy*, 2 E. & Y. 289.

(*p*) *Vide infra*, Sect. 16.

(*q*) *Dr. Grant's case*, 11 Rep. 15; 1 E. & Y. 222; *Witncar* v. *Leyfield*, 1 E. & Y. 232. *Vide supra*, p. 1489.

(*r*) *Brown* v. *Vermuden*, 1 E. & Y. 509; *Tally* v. *Kelsall*, 1 Wood, 74; *Pindur* v. *Jackson*, 1 E. & Y. 583.

(*s*) *Burton* v. *Spencer*, 2 Wood, 336.

(*t*) *Thomas* v. *Perry*, 1 Roll. Ab. 642.

(*u*) *Burton* v. *Spencer*, 2 Wood, 336.

Sect. 11.—*Incidents to Rent-charges and Tithes.*

Merger.

One of the principal incidents of the rent-charge is the power given to "any person or persons who shall either alone or together be seised of or have the power of acquiring or disposing of the fee-simple in possession of any tithes or rent-charge in lieu of tithes," of merging such tithes or rent-charges in land (*x*).

Tithes in lay hands.

Tithes which come to the crown by the statutes of dissolution, and are now vested in the lay impropriators, are subject to all the laws and incidents of other freehold property; they are assets for the payment of debts, and subject to dower and curtesy (*y*); and having become lay fees, they are tenements within the statute *De Donis*, 13 Edw. 1, c. 1 (*z*), and may be entailed and limited to the heirs of the body (*a*). The statute 3 & 4 Will. 4, c. 74, for the abolition of fines and recoveries, extends to tithes (*b*). Tithes are *not* subject to *customary* modes of descent, as gavelkind or borough English (*c*). Tithes of which a man is seised in fee may be devised as hereditaments; and it seems may pass by a devise of all lands in a parish, if the testator has no land there, in order to make the devise operative (*d*). The act 7 Will. 4 & 1 Vict. c. 26, for the amendment of the laws with respect to wills, includes tithes. Formerly no time was a bar to the recovery of tithes; but by 3 & 4 Will. 4, c. 27, s. 2, it was enacted, that, "After the thirty-first day of December, 1833, no person shall make an entry or distress or bring an action to recover any land or rent but within twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to some person through whom he claims; or if such right

Time as bar to recovery.

No land or rent to be recovered but within twenty years after the right of action accrued.

(*x*) 1 & 2 Vict. c. 64, s. 1. *Vide infra*, sect. 14.

(*y*) *Hulme* v. *Pardoe*, M'Clel. 393; 3 E. & Y. 116.

(*z*) Co. Litt. 159 a.

(*a*) 1 Vent. 173; 2 Lev. 139; Co. Litt. 6; Cro. Jac. 301; *Rex* v. *Ellis*, 3 Price, 323; 3 E. & Y. 781.

(*b*) By 32 Hen. 8, c. 7, s. 5, recoveries and fines of tithes and other ecclesiastical possessions which were in *lay* hands, might be suffered and levied in the same manner as if lands; but tithes must have been named, in order to pass them in such assurances. See *Gibson* v. *Clarke*, 1 Jac. & W. 159; 3 E. & Y. 946.

(*c*) *Doe* d. *Lushington* v. *Llandaff*, 2 New Rep. 491; 2 E. & Y. 557.

(*d*) *Ritch* v. *Sanders*, Styles, 261. See *Ashton* v. *Ashton*, 3 P. Wms. 386. It has not been decided whether tithes would pass under a devise of a messuage and tenement, "and all the profits arising therefrom, at D. in the parish of B." *Doe* d. *Watson* v. *Jefferson*, 2 Moore, 260; 2 Bing. 118.

shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to the person making or bringing the same."

Crown.

The crown, it should be observed, is not particularly named in this statute, as it must be to deprive it of any prerogative right.

By 6 & 7 Will. 4, c. 71, it is carefully provided that the rent-charge shall be subject to the same incumbrances and incidents as before the Tithe Commutation Acts.

Rent-charge to be subject to the same incumbrances and incidents as tithe before this act.

Sect. 71. "Any person having any interest in or claim to any tithes, or to any charge or incumbrance upon any tithes, before the passing of this act, shall have the same right to claim upon the rent-charge for which the same shall be commuted as he had to or upon the tithes, and shall be entitled to have the like remedies for recovering the same as if his right or claim to or upon the rent-charge had accrued after the commutation: provided that nothing herein contained shall give validity to any mortgage or other incumbrance which before the passing of this act was invalid or could not be enforced; and every estate for life, or other greater estate, in any such rent-charge, shall be taken to be an estate of freehold; and every estate in any such rent-charge shall be subject to the same liabilities and incidents as the like estate in the tithes commuted for such rent-charge; and where any lands were exempted from tithe whilst in the occupation of the owner thereof by reason of being glebe or of having been heretofore parcel of the possessions of any privileged order, the same lands shall be in like manner exempted from the payment of the rent-charge apportioned on them whilst in the occupation of the owner thereof; and where by virtue of any act or acts of parliament heretofore passed any tithes are authorized to be sold, exchanged, appropriated, or applied in any way, the rent-charges for which such tithes may be commuted under the provisions of this act, or any part thereof, shall or may be saleable or exchangeable, appropriated and applied, to all intents and purposes, in like manner as such tithes, and the same powers of sale, exchange and appropriation shall in all such cases extend to and may be exercised in respect of the said commutation rent-charges: and the money to arise by the sale of such rent-charges shall or may be invested, appropriated, and applied to the same purposes and in like manner as the money to arise by the sale of any such tithes might have been invested, appropriated, and applied under such

particular act or acts in case this act had not been passed; and no such rent-charge shall merge or be extinguished in any estate of which the person for the time being entitled to such rent-charge may be seised or possessed in the lands on which the same shall be charged."

Apportionment.

Among other incidents to the rent-charge should be mentioned the provisions for its apportionment, where by a vacancy it has become due to two persons (*e*).

Under the Tithe Commutation Acts, the rent-charge will be apportioned between the parties with reference to the respective periods of their holding the benefice. On the death, resignation, or deprivation of an incumbent, the successor will be entitled to receive the whole half-yearly payment accruing due after his induction, but he must account to the predecessor or his representative for so much of such half-yearly payment as became due during the predecessor's incumbency.

SECT. 12.—*Tithes and Rent-charges exchanged for Land.*

6 & 7 Will. 4, c. 71, contains certain provisions for giving land, in lieu of tithes, to *ecclesiastical* persons, but not to *lay* impropriators. It should be observed, this exchange of land for tithes must be the subject of an *agreement*: it cannot be an *award* (*f*) of the commissioners.

Land not exceeding twenty acres may be given as commutation for tithes, &c.

Sections 21, 27, and 28, having specified the nature of parochial agreements, it is enacted, by sect. 29, that "any such parochial agreement may be made in manner and form aforesaid for giving to any ecclesiastical owner, in right of any spiritual benefice or dignity, of any tithes or of any rent-charge for which such tithes shall have been commuted, any quantity not exceeding in the whole twenty imperial acres of land by way of commutation for the whole or an equivalent part of the great or small tithes of the parish, or in discharge of or exchange for the whole or an equivalent part of any rent-charge agreed to be paid instead of such tithes, but subject in every case to the provisions hereinafter contained; and every such agreement shall be made in such form and contain such particulars as the commissioners shall in that behalf direct, specifying the land whereof the tithes or rent-charge for which such tithes shall have been commuted shall be the subject of such agreement, and giving full and sufficient descriptions

(*e*) See 6 & 7 Will. 4, c. 71, s. 86, and 33 & 34 Vict. c. 35.

(*f*) See 6 & 7 Will. 4, c. 71, s. 50.

of the quantity, state of culture, and annual value of the land proposed to be given in exchange for such tithes or rent-charge: provided always, that the same consent and confirmation shall be necessary to any such agreement as in the case of an agreement for a rent-charge; and that in case the said agreement shall not extend to the whole of the tithes of the parish, an agreement or award as hereinafter provided may and shall be made for the payment of a rent-charge in satisfaction of the residue of the said tithes; and such rent-charge, when agreed upon or awarded, or the residue thereof, shall be apportioned in manner hereinafter provided upon all the lands of the parish subject to the payment of tithes, unless otherwise agreed upon by the parties to the said parochial agreement, except the land so given by way of commutation, in like manner as if no agreement for giving land had been mada: provided also, that the land so given shall be free from incumbrances, except leases at improved rent, land tax, or other usual outgoings, and shall not be of leasehold tenure, nor of copyhold or customary tenure, subject to arbitrary fine or the render of heriots."

Extended by later act.

Under these provisions it will be seen, that land in lieu of tithes could not be given after the confirmation of the apportionment. 2 & 3 Vict. c. 62, made (as will be seen) the time for giving land in lieu of tithes co-extensive with the tithe commission. 6 & 7 Will. 4, c. 71, further provided that such lands should be subject to the same uses and trusts as the tithes, and that the agreements for the exchange should operate as conveyances.

Agreements for giving land to operate as conveyances.

Sect. 31. "Such agreement for giving land confirmed by the said commissioners, shall operate as a conveyance of such land to the owner of such tithes or rent-charge, and the land so conveyed shall thereupon vest in and be and be deemed to be holden by such person or persons, and upon the like uses and trusts in every respect as the tithes or rent-charge in commutation or exchange for which the same shall have been given shall be vested and holden: and for the purpose of making and completing any such agreement, the provisions of this act respecting persons under legal disability (*g*) shall apply to every

(*g*) By 6 & 7 Will. 4, c. 71, s. 15, "whenever the patron of any benefice, or the owner of any lands or tithes to which the provisions of this act are intended to apply, or any person interested in any question as to any tithes, shall be a minor, idiot, lunatic, feme covert, beyond the seas, or under any other legal disability, the guardian, trustee, committee of the estate, husband, or attorney respectively, or, in default thereof, such person as may be

person party to such agreement, or in whom any such land shall be vested, and whose concurrence or consent may be necessary to the perfecting thereof, or of the title to such land, as fully as if the same had been here repeated and re-enacted."

Power is also given, by this statute, to the land-owner, to give twenty acres of land in lieu of rent-charge.

Owners of lands chargeable with rent-charge may give land instead thereof.

Sect. 62. "It shall be lawful for the owner of any lands chargeable with any such rent-charge to agree, at any time before the confirmation of any such instrument of apportionment, with any ecclesiastical person being the owner of the tithes thereof in right of any spiritual benefice or dignity, for giving land instead of the rent-charge charged or about to be charged upon his lands; and every such agreement shall be made under the hands and seals of the land-owner and tithe-owner, and shall contain all the particulars hereinbefore required to be inserted in a parochial agreement for giving land instead of tithes or rent-charge: provided always, that no such tithe-owner shall be enabled to take or hold more than twenty imperial acres of land in the whole by virtue of any such agreement or agreements made in the same parish; and the same consent and confirmation relatively to the lands and tithes comprised in the said agreement shall be necessary to any such agreement as in the case of a parochial agreement for giving land instead of tithes; and all the provisions hereinbefore contained concerning a parochial agreement for giving land shall be applicable to every such agreement as hereinbefore last mentioned, so far as concerns the lands and tithes comprised in the said agreement: provided also, that any amendment which shall be made in the draft of apportionment before confirmation thereof, and subsequent to any such agreement for giving land instead of rent-charge, whereby the charge upon the lands referred to in such agreement shall be altered, shall be taken to annul the execution of such agreement for giving land, and any consent which may have been necessary thereunto."

The provisions in 2 & 3 Vict. c. 62, mentioned above, are as follow: —

Extension of

Sect. 19. "So much of the said first-recited act as

nominated for that purpose by the commissioners after due inquiry shall have been made by them as to the fitness of such person, and whom they are hereby empowered to nominate under their hands and seal, shall, for the purposes of this act, be substituted in the place of such patron, owner, or person so interested."

6 & 7 Will. 4, c. 71, ss. 29, 62, for giving land in lieu of tithes.

enables any land-owner, either by parochial agreement or individually, to give land instead of tithes or rent-charge at any time before the confirmation of any instrument of apportionment, shall be and the same is hereby extended, and the powers and provisions for that purpose may be exercised in every such case at any time, as well after as before such confirmation of the apportionment as aforesaid, during the continuance of the commission constituted and with the consent of the commissioners appointed and acting under the said first-recited act."

Lands taken by ecclesiastical tithe-owners instead of tithes to vest absolutely in them.

Sect. 20. "In any case where any land shall have been or shall hereafter be taken by any ecclesiastical tithe-owner under any agreement for the commutation of any tithes, or for giving land instead of any rent-charge, under the recited acts, or any of them, or this act, such land shall, upon the confirmation of such agreement, vest absolutely in such tithe-owner and his successors, free from all claims of any person or body corporate, and without being thereafter subject to any question as to any right, title, or claim thereto, or in any manner affecting the same; and the commissioners shall cause to be inserted in or endorsed upon every such agreement the amount of the rent-charge instead of which such land was given, and the lands upon which the same was chargeable; and every person who, if this act had not been made, would have been entitled to recover any such land given instead of rent-charge, or any rents or profits issuing out of such land, shall be entitled to recover against the party or parties giving such land instead of tithes or rent-charge, his, her, or their heirs, executors, or administrators, by way of damages, in an action on the case, such compensation as he or she may be entitled to for any loss thereby sustained; and such damages, and all costs and expenses awarded to the plaintiff in such action, shall forthwith attach upon and be payable out of the lands exonerated by such agreement."

Corporations, trustees, and feoffees to charitable uses may convey lands.

Sect. 21. "All agreements and other assurances which shall be made for the purpose of effecting the taking of land instead of rent-charge under the provisions of the said recited acts, or any of them, or this act, shall be valid and effectual for the purpose of vesting an estate of inheritance as to such lands in such ecclesiastical tithe-owner and his successors, notwithstanding the same be made by any corporation sole or aggregate, or any trustees or feoffees for charitable purposes, otherwise restrained from or incapable of making any such valid conveyance or assurance."

By 3 & 4 Vict. c. 15, s. 17, the provisions of this section

are extended to churchwardens and overseers, and trustees or feoffees of parish property or of any property holden on a parochial or public trust.

Extending power of giving land for tithes.

By 5 & 6 Vict. c. 54, s. 6, "Whereas the power of giving land instead of tithes has been found beneficial to both tithe-owners and land-owners, but such power has been inoperative in a great degree by reason that the land-owners by giving land instead of vicarial tithe cannot free their lands from the liability to rectorial tithe, and the converse; be it enacted, that it shall be lawful for any tithe-owner with the consent of the patron and ordinary in the case of spiritual tithes, to be testified as their consent under the first-recited act is testified to anything for which their consent is therein required, and subject in that case to the limitation of quantity of land provided by the first-recited act, and subject to the approval of the tithe commissioners, to agree for the assignment to any other owner of tithes issuing out of the same lands of so much of his tithes arising within the same parish, or of the rent-charge agreed or awarded to be paid instead of such tithes, as shall be an equivalent for the tithes belonging to such other tithe-owner issuing out of the same lands, or for the rent-charge agreed or awarded to be paid instead thereof, for the purpose of enabling any land-owner who shall be desirous of giving land instead of tithes to free his lands, or any part thereof, from both rectorial and vicarial tithes, and from the payment of any rent-charge in respect thereof; and every such agreement shall be carried into effect by means of an award or supplemental award, to be made by the said commissioners either before or after the confirmation of the apportionment, in like manner as awards or supplemental awards are made by them pursuant to the powers vested in them before the passing of this act."

Confirmation of old agreements for giving land for tithes.

Sect. 7. "Where any agreement shall have been made before the passing of the first-recited act for giving land or money, or both, instead of tithes or glebe or commonable or other rights or easements, which is not of legal validity, and such lands or money, or both, shall appear to the commissioners to be a fair equivalent for the said tithes or glebe, or rights or easements, they shall be empowered to confirm and render valid such agreement; and in case the same shall not appear to be a fair equivalent, the said commissioners shall nevertheless be empowered to confirm such agreement, and also to make an award for such rent-charge, which with the said land or money, or both, will be a fair equivalent for the said tithes or glebe, or rights or easements, and, subject to such confirmation and

award, to extinguish the right of the tithe-owners to the perception of the said tithes, or his title to the said glebe rights or easements, or to the receipt of any rent-charge instead thereof, other than the rent-charge awarded over and above the lands or money, or both, so confirmed to them."

SECT. 13.—*Redemption of Rent-charges.*

In what cases.

Provisions for the redemption of rent-charges in three classes of cases—(1) where the whole rent-charge payable in the parish does not exceed 15*l.* a year; (2) where a rent-charge is divisible into very small sums; (3) where it has been erroneously charged on lands not within the parish—are made by the later Commutation Acts, 9 & 10 Vict. c. 73, and 23 & 24 Vict. c. 93.

(1) By 9 & 10 Vict. c. 73, it is enacted as follows:—

Power to landlords to redeem a rent-charge not apportioned, where the amount does not exceed 15*l.*

Sect. 1. "Where, under any agreement or award which has been or hereafter shall be confirmed by the commissioners, the amount of the rent-charge agreed or awarded to be paid instead of the tithes of any parish shall not exceed the sum of fifteen pounds, and shall not have been apportioned, or the apportionment of such rent-charge shall not have been confirmed by the commissioners, it shall be lawful for the owners of the land chargeable therewith, or any of them, with the consent of the person or persons for the time being entitled to the receipt thereof, or, in the case of an infant, feme covert, or lunatic, with the consent of the guardian, husband, or committee of the estate of the person so under disability, to redeem such rent-charge on payment, in manner hereinafter mentioned (within such time as the commissioners shall in each case limit in this behalf), of a sum of money not less than twenty-four times the amount of such rent-charge."

By 23 & 24 Vict. c. 93, s. 31, the commissioners may order a redemption without the consent of the person entitled to the receipt of the tithes, for a sum equal to twenty-five times the amount of the rent-charge.

Upon payment of the consideration money, commissioners to certify that the parish is discharged of tithes.

By 9 & 10 Vict. c. 73, s. 2, "In every case in which any such rent-charge, not exceeding fifteen pounds as aforesaid, has been or shall be awarded to be paid, the commissioners shall give notice, in such manner as they shall think fit, of the time within which it shall be lawful for the owners of the land charged therewith, or any of them, to redeem such rent-charge; and when it shall

appear to the commissioners that the consideration money for the redemption of such rent-charge as aforesaid shall have been paid, according to the provisions of this act, within the time limited by them in this behalf, or within any enlarged time which the commissioners may by any order under their hands and seal allow for that purpose, no apportionment of the rent-charge shall be made, but the commissioners shall, by a certificate under their hands and seal, certify that such rent-charge has been redeemed, and that the parish is discharged of such rent-charge, and of the tithes in lieu of which such rent-charge was agreed or awarded to be paid, as from such time as the commissioners shall think reasonable and declare, and such parish shall be thenceforth discharged according to the terms of such certificate."

Separate rent-charges, not exceeding 20*s.* in amount, may be redeemed after apportionment.

(2) By 9 & 10 Vict. c. 73, s. 5, "In every case in which, under any confirmed instrument of apportionment or any altered apportionment under the powers of the said acts, the whole amount of the rent-charge or separate portion of rent-charge with which the lands of any owner shall be charged in respect either of all tithes or of any kind of tithes payable to separate tithe-owners shall be a sum not exceeding twenty shillings, it shall be lawful for such owner at his option, and with the consent of the person or persons for the time being entitled to the receipt thereof, or, in the case of an infant, feme covert, or lunatic, with the consent of the guardian, husband, or committee of the estate of the person so under disability, at any time to redeem such rent-charge or separate portion of rent-charge on payment, according to the provisions of this act, of such a sum of money as shall be not less than twenty-four times the amount of the rent-charge or portion of rent-charge; and after payment of such consideration money according to the provisions of this act the commissioners shall certify that such rent-charge or portion of rent-charge has been redeemed, and the same, from after the payment of the half-yearly portion of such rent-charge or portion of rent-charge which shall next accrue due subsequently to the time of the payment of such consideration money, shall cease and be extinguished: provided always, that no such redemption as last aforesaid shall extinguish or affect any extraordinary rent-charge which would become payable in respect of such land upon any change of the cultivation thereof."

Extraordinary charge not to be affected.

Where land divided, commissioners may order rent-

By 23 & 24 Vict. c. 93, s. 32, "Whenever lands charged with rent-charge under any instrument of apportionment or altered apportionment shall be divided for building or

charge to be redeemed after apportionment.

other purposes into numerous plots, and it shall appear to the commissioners that no further apportionment of the said rent-charge can conveniently be made, the commissioners may, if they shall see fit, upon the application of any one owner of the said lands, and without the consent of any other owner, or of the person for the time being entitled to the receipt of the said rent-charge, and without limitation as to the amount thereof, by an order under their hands and seal direct that such rent-charge shall be redeemed by the payment by the owners of the lands chargeable therewith, within such time as the commissioners shall by such order direct and appoint, of a sum equal to twenty-five times the amount of such rent-charge."

Power to redeem rent-charge erroneously apportioned on lands not chargeable therewith.

(3) By 9 & 10 Vict. c. 73, s. 3, "In every case in which, by any instrument of apportionment confirmed under the provisions of the said acts, any rent-charge or portion of rent-charge has been or shall have been (by reason of error as to boundary or otherwise) charged on lands not within the parish in respect of the tithes of which the aggregate rent-charge the apportionment of which shall have been so confirmed was agreed or awarded to be paid, such rent-charge or portion of rent-charge so charged on lands not within the parish shall be redeemable on payment by the owners of the lands charged with the residue of such aggregate rent-charge, or any of them, of a sum of money equal to twenty-four times the amount of the rent-charge or portion of rent-charge hereby made redeemable, and it shall be lawful for the commissioners, before they shall proceed to direct a new apportionment, to give notice that the rent-charge or portion of rent-charge so erroneously apportioned on lands not within the parish may be redeemed, under the provisions of this act, within a time in such notice to be limited in this behalf" (*h*).

After redemption of the rent-charge erroneously apportioned, the apportionment of the remainder to be valid.

Sect. 4. "When it shall appear to the commissioners that the consideration money for the redemption of the rent-charge or portion of rent-charge so charged by such instrument of apportionment on lands not within the parish shall have been paid, according to the provisions of this act, within the time which shall have been limited by the commissioners in this behalf, or within any enlarged time which the commissioners may by order under their hands and seal allow for that purpose, and that the arrears thereof (if any) have been paid, the commissioners shall under their hands and seal certify that such rent-charge or portion of rent-charge has been re-

(*h*) See 10 & 11 Vict. c. 104, ss. 3, 4.

deemed, and thenceforth, except as respects the lands so erroneously charged, and the rent-charge or portion of rent-charge apportioned thereon, the apportionment and charges made by such instrument of apportionment shall be valid and effectual in such and the same manner as if the aggregate rent-charge had originally consisted only of the sum of the portions charged on the lands within the parish, and had been apportioned on such lands and no others, in the portions in the instrument of apportionment expressed."

Provision in cases where rent-charge has been charged on lands which, in consequence of error in boundary, are not within the parish where aggregate charge is awarded.

By 23 & 24 Vict. c. 93, s. 33, "Whenever it shall be shown to the satisfaction of the commissioners that by reason of error as to boundary or otherwise any rent-charge or portion of rent-charge shall have been charged by any confirmed instrument of apportionment on lands not within the parish in respect of the tithes of which the aggregate rent-charge, the apportionment of which shall have been so confirmed, was agreed or awarded to be paid, the commissioners may, if they shall see fit, upon the application of the owner or owners of the said lands, and without the consent of any owner of land in the said parish, or of the person for the time being entitled to the receipt of the said rent-charge, by an order under their hands and seal, direct that such rent-charge or portion of rent-charge so charged on lands not within the parish shall be redeemed by the payment by the owners of lands charged with the residue of the said rent-charge by the said apportionment, or any of them, within such time as the said commissioners shall by such order direct and appoint, of a sum equal to twenty-five times the amount of such rent-charge; and if there shall be any question touching the situation or boundary of the lands which shall be alleged to have been erroneously included in the said apportionment, the commissioners shall have the same powers for hearing and determining the same as are given by the said first-recited act for hearing and determining any difference whereby the making of an award of rent-charge in lieu of tithes is hindered."

Provision for charging rent-charge where land made chargeable for more than one parish.

Sect. 34. "Where any land has been made chargeable with rent-charges in lieu of tithes for more than one parish, the commissioners, on being satisfied thereof, may determine in respect of which parish the rent-charge ought to have been charged, and may, by order, direct such rent-charge to be paid in respect of such parish only."

As to all cases it is provided by the two acts as follows:—

Commissioners shall give notice of their intention to

23 & 24 Vict. c. 93, s. 35. "Before the commissioners shall order the compulsory redemption of any rent-charge, they shall cause notice to be given of their intention in

order compulsory redemption.

such manner as to them shall seem fit, and shall by such notice specify the time (being not less than twenty-one days) within which objections in writing to such proposed order may be signified to them; and in case any notice of objections shall be given within the time limited as aforesaid, the commissioners shall, by themselves or an assistant commissioner, take such objections into their consideration."

If person refuse to receive redemption money, to be dealt with as if under disability.

Sect. 36. "If the person absolutely entitled to the redemption money refuses to receive the same, or if the rent-charge be subject to incumbrances, and the commissioners shall consider that the incumbrancers should be protected, such redemption money shall be dealt with as is provided in cases where the owner of the rent-charge is only entitled thereto for a limited estate."

Trustees may be appointed to receive sums not exceeding 200*l*. payable to corporations.

Sect. 37. "Where the money to be paid for the redemption of any rent-charge does not exceed two hundred pounds, and the person for the time being entitled to such rent-charge shall be a corporation not authorized to make an absolute sale of such rent-charge otherwise than under the provisions of the said recited acts, the redemption money may be paid into the hands of trustees to be nominated by the commissioners, by order under their hands and seal, and the money when so paid shall be applied by the trustees, with the consent of the commissioners, to the purposes to which money to be paid for the redemption of any rent-charge into the bank of England in the name of the accountant-general is by the said recited acts directed to be applied, and upon every vacancy in the office of such trustees some other person shall be appointed by the said commissioners in like manner.

Commissioners to certify the amount of consideration money for redemption.

By 9 & 10 Vict. c. 73, s. 6, "In every case in which a rent-charge is redeemable under the provisions of this act, the commissioners shall, upon the request of the owners of land chargeable with such rent-charge or any of them, certify under the hands and seal of the commissioners the sum of money in consideration of which such rent-charge may be redeemed (*i*); and when it shall appear to the commissioners that payment or tender of such consideration money has been duly made, it shall be lawful for the commissioners to certify that such rent-charge has been redeemed under the provisions of this act, and such certificate shall be final and conclusive: provided that if any consideration money shall be paid for the redemption of a rent-charge to a person not entitled under the provisions

(*i*) See Sect. 12 for form of the certificate.

of this act to receive the same, the land which was charged with such rent-charge before the redemption thereof shall be charged in equity with the payment of such consideration money to the person rightfully entitled thereto as if the same were purchase-money for such land remaining unpaid; but the same remedies may be had against the person who shall have wrongfully received such money as purchasers are entitled to by the rules of law and equity."

Sections 7, 9, 10 provide for the payment of the consideration money to lay owners of the rent-charge; as to spiritual owners, it is enacted as follows by sect. 8, "The consideration money for the redemption under this act of any rent-charge agreed or awarded to be paid or payable under any apportionment to any spiritual person in respect of his benefice or cure shall be paid to the 'governors of Queen Anne's Bounty for the augmentation of the maintenance of the poor clergy;' and such consideration money shall be applied and disposed of by the said governors as money in their hands appropriated for the augmentation of such benefice or cure should by law and under the rules of the said governors be applied and disposed of."

Consideration money for redemption of rent-charges payable to spiritual owners, to be paid to Governors of Queen Anne's Bounty.

By sect. 11, "Every owner of an estate in land less than an immediate estate in fee simple or fee tail, or which may be settled upon any uses or trusts, may, with the consent of the commissioners, or in such manner as they shall direct, charge so much of the consideration money and other monies payable in respect of the redemption of a rent-charge, or any part thereof, with interest after the yearly rate of four pounds by the hundred upon the lands of such owner which would have been subject to such rent-charge, or to an apportioned part thereof, but so, nevertheless, that the charge upon such land shall be lessened in every year after the redemption of such rent-charge by one twentieth part at least of the whole original charge thereon."

Power to persons entitled for limited interests to charge expenses of redemption.

By 23 & 24 Vict. c. 93, s. 39, the expenses of making new awards or apportionments or of collecting redemption money are to be raised by the commissioners from the tithe-owners and land-owners in the same manner as expenses of making original awards under the earlier acts.

How expenses to be divided.

By sect. 40, "Whenever land or money payments, or both, have been given to the tithe-owners of any parish, and are now holden by them, instead of tithes or glebe or commonable or other rights or easements, and it shall appear that such land or money payments, or both, shall have been so given by virtue of any act of parliament the provisions of which have not been fully carried out, or by

Informal arrangements may be confirmed.

virtue of any arrangement which is not of legal validity, the commissioners may, if it shall appear just and expedient, having regard to all the circumstances of or incident to the case, by an award confirm the tithe-owner in possession of the said land or money, or both, and may confirm and render valid any such arrangement, and may also award a rent-charge, subject to the provisions of the said recited acts, when and in such cases as to them shall seem fit; and, subject to such confirmation and award, the commissioners may extinguish the right of the tithe-owners to the perception of the said tithes, or his title to the said glebe rights or easements, or to the receipt of any rent-charge instead thereof, other than the rent-charge, if any, awarded over and above the lands or money, or both, so confirmed to them."

Sect. 14.—*Merger of Rent-charges.*

6 & 7 Will. 4, c. 71.

The first provision for merger of the rent-charge in the land is contained in 6 & 7 Will. 4, c. 71, s. 71, and is as follows:—

Tenant in fee simple or fee tail may declare rent-charge merged.

"It shall be lawful for any person seised in possession of an estate in fee simple or fee tail of any tithes or rent-charge in lieu of tithes, by any deed or declaration under his hand and seal, to be made in such form as the said commissioners shall approve, and to be confirmed under their seal, to release, assign, or otherwise dispose of the same, so that the same may be absolutely merged and extinguished in the freehold and inheritance of the lands on which the same shall have been charged."

2 & 3 Vict. c. 62.

The charges and incumbrances on tithes (and therefore on rent-charges) being various and many, such as liability to the repairs of the chancel, to stipends of ministers and curates, and fee-farm rents, and sometimes to mortgages, annuities, &c., the commissioners for carrying the tithe commutation acts into execution refused to confirm the merger of tithes so incumbered into land, till the passing of 2 & 3 Vict. c. 62, which removed this obstacle by making any legal charge on the tithes the first charge on the land in which the tithes are merged, and by giving the same remedies against such lands, or the owners thereof, as existed previously to the merger against the tithes or the owners thereof. The first section of this act, after reciting the former statutes, enacts, that "In every case where any tithes or rent-charge shall have been or

On merger of tithes or rent-

shall hereafter be released, assigned, or otherwise conveyed or disposed of under the provisions of the said acts, or any of them, or of this act, for merging or extinguishing the same, the lands in which such merger or extinguishment shall take effect shall be subject to any charge, incumbrance, or liability which lawfully existed on such tithes or rent-charge previous to such merger to the extent of the value of such tithes or rent-charge; and any such charge, incumbrance, or liability shall have priority over any charge or incumbrance existing on such lands at the time of such merger taking effect; and such lands, and the owners thereof for the time being, shall be liable to the same remedies for the recovery of any payment and the performance of any duty in respect of such charge, incumbrance, or liability, or of any penalty or damages for nonpayment or non-performance thereof respectively, as the said tithes or rent-charge, or the owner thereof for the time being, were or was liable to previous to such merger."

charge, the charges thereon to be charges on lands.

It gives also a power of apportioning the charges on tithes merged:

Sect. 2. "Every person entitled to exercise the powers for merger of tithes or rent-charge in land under the said acts or any of them, or of this act, may, with the consent of the tithe commissioners for the time being under their hands and seal of office, and of the person to whom the lands in which such merger or extinguishment shall take effect shall belong, either by the deed or other instrument or declaration by which such merger shall be effected, or by any separate deed, instrument, or declaration to be made in such form as the commissioners shall approve, specially apportion the whole or any part of any such charge, incumbrance, or liability affecting the said tithes or rent-charge so merged or extinguished, or proposed to be merged or extinguished in such lands, upon the same or any part thereof, or upon any other lands of such person held under the same title and for the same estate in the same parish, or upon the several closes or portions of such lands, or according to an acreable rate or rates upon lands of different quality, in such manner and proportion, and to the exclusion of such of them, as the person intending to merge the same, with such consent as aforesaid, may by any such deed, instrument, or declaration direct: provided always, that no land shall be so exclusively charged unless the value thereof shall in the opinion of the said commissioners be at least three times the value of the amount of the charge, incumbrance, or liability charged or intended

Power for special apportionment of such charge on lands being of three times the value of the charge.

to be charged thereon, over and above all other charges and incumbrances, if any, affecting the same" (*h*).

And of apportioning charges on tithes not merged:

Power of special apportionment on tithes or rent-charge.

Sect. 4. "Where the whole of the great tithes or the whole of the small tithes, or the respective rent-charges in lieu thereof, shall be lawfully subject to any such charge, incumbrance, or liability, and the person entitled to such tithes or rent-charge respectively shall be desirous of apportioning such charge, incumbrance, or liability respectively exclusively upon any part of such tithes or rent-charge, although such person has not the power or does not intend to merge the same under the said acts or this act, such person may, with the like consent of the said commissioners, and in such manner as they shall see fit and prescribe, and also with the consent of the bishop of the diocese, specially apportion such charge, incumbrance, or liability respectively upon any part or portion of the tithes or rent-charge respectively subject thereto, not being in the opinion of the said commissioners less than three times the value of the said charge, incumbrance, or liability, or of such part thereof as shall be so apportioned thereon, or intended so to be."

Who may merge rent-charge.

By sect. 71 of 6 & 7 Will. 4, c. 71, only tenants in fee or in tail were empowered to merge rent-charge; but this power was extended by 1 & 2 Vict. c. 64, and 2 & 3 Vict. c. 62, to all persons having powers of appointment over the fee simple of tithes or rent-charge, and to cases where tithes (or rent-charge in lieu of tithes), and the lands out of which they are payable, *are both settled to the same uses*, when anybody in *possession of an estate for life in tithes* may merge: and also to the owners of glebes in certain cases specified below.

Persons having the power of appointment over tithes may merge them in the land.

1 & 2 Vict. c. 64, s. 1, enacts, that "It shall be lawful for any person or persons who shall, either alone or together, be seised of or have the power of acquiring or disposing of the fee simple in possession of any tithes or rent-charge in lieu of tithes, by any deed or declaration under his or their hand and seal or hands and seals, to be made in such form as the Tithe Commissioners for England and Wales shall approve, and to be confirmed under their seal, to convey, appoint, or otherwise dispose of the same, so that the same may be absolutely merged and ex-

(*h*) See 6 & 7 Will. 4, c. 71, s. 58, giving a power to apportion the rent-charge on specific lands at the request of the landowner, provided the lands are at least three times the value of the whole rent-charge put on them; pp. 1505, 1509, *supra*.

tinguished in the freehold and inheritance of the lands out of or on which the same shall have been issuing or charged; and every such deed or declaration as aforesaid shall be valid and effectual for the purpose aforesaid, although the same may not be executed or made in the manner or with the formalities or requisites which if this act had not been passed would have been essential to the validity of any instrument by which such person or persons could have acquired or disposed of the fee simple in possession of such tithes, or rent-charge in lieu of tithes" (*i*).

Where tithes and the lands charged therewith are settled to the same uses, the tenant for life may cause them to merge in the land.

Sect. 3. "In all cases where tithes, or rent-charge in lieu of tithes, and the lands out of which the same are payable, are both settled to the same uses, it shall be lawful for any person in possession of an estate for life in both such lands and tithes, or rent-charge in lieu of tithes, by any deed or declaration under his hand and seal, to be made in such form as the said commissioners shall approve, and to be confirmed under their seal, to release, assign, or otherwise dispose of such tithes or rent-charge, so that the same may be absolutely merged and extinguished in the freehold and inheritance of the lands out of which such tithes shall have been issuing, or on which such rent-charge shall have been charged."

Tithes may be merged in copyhold lands.

Sect. 4. "And whereas doubts have been entertained whether, according to the true construction of the said act, any tithes, or rent-charge in lieu of tithe, can be merged in lands of copyhold tenure, and it is expedient that such doubts should be removed; be it therefore declared and enacted, that the provisions in the said act and this act contained as to the merger of any tithe, or rent-charge in lieu of tithe, shall be deemed and taken to extend to all lands, being copyhold of inheritance or copyhold for lives, or of any other tenure whatsoever."

Provision for deducting value of tithes and rent-charge from arbitrary fines in cases of merger in copyholds.

A further provision on the subject is made by 2 & 3 Vict. c. 62, s. 7, as to the valuation of tithes merged in copyhold land:—

"In every case of merger of tithes or rent-charge issuing out of land of copyhold tenure, and subject to arbitrary fine, it shall be lawful for the said commissioners, on the application of the owner of such land, to ascertain, by such ways and means as they shall think fit, the annual value of the tithes or rent-charge so merged or intended to be merged; and the said commissioners shall in such case cause to be indorsed on the deed, declaration, or other

(*i*) Sect. 2. "No deed or declaration authorized by this act for the merging of tithes shall be chargeable with any stamp duty."

instrument effecting such merger, a certificate under their hands and seal, setting forth such annual value so ascertained; and in every case of future assessment of fine on the lands which before such merger were subject to such tithes or rent-charge, the parties entitled to such fine shall assess the same as if such lands were subject to the tithes or rent-charge of which the annual value shall be so endorsed; and the production of such deed, declaration, or instrument of merger, or of a duplicate thereof, with such certificate endorsed, or of an office copy of such deed, declaration, or instrument and certificate endorsed thereon, shall be sufficient evidence of the annual value of such tithes or rent-charge."

This act also allows the tithes and rent-charge of glebe lands to be merged:—

Tithe and rent-charge of glebe may be merged.

Sect. 6. "The provisions of the said acts and this act for merger or extinguishment of tithes or rent-charge instead of tithes in the lands out of which such tithes shall have been issuing, or whereon such rent-charge shall be fixed, do and shall extend to glebe or other land, in all cases where the same and the tithes or rent-charge thereof shall belong to the same person in virtue of his benefice, or of any dignity, office, or appointment held by him."

Further provisions on this subject are made by the following sections of 9 & 10 Vict. c. 73:—

Tithes or rent-charge in lieu thereof may be merged after agreement or award, but before apportionment.

Sect. 18. "Where by any agreement or award already made or hereafter to be made a rent-charge shall have been agreed or awarded to be paid instead of the tithes of any parish, or instead of any of such tithes, and shall not have been apportioned, it shall be lawful for the person who under the provisions of the said recited acts would have been enabled in case such agreement or award had not been made to merge the tithes in lieu of which such rent-charge shall have been agreed or awarded to be paid, or such of the same tithes as were payable out of part of the said lands, by any deed or declaration, to be made in such form as the commissioners shall approve, and to be confirmed under their hands and seal, to declare that the tithes which he would have been so entitled to merge shall, so far as respects all the lands, or, if he shall think fit, so far as respects only any specified part of the lands out of which the same were payable, and the rent-charge or portion of rent-charge which shall have been awarded or ought to be apportioned in lieu thereof on such lands, or specified parts of such lands, as the case may be, shall be merged, and such merger shall take effect accordingly; and in case such merger shall extend to all the lands

which would have been chargeable with such rent-charge, no apportionment of such rent-charge shall be made under the provisions of the said recited acts; but in case such merger shall extend to part only of the lands which would have been chargeable with such rent-charge, then such portion of the rent-charge shall be apportioned among the other lands which would have been chargeable with such rent-charge as such other lands would have been subject to in case such merger had not taken place; and the owner of the land to which such merger shall extend shall pay such portion of the expenses of or incident to the apportionment as the commissioners or any assistant commissioner may under the special circumstances order to be paid by such owner, instead of the rateable proportions to which he would have been liable in case the whole of such rent-charge had been apportioned."

Powers relating to the merger, &c. of any tithes may be executed by a person entitled in equity.

Sect. 19. "All the powers relating to the merger and extinguishment of any tithes, or rent-charge instead thereof, may be executed by a person entitled in equity to such tithes or rent-charge in all respects and with the same consequence as he could have done if he had been legally entitled thereunto; and every instrument already executed and purporting to be made in pursuance of the powers of the said acts or any of them by any person so entitled in equity shall in every respect be as effectual and have the same consequence as if he had been legally entitled to the said tithes or rent-charge at the time of the execution of such instrument, subject nevertheless in every case to any charge, incumbrance, or liability which lawfully or equitably existed on such tithes or rent-charge to the extent of the value of such tithes or rent-charge; and any such charge, incumbrance, or liability shall have such priority, and the lands and the owners thereof for the time being shall be liable in the same manner in respect of such rent-charge, incumbrance, or liability, or of any penalty or damages for non-payment or non-performance thereof respectively, as by the said act of 2 & 3 Vict. c. 62 is provided in the case of such merger or extinguishment as therein mentioned; and every instrument purporting to merge any tithes or rent-charge, and made with the consent of the said commissioners before the passing of this act, shall be hereby absolutely confirmed and made valid both at law and in equity in all respects, subject nevertheless to any charge, incumbrance, or liability in all respects as is lastly hereinbefore provided."

In the case of *Walker* v. *Bentley* (*i*), it was holden by

(*i*) 9 Hare, 629.

Walker v. *Bentley.*

the Vice-Chancellor and confirmed by the Lords Justices that under this last section an instrument purporting to merge the tithes executed with the consent of the commissioners is conclusive, though the person executing the instrument had actually no estate in the tithes or rent-charge.

Sect. 15.—*Mode of recovering Rent-charges.*

The powers given for the recovery of the rent-charge by 6 & 7 Will. 4, c. 71, are as follows:—

When rent-charge is in arrear for twenty-one days, after half-yearly days of payment, the person entitled thereto may distrain.

Sect. 81. "In case the said rent-charge shall at any time be in arrear and unpaid for the space of twenty-one days next after any half-yearly day of payment, it shall be lawful for the person entitled to the same, after having given or left ten days' notice in writing at the usual or last known residence of the tenant in possession, to distrain upon the lands liable to the payment thereof, or on any part thereof, for all arrears of the said rent-charge, and to dispose of the distress when taken, and otherwise to act and demean himself in relation thereto, as any landlord may for arrears of rent reserved on a common lease for years (*k*); provided that not more than two years' arrears shall at any time be recoverable by distress."

Priority of right to goods distrained.

"By (*l*) the stat. 8 Ann. c. 14" (or 18), "s. 1, the landlord is entitled to be paid one year's rent actually due at the time of the execution, before the goods are applied to the purposes of the execution. By 6 Geo. 4, c. 16, s. 74, no distress for rent levied after an act of bankruptcy, whether before or after the fiat, will be available for more than one year's rent, accrued prior to the date of the fiat, but the landlord may come in as a creditor for the residue (*m*). Under a sequestration from equity, the landlord is entitled to be paid arrears of rent (*n*). Perhaps it is not clear that the owner of the rent-charge will be entitled

(*k*) This provision does not give the distrainor, when ultimately successful, a right to double costs, under the old law, nor consequently to "a full and reasonable indemnity," under 5 & 6 Vict. c. 97, s. 2; *Newnham* v. *Bever*, 7 D. & L. 253; 8 C. B. 560.

(*l*) The following remarks are taken from a valuable note to clause 81, in Mr. Shelford's elaborate work on the Tithe Commutation Acts, 3rd edit. (1848), p. 292.

(*m*) This section has been repealed; but a similar provision is contained in the present act, 32 & 33 Vict. c. 71, s. 34.

(*n*) *Dixon* v. *Smith*, 1 Swanst. 457.

to avail himself of the above statutes; at any rate, it should seem that he can only do so for one year's arrears.

Distresses at common law.

"At common law, distresses taken for rent in arrear were not saleable, but could only be kept as a pledge for the rent. By the stat. 2 W. & M. c. 5, goods and chattels distrained for rent due under a contract, may be kept and sold in the manner pointed out by that act. It was not until the 11 Geo. 2, c. 19, s. 8, that landlords had power to distrain corn, grain, or other produce growing on the land demised. The grantee of a rent-charge was empowered by deed 'to detain, manage, sell, and dispose of distresses in the same manner in all respects as distresses for rents reserved upon leases for years, and as if the annuity was a rent reserved upon a lease for years;' and it was held that these words were fully satisfied by holding them to grant the powers which were given to landlords under the stat. 2 W. & M. c. 5, without extending them to the new subjects of distress first granted by the statute 11 Geo. 2, c. 19. The court held that such a power ought to be construed strictly, especially in a case seeking to bring within it the growing crops of a person who was a stranger to the deed (*o*).

Distress for corn rents on recently enclosed lands.

"The following case may probably have some application to the cases which may arise under the new act. An inclosure act provided 'that there shall be issuing and payable from time to time to the impropriators and the vicar, according to their rights and interests therein, and of the several estates of the land-owners, in the parish, such yearly corn rents or sums as therein mentioned, and declared that the rent should be payable by the persons who should be in possession or occupation of the lands or estates out of which the same should be issuing;' it then specified the time and place of payment, and enacted 'that the several corn rents and sums of money should be in lieu of and in satisfaction for all tithes.' By a subsequent clause, the impropriators were to have the same powers and remedies for recovering the yearly *rent*, when the same was in arrear, as were by law given for the recovery of rent service, or other rent in arrear. Part of the inclosed lands was uncultivated and untenanted for some years, during which time the owner lived on another estate; he afterwards demised them to a tenant who entered and occupied. A distress was taken for the corn rents, and payment was refused, on the ground that during the period when the rents respectively became due, the

(*o*) *Miller* v. *Green*, 8 Bing. 107; 2 Cr. & J. 142; 1 Moore & S. 199; 2 Tyrw. 1.

Distress for corn rents on recently enclosed lands.

land was not liable to the payment of corn rents, because no crop was reared upon it, and the owner had not any beneficial enjoyment of it. It was said by Bayley, J.: 'The parties may be considered in the same situation as if the tithe-owner had granted a lease of the tithes at an annual rent. In that case it is quite clear that it would be no answer to an action for the rent, that no tithe in kind was produced, or that the land was unoccupied. Here the rent is a substitute for tithes, not merely *de anno in annum*, but for ever. It does not therefore follow that because no tithe in kind was produced, that no money rent is payable. It is said that this may operate as a hardship in particular cases where preceding tenants have omitted to pay the rent: perhaps the tithe-owner might not have any remedy by distress against an occupier not coming in under the party indebted; here, however, the plaintiff in replevin came in under the landlord during whose occupation the arrears of rent accrued. During that time the landlord had the legal occupation, for he might have maintained trespass or ejectment against a wrong-doer. I think, therefore, that even if the rent were payable only by a person in possession, that, under the circumstances of the case, he must be considered to have been in possession during the time that there was no tenant. But my opinion proceeds principally on the ground, that by the act of parliament the corn rent is made a perpetual charge or burden on the estate.' And it was held that the distress was legal" (*p*).

When rent-charges are in arrear for forty days after half-yearly days of payment, and no sufficient distress on the premises, writ to be issued, directing sheriff to summon jury to assess arrears.

Sect. 82. "In case the said rent-charge shall be in arrear and unpaid for the space of forty days next after any half-yearly day of payment, and there shall be no sufficient distress on the premises liable to the payment thereof, it shall be lawful for any judge of his majesty's courts of record at Westminster, upon affidavit of the facts, to order a writ to be issued, directed to the sheriff of the county in which the lands chargeable with the rent-charge are situated, requiring the said sheriff to summon a jury to assess the arrears of rent-charge remaining unpaid, and to return the inquisition thereupon taken to some one of his majesty's courts of law at Westminster, on a day therein to be named, either in term time or vacation: a copy of which writ, and notice of the time and place of executing the same, shall be given to the owner of the land, or left at his last known place of abode, or

(*p*) *Norling* v. *Pearse*, 1 B. & C. 437; 2 Dowl. & R. 607; 3 E. & Y. 1094; Gw. 2067.

with his known agent, ten days previous to the execution thereof, and the sheriff is hereby required to execute such writ according to the exigency thereof; and the costs of such inquisition shall be taxed by the proper officer of the court; and thereupon the owner of the rent-charge may sue out a writ of *habere facias possessionem*, directed to the sheriff, commanding him to cause the owner of the rent-charge to have possession of the lands chargeable therewith until the arrears of rent-charge found to be due, and the said costs, and also the costs of such writ and of executing the same, and of cultivating and keeping possession of the lands, shall be fully satisfied: provided always, that not more than two years' arrears over and above the time of such possession shall be at any time recoverable."

Cases on this section.

Under this section crops growing into profit are to be taken into consideration in estimating the sufficient distress (*q*). The judge's order under this section may be obtained *ex parte* (*r*). Possession of the land, and recovery of the full two years' arrears, may be obtained, if there is no sufficient distress at the end of the two years, though at the end of the three half-years previous there might have been sufficient distress, if it had been taken, for the arrears then due (*s*).

No action for damages for non-cultivation.

It has been holden that the injury sustained by a tithe-owner, in consequence of land being rendered incapable of producing tithe, is not such a wrongful act in law as will entitle a tithe-owner to maintain an action for damages (*t*).

Account, how to be rendered.

Sect. 83. "It shall be lawful for the court out of which such writ shall have issued, or any judge at chambers, to order the owner of the rent-charge who shall be in possession by virtue of such writ from time to time to render an account of the rents and produce of the lands, and of the receipts and payments in respect of the same, and to pay over the surplus (if any) to the person for the time being entitled thereunto, after satisfaction of such arrears of rent-charge and all costs and expenses as aforesaid, and thereupon to order a writ of *supersedeas* to issue to the said writ of *habere facias possessionem*, and also by rule or order of such court or judge from time to time to give

(*q*) *Ex parte Arnison*, L. R., 3 Ex. 56; 37 L. J., Ex. 57 (1868).

(*r*) *Re Hammersmith Rent-charge*, 4 Ex. 87; 19 L. J., Ex. 66 (1849).

(*s*) *Re Camberwell Rent-charge*, 4 Q. B. 151; 3 C. & D. 365.

(*t*) *Rex* v. *Commissioners of New Retfall*, 4 M. & R. 647; 9 B. & C. 833.

such summary relief to the parties as to the said court or judge shall seem fit."

Powers of distress and entry to extend to all lands within the parish occupied by the owner or under the same landlord or holding.

Sect. 85. "Whenever any rent-charge payable under the provisions of this act shall be in arrear, notwithstanding any apportionment which may have been made of any such rent-charge, every part of the land situate in the parish in which such rent-charge shall so be in arrear, and which shall be occupied by the same person who shall be the occupier of the lands on which such rent-charge so in arrear shall have been charged, whether such land shall be occupied by the person occupying the same as the owner thereof, or as tenant thereof, holding under the same landlord under whom he occupies the land on which such rent-charge so in arrear shall have been charged, shall be liable to be distrained upon or entered upon as aforesaid for the purpose of satisfying any arrears of such rent-charge, whether chargeable on the lands on which such distress is taken or such entry made, or upon any other part of the lands so occupied or holden: provided always, that no land shall be liable to be distrained or entered upon for the purpose of satisfying any such rent-charge charged upon lands which shall have been washed away by the sea, or otherwise destroyed by any natural casualty."

Quakers.

Quakers' goods, it will be seen, may be distrained off the premises and sold without being impounded.

Recovery of rent-charges from.

Sect. 84. "In all cases in which it shall be necessary to make any distress under this act in respect of any lands in the possession of any person of the persuasion of the people called quakers, the same may be made upon the goods, chattels, or effects of such person, whether on the premises or elsewhere, but nevertheless to the same amount only, and with the same consequences in all respects as if made on the premises; and that in all cases of distress under this act upon persons of that persuasion, the goods, chattels or effects which may be distrained shall be sold without its being necessary to impound or keep the same: provided always, that no writ under the provision hereinbefore contained shall be issued for assessing or recovering any rent-charge payable under this act in respect of any lands in the possession of any person of the persuasion aforesaid, unless the same shall be in arrear and unpaid for the space of forty days next after any half-yearly day of payment, without the person entitled thereto being able to find goods, chattels, or effects, either on the premises or elsewhere liable to be distrained as aforesaid, sufficient to

satisfy the arrears to which such lands are liable, together with the reasonable costs of such distress."

Where a tenant at rack-rent, at the time when the commutation was effected, has dissented from paying the rent-charge, the landlord is empowered to take the tithes, it being enacted by sect. 79, "Any tenant or occupier, who at the time of such commutation shall occupy at rack-rent any lands of which the tithes shall be so commuted, may, within one calendar month next after the confirmation of the apportionment by the commissioners, signify, by writing under his hand given to or left at the usual residence of his landlord or his agent, his dissent from being bound to pay any rent-charge apportioned and charged on the said lands as aforesaid; and in that case such landlord shall be entitled, from the time when the said apportionment shall take effect, and during the tenancy or occupation of such tenant or occupier, to stand, as to the perception and collection of tithes or receipt of any composition instead thereof, in the place of the owner of the tithes so commuted, and to have all the powers and remedies for enforcing render and payment of such tithes or composition which the tithe-owner would have had if the commutation had not taken place."

If tenant of lands at rack-rent dissent from paying the rent-charge, the landlord may take the tithes during the tenancy.

No action for the rent-charge lies against the owner or occupier of the lands (*u*).

No action for rent-charge.

The following supplemental provisions are made by 5 & 6 Vict. c. 54:—

Sect. 12. "It shall be lawful for any owner of rent-charge having taken possession of any land for non-payment of the rent-charge under the provisions of the first-recited act (*x*), from time to time during the continuance of such possession to let such land, or any part thereof, for any period not exceeding one year in possession, at such rent as can be reasonably obtained for the same; and the restitution of such land, on payment or satisfaction of the rent-charge, costs, and expenses, shall be subject and without prejudice to any such tenancy."

Power to owner of rent-charge to let land taken under writ of possession.

Sect. 16. "In case any land charged with one amount of rent-charge shall belong to two or more land-owners in several portions, and the owner of any of such portions, or his tenant, shall have paid the whole of such rent-charge, or any portion thereof greater than shall appear to him to be his just proportion, and contribution thereto shall have been refused or neglected to be made by any other of the

Remedy for enforcing payment of contribution of rent-charge.

(*u*) *Griffenhoofe* v. *Daubuz*, 4 E. & B. 230; 24 L. J., Q. B. 20.
(*x*) 6 & 7 Will. 4, c. 71.

said land-owners, or his tenants, after a demand in writing made on them, or either of them, for that purpose, it shall be lawful for any justice of the peace acting for the county or other jurisdiction in which the land is situated, upon the complaint of any such land-owner, or his tenant or agent, to summon the owner so refusing or neglecting to make contribution, or his tenant, to appear before any two or more such justices of the peace, who, upon proof of the demand and of service of the summons, as hereinafter provided, whether or not the party summoned shall appear, shall examine into the merits of the complaint, and determine the just proportion of the rent-charge so paid as aforesaid which ought to be contributed by the land-owner of such other portion of the said land, and by order under their hands and seals (*y*) shall direct the payment by him of what shall in their judgment be due and payable in respect of such liability to contribution, with the reasonable costs and charges of such proceedings, to be ascertained by such justices; and thereupon it shall be lawful for the complainant to take the like proceedings for enforcing payment of the said amount of contribution and costs, and with the like restriction as to the arrears recoverable, as are given to the owner of the rent-charge by the said first-mentioned act or this act for enforcing payment of the rent-charge."

Service of summons, &c.

Sect. 17. "Service of the said demand in writing, and summons, or of any notice to distrain, or copy of writ to assess the arrears of rent-charge, or notice of the execution thereof under the said first-recited act, or the several acts to amend the same, or this act, upon any person occupying or residing on the land chargeable with the rent-charge, or in case no person shall be found thereon, then affixing the same in some conspicuous place on the land, shall be deemed good service of any such summons, notice, writ, or other proceeding."

Provision for general avowry in actions of replevin for rent-charge.

Sect. 18. "It shall be lawful for all defendants in replevin, brought on any distress for rent-charge payable under the said first-recited act, or the several acts to amend the same, or this act, to avow or make cognizance generally that the lands and tenements whereon such distress was made were chargeable with or liable to the payment of a certain yearly amount of rent-charge under the provisions of the statutes for the commutation of tithes in England and Wales, which rent-charge, or some part thereof, was in arrear and unpaid for the space of twenty-

(*y*) See *Reg.* v. *Williams*, 21 L. J., M. C. 150.

one days next after some half-yearly day of payment thereof, and after ten days notice in writing, as required by the said acts, and that a certain amount of such rent-charge, according to the prices of corn, as directed by the said acts, was at the time of the said distress due to the person entitled to the rent-charge."

Sect. 19. "Where any distress shall be made for any rent-charge payable under the said recited acts or any of them, or this act, and justly due, and any irregularity or unlawful act shall be afterwards done by the party distraining, or his agent, in the conduct, sale, or disposition of the distress, the distress itself shall not be therefore deemed to be unlawful, nor the party making it deemed a trespasser from the beginning, but the party aggrieved by such unlawful act or irregularity may recover full satisfaction for the special damage in an action upon the case; provided nevertheless, that no plaintiff shall recover in any action for any such unlawful act or irregularity, if ten days notice in writing (z) shall not have been given to the defendant by the plaintiff of his intention to bring such action before the commencement thereof, or if tender of sufficient amends has been made by the party distraining, or his agent, before such action brought, or if after action brought a sufficient sum of money shall have been paid into court, with costs, by or on behalf of the defendant."

Irregularity not to vitiate proceedings.

And by 23 & 24 Vict. c. 93, it is thus enacted:—

Sect. 29. "If a rent-charge shall at any time be in arrear and unpaid, and in order to enforce payment thereof it shall become necessary for the person entitled to the same to give notice of his intention to distrain upon the lands liable to the payment thereof for the arrears of the said rent-charge, according to the provisions of the said recited acts, the owner of the rent-charge shall in all cases be entitled to two shillings and sixpence for and in respect of each notice which shall have been so issued, and such sum shall be deemed and taken to be part of the rent-charge which is in arrear and unpaid, and shall be recoverable accordingly, in like manner as the said arrears of rent-charge are recoverable."

Expenses of recovering rent-charge.

Sect. 30. "Notice of intention to distrain may be given in the manner provided by the said recited acts, or by sending it by the post in a registered letter to the office or usual place of abode of the person to whom the same is addressed."

Notice of intention to distrain may be sent by post.

A special provision is made for recovering rent-charges

Remedy for

(z) See *Howard* v. *Remer*, 2 E. & B. 915; 23 L. J., Q. B. 60.

recovery of tithe rent charged on railway land.

from railway companies by 7 & 8 Vict. c. 85, s. 22: "In all cases in which any such rent-charge, or part of any rent-charge, has been or hereafter shall be duly apportioned, under the provisions of the acts for the commutation of tithes in England and Wales, upon lands taken or purchased by any railway company for the purposes of such company, or upon any part of such lands, it shall be lawful for every person entitled to the said rent-charge or parts of such rent-charge, in case the same has been or shall be in arrear and unpaid for the space of twenty-one days next after any half-yearly day fixed for the payment thereof, to distrain for all arrears of the said rent-charge upon the goods, chattels and effects of the said company, whether on land charged therewith, or any other lands, premises or hereditaments of such company, whether situated in the same parish or elsewhere, and to dispose of the distress when taken, and otherwise to demean himself in relation thereto as any landlord may for arrears of rent reserved on a lease for years: provided always, that nothing herein contained shall give or be construed to give a legal right to such rent-charge, when but for this act such rent-charge was not or could not be duly apportioned."

Tenant quitting, leaving tithe rent-charge unpaid, landlord, &c. may pay the same, and recover from the first-named tenant as if it were a simple contract debt.

And, as to the relations between landlords and tenants, it is provided as follows by 14 & 15 Vict. c. 25, s. 4: "If any occupying tenant of land shall quit leaving unpaid any tithe rent-charge for or charged upon such land which he was by the terms of his tenancy or holding legally or equitably liable to pay, and the tithe-owner shall give or have given notice of proceeding by distress upon the land for recovery thereof, it shall be lawful for the landlord, or the succeeding tenant or occupier, to pay such tithe rent-charge, and any expenses incident thereto, and to recover the amount or sum of money which he may so pay over against such first-named tenant or occupier, or his legal representatives, in the same manner as if the same were a debt by simple contract due from such first-named tenant or occupier to the landlord or tenant making such payment."

SECT. 16.—*Tithes in Metropolis.*

Excepted from statutes.

In the several acts of 27 Hen. 8, c. 20; 32 Hen. 8, s. 7; 2 & 3 Edw. 6, c. 13; 7 & 8 Will. 3, c. 60, and 6 & 7 Will. 4, c. 71, s. 90, there is a proviso that nothing therein shall extend to the city of London, concerning any tithe, offer-

ing, or other ecclesiastical duty, grown and due to be paid within the said city, because there is another order made for the payment of tithes and other duties there.

Which order is as follows:—It appeared by the records of the city of London, that Niger, bishop of London, in the 13 Hen. 3, made a constitution, in confirmation of an ancient custom formerly used time out of mind, that provision should be made for the ministers of London in this manner, that is to say, that he who paid the rent of 20*s.* for his house wherein he dwelt, should offer every Sunday, and every Apostle's day whereof the evening was fasted, one halfpenny; and he that paid but 10*s.* rent yearly, should offer but one farthing; all which amounted to the proportion of 2*s.* 6*d.* in the pound, for there were fifty-two Sundays, and eight Apostles' days the vigils of which were fasted; and if it chanced that one of the Apostles' days fell upon a Sunday, then there was but one halfpenny or farthing paid, so that sometimes it fell out to be somewhat less than 2*s.* 6*d.* in the pound.

Order by which they are governed.

Constitution of Bishop Niger.

And it appears by the book cases in the reign of Edward III. that the provision made for the ministers of London was by offerings and obventions, albeit the particulars are not assigned there, but must be understood according to former ordinance made by Niger.

And the payment of 2*s.* 6*d.* in the pound continuing until the 13 Ric. 2, Arundel, Archbishop of Canterbury, made an explanation of Niger's constitution, and thrust upon the citizens of London two and twenty more saints' days than were intended by the constitution made by Niger, whereby the offerings now amounted unto the sum of 3*s.* 5*d.* in the pound. And there being some reluctation by the citizens of London, Pope Innocent, in the 5 Hen. 4, granted his bull, whereby Arundel's explanation was confirmed. Which confirmation (notwithstanding the difference between the ministers and citizens of London about those two and twenty saints' days which were added to their number), Pope Nicholas also, by his bull, did confirm in the 31 Hen. 6.

Constitution of Archbishop Arundel.

Against which the citizens of London did contend with so high a hand that they caused a record to be made whereby it might appear, in future ages, that the order of explanation made by the Archbishop of Canterbury was done without calling the citizens of London unto it, or any consent given by them: and it was branded by them as an order surreptitiously and abruptly obtained, and therefore more fit to have the name of a destructory than a declaratory order.

Order by which they are governed.

Constitution of Archbishop Arundel.

Nevertheless, notwithstanding this contention, the payment seems to have been most usually made according to the rate of 3*s.* 5*d.* in the pound. For Lindwood, who wrote in the time of Henry VI., in his Provincial Constitutions debating the question, whether the merchants and artificers of the city of London ought to pay any tithes, shows, that the citizens of London, by an ancient ordinance observed in the said city, are bound, every Lord's-day, and every principal feast-day either of the Apostles or others whose vigils are fasted, to pay one farthing for every 10*s.* rent that they paid for their houses wherein the dwelt.

And in the 36 Hen. 6, there was a composition made between the citizens of London and the ministers, that a payment should be made by the citizens according to the rate of 3*s.* 5*d.* in the pound, and if any house were kept in the proper hand of the owner, or were demised without reservation of any rent, then the churchwardens of the parish where the houses were should set down a rate of the houses, and according to that rate payment should be made.

After which composition so made, there was an act of common council made in the 14 Edw. 4 in London, for the confirmation of the bull granted by Pope Nicholas.

27 Hen. 8, c. 21.

But the citizens of London finding that by the common laws of the realm, no bull of the pope, nor arbitrary composition, nor act of common council, could bind them in such things as concerned their inheritance, they still wrestled with the clergy, and would not condescend to the payment of the said 11*d.* by the year, obtruded upon them by the addition of the two and twenty saints' days: whereupon there was a submission to the lord chancellor and divers others of the privy council in the time of King Henry VIII.; and they made an order for the payment of tithes according to the rate of 2*s.* 9*d.* in the pound; which order was first promulgated by a proclamation made, and afterwards established by an act of parliament, 27 Hen. 8, c. 21, intituled "An Act for the Payment of Tithes within the City and Suburbs of London, until another Law and Order shall be made and published for the same" (*a*).

37 Hen. 8, c. 12.

And ten years after this another law and order was made by the statute 37 Hen. 8, c. 12, as follows: "Where of late time, contention, strife, and variance hath risen and grown within the city of London and the liberties of the

(*a*) Privilegia Londini, 456—458.

same, between the parsons, vicars, and curates of the said city, and the citizens and inhabitants of the same, for and concerning the payment of tithes, oblations, and other duties within the said city and liberties; for appeasing whereof, a certain order and decree was made thereof, by the most reverend father in God Thomas Archbishop of Canterbury, Thomas Audley, Knight, Lord Audley of Walden, and then Lord Chancellor of England, now deceased, and other of the king's most honourable privy council; and also the king's letters patents and proclamation was made thereof, and directed to the said citizens concerning the same; whereupon it was after enacted in the parliament holden at Westminster by prorogation, the fourth day of February, in the twenty-seventh year of the king's most noble reign, that the citizens and inhabitants of the same city should, at Easter then next following, pay unto the curates of the said city and suburbs, all such and like sums of money, for tithes, oblations, and other duties, as the said citizens and inhabitants by the order of the said late lord chancellor, and other the king's most honourable council, and the king's said proclamation, paid or ought to have paid by force and virtue of the said order at Easter, in the year 1535; and the same payments so to continue from time to time, until such time as any other order or law should be made by the king and the two and thirty persons by the king to be named, as well for the full establishment concerning the payment of all tithes, oblations, and other duties of the inhabitants within the said city, suburbs, and liberties of the same, as for the making of other ecclesiastical laws of this realm of England; and that every person denying to pay as is aforesaid should, by the commandment of the mayor of London for the time being, be committed to prison, there to remain until such time as he should have agreed with the curate for the said tithes, oblations, and other duties as is aforesaid, as in the said act more plainly appeareth; since which act, divers variances, contentions, and strifes are newly arisen and grown between the said parsons, vicars, and curates, and the said citizens and inhabitants, touching the payment of the tithes, oblations, and other duties, by reason of certain words and terms specified in the said order, which are not so plainly and fully set forth as is thought convenient and meet to be; for appeasing whereof, as well the said parsons, vicars, and curates, as the said citizens and inhabitants, have compromitted and put themselves to stand to such order and decree touching the premises as shall be made by the said right reverend father in God

Order by which they are governed.

37 Hen. 8, c. 12.

and the several other persons hereunder mentioned, for a final end and conclusion to be had and made touching the premises for ever: And to the intent to have a full peace and perfect end between the said parties, their heirs and successors, touching the said tithes, oblations, and other duties for ever, it is enacted, that such end, order, and direction as shall be made by the forenamed archbishop and the several other persons as aforesaid, or any six of them, before the first day of March next ensuing, concerning the payment of tithes, oblations, and other duties within the said city and the liberties thereof, and inrolled of record in the High Court of Chancery, shall stand, remain, and be as an act of parliament, and shall bind as well all citizens and inhabitants of the said city and liberties for the time being, as the said parsons, vicars, curates, and their successors for ever, according to the effect, purport, and intent of the said order and decree so to be made and inrolled; and that every person denying to pay any of his tithes, oblations, or other duties, contrary to the said decree so to be made, shall by the commandment of the mayor of London for the time being, and in his default or negligence by the lord chancellor of England for the time being, be committed to prison, there to remain till such time as he hath agreed with the curate for the same."

Decree.

Which decree made in pursuance hereof is as follows (*b*); viz.:—

"1. As touching the payment of tithes in the city of London, and the liberties of the same: It is fully ordered and decreed by the most reverend father in God Thomas Archbishop of Canterbury, primate and metropolitan of England, Thomas Lord Wryothesly, lord chancellor of England, William Lord St. John, president of his majesty's council and lord great master of his majesty's household, John Lord Russell, lord privy seal, Edward Earl of Hertford, lord great chamberlain of England, John Viscount Lisle, high admiral of England, Richard Lister, knight, chief justice of England, and Roger Cholmely, knight, chief baron of his majesty's exchequer, this twenty-fourth day of February, in the year of our Lord 1545, according to the statute in such case lately provided, that the citizens and inhabitants of the said city and liberties thereof for the time being, shall yearly, without fraud or

(*b*) In *Macdougall* v. *Purrier*, 4 Bligh, N. S. 433; 2 Dow. & Cl. 135, the House of Lords held that they would *presume* that this decree was enrolled according to the act.

covin, for ever pay their tithes to the parsons, vicars, and curates of the said city, and their successors for the time being, after the rate hereafter following; that is to wit: Of every 10*s.* rent by the year, of all houses, shops, warehouses, cellars, stables, and every of them, within the said city and liberty thereof, 16½*d.*; and of every 20*s.* rent by the year, 2*s.* 9*d.*; and so above the rent of 20*s.* by the year, ascending from 10*s.* to 10*s.*, according to the rate aforesaid.

"2. Item, that where any lease is or shall be made of any dwelling-house or houses, shops, warehouses, cellars, or stables, or any of them, by fraud or covin, reserving less rent than hath been accustomed or is; or where any such lease shall be made without any rent reserved upon the same, by reason of any fine or income paid beforehand, or by any other fraud or covin; in every such case, the tenant or farmer shall pay for his tithes of the same after the rate aforesaid, according to the quality of such rents as the same were last letten for, without fraud or covin before the making of such lease.

"3. Item, that every owner or inheritor of any dwelling-house, or houses, shops, warehouses, cellars, or stables, inhabiting or occupying the same himself, shall pay after such rate, according to the quantity of such yearly rent as the same was last letten for, without fraud or covin.

"4. Item, if any person hath taken, or hereafter shall take, any mease or mansion place by lease, and the taker thereof, his executors or assigns, doth or shall inhabit in any part thereof, and hath within eight years last past before this order, or hereafter shall let out the residue of the same; in such case, the principal farmer or farmers, or first taker or takers thereof, their executors or assigns, shall pay their tithes after the rate above said, according to the quantity of their rent by the year.

"5. And if any person shall take divers mansion houses, shops, warehouses, cellars, or stables in one lease, and shall let out one or more of them, and shall keep one or more in his own hands, and inhabit in the same; the said taker, and his executors or assigns, shall pay their tithes after the rate abovesaid, according to the quantity of the yearly rent of such mansion houses or house retained in his own hands; and his assignees of the residue of the said mansion house or houses, shall pay their tithes after the rate abovesaid, according to the quantity of their yearly rents.

"6. Item, if such farmer or farmers, or his or their assigns, of any mansion house or houses, warehouses, shops, cellars, or stables, hath at any time within eight years last

Order by which they are governed.

Decree.

past, or shall hereafter let over all the said mansion house or houses contained in his or their lease, to one or more persons; the inhabitants, lessees, or occupiers thereof, shall pay their tithes after the rate of such rents as the inhabitants, lessees, or occupiers, and their assigns, have been or shall be charged withal, without fraud or covin.

"7. Item, if any dwelling-house within eight years last past was or hereafter shall be converted into a warehouse, storehouse, or such like; or if a warehouse, storehouse, or such like, within the said eight years was or hereafter shall be converted into a dwelling-house, the occupiers thereof shall pay tithes for the same after the rate above declared of mansion house rents.

"8. Item, that where any person shall demise any dyehouse or brewhouse, with implements convenient and necessary for dyeing or brewing, reserving a rent upon the same, as well in respect of such implements as in respect of such dyehouse or brewhouse, the tenant shall pay his tithes after such rate as is abovesaid, the third penny abated; and every principal house or houses, with key or wharf, having any crane or gibet belonging to the same, shall pay after the like rate of their rents as is aforesaid, the third penny abated; and the other wharfs belonging to houses having no crane or gibet, shall pay for tithes as shall be paid for mansion houses in form aforesaid.

"9. Item, that where any mansion house with a shop, stable, warehouse, wharf with crane, timber yard, teinter yard, or garden belonging to the same, or as parcel of the same, is or shall be occupied together, if the same be hereafter severed or divided, or at any time within eight years last past were severed or divided, then the farmers or occupiers thereof shall pay such tithes as is abovesaid for such shops, stable, warehouses, wharf with crane, timber yard, teinter yard, or garden aforesaid, so severed or divided, after the rate of their several rents thereupon reserved.

"10. Item, that the said citizens and inhabitants shall pay their tithes quarterly, that is to say, at the feast of Easter, the nativity of St. John the Baptist, the feast of St. Michael the Archangel, and the nativity of our Lord, by even portions.

"11. Item, that every householder paying 10*s*. rent or above shall for him or herself be discharged of their four offering days: but his wife, children, servants, or others of their family, taking the rites of the church at Easter, shall pay 2*d*. for their four offering days yearly.

"12. Provided always, and it is decreed, that if any

house which hath been or hereafter shall be letten for 10*s.* rent by the year, or more, be or hath been at any time within eight years last past, or hereafter shall be divided and leased into small parcels or members, yielding less yearly rent than 10*s.* by the year, the owner, if he shall dwell in any part of such house, or else the principal lessee (if the owner do not dwell in some part of the same) shall pay for the tithes after such rate of rent as the same house was accustomed to be letten for before such division or dividing into parts or members; and the under-farmers and lessees to be discharged of all tithes for such small parcels, parts or members, rented at less yearly rent than 10*s.* by the year without fraud or covin, paying 2*d.* yearly for four offering days.

"13. Provided always, and it is decreed, that for such gardens as appertain not to any mansion house, and which any person holdeth in his hands for pleasure, or to his own use, the person holding the same shall pay no tithes for the same. But if any person which shall hold any such garden, containing half an acre or more, shall make any yearly profit thereof, by way of sale, he shall pay tithes for the same after such rate of his rent as is herein first above specified.

"14. Provided also, that if any such gardens now being of the quantity of half an acre or more, be hereafter by fraud or covin divided into less quantities, then to pay according to the rate abovesaid.

"15. Provided always, that this decree shall not extend to the houses of great men, or noblemen, or noblewomen, kept in their own hands, and not letten for any rent, which in times past have paid no tithes, so long as they shall so continue unletten; nor to any halls of crafts or companies, so long as they be kept unletten, so that the same halls in times past have not used to pay any tithes.

"16. Provided always, and it is decreed, that this present order and decree shall not in anywise extend to bind or charge any sheds, stables, cellar, timber yards, nor teinter yards, which were never parcel of any dwelling-house, nor belonging to any dwelling-house, nor have been accustomed to pay any tithes; but that the said citizens and inhabitants shall thereof be quit of payment of any tithes, as it hath been used and accustomed.

"17. Provided also, and it is decreed, that where less sum than 16½*d.* in the 10*s.* rent, or less sum than 2*s.* 9*d.* in the 20*s.* rent, hath been accustomed to be paid for tithes; in such places the said citizens and inhabitants shall pay but only after such rate as hath been accustomed.

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"18. Item, it is also decreed, that if any variance, controversy or strife shall arise in the said city for nonpayment of any tithes; or if any variance or doubt shall arise upon the true knowledge or division of any rent or tithes within the liberties of the said city, or of any extent or assessment thereof; or if any doubt arise upon any other thing contained within this decree; then, upon complaint made by the party grieved to the mayor of the city of London for the time being, the said mayor, by the advice of counsel, shall call the parties before him, and make a final end of the same, with costs to be awarded by the discretion of the said mayor and his assistants according to the intent and purport of this present decree.

"19. And if the mayor shall not make an end thereof within two months after complaint to him made, or if any of the said parties find themselves aggrieved, the lord chancellor of England for the time being, upon complaint to him made within three months then next following, shall make an end in the same, with such costs to be awarded as shall be thought convenient, according to the intent and purport of the said decree.

"20. Provided always, that if any person take any tenement for a less rent than it was accustomed to be letten for, by reason of great ruin or decay, burning, or such like occasions or misfortunes, such person, his executors or assigns, shall pay tithes only after the rate of the rent reserved in his lease, and none otherwise, as long as the same lease shall endure."

Cases under decree.

Meadhouse v. *Taylor.*

Of every 10*s. Rent by the Year.*]—It was resolved, in the case of *Meadhouse* v. *Taylor*, that a rent for half a year, and afterwards for another half year, is a yearly rent, or a rent by the year, within the meaning of this decree (*c*).

Green v. *Piper.*

Of all Houses.]—In the case of *Green* v. *Piper*, in 43 Eliz. (*d*), it was suggested, in order to hinder the granting of a consultation, that the house belonged to a priory which was discharged of tithes by bull. But the court replied, that by the common law houses paid no tithes; and the right in the present case subsisting immediately upon this statute, which lays them upon every house, no exemption shall be allowed, but to such houses as are specially exempted by the statute itself.

Skidmore and *Eire* v. *Bell.*

By reason of any Fine or Income paid beforehand, or by any Fraud or Covin.]—In the case of *Skidmore* and *Eire* v. *Bell*, in 5 James 1, Bell being parson of St.

(*c*) Noy. 130. (*d*) Cro. Eliz. 279.

Michael, Queenhithe, in London (*e*), libelled before the chancellor of London for the tithes of a house called the Boar's Head, in Bread-street, in the said parish, the ancient farm rent whereof was 5*l.* at the time of the said decree and after; and that of late a new lease was made of the said house, rendering the rent of 5*l.* a year, and over that a great income or fine, which was covenanted and agreed to be paid yearly at the same day; that the rent was paid as a sum in gross, and that so much rent might have been reserved for the said house, as the rent reserved and the sum in gross amounted unto; which reservation and covenant were made to defraud the said parson of the tithes of the true rent of the said house, which to him did appertain by the purport and true intention of the said decree. And, a prohibition being moved for in this case, four points were resolved by the court. 1. If so much rent be reserved as was accustomed to be paid at the making of the said decree (whatsoever fine or income be paid), that the parson can aver no covin; for the words of the decree be, "Where any lease is or shall be made of any dwelling-house by fraud or covin, in reserving less rent than hath been accustomed:" so as if the accustomed rent be reserved, no fraud can be alleged; for the fraud by the decree is, when lesser rent than was then accustomed to be paid is reserved, or if no rent at all be reserved, for then tithe shall be paid according to the rent that then was last before reserved to be paid. So as the decree consists upon four points; first, where the accustomed rent was reserved; secondly, where the rent was increased, there the tithes should be paid according to the whole rent; thirdly, where lesser rent was reserved; and fourthly, where no rent was reserved, but had been formerly reserved. And this act and decree were very beneficial for the clergy of London, in respect of that which they had before. And the defendant in his libel confesses that the accustomed rent was reserved, and therefore no cause of suit. 2. It was resolved, that as to such houses as were never letten to farm, but inhabited by the owner, this is *casus omissus*, and shall pay no tithes by force of the decree. 3. It was resolved, that where the decree says, "Where no rent is reserved by reason of any fine or income paid beforehand," albeit no fine or income be paid in that case; yet if no rent be reserved, the parson shall have his tithes according to the decree; for that is put but for an example or cause why no rent is reserved: and

(*e*) 2 Inst. 660.

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Cases under the decree.

whether any fine or income were paid or no, is not material as to the parson. 4. It was resolved, that the parson could not sue for the said tithes in the ecclesiastical court; for that the act and decree that raised and gave these kind of tithes, did limit and appoint how and before whom the same should be sued for, and did appoint new and special judges to hear and determine the same. And in the end it was awarded that the prohibition should stand.

Antrobus v. The East India Company.

In *Antrobus* v. *The East India Company* (*f*), a bill was filed by the plaintiff, under the decree and stat. 37 Hen. 8, c. 12, for the payment of tithes at the rate of 2*s.* 9*d.* in the pound upon the annual *value* of premises, consisting of extensive warehouses, lately erected by the East India Company, and used by them in the course of their trade. The warehouses were erected upon the site of some small tenements, some of which appeared by the answer to have been formerly occupied at low rents: as to the others, the ancient rents were not known. The answer did not state any specific customary payment in lieu of tithes; but alleged generally, that some less sums than 2*s.* 9*d.* in the pound had been paid. The defendants insisted, that the payment, according to the statute, could be only upon such of the old rents as were ascertained; and that nothing was to be paid in respect of those premises, the ancient rents of which were not known: and they contended, that an issue ought to be directed, which was opposed by the plaintiff, on the ground, that no specific customary payment being set up, no foundation was laid for an issue. The Master of the Rolls decreed for payment at the rate of 2*s.* 9*d.* in the pound upon the *value*, and directed a reference to the master accordingly.

Vivian v. Cochrane.

In the case of *Vivian* v. *Cochrane* (*g*), before the Lord Chancellor assisted by two common law judges, the defendant was the lessee of premises in London, which were let for a term of sixty years at a reserved rent (including insurance against fire) of 102*l.* 10*s.*, the lease however having been granted in consideration of the lessee having laid out 2,000*l.* in building thereon; and the improved value of the property was in reality 250*l.* It was holden by the court, affirming the decision of the Vice-Chancellor, that the defendant must, for the purposes of the statute and decree, be considered as owner of the house during the term, and must pay the tithes on the full annual value of the property, 250*l.*

It was further holden, after a most careful review of the

(*f*) 13 Ves. 9.
(*g*) 4 De G., M. & G. 818; 1 Jur., N. S. 809 (1854).

authorities, that the second resolution in *Skidmore* and *Eire* v. *Bell* (*h*), "that as to such houses as were never letten to farm, but inhabited by the owner, this is *casus omissus*, and shall pay no tithes by force of the decree," is not law.

London and Blackwall Railway Company v. Letts.

In the case of *The London and Blackwall Railway Company* v. *Letts* (*i*), the railway company were by their local act (2 & 3 Vict. c. xcv, s. 33) bound to pay to the rectors of certain parishes, for all houses they took down, and until new houses of equal value were erected, "the tithes or yearly sums of money or customary payments in lieu of tithes, payable in respect of the houses or other buildings within any of the said parishes which shall be so quitted as aforesaid (according to the last assessments thereof to the 25th day of March then last), or annual sums of money equal to the loss in tithes, &c." It appeared that in one parish the rector had been in the habit of taking from all persons, other than public or corporate bodies, who were owners of houses therein, a less sum than the full rate to which he was entitled under the statute and decree; and it was holden by the House of Lords, reversing the decision of the vice-chancellor, that the object of the provision in the railway act was only to indemnify the clergy against any loss which they would otherwise have received, and the rector could only recover from the railway company the sum which he would have in fact received, though this sum was less than his strict claim, if the houses had not been taken down by the railway company.

Upon Complaint made.]—In the aforesaid case of *Meadhouse* v. *Taylor* (*k*) it was holden by the court, that the complaint ought to be in writing (and not by word of mouth only), in the nature of a *monstrans de droit* declaring all the title.

To the Mayor.]—Pursuant to the aforesaid case of *Skidmore* and *Eire* v. *Bell* (*h*), divers prohibitions have been granted (when tithes were sued for upon this statute) to the ecclesiastical court. But when it was pleaded, in the year 1658, that the right of tithes, upon the foundation of this act, could not be cognizable in the exchequer, by reason of the provision therein made for determining of all controversies before the lord mayor or lord chancellor; it was holden clearly by the barons, that the court of exchequer had jurisdiction in the cause, because the act had no negative words in it.—Upon which Dr. Gibson

(*h*) Gibs. 1223.
(*i*) 3 H. L. Ca. 470; 15 Jur. 295, in 1851.
(*k*) Noy, 130.

Order by which they are governed.

shrewdly observes, that if affirmative words will not exclude the temporal court, it may be hard to find a good reason, why (according to the foregoing judgments) they should exclude the spiritual court.

After all, notwithstanding this settlement by the aforesaid decree, divers prescriptions for the payment of lesser rates than the parsons might require by the said settlement (as to pay 10*s.* for the tithe of an house, although the rent thereof was 40*l.* a year or more) have been gained and allowed (*l*).

22 & 23 Car. 2, c. 15.

Churches united after the Fire of London are entitled to an annual sum of money.

But upon the occasion of the fire in London in the year 1666, as to the churches and houses thereby consumed, another statute was made, namely, 22 & 23 Car. 2, c. 15, which is as follows:—"Whereas the tithes in the city of London were levied and paid with great inequality, and are, since the late dreadful fire there, in the rebuilding of the same, by taking away of some houses, altering the foundations of many, and the new erecting of others, so disordered, that in case they should not for the time to come be reduced to a certainty, many controversies and suits of law might thence arise: it is therefore enacted, that the annual certain tithes of the parishes within the said city and liberties thereof, whose churches have been demolished, or in part consumed by the late fire, and which said parishes, by virtue of an act of this present parliament, remain and continue single as heretofore they were, or are by the said act annexed or united into one parish respectively, shall be as followeth; that is to say, the annual certain tithes, or sum of money in lieu of tithes."

Sect. 2 contains a list of the parishes and of the sums set opposite to them.

Sect. 3. "Which respective sums of money to be paid in lieu of tithes within the said respective parishes, and assessed as hereinafter is directed, shall be the respective certain annual maintenance (over and above glebes and perquisites, gifts and bequests to the respective parson, vicar and curate of any parish for the time being, or to their successors respectively, or to others for their use), of the said respective parsons, vicars and curates who shall be legally instituted, inducted and admitted into the respective parishes aforesaid."

And by sects. 4, 5, 6, 7, for the more equal levying of the same upon the several houses, buildings and other

(*l*) These are confirmed by sect. 17 of the decree. See *Bennet* v. *Treppas*, Gilb. Eq. R. 191; 8 Vin. Ab. 568; Bunb. 106; 2 Bro. P. C. 439.

hereditaments within the respective parishes, assessments were ordered to be made before July 24, 1671, " upon all houses, shops, warehouses and cellars, wharfs, quays, cranes, water-houses, tofts of ground (remaining unbuilt), and all other hereditaments whatsoever (except parsonage or vicarage houses), the whole respective sum by this act appointed, or so much of it as is more than what each impropriator is by this act enjoined to allow."

Sect. 8. " And three transcripts of the assessments were to be made; one to be deposited amongst the records of the city, another in the registry of the bishop of London, and another in the parish vestry respectively, for a perpetual memorial thereof."

Sect. 9. " The sums assessed to be paid to the respective parsons, vicars and curates, at the four most usual feasts, to wit, at the annunciation of the blessed Virgin, the nativity of St. John Baptist, the feast of St. Michael the Archangel, and the nativity of our blessed Saviour, or within fourteen days after each of the feasts aforesaid, by equal payments; the respective payments thereof to begin and commence only from such time as the incumbent shall begin to officiate or preach as incumbent."

Sect. 10. " Impropriators shall pay what *bonâ fide* they have used and ought to pay to the respective incumbents at any time before the said late fire; the same to be computed as part of the maintenance of such incumbent."

Sect. 11. " And if any inhabitant shall refuse or neglect to pay to the incumbent the sum appointed by him to be paid (the same being lawfully demanded upon the premises); it shall be lawful for the lord mayor, upon oath to be made before him of such refusal or neglect, to grant out warrants for the officer or person appointed to collect the same, with the assistance of a constable in the day time, to levy the same by distress and sale of the goods of the party so refusing or neglecting; restoring to the owner the overplus over and above the said arrears and the reasonable charges of making such distress."

Sect. 12. " And if the lord mayor shall refuse or neglect to execute any of the powers to him given by this act, it shall be lawful for the lord chancellor or lord keeper, or two or more of the barons of the exchequer, by warrant under their hands and seals respectively, to do and perform what the said lord mayor might or ought to have done in the premises."

Sect. 14. " Provided, that no court or judge, ecclesiastical or temporal, shall hold plea of or for any the sum or sums of money due and owing or to be paid by virtue of

22 & 23 Car. 2, c. 15.
Churches united after the Fire of London are entitled to an annual sum of money.

this act; other than the persons hereby authorized to have cognizance thereof: nor shall it be lawful to or for any parson, vicar, curate or incumbent, to convent or sue any person assessed as aforesaid and refusing or neglecting to pay the same in any court or courts, or before any judge or judges, other than what are authorized and appointed by this act, for the hearing and determining of the same, in manner aforesaid."

Sect. 15. "Provided also, that it shall be lawful for the warden and minor canons of St. Paul's, parson and proprietors of the rectory of the parish of St. Gregory aforesaid, to receive and enjoy all tithes, oblations and duties arising or growing due within the said parish, in as large and beneficial manner, as formerly they have or lawfully might have done."

Ex parte Savage and *Ex parte Wood.*

In the cases, *Ex parte Savage*, rector of the united parishes of St. Andrew, Wardrobe, and St. Anne, Blackfriars, and *Ex parte Wood*, rector of St. Michael Royal and St. Martin Vintry (*m*), which came before Lord Harcourt on petition, Oct. 29, 1713, setting forth, that the petitioners had respectively demanded of the inhabitants the respective rates and arrears for the houses in their respective occupations, but they refused to pay the same, and that the petitioners applied to Sir Richard Hoare, lord mayor, for such warrants as the act of parliament directed him to grant for levying the said money, and he refused to grant such warrants; wherefore it was prayed that his lordship would grant the petitioners his warrant to levy the several sums of money so respectively due to them, by distress and sale of the goods of the defaulters; Lord Harcourt, thinking the matter of great consequence to the London clergy in general, as no such complaint since the making of the act had been before made to the lord chancellor, or lord keeper of the great seal, or to any two of the barons of the exchequer, desired the assistance of Mr. Baron Bury, and Mr. Baron Price: and on the 2nd December following it came on again in their presence, when it appeared that several of the quarterly sums claimed by the petitioners became due and in arrear when the houses stood empty, or were in the possession of former tenants or occupiers thereof; and a question thereupon arising, whether such sums so assessed upon the several houses, for making up certain annual sums of money to be paid in lieu of tithes, were become a fixed or real charge upon the houses whereon they had been so assessed, so that the

(*m*) 3 Atk. 639.

arrears which became due in the time of former tenants, or when the houses were empty, might be levied on the succeeding tenants; the further consideration of the petitions was adjourned to December 23, upon which day the two barons certified their opinion, that by the statute the sums assessed on the several houses are become real charges upon the houses, so that the arrears which ought to have been paid by the former occupiers, or which became due when the houses stood empty, may be levied by distress and sale of the goods of the present occupiers: and Lord Harcourt declared he entirely concurred in opinion with the barons, and that the petitioners were at liberty to apply to him for warrants of distresses as prayed by their petition.

Ex parte Croxall.

And in *Ex parte Croxall*, minister of the united parishes of St. Mary Somerset, and St. Mary Mountshaw, April 25, 1748 (*n*), where the lord mayor had heard the parties, and was of opinion not to grant the warrant, and thereupon it was urged that the lord mayor's determination was final, and nothing further could be done; Lord Hardwicke said, that the lord mayor's determination is final only in cases of appeal brought before him, but here the only act he has to do is to issue his warrant; which he having refused to do, the lord chancellor held that he had jurisdiction to inquire whether the lord mayor had done right in refusing the warrant, and if of opinion the lord mayor had done wrong, he could then issue his own warrant for levying the assessment.

Warden and Minor Canons of St. Paul's v. Morris.

In the case of *The Warden and Minor Canons of St. Paul's* v. *Morris* (*o*), the bill filed by the plaintiffs stated their title, as parson and proprietors of the church of St. Gregory, under letters patent, 24th Hen. 6, to all tithes, &c. within the said parish. It stated also the decree, made on the 23rd February, 1545, in pursuance of the statute 37 Hen. 8, c. 12, by which it was ordered, that the inhabitants of London should pay tithes at the rate of 2*s.* 9*d.* in the pound. The bill further stated the act of parliament, 22 Cha. 2, c. 11, for rebuilding the city of London, by which the parishes of St. Mary Magdalen, Old Fish Street, and St. Gregory were united, and the act 22 & 23 Cha. 2, c. 15, by which the tithes of those two parishes were fixed at 120*l.*, *both those acts saving expressly the right of the plaintiffs to the tithes of the parish of St. Gregory;* and the bill prayed an account of the tithes due from the defendants, occupiers of houses

(*n*) 3 Atk. 639.

(*o*) 9 Vez. 155.

Warden and Minor Canons of St. Paul's v. Morris.

within the said parish. After two trials at bar in favour of the claim of the plaintiffs to tithes of 2*s.* 9*d.* in the pound, upon an issue whether any and what less sum had been paid, a motion was made for a new trial on the ground that evidence had been improperly rejected. The court refused to grant a new trial, being of opinion that the evidence offered on the part of the defendants, though proving that a less sum than 2*s.* 9*d.* in the pound had been paid, did not show any *certain* payment in lieu of tithes.

Customary tithes for houses near London.

In some places, particularly in the neighbourhood of London, though not within the city, and therefore not within 37 Hen. 8, c. 12, a sum of money is paid for each house, in the nature of a *modus decimandi* (*p*). In *Pocock* v. *Titmarsh* (*q*), it appeared that this payment, which was 12*s.* per house, was the only provision for the vicar of St. Saviour's, Southwark; and the court decreed an account without directing an issue.

Case of *Beresford* v. *Newton.*

The most important case on this subject is *Beresford* v. *Newton* (*r*). In this case a bill was filed by the plaintiff, the rector of St. Andrew, Holborn (in the Court of Exchequer), to enforce certain ancient customary payments in respect of certain houses occupied in that part of the parish of St. Andrew, Holborn, which is within the county of Middlesex (*s*).

Lord Abinger, C. B.—"The first question to be decided is, whether or not, under the circumstances stated, there is ground for us to infer, that by custom existing from time immemorial, these payments were made to the incumbent of St. Andrew's, Holborn, by the respective occupiers of the houses described in the bill. Upon that point I have personally no doubt that sufficient ground appears to justify that inference. The evidence shows that for more than 100 years the occupiers of these houses have made these customary payments. Now, though it would be a question for a jury to say whether an usage of that duration, standing alone without explanation or contradiction by other facts, was or was not immemorial, I cannot presume that they would do otherwise than draw

(*p*) See Hobart. 10, and *Dr. Grant's case*, 11 Co. 15.

(*q*) Bunb. 102.

(*r*) 1 Crom., M. & R. 901; 5 Tyrrwh. 441.

(*s*) The cases cited were *Umfreville* v. *Hodges*, 1 E. & Y. 553; *Umfreville* v. *Topping*, 2 E. & Y. 184; *Umfreville* v. *Campion*, 1 E. & Y. 590; *Kynaston* v. *Hattersley*, 2 E. & Y. 183; *Kynaston* v. *Hawley*, 3 Wood, 135; *Heath* v. *Sandford and another*, 1 Wood, 427; *Dr. Grant's case*, 11 Co. 15; 1 E. & Y. 222; and others not reported from the Decree Book.

"the true inference from that state of evidence, viz. that the usage was immemorial. As to the second question, whether such payments could have had a legal origin, we should be doing great violence to the many decisions which have established payments of this description to be legal, if we were now to overturn them all because we cannot with certainty point out a legal origin for them. Surely it is the duty of courts of justice rather to endeavour to find out grounds for supporting a long series of former decisions than to try to discover new lights in order to overturn them. I should say, that after repeated decisions of the competent tribunals on a particular subject-matter, which have remained unimpeached for many years, and as such have afforded foundation for usage resting upon them, courts of justice can hardly be called on to suggest any legal origin for the payments which have been so often upheld by their decrees. The decisions themselves afford sufficient grounds for our judgment (*t*); however, if called upon to suggest a legal origin for these payments, I think, first, that we may resort to any reasonable intendment in support of them; and, next, that there are several ways in which they may legally have originated. First, it is provided generally by 27 Hen. 8, c. 20, that all tithes should be paid according to the ecclesiastical laws and ordinances of the Church of England, and after the laudable usages and customs of the parish or place where the party dwelt. Stat. 2 & 3 Edw. 6, c. 13, next introduced several variations and useful modifications in the laws of tithes, providing, among others, by sect. 7, 'that every person exercising merchandizes, bargaining and selling clothing, handicraft, or other art or faculty, being such kind of persons and in such places as heretofore within these forty years have accustomably used to pay such personal tithes, or of right ought to pay (other than such as have been day labourers) shall yearly, at or before the feast of Easter, pay for his personal tithes,' &c. The expression, 'have accustomably been used to pay,' is applicable to all cases where personal tithes had been paid. The 11th section sanctions the payment of the customary tithe of fish, and speaks of the parish. The 12th section speaks of the payment by the inhabitants of London and Canterbury, and the suburbs of the same: 'provided always, and be it enacted by the authority aforesaid, that this act, or anything herein con-

(*t*) See Ambler, 10, 11; Prec. in Ch. 461; Hargreave's Co. Lit. 145, note to p. 24 b.

Case of *Beresford* v. *Newton*.

"tained, &c., shall not extend in anywise to the inhabitants of the cities of London and Canterbury, and suburbs of same, nor to any other town or place that hath used to pay their tithes by their houses, otherwise than than they ought or should have done before the making of this act.' Now suppose that, before the making of that act, an agreement had been made in fact, whether exactly grounded on the existing law or not, that certain houses in the suburbs of the city of London, viz. in the parish here spoken of, St. Andrew's, Holborn, should pay certain specific sums for their tithes, and that all the other houses in that suburb and part of the parish should be discharged. And suppose that agreement to have been acted upon for forty years, would not the effect of this statute be to confirm the payment so stipulated for? Suppose, first, that it had no legal origin, and that it had been acted on for forty, fifty, or 100 years—suppose, as we are at liberty to do, that the whole of this parish, which is situate out of the city of London, had been in the hands of one or two persons, who, while there were only a few houses built, had made a bargain with the incumbent or proper authorities for the time being, that in consideration of certain houses then existing within the parish, paying certain specific sums, which we will suppose of much larger amount than they would be liable to pay upon any footing of a tithe applicable to them or their sites, that then any new inhabitants who might come to reside in new houses afterwards to be built as the population might increase, should be exempted from personal tithes (not from prædial tithes as long as the land should be cultivated). Then if that bargain had been acted upon for forty years, the result would be, that this statute would apply to it, and the occupiers of those newly-built houses would have the benefit of exemption from all personal tithes within that district, which had been before accustomed to pay personal tithes, by reason of the owners of the houses then existing having submitted to a much larger payment than those houses on their sites would otherwise have been liable to pay? I think we need not look to the origin of the transaction, if, in point of fact, it might have existed forty years before the passing of the statute of Edw. 6. If it had existed so long, then the statute has the effect of declaring that parties shall not pay personal tithes if they have not paid them for the last forty years; but if they have been accustomed to pay personal tithes, they shall continue to do so. I quite agree that a house, *quà* house, is not liable to pay tithes at all: but I should go further. I can suggest a

" case where such a composition would be perfectly good. Suppose an owner of land, paying prædial tithes for it, do intend to cover it with buildings, in which state no tithes are payable for it, but during the progress of the building, the part not covered is liable to pay tithes for such matters as it produces; is there anything unreasonable in the owner of that land saying to the rector, patron, and ordinary, 'I am now going to dedicate my lands to purposes which in the event will probably destroy all your tithes; but I offer to enter into this arrangement with you: if you will take for the first eight or ten houses that I build one fixed and specific payment, according to the different annual value of the houses, and exonerate the remainder of the land from tithes so long as it remains unbuilt on, those payments shall be made to you perpetually as long as those houses are occupied? Sir Charles Wetherell has asked, with great ingenuity, what becomes of the modus when the houses have ceased to be occupied, and where is the consideration for it? The answer is, that when all the rest of the land is built on, *ex hypothesi*, the incumbent would be entitled to no tithes at all for it, and therefore would not make a bad bargain in taking the chance of those payments from the existing houses during all the time they were occupied, in lieu of all the tithes claimed for their sites, and as a perpetual payment in lieu of the prædial tithes, which, should the rest of the land be subsequently built on, he could not afterwards claim. If the houses were all burnt, then the foundation of the argument is gone; if the land goes back into a state of cultivation, the original right to prædial tithes or small tithes is revived. So long as the land is covered with the buildings, so that the incumbent can get no tithes from it, he has made a good bargain. I suggest that is the origin of a custom, that as long as certain houses were occupied, the incumbent should take a specific payment for those houses in exoneration of all the rest. I consider that to be a good modus. Supposing I prove the fact of payment to have existed in proper time, and the agreement might have been made by competent parties, I do not see any objection to it in point of law. Without affirming that such was the fact, I suggest a possible case which occurred to me in regard to this sort of payment; and if any possible case can be suggested, the court is bound to adopt it, in order to support payments that have been allowed above one hundred years, and sanctioned by so many decisions of courts of justice, especially of this court. I remember arguing a question before Lord Kenyon respecting the origin of a usage of

Case of *Beresford* v. *Newton.*

"sixty or seventy years, and his lordship emphatically said, 'I will presume an act of parliament to sanction the usage of 100 years' (*u*). However strong that presumption may be, it shows his strong opinion as to how far a court would go to sanction an existing usage; and when I recollect how many various rights of property must depend on usage, and consider that in this instance we are asked to disturb a settled and existing right which has lasted for a century, I think it is not too much to resort to and adopt any possible suggestion for the purpose of supporting it. It appears to me that I have suggested in this case two states of things very likely to have occurred to sanction the usage; others, which might equally sanction, may have in fact occasioned it. I think, therefore, we may presume a legal origin to it. Whether these payments are called a composition or modus for tithes, or by any other name, they appear to be ancient, and I think that enough is shown to give us the right to presume that they have been made from time immemorial for these particular houses, or for houses preceding them on the same sites. We ought therefore to sustain them" (*x*).

Fifty new churches.

For the stipends of the ministers of the fifty new churches, provision is made by the several acts of parliament relating thereunto (*y*), to be raised from the duties on coals.

There are moreover several particular statutes for particular churches, in London and elsewhere.

After all, these pecuniary compensations, however reasonable at first, must in process of time become insufficient, as the value of money decreases. And this has been the case of all moduses, which at the time of their commencement were the real value of the tithes.

SECT. 17.—*Corn Rents under Local Acts.*

Besides the customary payments by householders in lieu of tithes in the vicinity of the city of London and in other towns, there have been in many places arrangements made by local acts for paying corn rents in lieu of the ordinary tithes.

These corn rents were left untouched by the earlier com-

(*u*) See *Eldridge* v. *Knott*, Cowp. 214; *Bealey* v. *Shaw*, 6 East, 215; *Rex* v. *Montague*, 4 B. & C. 588; *Fanshaw* v. *Rotheram*, 1 Eden's Ch. Cas. 296; *Chalmer* v. *Bradley*, 1 Jac. & W. 63.

(*x*) Parke, B., Bolland, B., and Alderson, B., agreed.

(*y*) 9 Anne, c. 17; 10 Anne, c. 20; 1 Geo. 1, st. 2, c. 23.

mutation acts; but provision for their conversion into rent-charges, similar to the ordinary commutation rent-charges, is made by the last commutation act, 23 & 24 Vict. c. 93.

Sect. 1. "Where corn rents are payable by virtue of any local act of parliament, in commutation of the whole or part of the tithes of any parish, and such corn rents shall be subject to variation at certain periods under the provisions of the same act, the commissioners, upon the application in writing of the owners of lands liable to the payment of the major part in value of such corn rents, or of the persons to whom a major part in value of such rents are payable, at any time at which the said corn rents might be subjected to variation under such local act, or at any other time, upon the joint application in writing of the owners of lands liable to the payment of the major part in value of such corn rents, and of the persons to whom a major part in value of such rents are payable, may, by an award under their hands and seal, convert the same into a rent-charge, to be thenceforth and for ever thereafter payable, in like manner and subject to the like incidents as rent-charges awarded under the said recited acts (z) are payable and subject to: provided always, that nothing in this act contained shall be construed to render any such rent-charge liable to parochial or other rates or taxes, from which the corn rents in respect of which such rent-charge shall have been awarded were free and exempt."

Corn rents under local acts may be converted into tithe rent-charge.

Sect. 2. "Wherever the local act provides that the average prices upon which any corn rents shall be varied shall be taken from any county, or from towns from which corn returns are made, the commissioners shall calculate the rent-charge to be awarded by them in lieu of such corn rents upon the returns for such county or such towns; and where no corn returns are made from the towns so named, the commissioners shall select two towns in the same or any adjoining county from which there are returns, and give notice thereof in such manner as to them shall seem fit, and shall appoint a time (being not less than twenty-one days from the date of the notice) within which objections to such selection may be signified in writing to the commissioners by any person interested, and if there be any such objections the commissioners shall consider the same, and shall either confirm the selection, or select some other towns, as they may think fit."

County or towns from whose returns average to be calculated.

Sect. 3. "The commissioners shall calculate the rent-charge to be awarded in lieu of any such corn rents upon

How average to be calculated.

(z) That is, the previous Commutation Acts.

the average prices for the number of years next preceding the date of the application to them, which shall be provided by such local act as the basis of variation, having due regard to the average prices upon which such corn rents were ascertained, and such calculation, where practicable, shall be made with reference to the particular grain mentioned in the local act under which such corn rents are payable, or if there shall be no returns of such grain, upon the average prices of wheat, barley, and oats."

Commissioners to apportion rent-charge.

Sect. 4. "The commissioners shall apportion the rent-charge to be awarded by them in lieu of corn rents upon and among the lands heretofore subject to such corn rents, either by a general schedule or a schedule in detail of the same lands, to be annexed to and form part of their award, and with or without a map of the same lands or any part thereof, but the commissioners shall not require a map unless the same shall in their opinion be rendered necessary for the identification of any such lands; and the commissioners shall deposit a draft of such award for inspection in the same manner as by the said recited acts is required in reference to an instrument of apportionment, and shall cause notice of such deposit to be given in such manner as to them shall seem fit, and shall by such notice specify the time (being not less than twenty-one days) within which objections in writing to such proposed award may be signified to the commissioners; and in case any notice of objection shall be given within the time limited as aforesaid, the commissioners shall appoint a time and place for hearing such objections, and shall by themselves or by an assistant commissioner take such objections into their consideration; and if there be no notice of objections, or when the said commissioners or assistant commissioner shall have heard and determined all such objections, the commissioners shall confirm such award, with or without amendments, as they shall see fit, and such award shall thenceforth be binding and conclusive on all persons whomsoever, subject to the provision hereinafter contained, and shall be conclusive evidence on every matter in the said award set forth and contained."

Power of appeal to a court of law.

Sect. 5. "Any person dissatisfied with the said award, and who shall be desirous of appealing against the same, shall have the same power of appeal as is given by the said first-recited act in the case of a decision given under the forty-fifth section of such act (z), notwithstanding

(z) 6 & 7 Will. 4, c. 71, s. 45. The appeal is given by sect. 46. See on the construction of this section, *Homfray* v. *Scroope*, 13 Q. B. 509; *Earl of Stamford* v. *Dunbar*, 14 M. & W. 151.

that the yearly payment in dispute shall be less than twenty pounds; and the court is hereby empowered to amend such award, or to remit the same to the commissioners to be amended by them in such manner as the said court shall direct, and the commissioners shall thereupon amend the same, in conformity to such direction, and the award so amended shall be binding and conclusive on all persons whomsoever."

Comptroller of corn returns to furnish information.

Sect. 6. "The commissioners shall have access to the books of the comptroller of corn returns for the time being, and shall be furnished by him with such information as they may require for the purposes of any award of rent-charge in lieu of corn rents."

Commissioners to have same powers as in tithe commutations.

Sect. 7. "In making any such award, and any inquiries incident thereto, the commissioners shall have the same powers as to the attendance and examination of witnesses, the production of documents, and all other matters, as are given by the said recited acts(*a*) in matters relating to the commutation of tithes; and all expenses of or incident to any such award or any part thereof shall be borne and paid by and amongst the owners of lands heretofore liable to such corn rents, and the persons to whom the same were payable respectively, in such proportion and manner as the commissioners shall direct, and be recoverable in like manner as expenses under the said recited acts (*a*) are recoverable."

As to expenses of awards, &c.

Copies of award to be deposited, &c.

Sect. 8. "The commissioners shall cause to be made two copies of every such award of rent-charge in lieu of corn rents, which copies shall be sealed by them and be deposited in like manner and subject to all the like incidents as provided by the said recited acts in reference to the sealed copies of an instrument of apportionment."

As to recovery of rent-charges awarded in lieu of corn rents.

Sect. 9. "The payment of any rent-charge awarded in lieu of corn rents which shall be in arrear may be enforced by the same ways and means as payment of rent-charge in arrear may be enforced under the provisions of the said recited acts, or may be enforced, at the option of the person to whom the same rent-charge is payable, by the same ways and means as are provided by the local act for the recovery of the corn rents in lieu of which such rent-charge shall have been awarded."

Where consents not given, draft of proposed altered appor-

Sect. 10. "In any case of altered apportionment in which the consent of the whole of the land-owners interested in such alteration shall not be signified thereto, the commissioners shall, in lieu of the service of notice required

(*a*) The previous Commutation Acts.

tionment to be deposited for inspection.

by the said acts, cause a draft of the proposed altered apportionment to be deposited for inspection, in the same manner as by the said first-recited act is required in reference to an instrument of apportionment, and shall cause notice to be given of such deposit in such manner as to them shall seem fit, and shall by such notice specify the time (being not less than twenty-one days) within which objections in writing to such proposed altered apportionment may be signified to the commissioners; and in case any notice of objection shall be given within the time limited as aforesaid, the commissioners shall appoint a time and place for hearing such objection, and shall, by themselves or by an assistant commissioner, take such objection into their consideration; and if there be no notice of objection, or when the said commissioners or assistant commissioner shall have heard and determined every such objection, the commissioners shall confirm such altered apportionment, with or without amendments, as they shall see fit."

In case of objection, commissioners to appoint a time for hearing the same.

Cases on local tithe acts.

The following are some of the more important cases that have recently been decided on the construction of the local tithe acts: *Willoughby* v. *Willoughby* (*b*); *Re Winteringham Tithes* (*c*); *Reg.* v. *Justices of Lindsey* (*d*); *Bedford* v. *Sutton Coldfield* (*e*); *Vigar* v. *Dudman*, decided by the Court of Common Pleas, and affirmed by the Exchequer Chamber (*f*).

Sect. 18.—*The Tithe Commission.*

This commission (*g*) was originally appointed for five years only; the duration of the commission being afterwards extended from time to time by several acts.

Amalgamation with other commissions.

By 14 & 15 Vict. c. 53, the tithe commission was amalgamated with the copyhold commission and the inclosure commission, and commissioners were to be appointed under the act for two years: these new commissioners were to be called tithe commissioners, copyhold commissioners, or inclosure commissioners, according to the powers by virtue of which they acted and the duties which they undertook, in each case.

This commission has been continued from time to time.

(*b*) 4 Q. B. 687; 7 Jur. 798.
(*c*) 9 Jur., N. S. 277; 31 L. J., C. P. 274.
(*d*) 13 Q. B. 484; 13 Jur. 491.
(*e*) 3 C. B., N. S. 449.
(*f*) L. R., 6 C. P. 470; 7 C. P. 72; 40 L. J. (N. S.) C. P. 229.
(*g*) *Vide supra*, p. 1504.

By 31 & 32 Vict. c. 89, provisions are made for defraying the expenses of the commission by means of fees.

Fees to be taken for defraying expenses.

By sect. 1, security for costs is to be taken before any inquiry is held by an assistant commissioner; and by sect. 6, the commissioners shall prepare a table of fees, to be approved by the lords of the treasury, in respect of the business transacted under the acts administered by them; and these fees are to be paid in stamps. The table of fees, and any alterations afterwards made therein, are to be published in the Gazette and laid before parliament.

Liability of commissioner.

As to the liability of a commissioner to an action at law for acts done by him in discharge of his official duties, the case of *Acland* v. *Buller* (*h*) should be referred to.

(*h*) 1 Ex. 837.

CHAPTER IV.

PENSIONS, OFFERINGS, FEES.

SECT. 1.—*Pensions.*
2.—*Offerings.*
3.—*Fees.*

Subject of chapter.

THIS chapter deals with several minor sources, from which, as well as from the more prominent sources of glebes and tithes, the incomes, enjoyed by ecclesiastical persons in virtue of their benefices or preferments, arise.

SECT. 1.—*Pensions.*

What they are.

Pensions are certain sums of money paid to clergymen in lieu of tithes; and some churches have settled on them annuities or pensions payable by other churches.

Thus, in the *Registrum Honoris de Richmond* (*a*), we find a pension paid out of Coram, or Coverham Abbey, in the county of York (unto which the church of Ledburgh was appropriated), to the prior of Connyside (unto whose priory the church of Orton was appropriated), for the said church of Ledburgh, 20*s*.

Origin of.

These pensions are due by virtue of some decree made by an ecclesiastical judge upon a controversy for tithes, by which the tithes have been decreed to be enjoyed by one, and a pension instead thereof to be paid to another; or they have arisen by virtue of a deed made by the consent of the parson, patron and ordinary (*b*).

Pensions paid by monasteries.

At the dissolution of monasteries there were many pensions issuing out of their lands, and payable to several ecclesiastical persons; which lands were vested in the crown by the statutes of dissolution; in which statutes there is a saving to such persons of the right which they had to those pensions: but notwithstanding such general saving, those who had that right were disturbed in the collecting and receiving such pensions; and therefore by another statute, 34 & 35 Hen. 8, c. 19, it was enacted, that pensions, portions, corrodies, indemnities, synodies, proxies, and all other profits due out of the lands of religious houses dissolved, shall continue to be paid to ecclesiastical persons by the occupiers of the said lands. And the plaintiff may recover the thing in demand, and

(*a*) Append. 94. (*b*) F. N. B. 117.

the value thereof in damages in the ecclesiastical court, together with costs. And the like he shall recover at the common law when the cause is there determinable.

May be sued for in ecclesiastical court.

By the statute of *Circumspectè agatis*, 13 Edw. 1, st. 4, "if a prelate of a church, or the patron, demand of a parson a pension due to him, all such demands are to be made in a spiritual court;" in which case "the spiritual judge shall have power to take knowledge, notwithstanding the king's prohibition."

In pursuance of which, the general doctrine is, that pensions, as such, are of a spiritual nature, and to be sued for in the spiritual court; and accordingly, when they have come in question, prohibitions have been frequently denied or consultations granted, even though they have been claimed upon the foot of prescription (*c*).

But Lord Coke says, if a pension be claimed by prescription, there, seeing a writ of annuity lies, and that prescription must be tried by the common law, because common and canon law therein do differ, they cannot sue for such a pension in the ecclesiastical court (*d*).

But this has been denied to be law: and in the case of *Jones* v. *Stone*, in 12 Will. 3 (*e*), Holt, Chief Justice, said he could never get a prohibition to stay a suit in the spiritual court against a parson for a pension by prescription.

In the case of *Gooche* v. *Bishop of London*, in 4 Geo. 2 (*f*), the bishop libelled in the spiritual court, suggesting that Dr. Gooche, as archdeacon of Essex, is to pay 10*l.* due to the bishop as a *prestation* for the exercise of his exterior jurisdiction. The doctor moved for a prohibition, alleging that he had pleaded there was no prescription; and then that being denied, a prohibition ought to go for defect of trial. On the contrary, it was argued for the bishop, that the libel being general it must not be taken that he goes upon a prescription; but it is to be considered in the same light as the common case of a pension which is suable for in the spiritual court; and the nature of the demand shows it must have its original from a composition, it being a recompense for the archdeacon's being allowed to exercise a jurisdiction which originally did belong to the ordinary. And by the court: "The bishop may certainly entitle himself *ab antiquo*

(*c*) Gibs. 706; *Goodwin* v. *Dean and Chapter of Wells*, Noy, 16; *Smith* v. *Wallis*, 1 Salk. 58; Cro. Eliz. 675; *Collier's case*, 3 Salk., 58.

(*d*) 2 Inst. 491.

(*e*) 2 Salk. 550. See *Johnson* v. *Rymon*, 12 Mod. 416; Wats. c. 56.

(*f*) 1 Str. 879.

without laying a prescription; and as it is only laid in general, there is no ground for us to interpose, till it appears by the proceedings that a prescriptive right will come in question; if they join issue on the plea, it will then be proper to apply; but at present there ought to be no prohibition."

Bill for, in Court of Exchequer.

In *Bailey* v. *Cornes* (*q*), in 1724, a bill was preferred in the Court of Exchequer for a pension only, payable to the preacher of Bridgnorth; and upon hearing of the cause (which was afterwards ended by compromise) it seemed to be admitted that a bill might be brought for a pension only.

They which pay pensions to others out of their spiritual living may retain the tenth part thereof.

By 26 Hen. 8, c. 3, s. 18, "And forasmuch as every incumbent of the dignities, benefices, and promotions spiritual aforementioned shall be charged by this act to the payment of the tenth part of the value of their dignities, benefices, and promotions spiritual, without any deduction or allowance of such pension or pensions, wherewith some of them have been charged to pay to their predecessors during their lives, or to other persons to the use of such their predecessors during their lives; it is therefore ordained and enacted by authority aforesaid, that it shall be lawful to every incumbent charged with any such pension payable to any his predecessors, or to any to his use, to retain and keep in his hand the tenth part of every such pension; and that every such incumbent and his sureties shall from henceforth be acquitted and discharged of the said tenth part of every such pension, by virtue and authority of this present act; any decree, ordinance or assignment of any ordinary, or any collateral writing or security made for such pension to any spiritual person or persons, or to any to their uses for term of their lives, in anywise notwithstanding: and that as well every incumbent, as such persons as stand bound for him for payment of any such pensions, shall plead this act in every of the king's courts, for the clear extinguishment and discharge of the tenth part of every such pension."

No pension shall be reserved upon the resignation of a benefice, above the value of the third part.

Sect. 19. "No pension shall hereafter be assigned by the ordinary, or by any other manner of agreement, by collateral surety, or otherwise, upon any resignation of any dignity, benefice, or promotion spiritual, above the value of the third part of the dignity, benefice or promotion spiritual resigned: and if any pension amounting above the value of the third part of the dignity, benefice, or promotion spiritual heretofore resigned, be already limited and made sure to any spiritual person or persons, by decree of the ordinary, or otherwise by any collateral surety, or

(*q*) Bunb. 183.

hereafter shall happen to be assigned and made sure to any person or persons spiritual, or to any other to their use, by decree of the ordinary, or by any other collateral surety, upon any resignation thereof; yet nevertheless the incumbent charged with such pension, nor his sureties collateral, shall not be compelled to pay any more pension than the value of the third part of his dignity, benefice, or promotion spiritual so resigned shall amount unto; but shall by authority of this act be clearly acquitted and discharged of so much of the said pension as shall amount above the value of the third part of the dignity or benefice resigned; any decree or assignment of the ordinary, or any collateral writings or sureties heretofore made, or hereafter to be had or made for the same, to the contrary thereof notwithstanding."

How suits may be instituted.

A bishop may sue for a pension before a chancellor, and an archdeacon before his official (*h*).

If a suit be brought for a pension or other thing due of a parsonage, it seems that the occupier (though a tenant) ought to be sued; and if part of the rectory be in the hand of the owner, and part in the occupation of a tenant, the suit is to be against them both (*i*).

And though there is neither house, nor glebe, nor tithes, nor other profits, but only of Easter offerings, burials, and christenings, yet the incumbent is liable to pay the pension (*j*).

If an incumbent leave arrearages of a pension, the successor shall be answerable, because the church itself is charged, into whatsoever hand it comes (*k*).

In *Still & Dunn* v. *Palfrey* (*l*), where the parishioners had the patronage of the parish and were bound to provide and pay a minister, and it was the custom to agree upon the election of each minister for the payment of a fixed stipend, Sir H. J. Fust appears to have thought that, though no church-rate could be made for this stipend, a suit for the payment of it, in the nature of a suit for a pension or for ecclesiastical dues, might be brought in the Ecclesiastical Court.

Pensions not now generally grantable.

By 13 Eliz. c. 20, s. 1, the grant of any new pension is made void (*m*). Pensions may, however, be granted to incumbents resigning according to the provisions of The Incumbents Resignation Act, 1871, 34 & 35 Vict. c. 44 (*n*).

(*h*) Wood, b. 2, c. 2.

(*i*) Wats. c. 53.

(*j*) Hardr. 230.

(*k*) *Trinity College, Cambridge* v. *Tunstall*, Cro. Eliz. 810.

(*l*) 2 Curt. 902 (1841).

(*m*) *Vide infra*, Part V., Chap. VII.

(*n*) *Vide supra*, pp. 521, 525, 526.

Sect. 2.—*Offerings* (*n*).

What they are.

Offerings, *oblations*, and *obventions*, are one and the same thing: though *obvention* is the largest word. And under these are comprehended, not only those small customary sums commonly paid by every person when he receives the sacrament of the Lord's Supper at Easter, sometimes called Easter dues, which in many places are by custom twopence from every communicant, and in London fourpence a house, but also the customary payment for marriages, christenings, churchings and burials (*o*).

Oblations according to canon law.

The term *oblation*, in the canon law, means whatever is in any manner offered to the church by the pious and faithful, whether it be moveable or immoveable property (*p*). These offerings were given on various occasions, such as at burials and marriages, by penitents, at festivals, or by will. But they were not to be received from persons excommunicated, or who had disinherited their sons, or been guilty of injustice, or had oppressed the poor. Such offerings constituted at first the chief revenues of the church. When established by custom, they may now be recovered as small tithes before two justices of the peace, by 7 & 8 Will. 3, c. 6, and subsequent acts. Offerings are made at the holy altar by the king and queen twelve times in the year on festivals called *offering days*, and distributed by the dean of the chapel to the poor. James the First commonly offered a piece of gold, having the following mottos: *Quid retribuam domino pro omnibus quæ tribuit mihi? Cor contritum et humiliatum non despiciet Deus* (*q*). The money in lieu of these accustomed offerings is now fixed at fifty guineas a year, and paid by the privy purse annually to the dean or his order; for the distribution of which offertory money, the dean directs proper lists of poor people to be made out (*r*).

Royal offerings.

Kinds of offerings.

Offerings, as now known to the law and recoverable by legal process, may be divided into two kinds, (1), mortuaries or offerings at the burial of the dead, and (2), offerings at the four great feasts.

Mortuaries.

The law as to mortuaries has been already mentioned in the chapter on burial (*s*).

Offerings at four principal feasts.

Offerings at the four principal feasts are expressly provided for by the following section of 2 & 3 Edw. 6, c. 13.

(*n*) See Comyn's Digest, tit. "Prohibition," G. 11; and Ayliffe's Parergon, 11.

(*o*) Wats. c. 52.

(*p*) X. 5, 40, 29; Spelm. in Concil. vol. i. p. 39.

(*q*) Lex Constit. 184.

(*r*) Ex. MSS.

(*s*) *Vide supra*, Part III., Chap. X., Sect. 5, pp. 874, 879; *et vide* Ken. Par. Ant. Gloss.

Sect. 10. "All and every person and persons which by the laws or customs of this realm ought to make or pay their offering, shall yearly from henceforth well and truly content and pay his or their offering to the parson, vicar, proprietor, or their deputies or farmers of the parish or parishes where it shall fortune or happen him or them to dwell or abide, and that at such four offering days as at any time heretofore within the space of four years last past hath been used and accustomed for the payment of the same; and in default thereof, to pay for their said offerings at Easter then next following."

Four offering days.

The four offering days are Christmas, Easter, Whitsuntide, and the feast of the dedication of the parish church (*t*).

Easter offerings. Rubric.

Concerning the offerings at Easter, it is directed by the rubric at the end of the communion office, that "yearly at Easter, every parishioner shall reckon with the parson, vicar, or curate, or his or their deputy or deputies, and pay to them or him all ecclesiastical duties, accustomably due, then and at that time to be paid."

Of common right.

And it has been decreed, that Easter offerings are due of common right, and not by custom only (*u*); C. B. Gilbert said, that offerings were a compensation for personal tithes (*x*). And in the case of *Carthew* v. *Edwards*, it was holden that they were due from the householder for every member of his family of sixteen years of age and upwards (*y*).

To what amount.

Easter offerings are due by the common law at the rate of twopence per head (*z*); but by custom it may be more. In London, it is mentioned in several books of authority, that a groat a house is due (*a*); but I have not discovered on what this opinion of a groat a house for offerings in London is founded. Hobart refers to the statute, but does not mention any statute in particular. Now, by 37 Hen. 8, c. 12, s. 12, every householder in London paying 10*s*. rent or above, shall be discharged of offerings: but his wife and children, or others, taking the rites of the church, at Easter should pay twopence each for their offerings yearly. And London is excepted out of 27 Hen. 8, c. 20, by sect. 2, out of 2 & 3 Edw. 6, c. 13, by sect. 12, and out of 7 & 8 Will. 3, c. 6, by sect. 5.

(*t*) Gibs. 739.

(*u*) *Lawrence* v. *Jones*, Bunb. 173; 2 Gw. 662; 1 E. & Y. 801, 818.

(*x*) *Egerton* v. *Still*, Bunb. 198; 2 Wood, 250; 2 Gw. 661.

(*y*) Ambl. 72; Gw. 826; 2 E. & Y. 818.

(*z*) Bunb. 173, pl. 425.

(*a*) Hob. 11; Godolph. Repert. Canon. edit. 1687, p. 427; Wats. c. 52, p. 585.

Regina v. Hall.

In the recent case of *Reg. v. Hall*(*c*), the terriers of the glebe lands and other rights belonging to the parish church of B., dating from 1727 to 1825, contained the following clause: "Easter offerings. Every communicant, 2*d.*; every cow, 2*d.*; every plough, 2*d.*; every foal, 1*s.*; every hive of bees, 1*d.*; every house, 3½*d.*"

It was holden—1. That the terriers were evidence of such a custom as excluded the common law right (if such existed) to a payment of 2*d.* for every member of a family of the age of sixteen as an Easter offering, because it included items to which the common law right did not extend. 2. That the word communicant did not override the whole clause, but that each item was an independent charge, and payable by every parishioner, whether he came within the denomination of a communicant or not. 3. That in the absence of evidence to the contrary "communicant" meant only those who were actually attendants at the communion; and that therefore this charge could only be demanded from actual communicants. 4. That the custom attached to any house as soon as built and occupied, and was not confined to ancient houses which were in existence when the terriers were made.

Tithe Commutation Act not to extend to Easter offerings, &c.

By 6 & 7 Will. 4. c. 71, the first Tithe Commutation Act, sect. 90: "Nothing in this act contained, unless by special provision to be inserted in some parochial agreement and specially approved by the commissioners, in which case the same shall be valid, shall extend to any Easter offerings, mortuaries, or surplice fees."

Power after award to make parochial agreements for them.

But by 2 & 3 Vict. c. 62, s. 9, it shall be lawful at any time before the confirmation of any apportionment after a compulsory award in any parish, for the land-owners and tithe-owners, having such interest in the lands and tithes of such parish as is required for the making a parochial agreement, to enter into a parochial agreement for the commutation of Easter offerings, mortuaries or surplice fees . . . . and all the provisions, conditions, limitations and powers of the said recited acts(*d*), or any of them, relating to parochial agreements, so far as the same shall in the judgment of the commissioners be applicable to the subject of the proposed commutation, shall be observed and applied in every such case as if no previous award had been made.

Offerings at Whitsuntide.

Pentecostals, otherwise called *Whitsun-farthings*, took their name from the usual time of payment, at the feast

(*c*) L. R., 1 Q. B. 632 (1866).
(*d*) 6 & 7 Will. 4. c. 71; 7 Will. 4 & 1 Vict. c. 69; 1 & 2 Vict. c. 64.

of Pentecost. These are spoken of in a remarkable grant of King Henry VIII. to the dean and chapter of Worcester; in which he makes over to them all those oblations and obventions, or spiritual profits, commonly called Whitsun-farthings, yearly collected or received of divers towns within the archdeaconry of Worcester, and offered at the time of Pentecost. From hence it appears that pentecostals were oblations; and as the inhabitants of chapelries were bound, on some certain festival or festivals, to repair to the mother church, and make their oblation there, in token of subjection and dependence, so, as it seems, were the inhabitants of the diocese obliged to repair to the cathedral (as the mother church of the whole diocese) at the feast of Pentecost. Something like this was the coming of many priests and their people in procession to the church of St. Austin in Canterbury, in Whitsun-week, with oblations and other devotions; and in the register of Robert Read, who was made Bishop of Chichester in the year 1396, there is a letter to compel the inhabitants of the parishes within the archdeaconry of Chichester, to visit their mother church in Whitsun-week (*e*).

These oblations grew by degrees into fixed and certain payments from every parish and every house in it, as appears not only from the aforementioned grant of King Henry VIII., but also from a remarkable passage in the articles of the clergy in convocation in the year 1399; where the sixth article is, a humble request to the archbishops and bishops that it may be declared whether Peter-pence, the holy loaf and pentecostals were to be paid by the occupiers of the lands, though the tenements were fallen or not inhabited, according to the ancient custom, when every parish paid a certain quota (*f*).

Modern payments of.

These are still paid in some few dioceses, being now only a charge upon particular churches, where by custom they have been paid (*g*).

And if they be denied where they are due, they are recoverable in the spiritual court (*h*).

Offerings at other two feasts.

Nothing in particular is to be found in the books as to the offerings at the other two principal feasts.

Recoverable in spiritual court.

By the statute of *Circumspectè agatis*, 13 Edw. 1, st. 4, "If a parson demands of his parishioners oblations due and accustomed," "all such demands are to be made

(*e*) Gibs. 976; 1 Warn. 339.
(*f*) Gibs. 976.
(*g*) Ken. Par. Ant. 596; Deg. p. 2, c. 15.
(*h*) Gibs. 977.

in the spiritual court," in which case "the spiritual judge shall have power to take knowledge notwithstanding the king's prohibition."

7 & 8 Will. 3, c. 6.

Small tithes and offerings, &c. to be duly paid.

By 7 & 8 Will. 3, c. 6, s. 1, "For the more easy and effectual recovery of small tithes, and the value of them, where the same shall be unduly subtracted and detained, where the same do not amount to above the yearly value of forty shillings from any one person;" it is enacted, that "all persons shall well and truly set out and pay all and singular the tithes commonly called small tithes, and compositions and agreements for the same, with all offerings, oblations, and obventions, to the several rectors, vicars, and other persons to whom they shall be due in their several parishes, according to the rights, customs, and prescriptions commonly used within the said parishes respectively: and if any person shall subtract or withdraw, or any ways fail in the true payment of such small tithes, offerings, oblations, obventions, or compositions, by the space of twenty days at most after demand thereof, it shall be lawful for the person to whom the same shall be due to make his complaint in writing to two or more justices of the peace within that county, place, or division where the same shall grow due, neither of which justices is to be patron of the church or chapel whence the said tithes shall arise, nor any ways interested in such tithes, offerings, oblations, obventions, or compositions aforesaid."

If not paid within twenty days, complaint to two justices.

Procedure before justices.

By sect. 2, the justices are to summon in writing the party complained of, and, upon his appearance or default, if service of the summons is proved, may determine the cause and give compensation for the small tithes or offerings refused and costs.

By sect. 3, in default of payment for ten days the constables and churchwardens of the parish, or any one of them, may by virtue of a warrant from the justices seize the goods of the party refusing by way of distress, and may in due time sell the same.

Sect. 4 gives the justices power to administer oaths.

Sect. 5 excludes from the operation of the act the city of London and other places where special provision is made by local statutes.

Sect. 6 limits the time of complaint to the justices to two years from the time when the tithes or offerings became due.

Appeal to quarter sessions.

Sect. 7. "Any person finding himself aggrieved by any judgment to be given by two such justices, may appeal to the next general quarter sessions to be held for that

county or other division; and the justices there shall proceed finally to hear and determine the matter, and to reverse the said judgment if they shall see cause; and if they shall find cause to confirm the said judgment, they shall decree the same by order of sessions, and shall also proceed to give such costs against the appellant, to be levied by distress and sale of the goods and chattels of the said appellant, as to them shall seem just and reasonable. And no proceedings or judgment had by virtue of this act shall be removed or superseded by any writ of *certiorari*, or other writs out of his majesty's courts at Westminster, or any other court, unless the title of such tithes, oblations, or obventions shall be in question."

Proceedings not removed by *certiorari*, unless title in question.

Sect. 8. "Where any person complained of for subtracting or withholding any small tithes or other duties aforesaid, shall, before the justices to whom such complaint is made, insist upon any prescription, composition, or *modus decimandi*, agreement, or title, whereby he ought to be freed from payment of the said tithes or other dues in question, and deliver the same in writing to the said justices subscribed by him; and shall then give the party complaining reasonable and sufficient security, to the satisfaction of the said justices, to pay all such costs and damages, as upon a trial at law to be had for that purpose in any of his majesty's courts having cognizance of that matter, shall be given against him, in case the said prescription, composition, or *modus decimandi* shall not upon the said trial be allowed; in that case, the said justices shall forbear to give any judgment in the matter, and then and in such case the party complaining shall be at liberty to prosecute such person for his said subtraction in any other court where he might have sued before the making of this act."

Where person insists on *modus*, and gives security for costs, justices to forbear judgment, and complainant to sue in other court.

A party summoned under this act, who resists the payment of tithe on the ground of a *modus* under this last section, must set up a *modus* before the justices in the first instance; and if he neglect to do so, and an order is made by the justices, he cannot, on appeal to the sessions, give evidence of the *modus*. It should seem that this eighth section takes away from the justices the power of trying a question of *modus* in any case (*i*).

By sect. 9, where the judgment is given out of sessions, it is to be enrolled at the quarter sessions; and a judg-

Procedure after judgment.

(*i*) *Rex* v. *Jefferys*, 1 B. & C. 604; 2 D. & R. 860; 3 E. & Y. 1098; *Rex* v. *Wakefield*, 1 Burr. 485; 2 E. & Y. 153; *Rex* v. *Furness*, 11 Mod. 320; 1 Str. 264; 1 E. & Y. 750.

Procedure after judgment.

ment so enrolled, and satisfied by payment, is to be a bar to any other suit for the same tithes or offerings.

By sect. 10, when the party complained of removes out of the jurisdiction of the justices before the sum is levied on his goods, the justices are to certify the same to the justices who have jurisdiction in the place to which he has removed; and these latter justices are to issue a warrant for seizure of his goods.

Sect. 12 empowers the justices to give ten shillings costs for a frivolous complaint.

By sect. 13, any person sued for anything done under the powers of this act, and succeeding in his defence, shall have double costs.

Person suing in other courts for sums within this act, to have no benefit from it.

Sect. 14. "Any clerk or other person who shall begin any suit for recovery of small tithes, oblations, or obventions, not exceeding the value of forty shillings, in his majesty's court of exchequer, or in any of the ecclesiastical courts, shall have no benefit by this act for the same matter for which he hath so sued."

By 7 Geo. 4, c. 15, in places where the justices are patrons of the church, the parties are to be summoned before two justices of any adjoining county, riding, or division. By 53 Geo. 3, c. 127, s. 4, one justice is competent to receive the original complaint, and summon the parties to appear before two or more justices.

7 & 8 Will. 3, c. 34.
Quakers' tithes.

As to Quakers' tithes, it is thus provided by 7 & 8 Will. 3, c. 34, s. 3, "Whereas by reason of a pretended scruple of conscience, Quakers do refuse to pay tithes and church rates," "where any Quaker shall refuse to pay or compound for his great or small tithes, or to pay any church rates, it shall be lawful for the two next justices of the peace of the same county (other than such justice as is patron of the church or chapel whence the said tithes shall arise, or anyways interested in the said tithes), upon the complaint of any parson, vicar, farmer, or proprietor of tithes, churchwarden or churchwardens, who ought to have received or collected the same, by warrant under their hands and seals, to convene before them such Quaker or Quakers neglecting or refusing to pay or compound for the same, and to examine upon oath (or affirmation, in case of the examination of a Quaker) the truth and justice of the said complaint, and to ascertain and state what is due and payable; and by order under their hands and seals to direct and appoint the payment thereof, so as the sum ordered do not exceed ten pounds: and upon refusal to pay according to such order, it shall be lawful for any one of the said justices, by warrant under his hand and

seal, to levy the same by distress and sale of the goods of such offender, his executors or administrators, rendering only the overplus to him or them, the necessary charges of distraining being thereout first deducted and allowed by the said justice. And any person finding himself aggrieved by any judgment given by such two justices, may appeal to the next general quarter sessions to be held for the county, riding, city, liberty, or town corporate; and the justices there shall proceed finally to hear and determine the matter, and to reverse the said judgment if they see cause; and if they shall find cause to continue the said judgment, they shall then decree the same by order of sessions, and shall also proceed to give such costs against the appellant, to be levied by distress and sale of the goods and chattels of the said appellant, as to them shall seem just and reasonable. And no proceedings or judgment had by virtue of this act shall be removed or superseded by any writ of *certiorari* or other writ out of his majesty's courts at Westminster, or any other court whatsoever, unless the title of such tithes shall be in question."

Sect. 5. "In case any such appeal be made as aforesaid, no warrant of distress shall be granted until after such appeal be determined."

This act extended by 1 Geo. 1, stat. 2, c. 6.

And by 1 Geo. 1, stat. 2, c. 6, s. 2, "The like remedy shall be had against any Quaker or Quakers for the recovering of any tithes or rates, or any customary or other rights, dues, or payments belonging to any church or chapel, which of right by law and custom ought to be paid, for the stipend or maintenance of any minister or curate officiating in any church or chapel; and any two or more justices of the peace of the same county or place (other than such justice as is patron of any church or chapel, or anywise interested in the said tithes), upon complaint of any parson, vicar, curate, farmer, or proprietor of such tithes, or any churchwarden or chapelwarden, or other person who ought to have, receive, or collect any such tithes, rates, dues, or payments as aforesaid, are authorized and required to summon in writing under their hand and seals, by reasonable warning, such Quaker or Quakers against whom such complaint shall be made; and after his or their appearance, or upon default of appearance, the said warning or summons being proved before them upon oath, to proceed to hear and determine the said complaint, and to make such order therein as in the aforesaid act is limited; and also to order such costs and charges as they shall think reasonable, not exceeding ten shillings, as upon the merits of the cause shall appear just; which order shall and may be so executed,

and on such appeal may be reversed or affirmed by the general quarter sessions, with such costs and remedy for the same; and shall not be removed into any other court, unless the titles of such tithes, dues, or payments shall be in question, in like manner as by the aforesaid act is limited and provided."

Further extended by 53 Geo. 3, c. 127.

By 53 Geo. 3, c. 127, s. 6, these last acts as to Quakers are extended so as to comprise any sum not exceeding *50l.*; and one justice is competent to receive the complaint and to summon the party before two justices.

Justices of peace may determine complaints respecting tithes not exceeding *10l.*

Further, by sect. 4 of this act, reciting 7 & 8 Will. 3, c. 6, it is enacted, "That such justices of the peace [as are in the said recited act mentioned] shall, from and after the passing of this act, be authorized and required to hear and determine all complaints touching tithes, oblations, and compositions subtracted or withheld, where the same shall not exceed ten pounds in amount from any one person, in all such cases, and by all such means, and subject to all such provisions and remedies, by appeal or otherwise, as are contained in the said act of King William, touching small tithes, oblations, and compositions not exceeding forty shillings: provided always, nevertheless, that from and after the passing of this act, one justice of the peace shall be competent to receive the original complaint, and to summon the parties to appear before two or more justices of the peace, as in the said act is set forth."

Limitation of actions respecting tithes.

Sect. 5. "No action shall be brought for the recovery of any penalty for the not setting out tithes, nor any suit instituted in any court of equity, or in any ecclesiastical court, to recover the value of any tithes, unless such action shall be brought or such suit commenced within six years from the time when such tithes became due."

5 & 6 Will. 4, c. 74.

Proceedings for the recovery of tithes under *10l.* (except in the case of Quakers) shall be had only under the powers of the two first-recited acts.

By 5 & 6 Will. 4, c. 74, reciting 7 & 8 Will. 3, c. 6, 53 Geo. 3, c. 127, and the other acts above mentioned, it is enacted as follows: "No suit or other proceeding shall be had or instituted in any of his majesty's courts in England now having cognizance of such matter for or in respect of any tithes, oblations, or compositions withheld, of or under the yearly value of ten pounds (save and except in the cases provided for in the two first-recited acts), but that all complaints touching the same shall, except in the case of Quakers, be heard and determined only under the powers and provisions contained in the said two first-recited acts of parliament in such and the same manner as if the same were herein set forth and re-enacted; and that no suit or other proceeding shall be had or instituted in any of his majesty's courts either in England or Ireland now having cognizance of such matter, for or in respect of any great or

small tithes, moduses, compositions, rates, or other ecclesiastical dues or demands whatsoever, of or under the value of fifty pounds, withheld by any Quaker either in England or Ireland; but that all complaints touching the same, if in England, shall be heard and determined only under the powers and provisions contained in the said recited acts 7 & 8 Will. 3, c. 6, and 53 Geo. 3, c. 127; . . . . . provided always, that nothing hereinbefore contained shall extend to any case in which the actual title to any tithe, oblation, composition, modus, due, or demand, or the rate of such composition or modus, or the actual liability or exemption of the property to or from any such tithe, oblation, composition, modus, due, or demand, shall be *bonâ fide* in question, nor to any case in which any suit or other proceeding shall have been actually instituted before the passing of this act."

Proviso.

It seems that where the respondent, on a summons before the justices, disputes his liability, and the complainant accordingly takes proceedings in some court, the complainant may get six years' arrears of tithes and offerings; though if the respondent had submitted to the justices, he could only have been compelled to pay two years' arrears (*k*).

This section takes away the right, not only of bringing suits for tithes under 10*l.*, but also of bringing actions under 2 & 3 Edw. 6, c. 13, s. 2, for not truly setting out tithes under 10*l.* (*l*).

Manner of recovering tithes due from Quakers.

Sect. 2. "In case any suit or other proceeding has been prosecuted or commenced, or shall hereafter be prosecuted or commenced, in any of his majesty's courts in England or Ireland, for recovering any great or small tithes, modus or composition for tithes, rate or other ecclesiastical demand, subtracted, unpaid, or withheld by or due from any Quaker, no execution or decree or order shall issue or be made against the person or persons of the defendant or defendants, but the plaintiff or plaintiffs shall and may have his execution or decree against the goods or other property of the defendant or defendants; and in case any person now is detained in custody in England or Ireland under any execution or decree in such suit or proceeding, the sheriff or other officer having such person in his custody shall forthwith discharge him therefrom: and the plaintiff or plaintiffs in such suit or proceeding shall and may, notwithstanding such discharge, issue any other

(*k*) *Robinson* v. *Purday*, 16 Mee. & Wels. 11.

(*l*) *Peyton* v. *Watson*, 2 G. & D. 750; 3 Q. B. 658.

execution or take any other proceeding for recovering his demand and his costs out of the property, real or personal, of the person so discharged."

4 & 5 Vict. c. 36.

Enactments and provisions of recited act respecting proceedings for the recovery of certain tithes and other ecclesiastical dues extended to all ecclesiastical courts in England.

Lastly, by 4 & 5 Vict. c. 36, it is enacted as follows:— "All the enactments and provisions of 5 & 6 Will. 4, c. 74, respecting suits or other proceedings in any of her majesty's courts in England, in respect of tithes, oblations and compositions of or under the yearly value of ten pounds, and of any great or small tithes, moduses, compositions, rates or other ecclesiastical dues or demands whatsoever, of or under the value of fifty pounds, withheld by any Quaker, shall extend and be applied to all ecclesiastical courts in England."

SECT. 3.—*Fees.*

Divisions of subject.

The sources of income to the clergy mentioned in this section may be divided into two heads—(1.) What are commonly called "surplice fees." (2.) Fees for other acts performed in virtue of their office by beneficed clergy.

What are surplice fees.

"Surplice fees," also sometimes called offerings or oblations (*l*), are those which are paid to the minister for performing certain of the offices of the church for the behoof of individual members.

As to baptism.

It has already been said that no fee is due for the administration of baptism (*m*).

Since the chapter on Baptism went to press, a bill, brought into parliament by the Bishop of Winchester, has become law.

35 & 36 Vict. c. 36.

This act, reciting that doubts have been entertained whether in certain churches and chapels, under the authority of certain local statutes or of custom, fees may not be demanded for the administration of baptism or the registration thereof, and that it is expedient that such doubts should not exist, enacts, that "it shall not be lawful for the minister, clerk in orders, parish clerk, vestry clerk, warden, or any other person, to demand any fee or reward for the celebration of the sacrament of baptism or for the registry thereof."

This act, however, "shall not apply to the present holder of any office who may at the present time be entitled by any act of parliament to demand such fees."

Marriage.

The law as to fees on marriages has been already mentioned (*n*).

(*l*) Degge, pt. 2, c. 23. (*m*) *Vide supra*, pp. 663, 664.
(*n*) *Vide supra*, pp. 814—816.

The law as to fees or "accustomed offerings" on churchings has been already mentioned (*o*).

Churching.

The law as to fees on burials has been already mentioned (*p*).

Burial.

Where the clergyman is entitled to a fee for performing any of these offices, the parish clerk or sexton is often also entitled to a fee for performing his part in the office or ceremony (*q*).

Clerk and sexton.

The fees for these offices depend on custom, and have varied very much in different places. It has sometimes, too, been difficult to prove that any fee of constant amount has been customarily paid.

Fees depend on custom.

Now, by 59 Geo. 3, c. 134, s. 11, "It shall be lawful for the commissioners" (that is, now the Ecclesiastical Commissioners), "and they are hereby empowered to make and fix any table of fees for any parish, with the consent of the vestry or select vestry, or persons exercising the powers of vestry in such parish, and also to make and fix any such table of fees for any extra-parochial place, or in or for any district, chapelry, or parochial chapelry in which any church or chapel shall be built or appropriated, under the provisions of the above-recited act or this act, with the consent, nevertheless, in all such cases of the bishop of the diocese; and all fees so fixed may be demanded, received, sued for, prosecuted, and recovered, by the spiritual person, or clerk, or sexton, to whom the same shall be assigned, in like manner, and by such and the same means, as any ancient legal fees of a like nature may be sued for, prosecuted and recovered."

59 Geo. 3, c. 134. Power of ecclesiastical commissioners to fix fees.

The division of these fees between the incumbents of old and new parishes in cases where a parish has been divided will, so far as it has not been already treated of, be mentioned in the chapter on The Division of Parishes.

Division of fees.

Where these fees are taken by the minister or chaplain of any chapel, it seems that he is accountable for the same to the parson of the mother church (*r*).

Chaplains accountable to parson.

The same provisions as to the commutation or non-commutation of surplice fees are made by the Tithe Commutation Acts, 6 & 7 Will. 4, c. 71, s. 90, and 2 & 3 Vict. c. 62, s. 9, as are made with respect to Easter offerings and mortuaries (*s*).

Commutation of.

(*o*) *Vide supra*, pp. 833, 834.

(*p*) *Vide supra*, pp. 862—873; *et vide Dean and Chapter of Exeter's case*, 1 Salk. 334.

(*q*) *Vide infra*. Part VI. on these officers.

(*r*) God. 427: *Moysey* v. *Hillcoat*, 2 Hagg. 48: *Liddell* v. *Rainsford*, L. R., Weekly Notes (1868), 30. *Vide supra*, pp. 316—318.

(*s*) *Vide supra*, p. 1598.

Altarage.

These surplice fees and the other minor offerings are often in old books spoken of under the name of altarage.

Altarage, it is said, comprehends not only the offerings made upon the altar, but also all the profit which accrues to the priest by reason of the altar, *obventio altaris* (*t*).

Out of these, the religious assigned a portion to the vicar; and sometimes the whole altarage was allotted to him by the endowment (*u*).

Legal decisions as to.

Since the Reformation, divers disputes have arisen, what dues were comprehended under the title of *altaragium*: which were thus determined in a trial in the Exchequer, in 21 Eliz., viz.: "Upon hearing of the matter, between *Ralph Turner*, Vicar of West Haddon, and *Edward Andrews*, it is ordered, that the said vicar shall have by reason of the words *altaragium cum manso competenti* contained in the composition of the profits assigned for the vicar's maintenance, all such things as he ought to have by these words according to the definition thereof made by the Reverend Father in God John Bishop of London, upon conference with the civilians David Hewes, Judge of the Admiralty, Bartholomew Clerk, Dean of the Arches, John Gibson, Henry Joanse, Lawrence Hewes, and Edward Stanhope, all Doctors of the Civil Law; that is to say, by *altaragium*, tithes of wool, lambs, colts, calves, pigs, goslings, chickens, butter, cheese, hemp, flax, honey, fruits, herbs, and such other small tithes, with offerings that shall be due within the parish of West Haddon." And the like was for Norton in Northamptonshire, in the same court, within two or three years before, upon hearing, ordered in like manner (*x*).

Yet it seems to be certain, that the religious when they allotted the altarage in part or in whole to the vicar or capellane, did mean only the customary and voluntary offerings at the altar, for some divine office or service of the priest, and not any share of the standing tithes, whether prædial or mixed (*y*).

And in *Franklyn* v. *The Master and Brethren of St. Cross*, in 1721, it was decreed, that where *altaragium* is mentioned in old endowments, and supported by usage, it will extend to small tithes, but not otherwise (*z*).

Altarage at St. Paul's.

It is most probable, that the greatest annual revenue by *altars*, if not by *altarages*, in any one church within this

(*t*) God. Repertor. Canon. 339.

(*u*) Id. Introd. 51.

(*x*) Ken. Par. Ant. Gloss. Cod. 339.

(*y*) Ken. Par. Ant. Gloss.

(*z*) Bunb. 79. That this word is to be explained by usage, see also 2 Buls. 27, and Het. 137; to which add Ath. 12 and 18.

realm, was in that of St. Paul, London. For when the chantries were granted to King Henry VIII., whereof there were forty-seven belonging to St. Paul's, there were in the same church at that time no less than fourteen several altars. And although they were but chantry priests that officiated at them, and had their annual salaries on that account, distinct from altarages in the proper sense of oblations; yet in regard these annual profits accrued by their service at the altar, they may not improperly be termed *pension altarages*, though not *oblation altarages* (*a*).

Fees other than surplice fees.

There are various fees due to the beneficed clergy for acts done or authorized by them in virtue of their office, besides those due for their spiritual ministration in the cases already mentioned, which have been called surplice fees.

Searches of and copies from registers.

The minister of any church is entitled to a fee for searching the register books of baptisms and burials, and for giving copies of entries therein. This right is expressly saved by 52 Geo. 3, c. 146, s. 16 (*b*).

As to marriages, he is, by 6 & 7 Will. 4, c. 86, s. 35, to allow searches at all reasonable times of any register book in his keeping, and to give a copy certified under his hand of any entry therein upon payment of fees as follows: "For every search extending over a period of not more than one year the sum of 1*s.*, and 6*d.* additional for every additional year, and the sum of 2*s.* 6*d.* for every single certificate."

Duplicate marriage register.

He is also, by 1 Vict. c. 22, s. 27, to be paid for making the duplicate register of marriage for the superintendent registrar, at the rate of 6*d.* for each entry.

Monuments and vaults.

The rector or vicar is also entitled to fees for the erection of gravestones and monuments in churchyards, the affixing of monumental tablets to the walls of churches, and the construction of vaults, in the cases mentioned in the Chapter on Burial (*c*).

(*a*) God. Introd. 51.
(*b*) *Vide supra*, p. 655.
(*c*) *Vide supra*, Part III., Chap. X., Sect. 7, pp. 883, 886, 887.

CHAPTER V.

WASTE AND DILAPIDATIONS.

SECT. 1.—*The General Law.*
2.—*Ecclesiastical Dilapidations Acts of* 1871 *and* 1872.

SECT. 1.—*The General Law.*

Ecclesiastical persons subject to the law of waste.

IT has been said that ecclesiastical persons are subject to certain rules of law as to the committal of waste on their estates. It is obvious that no ecclesiastic can enjoy his benefice or preferment for more than his life at furthest; and in the eye of the law every person in succession in an ecclesiastical corporation sole is a quasi-tenant for life, having the freehold and an estate for life in his benefice or preferment, but no more.

General law of waste.

The law as to waste in general is thus laid down by Mr. Joshua Williams (*a*), "Every tenant for life, unless "restrained by covenant or agreement, has the common "right of all tenants to cut wood for fuel to burn in the "house, for the making and repairing of all instruments "of husbandry, and for repairing the house, and the hedges "and fences, and also the right to cut underwood and lop "pollards in due course. But he is not allowed to cut "timber, or to commit any other kind of waste: either by "voluntary destruction of any part of the premises, which "is called *voluntary* waste, or by permitting the buildings "to go to ruin, which is called *permissive* waste."

Again, Mr. Williams says (*b*), "So a tenant for life "cannot plough up ancient meadow land; and he is not "allowed to dig for gravel, brick, or stone, except in such "pits as were open and usually dug when he came in; "nor can he open new mines for coal or other minerals, "nor cut turf for sale on bog lands; for all such acts "would be acts of voluntary *waste*. But to continue the "working of existing mines, or to cut turf for sale in bogs "already used for that purpose, is not waste; and the "tenant may accordingly carry on such mines and cut "turf in such bogs for his own profit."

(*a*) Principles of the Law of Real Property (7th ed.), p. 23.
(*b*) Ibid., p. 24.

All waste of this kind, whether *voluntary* or *permissive*, is called in the ecclesiastical law dilapidations.

Known to ecclesiastical law as dilapidations.

In the Report of the commissioners of 1832, it is said:

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"If any spiritual person holding any preferment for life allow the parsonage house, stables, barns, or any other of the buildings, or the fences, on the property of the church, to fall into decay, or commit or allow to be committed any wilful waste on the same, he may be proceeded against in the ecclesiastical court, and compelled to make the necessary reparation. In case of accident by fire, the same responsibility attaches.

"Though suits of this description are infrequent, we think that this branch of jurisdiction ought to be retained, and that it may, when necessary, be beneficially exercised by the provincial courts. Some modifications may, however, be advantageously introduced. These proceedings have hitherto been carried on in the criminal form: in lieu of this, we are of opinion, that a civil suit should be substituted, and the defendant compelled by sequestration to obey the orders of the court; preserving to all the authorities of the church, the patron and parishioners, a right to institute the proceedings.

"When the chancel is repaired by a spiritual incumbent, the proceeding just described will in every respect apply; but in cases where a lay rector or other impropriator is bound to repair, it may not be expedient to enforce a sentence given in a civil suit by sequestration issuing from the ecclesiastical court; but we anticipate no inconvenience from this circumstance, if the suggestions we have made for carrying the process of the provincial courts into effect be adopted. The right of bringing these suits should be subjected to the same regulations as those proposed for suits instituted against spiritual incumbents.

"Suits for dilapidations may also be brought upon any vacancy made by the incumbent, against him or his personal representatives, by the successor to the benefice. This jurisdiction, which is enjoyed in common with the courts of common law, we think ought to be preserved.

"Doubts have been entertained, whether suits for dilapidations could be brought against perpetual curates. We are humbly of opinion, that all such or any similar persons holding preferment for life, whether in the strict acceptation of the term perpetual curates or not, should, in respect of all property they hold in right of the church, be liable on account of dilapidations to all proceedings which may be lawfully carried on against spiritual rectors or vicars.

"During the last half-century, land has frequently, upon

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enclosures taking place, been allotted to benefices in lieu of tithes: there may be some question whether the general rules applicable to dilapidations could be extended to such allotments; this doubt should in our judgment be set at rest, by declaring that all property of the church so acquired should with respect to dilapidations be deemed glebe.

"It will be desirable also to invest the provincial courts with power, upon application, to allow mines to be opened and worked, upon conditions equitable and fair to the persons at present holding spiritual preferment and their successors; and in all cases of this description, notice should be given to the patron" (c).

Definition in Parson's Counsellor.

A dilapidation, according to Parson's Counsellor (d), is the pulling down, or destroying in any manner, any of the houses or buildings belonging to a spiritual living, or suffering them to run into ruin or decay; or wasting or destroying the woods of the church; or committing or suffering any wilful waste in or upon the inheritance of the church. And certainly, he adds, there can be nothing worse becoming the dignity of a clergyman than non-residence and dilapidations, which for the most part go hand in hand.

Not identical.

It is not to be always assumed that the law of waste, applied to ecclesiastical persons, is exactly the same as that applied between ordinary tenants for life and remaindermen. The following points have, however, been expressly decided in the law of waste as applicable to ecclesiastical persons:—

That they may not commit waste by felling wood or the like (e).

That they may not open new mines or gravel pits and the like. This was at one time otherwise ruled in the *Countess of Rutland's case* (f): but the law is now well settled to the contrary (g).

The law of permissive waste is very much the same as that applied to the cases of tenants for life.

Remedies where waste is committed.

The remedies in these cases are very numerous.

If a bishop cut down and sell the trees of his bishopric, or a parson or prebendary commit waste, a prohibition lies at common law (h), for which there is a writ in the register (i).

(c) Rep. of Eccles. Comm. 51.

(d) B. 1, c. 8.

(e) Gibs. 661; *Duke of Marlborough* v. *St. John*, 21 L. J., Ch. 381; *Sowerby* v. *Fryer*, 8 L. R., Eq. 417.

(f) 1 Lev. 107; 1 Siderfin, 152.

(g) *Knight* v. *Mosely*, Ambl. 176; *Huntley* v. *Russell*, 13 Q. B. 572; 13 Jur. 837; *Holden* v. *Weekes*, 1 John. & Hem. 278.

(h) 2 Roll. Ab. 813; Regist. 72 a.

(i) Gibs. 661.

In the case of *Jefferson* v. *The Bishop of Durham*, it was holden, however, that the Court of Common Pleas had no power to issue an original writ of prohibition to restrain a bishop from committing waste in the possessions of his see, at least at the suit of an uninterested person (*k*).

Moreover, it was holden in the *Bishop of Salisbury's case* (*l*) that the ecclesiastical courts might punish a bishop, parson or other ecclesiastical person for cutting down trees upon the lands, unless it be for reparations of their ecclesiastical houses, and for doing or suffering to be done any dilapidations; and Lord Coke thinks that dilapidations (which in the ecclesiastical courts clearly include waste) are sufficient cause for deposing or depriving a bishop (*m*), but the circumstances must be of a very aggravated character which would warrant such a sentence.

The Court of Chancery will also grant an injunction at the suit of the patron to restrain waste (*n*).

And it is said that a similar injunction will be granted against a bishop at the suit of the attorney-general (*o*).

But the patron cannot pray an account of the waste already committed, for he cannot have any profit from the living (*p*).

Action for damages.

An action for damages by the succeeding incumbent against his predecessor, or the personal representatives of his predecessor, will in some cases lie.

It has sometimes been thought that such an action would lie in all cases of waste. So Gibson (*q*) and, following him, Dr. Burn (*r*) are of opinion.

The point seems to have been rather assumed than decided in the case of *Huntley* v. *Russell* (*s*), where a new gravel pit had been opened and part of the gravel therein sold by the incumbent, and his representatives were holden liable in an action for the value of the gravel.

The point, however, was very carefully considered in the recent case of *Ross* v. *Adcock* (*t*); and the Common Pleas

(*k*) 1 Bos. & Pull. 105.

(*l*) Godb. 259.

(*m*) *Bagge's case*, 11 Co. 99; 3 Bulstr. 158; Salk. 135; Serjt. Hill's MS. Notes.

(*n*) *Bradley* v. *Strachey*, 3 Barnard. 399; *S. C.*, 2 Atk. 217; *Hoskins* v. *Featherstone*, 2 Br. 552, are the earliest cases.

(*o*) *Jefferson* v. *Bp. of Durham*, 1 Bos. & Pull. 105.

(*p*) *Knight* v. *Mosely*, Ambl. 176; *Holden* v. *Weekes*, 1 John. & Hem. 278.

(*q*) P. 752.

(*r*) Title Dilapidations; and see Ref. Leg. s. 39 b; Viner, Abr. tit. Waste (O. 5, 6, 7); Serjt. Hill's MS. Notes.

(*s*) 13 Q. B. 572; 18 L. J., Q. B. 240; 13 Jur. 837: see note to *Ross* v. *Adcock*, in 3 L. R., C. P., at p. 670.

(*t*) 3 L. R., C. P. 655; 16 W. R. 1193.

held that the right of a rector to recover from the representatives of his predecessor damages at law for waste is confined to the case of dilapidations to houses and buildings, and does not extend to waste committed by digging gravel on the glebe.

It had been previously holden that no action for damages would lie against the executors of a prior incumbent for miscultivation of the glebe land (*s*).

Opening mines.

On the general law as to the right of an ecclesiastical person to open mines, the two following important cases have been decided:

In *Bartlett* v. *Phillips* (*t*), the coal under parts of the glebe of a vicarage had, at different times since 1756, with the consent of the vicars for the time being, been gotten by the persons working adjoining collieries, and royalties had been paid to the vicars for the time being, the working being conducted solely by underground passages from the adjoining collieries without entering on the surface of the glebe. In 1844 the then vicar demised the minerals in the glebe to a mining company, so that the surface of the glebe was not broken, and he received considerable sums by way of royalty from this company.

It was holden by the lords justices that the mines were not old ones previously opened, that the vicar had no right to receive these royalties, and that they must be invested for the permanent benefit of the living.

In the case of *Holden* v. *Weekes* (*u*) it was holden, that the incumbent of a living cannot open mines without the consent of the patron and ordinary; and that it is doubtful whether he can do so with such consent.

Upon a bill by patron to have an agreement between himself and the incumbent, for opening and working mines, declared void and cancelled, and to restrain future workings—the court declared that the workings were not lawful, and that the proceeds ought to be laid out for the permanent benefit of the living; but, being of opinion, that if duly authorized, the workings would be beneficial to the living, directed an inquiry what steps should be taken to obtain the concurrence of all necessary parties, and gave liberty to continue the workings in the meantime, subject to account.

Cutting timber.

As regards the felling of timber, it was decided by Lord

(*s*) *Bird* v. *Relfe*, 1 Nev. & Mann. 415; 4 B. & Ad. 826; 2 Ad. & Ell. 773.

(*t*) 4 D. G. & J. 414.

(*u*) 1 John. & Hem. 278; 6 Jur., N. S. 1288; 30 L. J., Cha. 35.

Eldon in the case of *Wither* v. *The Dean and Chapter of Winchester* (*x*), that ecclesiastical bodies, having the right to fell timber for the repairs of their buildings, are not bound necessarily to apply the specific timber, where it has grown upon portions of their property in parts of the country very distant (in this case eighteen miles) from the buildings to be repaired.

In the case, however, of *The Duke of Marlborough* v. *St. John* (*y*), this right of selling timber for repairs was much doubted, and the circumstance that the rector had applied a much larger sum in the repairs of the rectory house than the proceeds of the sale of timber cut by him, was holden not to be an answer to a case made against him of cutting and selling timber in a suit instituted by the patron.

And in the case of *Sowerby* v. *Fryer* (*z*), the purposes for which a vicar is entitled to cut timber are limited to proper and necessary repairs for the vicarage house, buildings, and premises. He may not, it was said, fell timber for the purpose of making a general repairing fund; and the expression of Lord Hardwicke, in *Knight* v. *Mosely* (*a*), that "parsons have been indulged in selling timber and stone where the money has been applied in repairs," merely means that where the trees or the quarries are far distant from the spot where they are wanted, the timber or stone may be sold, and similar materials purchased on the spot with the proceeds.

Chancels, houses, fences and buildings.

As to chancels, and the houses, fences and buildings (*b*) on an ecclesiastical benefice, some alteration in the general law and a total alteration in the mode of procedure has been made by the Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43). This act, however, is for the most part confined to the case of the parochial clergy; and for many purposes the old law remains still material.

Under the old law it was said that a bishop as soon as he is installed, and a rector or vicar as soon as he is inducted, ought to procure workmen, as carpenters, masons, tilers, and others skilled in building, to view the dilapidations, or whatsoever shall want repairing, and write down for what sum a workman will or may rebuild or repair the same, and set their hands to the same for a

(*x*) 3 Meriv. 421.
(*y*) 5 D. G. & Sm. 154; 21 L. J., Cha. 381: 16 Jur. 310.
(*z*) 8 L. R., Eq. 417.
(*a*) Ambl. 176.
(*b*) Barns and other buildings, the use whereof is no longer required for storing the tithe of produce, may be pulled down. See 6 & 7 Will. 4, c. 76, s. 87; 2 & 3 Vict. c. 62, s. 15, p. 1522, *supra*.

Chancels, houses, fences and buildings.

Old law.

memorial thereof when they shall be called to be witnesses thereunto. For after this inspection shall be made, such bishop, rector, or vicar, may commence his suit for dilapidations when he pleases. And such workmen, in support of the action, ought to prove that such decay cannot sufficiently be repaired or amended for less than such sum, and that they themselves would not do it for less. And that such proof may be sufficient, it is requisite, that there be two witnesses in every particular, and not one witness to one kind of work only, and another to another (*b*).

If the benefice has been vacant for some time, as for three or four years; or if the incumbent has not sued for some time after his induction or installation, nor caused the dilapidations to be viewed and estimated; he shall not be entitled to recover the whole sum estimated for dilapidations, but consideration shall be had of the time elapsed from the cessation of the last incumbency, and a proportionable deduction made for the decays which may reasonably be supposed to have happened during such intermediate time (*c*).

Constitution of Edmund.

More particularly, concerning dilapidations, the following constitutions and statutes have been made:

"If the rector of a church at his death shall leave the houses of the church ruinous or decayed, so much shall be deducted out of his ecclesiastical goods as shall be sufficient to repair the same, and to supply the other defects of the church. The same we do decree concerning those vicars who have all the revenues of the church, paying a moderate pension. For inasmuch as they are bound to the premises, such portion may well be deducted, and ought to be reckoned amongst the debts. Always, nevertheless, having a reasonable regard to the revenues of the church, when such deduction is to be made" (*d*).

Shall leave the Houses of the Church ruinous or decayed.—As the manse of the rectory or vicarage, and other buildings whatsoever, the building or reparation whereof pertains to the rector or vicar *immediately*. But otherwise it seems to be of those houses the building or reparation whereof pertains to others, as of tenants and vassals, by virtue of the tenure of their lands (*e*).

So much shall be deducted.—That is, by the ordinary, when administering the goods of the deceased according to the old law.

(*b*) Clarke, Tit. 121; 1 Ought. 253.

(*c*) Clarke, Tit. 126; 1 Ought. 255.

(*d*) Edm. Lind. 250.

(*e*) Id.

Out of his Ecclesiastical Goods.—Which he has obtained in the right of his church; for such goods by tacit agreement are bound to the said reparation; but suppose (says Lindwood) he has not ecclesiastical goods sufficient, whether such reparation ought to be made out of his patrimonial goods, has been made a question. It seems (he says) that if he has employed his ecclesiastical goods in the improving of his patrimony, or if by too much attention to his worldly affairs he has neglected his ecclesiastical; in such case he is bound to make satisfaction out of his patrimonial goods (*f*).

As shall be sufficient.—And if there be not sufficient, then so far forth as the goods will extend (*g*).

To repair the same.—Having regard to the exigencies and quality of the thing to be repaired, so as the same be for necessity, but not for pleasure (*h*).

And to supply other Defects of the Church.—So far forth as they belong to the rector or vicar to be sustained (*i*).

Ought to be reckoned amongst the Debts.—And, therefore, to be preferred before legacies; for legacies are not to be paid until the debts shall be first satisfied (*k*).

Priority of debts.

But albeit the law allows the payment of dilapidations before legacies, yet the same are not to be paid before other debts; for the common law (Sir Simon Degge says) prefers the payment of debts before damages for dilapidations (*l*).

Of late years it has been in terms decided that the executor of a deceased incumbent is bound to satisfy simple contract debts before paying for dilapidations by the testator.

Therefore, in a suit on the custom of England for dilapidations, by the successor of a deceased incumbent against the executor, it is a good plea that, since the commencement of the suit, defendant has paid simple contract debts, leaving no assets to be administered (*m*).

It seems, however, that in the administration of equitable assets in the Court of Chancery claims for dilapidations must be satisfied *pari passu* with specialty and simple contract debts (*n*).

Constitution of Othobon.

"To the intent that we may provide a remedy against the covetousness of divers persons, who although they

(*f*) Edm. Lind. 250.
(*g*) Id.
(*h*) Id.
(*i*) Id.
(*k*) Id.
(*l*) Deg. p. 1, c. 8.
(*m*) *Bryan* v. *Clay*, 1 Ell. & Bl. 38.
(*n*) *Burgess* v. *Bissett*, 2 Jur., N. S. 1221.

Constitution of Othobon.

receive much substance from their churches and ecclesiastical benefices, do yet neglect their houses and other edifices, so as not to preserve them in repair, nor build them when ruinous and fallen down; by reason whereof deformity occupieth the state of the churches, and many inconveniences ensue: we do ordain and establish, that all clerks shall take care decently to repair the houses of their benefices and other buildings, as need shall require; whereunto they shall be earnestly admonished by their bishops or archdeacons; and if any of them, after the monition of the bishop or archdeacons, shall neglect to do the same for the space of two months, the bishop shall cause the same effectually to be done, at the costs and charges of such clerk, out of the profits of his church and benefice, by the authority of this present statute; causing so much thereof to be received as shall be sufficient for such reparation. The chancels also of the church they shall also cause to be repaired by those who are bound thereunto, according as is above expressed. Also we do injoin, by attestation of the divine judgment, the archbishops and bishops, and other inferior prelates, that they do keep in repair their houses and other edifices, by causing such reparations to be made as they know to be needful" (*o*).

That all Clerks shall take care.—Under which general expression are comprehended curates and prebendaries, and all others having any ecclesiastical benefice whatsoever (*p*).

This seems to have been at one time doubted (*q*); but the law is now clearly settled that perpetual curates are liable for dilapidations (*r*). Vicars choral, if they have a house by virtue of their office, are similarly liable (*s*).

Whereunto they shall be earnestly admonished by their Bishops or Archdeacons.—And this has sometimes been done by a general monition throughout the diocese or deanery (*t*).

Constitution of Mepham.

" We do ordain, that no inquisition to be made concerning the defects of houses or other things belonging to an ecclesiastical benefice, shall avail to the prejudice of another, unless it be made by credible persons sworn in form of law, the party interested being first cited thereunto. And the whole sum estimated for the defects of houses or

(*o*) Othob. Athon, 112.
(*p*) Id.
(*q*) *Curate of Orpington's case*, 3 Keb. 614.
(*r*) *Mason* v. *Lambert*, 12 Ad. & Ell., N. S. 795; *vide supra*, p. 305.
(*s*) *Gleaves* v. *Parfitt*, 7 C. B., N. S. 838; *vide supra*, p. 162.
(*t*) Gibs. 751; see 1 Still. 61.

other things belonging to ecclesiastical benefices, whether found by inquisition, or by way of composition made, the diocesan of the place shall cause it to be applied to the reparation of such defects, within a competent time to be appointed by his discretion" (*u*).

Inquisition to be made.—Which may be done, not only at the instance of any party interested, but also by the judge himself *ex officio*. For the ordinary, without any application made by any person, may cause the houses of the church to be convenably repaired out of the profits of the benefice. And such inquisition as aforesaid may be made without any fame of the defects preceding. And the reason is because it is done, not for deprivation of the parson, but for the amendment of the defects (*x*).

Concerning the Defects of Houses or other Things belonging to an Ecclesiastical Benefice.—That is, of which the beneficed person has the burthen and charge of reparation; as of the chancel, inclosures, hedges, ditches, and such like (*y*).

Shall avail to the prejudice of another.—That is, of the beneficed person himself, if he be living; or of his executors or administrators, if he be dead (*z*).

13 Eliz. c. 10.

By 13 Eliz. c. 10, "Where divers ecclesiastical persons, being endowed and possessed of ancient palaces, mansion-houses, and other edifices and buildings belonging to their ecclesiastical benefices or livings, have not only suffered the same, for want of due reparations, partly to run to great ruin and decay, and in some part utterly to fall down to the ground, converting the timber, lead, and stones to their own benefit; but also have made deeds of gift, colourable alienations, and other conveyances of like effect, of their goods and chattels in their life-time, to the intent and of purpose, after their deaths, to defeat and defraud their successors, of such just actions and remedies as otherwise they might and should have had for the same against their executors or administrators by the laws ecclesiastical of this realm; to the great defacing of the state ecclesiastical, and intolerable charges of their successors, and evil precedent and example for others, if remedy be not provided:" it is therefore enacted, "that if any archbishop, bishop, dean, archdeacon, provost, treasurer, chancellor, prebendary, or any other having any dignity or office in any cathedral or collegiate church: or if any parson, vicar or other incumbent of any ecclesiastical

(*u*) Mepham, Lind. 254.
(*x*) Id.
(*y*) Id.
(*z*) Id.

13 Eliz. c. 10.

living whereunto belong any house or houses, or other buildings, which by law or custom he is bound to keep and maintain in reparation, do make any deed or gift, or alienation or other like conveyance of his movable goods or chattels, to the intent and purpose aforesaid; the successor of him that shall make such deed of gift or alienation, shall and may commence suit, and have such remedy in any ecclesiastical court of this realm competent for the matter, against him or them to whom such deed of gift or alienation shall be so made, for the amendment and reparation of so much of the said dilapidations and decays, or just recompense of the same, as hath happened by his fact or default; in such sort as he might or ought to have, if he to whom such deed of gift or alienation shall be so made, were executor or administrator of him that made such deed or alienation."

Against their Executors or Administrators.—This act only makes provision against the particular abuse of fraudulent deeds to defeat the successor, after the incumbent is dead; but by the rules of the church (as appears by the foregoing constructions), the ordinary, in case of dilapidations, hath a right to take cognizance of them, during the life of the incumbent, either by voluntary inquisition, or upon complaint made to him; or to enforce reparation by sequestering of the profits, or by ecclesiastical censures, even to deprivation (*a*).

Their Executors or Administrators.—In a suit for dilapidations in the spiritual court, the executor of an administrator prayed a prohibition, upon oath that he had no goods of the first intestate; and the court agreed, that the executor of the administrator is not liable, unless he has goods of the first intestate, or be administrator of goods not administered by such administrator; upon which, the prohibition was granted and stood (*b*).

By the Laws Ecclesiastical of this Realm.—In acknowledgment of the right of the ecclesiastical courts to the sole cognizance in the case of dilapidations, a writ of consultation is provided in the register (*c*).

And Sir Simon Degge says, suits for dilapidations are most properly and naturally to be brought in the spiritual courts: and no prohibition lies. But nevertheless, he says, the successor may (if he will) upon the custom of England, have a special action upon the case against the dilapidator, his executors or administrators (*d*).

(*a*) Gibs. 753; 3 Inst. 204.
(*b*) Gibs. 753; 3 Keb. 619.
(*c*) Gibs. 753.
(*d*) Deg. p. 1, c. 8; Wats.

Bunbury v. *Hewson.*

In the case of *Bunbury* v. *Hewson*, H., the incumbent of a vicarage, died leaving the buildings of the vicarage out of repair. B. succeeded him, and died, whereupon S. was appointed. The premises still being dilapidated, the executrix of B. was compelled to pay S. the amount necessary to put them in repair, and she then brought an action against the executor of H., and it was holden that the action was maintainable. Also that the custom of England for rectors and vicars to leave their houses in repair to their successors, was transferred to Wales by 27 Hen. 8, c. 26 (*e*).

How to proceed against sequestrator and incumbent for dilapidations.

In *Hubbard* v. *Beckford* (*f*), Lord Stowell held the sequestrator liable to demands for dilapidations, and overruled the objection, that he was not liable for more than the surplus on rendering his account. "On a general principle (he said) I am inclined to hold that the sequestrator will be liable to dilapidations. The king's writ issues to the bishop to levy a sum for the discharge of the debt. The writ has been truly described as mandatory to the bishop, who is in a general sense only ministerial. The sequestrator is a kind of bailiff to the bishop. There is no mention of any purpose but the payment of the particular debt; it is however a thing incident to, and inseparable from, the subject-matter itself, that there are certain duties and expenses for which the sequestrator is bound to provide. The instrument issues under the authority of the bishop, and contains a clause of allowance for all necessary charges, and I do not know on what principle it can be maintained, that the repairs of the chancel and of the parsonage are not necessary charges;" and he adds, that the bishop has no power of exonerating the sequestrator from these charges. So too in *Wingfield* v. *Watkins* (*g*), the same great authority laid down the same principle as to the duty and liability of the sequestrator: "There can be no doubt that he may be compelled, by process in the bishop's court," to make the necessary repairs. He may be compelled by the bishop and churchwardens. See the note to this case, in which Lord Stowell also said, "I do not undertake to say that he may not plead circumstances which exonerate him from this obligation, as far as the authority of this court goes. If he can show that the sequestration has been finished and

c. 39; 1 Bac. Abr. 63; see *Jones* v. *Hill*, 3 Lev. 268; *Day* v. *Hollington*, cited in the previous case; *Radcliffe* v. *Doyly*, 2 T. R. 630.

(*e*) 3 Ex. Rep. 558.
(*f*) 1 Consist. 307.
(*g*) 2 Phill. 8.

determined, and that the accounts have been made up, he may not be liable here—he may be liable elsewhere, but it does not seem to me that this court can interfere, after his sequestration has closed, and his connexion with the living has ceased" (*h*).

Cases as to dilapidations in ecclesiastical courts.

In *North* v. *Barber*, a case of dilapidations at St. Cross, where there were conflicting estimates, the tender of the defendant was affirmed with costs (*i*). In the *Case of Little Hallingbury, Essex* (*k*), the court directed the balance of a sequestrator's account remaining in the registry, upon the death of the incumbent (who had been discharged under the Insolvent Debtors' Act, and an assignee appointed), to be paid to the assignee, although no personal representative was before the court.

Opinion of Lord Stowell.

The master, fellows, &c. of St. John's College, Cambridge, patrons of the living of Morteisne, in Bedford, applied to Lord Stowell (then Sir William Scott) for advice as to the proper manner of proceeding against a non-resident incumbent for dilapidations, and received this opinion for answer:—

"The proceedings in this case ought to be by what is technically called, 'The office of the judge promoted' against the incumbent, that is, by calling upon the incumbent in a complaint of dilapidations. It is proper that the party should be cited, and if he does not appear, the court may proceed notwithstanding his absence, and may issue a commission directed to clergymen and laymen, i. e., to able and experienced workmen, who are to survey the buildings and other appendages of the benefice, being sworn that they will make due inquisition. Upon the return of the inquisition, the court may proceed to sequester the profits, to be applied within a reasonable time for the repairs, allowing at the same time for the service of the church, and the support of the incumbent himself. For the repairs ought to be done gradually and and not all at once, so as to occupy the whole profits, leaving nothing for these purposes. The costs must be paid out of the sequestration."

"W. Scott, April 7, 1792."

Where lands are vested in trustees.

In a declaration by a vicar against his predecessor for dilapidations, he averred that he was seised in right of his vicarage: it appeared that part of the premises were copyhold, and devised to the master and senior fellows of a college, in trust to permit the vicar to receive the profits arising therefrom, after deducting certain charges which

(*h*) 2 Phill. 8. (*i*) 3 Phill. 307. (*k*) 1 Curteis, 556.

might accrue to the lord of the manor, or the expenses attending the repairs of the premises:—It was holden that the legal estate was vested in the trustees; that the use was not executed within the statute 9 Geo. 2, c. 36, and consequently that the plaintiff was not entitled to recover (*l*).

Where successive rectors had been in possession of land for above fifty years past, but in an action for dilapidations, brought by the present against the late rector, it appeared that the absolute seisin in fee of the same land was in certain devisees, by a devise since 9 Geo. 2, c. 36, and that no conveyance was inrolled according to the first section of that act, nor any disposition of it made to any college, (i. e., according to the fourth section,) it has been holden, that no presumption could be made of any such conveyance inrolled, and consequently that the rector had no title to the land, as the statute avoids all grants, &c., in trust for any charitable use made otherwise than is thereby directed, though in fact it appeared that the title to the rectory was in Balliol College, Oxford (*m*).

Dilapidations on exchange of livings.

As to claims for dilapidations arising on an exchange of livings, the following cases are important.

Two clergymen, being possessed of livings, agreed to exchange the one for the other, with the consent of their respective patrons, and the livings were accordingly resigned into the hands of the bishop, and each party respectively was inducted into the other of them. There was no specific agreement entered into upon the subject of dilapidations, but it was found that neither party at the time contemplated any claim for dilapidations:—It was holden, in an action by one of the incumbents against the other as his successor for dilapidations, that the plaintiff was entitled to recover (*n*).

In this case a doubt was raised whether an express agreement not to claim for dilapidations would not have been simoniacal.

It has, however, been since decided that such an agreement is not necessarily simoniacal, and can be lawfully made (*o*).

14 Eliz. c. 11.

By 14 Eliz. c. 11, s. 6, "all sums of money to be recovered for or in the name of dilapidations, by sentence, composition or otherwise, shall, within two years after such

(*l*) *Browne* v. *Ramsden*, 2 Moo. 612.

(*m*) *Wright* v. *Smythies*, 10 East, 409.

(*n*) *Downes* v. *Craig*, 9 Mee. & Wel. 166; *vide supra*, p. 502.

(*o*) *Goldham* v. *Edwards*, 16 C.B. 437; 17 ib. 141; *vide supra*, p. 1109.

14 Eliz. c. 11.

receipt, be truly employed upon the buildings and reparations, in respect whereof such money for dilapidations shall be paid; on pain that every person so receiving and not employing as aforesaid, shall forfeit double as much as shall be so by him received and not employed; which forfeiture shall be to the use of the queen's majesty, her heirs and successors."

In case of the incumbent's death within the two years, it seems that the same ought to be paid by his executors to the successor, to be laid out by him (and not by the executors) in repairs (*p*).

What repairs can be required.

The executors of a deceased incumbent are not bound to put the rectory-house into a finished state of repair, but are only bound to restore what is actually in decay, and to make such repairs as are absolutely necessary for the preservation of the premises. If the present incumbent has repaired with timber which grew on the glebe, the executors of the late incumbent are entitled to be allowed for the value of such timber in the estimate of dilapidations due from them (*q*).

In *Wise* v. *Metcalf* it was holden that an incumbent of a living is bound to keep the parsonage-house and chancel in good and substantial repair, restoring and rebuilding when necessary, according to the original form, without addition or modern improvement: but he is not bound to supply or maintain anything in the nature of ornament, such as painting (unless that be necessary to preserve exposed timber from decay), and whitewashing and papering; and in an action for dilapidations against the executors of a deceased rector by the successor, the damages are to be calculated upon this principle (*r*). This case contains an exposition of the whole law on this subject.

Properly speaking a faculty or licence should be obtained from the ordinary before alterations of importance are made in the parsonage-house or buildings. It has however been decided that it is not a dilapidation to pull down without a faculty old farm buildings and erect new ones, if the new ones are better than the old ones (*s*). Sheds or hovels of wood erected by an incumbent are removable by his representatives after his death, and no dilapidations can be claimed in respect of their removal, or *à fortiori* their bad state of repair (*t*).

(*p*) Gibs. 754.

(*q*) *Percival* v. *Cooke*, 2 C. & P. 460, *per* Best, J.

(*r*) *Wise* v. *Metcalf*, 10 B. & C. 299.

(*s*) *Huntley* v. *Russell*, 13 Q. B. 572; 13 Jur. 837; 18 L. J., Q. B. 239.

(*t*) Ibid.

In a case where a rector erected in the garden of the rectory, *apart from the rectory house* (*u*), hot-houses about seventy feet long, and between ten and twenty feet high, consisting of a frame and glasswork resting on brick walls about two feet high, and embedded in mortar on these walls: it was holden, that he or his executors in a reasonable time after his death were entitled to remove them, without incurring any liability as for either dilapidations or waste (*x*).

SECT. 2.—*The Ecclesiastical Dilapidations Acts of* 1871 *and* 1872.

34 & 35 Vict. c. 43.

It is now time to notice 34 & 35 Vict. c. 43, the Ecclesiastical Dilapidations Act, 1871, and the amending act, 35 & 36 Vict. c. 96. The first act came into operation on August 1st, 1871. It provides as follows:

Explanation of terms.

Sect. 3. "The term 'benefice' in this act shall comprehend all rectories with cure of souls, vicarages, perpetual curacies, donatives, endowed public chapels, and parochial chapelries, and chapelries or districts belonging or reputed to belong, or annexed or reputed to be annexed, to any church or chapel.

"The term 'patron' shall, with reference to any benefice, mean the person or persons or corporation who, in case such benefice were vacant, would be entitled to present thereto; but if the right to present to such benefice shall be vested in different persons or corporations, whether jointly or by way of alternate presentations, the term patron shall (unless the context requires otherwise) comprehend both or all such different persons or corporations in whom such right of joint or alternate presentations shall for the time being be vested; and as regards the patrons referred to in sections 126, 127 and 128 of the act 1 & 2 Vict. c. 106 (*y*), the actions of or towards such patrons required by this act shall be performed in the manner stated in such sections 126, 127 and 128, as if the said sections were here repeated and made applicable to the provisions of this act.

"The term 'surveyor' shall mean the official surveyor elected under this act, except where otherwise described.

"The term 'governors' shall mean the governors of the

(*u*) See *Buckland* v. *Butterfield*, 2 B. & B. 54.

(*x*) *Martin* v. *Roe*, 7 Ell. & Bl. 237; 3 Jur., N. S. 465; 26 L. J., Q. B. 129.

(*y*) *Vide supra*, pp. 1477. 1478.

Bounty of Queen Anne for the augmentation of the maintenance of the poor clergy.

"The term 'the archdeacon' shall mean the archdeacon of the archdeaconry within which the benefice is situated with regard to which the provisions of this act are sought to be applied.

"The term 'the rural dean' shall mean the rural dean of the rural deanery within which the benefice is situated with regard to which the provisions of this act are sought to be applied."

What included as buildings.

Sect. 4. "The provisions of this act respecting buildings belonging to a benefice shall apply to all such houses of residence, chancels, walls, fences, and other buildings and things as the incumbent of the benefice is by law or custom bound to maintain in repair."

Building out of diocese.

Sect. 5. "For the purposes of this act any building belonging to a benefice shall be deemed to be within the diocese of the bishop under whose jurisdiction the benefice is, although the building be not in fact locally situate within that diocese."

Who to have bishops' powers.

By sects. 6 and 7, archbishops are in their diocese to have the powers here given to bishops. The guardians of the spiritualities during a vacancy, and the person lawfully empowered to exercise his general jurisdiction in the diocese when a bishop is incapacitated, are to exercise the bishop's powers.

As to surveyors of dilapidations:—

Surveyors for each diocese.

Sect. 8. "Within three months after the commencement of this act, a surveyor or surveyors of ecclesiastical dilapidations shall be appointed in and for each diocese by the archdeacons and rural deans, if any, of such diocese, assembled at a meeting convened for that purpose, at which the bishop of the diocese, or in his absence the senior archdeacon present, as to the date of his appointment as archdeacon, shall preside. Every such appointment may be general or for a limited term, and may be for the whole or part of the diocese as shall be stated in the appointment, and shall be subject to the approval of the bishop of the diocese: the bishop shall have power to hear any complaint against the surveyor of neglect, breach of duty, or unfitness for his office, and to remove him from his office after giving him an opportunity of showing cause to the contrary. No surveyor appointed under the provisions of this act shall have any claim to compensation in consequence of the repeal or any alteration of this act."

Their successors.

Sect. 9. "On a vacancy occurring in the office of surveyor, a fit person shall in like manner be appointed within three months from the occurrence of such vacancy."

Sect. 10. "The surveyor shall be paid according to a rate of charges, and not by way of salary, and such charges and also the fees of the bishop's secretary and registrar for work done in pursuance of this act, shall be fixed in each diocese by the bishop, the archdeacons, the rural deans, if any, and the chancellor for the time being of such diocese, assembled at a meeting convened for that purpose, who may from time to time, at a meeting convened for that purpose, revise and alter such rate of charges and fees; but if any such alteration of surveyors' charges be made after the buildings belonging to any benefice shall have been inspected pursuant to this act by a surveyor, the payment of such surveyor for such inspection, and for all subsequent proceedings after such inspection with reference thereto, shall be according to the rate of charges in force at the time of making such inspection."

Payment of surveyors by fixed rate of charges.

By 35 & 36 Vict. c. 96, s. 3, the two archbishops, with their vicars general and the lord chancellor, with consent of the lords of the Treasury, may at any time during 1873 review the rates of fees of secretaries, registrars and surveyors charged under the preceding sections, and may ordain in lieu thereof one uniform table, which they may alter from time to time; this table to be submitted to the Queen in council, and generally dealt with like the tables of fees framed under 1 & 2 Vict. c. 106, s. 131, and 30 & 31 Vict. c. 135 (z).

Power to fix uniform scale of fees and charges.

By 34 & 35 Vict. c. 43, s. 11, the surveyor is not to be interested in contracts made under this act.

As to inspections at other times than when a benefice is vacant:—

Sect. 12. "It shall be lawful for the bishop, on the complaint in writing of the archdeacon, or of the rural dean, or of the patron of a benefice, that the buildings of the benefice are in a state of dilapidation, or at the request of the incumbent, to direct the surveyor to inspect the buildings of the benefice, or any of them; provided always, that a copy of such complaint shall be forwarded by the bishop to the incumbent, or the sequestrator, if any, one month before such inspection shall be ordered."

Inspection may be ordered at request of archdeacon, rural dean, patron, or incumbent.

Sect. 13. "As regards a benefice under sequestration at the time of the commencement of this act, the bishop may, at any time during such sequestration, and as regards a benefice thereafter put under sequestration, the bishop may, within six months after such sequestration issued, direct the surveyor to inspect as aforesaid, and such

As to a benefice under sequestration.

(z) *Vide supra*, pp. 131, 475.

inspection shall be renewed in every fifth year while such benefice shall be under sequestration."

Form of report and service on incumbent.

Sect. 14. "The surveyor shall as soon as conveniently may be after such direction inspect, and within one month after inspection send to the bishop a report of the result of the same, and shall send a copy to the incumbent, and to the sequestrator, if any."

Its contents.

Sect. 15. "Where the surveyor shall report that any works are needed for putting into repair any dilapidated building belonging to a benefice, he shall report,—

1. What works are so needed, specifying the same in detail:
2. What he estimates to be the probable cost of such works:
3. At or within what time or times such works respectively ought to be executed."

Objections by incumbent, and reference thereon.

Sect. 16. "The incumbent, or the sequestrator, if any, may within one month after the sending the said copy, state in writing to the bishop objections to the report on any grounds of fact or law, and in such case the bishop may, if he shall think fit, at the expense of the party objecting, direct a second report to be made by another surveyor or take the opinion of counsel upon any question of law, and the bishop shall, after due consideration of the whole matter, give his decision in writing.

"If no objections to the report shall be made, then, at the end of the period limited for making objections thereto, the report shall be final: and if objections shall have been made, then the report, as modified by the bishop's decision, shall be final."

Incumbent to execute works.

Sect. 19. "In case of a benefice not under sequestration, it shall be the duty of the incumbent to execute the repairs prescribed in the final report in the manner and at or within the time or times therein prescribed, or within such extended time or times as the bishop shall by writing under his hand direct."

Incumbent may borrow from the governors.

By sect. 17, the incumbent may borrow from the governors, with the consent of the bishop and patron, upon the security of the benefice,—

"(1.) The whole or any part of the sum stated in the final report as the cost of the works:

(2.) Such sum as the governors shall think fit in respect of costs and expenses."

Not more than three years' income.

By 35 & 36 Vict. c. 96, s. 1, the amount lent is never to exceed in the whole three years' net income of the benefice.

By the same section, "In fixing the terms of future

advances the governors may either lend moneys, to be repaid by annual instalments with interest on the principal money, or by a fixed sum or sums payable yearly in the form of a terminable annuity, but the rate of interest to be used in all computations shall not exceed four pounds per centum per annum. Upon the appointment of a new incumbent the mortgage term of repayment may be extended in respect of the balance of any loan, if the governors shall so direct, to be certified by a memorandum under the hand of their secretary, endorsed upon or attached to the deed and counterpart, such extension to be kept within the limits prescribed by the said recited acts," *i. e.*, those contained in the schedule to 34 & 35 Vict. c. 43, and mentioned under sect. 62 (*a*).

Loans may be made to be repaid in instalments with interest or by annuity.

Alteration of mortgage term.

By sect. 2. "It shall be lawful for the governors, with the consent in writing, under the hand only, of the mortgagor or of his successor, to change the day of the date of the annual payments payable to them under any mortgage deed, provided that they do not thereby lengthen the period for which the benefice or preferment is encumbered."

Power to change the day of the date of annual payments.

By 34 & 35 Vict. c. 43, s. 18, the sum lent shall be placed in the books of the governors to an account entitled "The Dilapidation Account of A. B., incumbent of ;" out of it the governors shall pay the costs and expenses incidental to the completion of the security.

The governors to keep a dilapidation account.

Sect. 20. "In the case of a benefice under sequestration, the sum stated in the final report as the cost of the works shall be a charge upon the moneys from time to time received by the sequestrator in respect of the net profits or income of the benefice in priority to all other charges, except the stipends of the curate or curates appointed to perform the duties attaching to the benefice, and the sequestrator shall so long as the sequestration shall remain in force pay so much of such profits as shall remain in his hands after payment of the said stipends to the governors until the whole of the sum stated shall have been paid."

Sequestrators to pay dilapidation moneys to the governors.

By sect. 21, moneys paid in respect of a benefice under sequestration shall be placed in the books of the governors to an account called 'The Dilapidation Account of C. D., sequestrator of .' The repairs may be executed as the moneys are received or deferred, with the consent of the bishop, until the whole sum required shall have been paid, and they shall be paid for out of the

Application of money paid by sequestrators.

(*a*) *Vide infra*, p. 1640.

moneys standing to the account as in the case of repairs executed by an incumbent; and if any benefice under sequestration shall become vacant before such repairs shall have been completed, an inspection and report shall be made by the surveyor and proceeded with in the same manner as if such benefice had not been under sequestration; and the amount (if any) which shall have been paid to the governors by the sequestrator in respect of repairs, and not expended, shall be carried to the dilapidation account of the new incumbent in reduction of the amount payable by the late incumbent, his executors or administrators.

Proviso in case archdeacon or patron make complaint of want of repairs.

Sect. 22. "Where complaint shall be made by the archdeacon, or the rural dean, or the patron of the benefice as aforesaid, if the incumbent shall, within twenty-one days after notice of such complaint shall have been given as aforesaid, inform the bishop in writing that he intends forthwith to put his buildings in proper repair, the bishop shall allow the incumbent a reasonable time to execute such repairs, and on being satisfied that such repairs have been fully executed shall abstain from further proceedings; but the bishop may during the progress and after the completion of such repairs direct the surveyor to inspect and report thereon, and if the surveyor shall report that the repairs are insufficient direct the surveyor to inspect and report upon such repairs; and if he shall report that further repairs are necessary, then the powers of this act shall or may be put in force in like manner as if the incumbent had not given notice that he intended himself to do the repairs."

Execution of works on neglect, &c. of incumbent.

Sect. 23. "If any incumbent shall refuse or neglect duly to execute in the prescribed manner, and at or within the prescribed time or times, any prescribed repairs, it shall be lawful for the bishop to raise the sum prescribed in the final report, if not otherwise provided by the incumbent, together with all costs incurred by the bishop in relation thereto, by sequestration of the profits of the benefice, and the provisions contained in sections 20 and 21 with respect to the payment of the profits of the benefice to the governors and the application of the money shall be applicable to this section."

Avoidance of benefice not to affect report, &c.

Sect. 24. "No report, order, or proceedings thereunder shall be affected by a vacancy occurring in the benefice before the commencement or pending the execution of the works prescribed by the report, but such report shall be acted on as if such vacancy had not occurred, subject nevertheless to any modification which may be made

therein in consequence of any report of the surveyor after his inspections made in consequence of such vacancy, in pursuance of provisions hereinafter specified."

As to houses of residence of archbishops, bishops, deans, and canons, the only provisions are as follows:—

Archbishop or bishop may require inspection.

Sect. 25. "At any time after the commencement of this act, it shall be lawful for any archbishop or bishop and for the holder of any dignity or office (*b*) in any cathedral or collegiate church to employ any surveyor, approved for the purpose by the Ecclesiastical Commissioners for England, to inspect and examine any house of residence or other building appurtenant thereto of such archbishop or bishop, or belonging to any such dignity or office which he is by law or custom bound to maintain in repair at his own personal cost."

Works to be prescribed.

Sect. 26. "Where, in the opinion of such surveyor, founded on any such inspection, any works are needed for putting into a proper state of repair the house of residence or other building inspected, he shall report what works are so needed, and at or within what time or times such works or any particular part or parts thereof ought to be executed."

Evidence of execution of works.

Sect. 27. "A certificate of such surveyor that such works have been duly executed, which shall be filed in the registry of the diocese in duplicate, and one of the duplicates whereof shall be delivered or sent by the registrar to the archbishop or bishop, to whose see or to the person to whose dignity or office, as the case may be, the certificate relates, shall be conclusive evidence of the due execution of such works."

Protection of archbishops or bishops from further liability.

Sect. 28. "If the archbishoprick or bishoprick, dignity, or office to which the certificate shall relate shall become vacant within the period of five years from the filing of such certificate, the archbishop or bishop, or the holder of the dignity or office, as the case may be, or his representatives respectively, shall not, as to such house of residence or other building, be liable to any claim for dilapidations in respect of such archbishoprick or bishoprick, dignity, or office, either under this act or at the suit of any successor independently of this act, except for wilful waste and loss or damage by fire; but this exemption from liability shall be subject to the like condition in regard to insurance

(*b*) No definition is anywhere given of the meaning of these words. It does not appear whether they would cover the case of a vicar-choral, as in *Gleaves* v. *Parfitt*, 7 C. B., N. S. 838, *supra*, pp. 162, 1618.

against fire as is contained in the 47th section in the case of the incumbent of a benefice" (*c*).

Archbishops and bishops.

As to the estates of archbishops and bishops the following provisions occur in late acts, and do not seem to be repealed by this act:—

Estates committee to see that property assigned as endowment is kept in proper condition.

By 23 & 24 Vict. c. 124, s. 9, "The estates committee (*d*) shall cause the property assigned as an endowment for any see as aforesaid to be inspected so often as they think fit, and shall cause notice in writing of all dilapidations or want of repair found on such inspection, and of the repairs or works necessary for remedying the same, to be given to the archbishop or bishop of such see, and such archbishop or bishop shall forthwith do or cause to be done, at his or their own expense, or at the expense of his or their lessees or tenants (as the case may require), the repairs or works mentioned in such notice; and if any difference arise between such archbishop or bishop and the estates committee with regard to the condition of such property, or the repairs or works required by the estates committee, the matter in difference shall be referred to arbitration as hereinafter provided."

Provision as to dilapidations on episcopal estates.

By 29 & 30 Vict. c. 111, s. 12, "No archbishop or bishop succeeding to a see shall have any claim against his predecessor therein, or against the representatives of such predecessor in respect of dilapidations on the estate forming the endowment of such see, but all the claims, rights, remedies, and powers of recovery which the archbishop or bishop so succeeding as aforesaid would legally have had as against his predecessor or the representatives of such predecessor in respect of dilapidations if this act had not passed shall belong to and be possessed by the said commissioners, and may be enforced and exercised on their behalf by the estates committee, who shall pay due regard to any just and reasonable claims for special consideration which any archbishop or bishop so vacating his see, or his representative, may appear to them to possess, on the ground of the actual state or repair of the buildings on the estate at the time of its transfer to him from the commissioners: provided always, that this section shall not extend to the case of any dilapidations occurring in or about the house or houses of residence belonging to any see or in or about the appurtenances of any such house or houses."

Further provision as to

Sect. 13. "The estates committee shall make or cause

(*c*) *Vide infra*, p. 1636.

(*d*) That is, of the Ecclesiastical Commissioners. *Vide infra*. Chapter on the Ecclesiastical Commissioners.

to be made such inspection of the whole or any part of the property forming the endowment of any see as is contemplated by sect. 9 of 23 & 24 Vict. c. 124, whenever they may be reasonably required so to do by the archbishop or bishop of such see by writing under his hand, as well as at any other times at which such inspection may appear to them to be necessary or desirable."

dilapidations on episcopal estates.

As to vacant benefices (*e*):—

Inspection of buildings of a benefice on a vacancy.

Sect. 29. "Within three calendar months after the avoidance of any benefice after the commencement of this act, unless the late incumbent shall under this act be free from all liability to dilapidations, the bishop shall direct the surveyor who shall inspect the buildings of such benefice, and report to the bishop what sum, if any, is required to make good the dilapidations to which the late incumbent or his estate is liable, and the late incumbent, his executors or administrators, shall have right of entry at reasonable hours, with his or their surveyor, upon the premises of the vacated benefice until such time as the question of the dilapidations has been finally settled."

Report of inspection to be sent to bishop, new incumbent, and late incumbent, or his representatives.

By sect. 30, the surveyor shall send copies of the report to the new incumbent, and the late incumbent, his executors or administrators. He shall certify to the bishop how each copy was sent.

Contents of report.

Sect. 31. "The report shall state what works, if any, are, in the opinion of the surveyor, needed, specifying the same in detail, and may state any special circumstances, and shall state what sum, in the opinion of the surveyor, will be required to make good the dilapidations."

Objections to the report.

Sect. 32. "The new incumbent and the late incumbent, his executors or administrators, may state in writing to the bishop objections to the report on any grounds of fact or law, and in such case the bishop may, if he shall think fit, at the expense of the party objecting, direct a second report to be made by some competent person, or take the opinion of counsel upon any question of law."

Time for objecting.

Sect. 33. "Such objections shall be transmitted to the bishop within one month after the sending of the copy of the report to the party by whom they are made, but the bishop may receive an objection transmitted at a later period if for any special reason he shall think fit to do so."

(*e*) This does not apply to the case of archbishops, bishops, deans or canons; and it would seem therefore that the contingency of a vacancy in any of their offices is not provided for by the act, except in cases falling under sect. 28.

The bishop to make an order.

Sect. 34. "The bishop shall in uncontested cases, as soon as conveniently may be after the time for the transmission of objections has expired, and in contested cases after consideration of the whole matter, make an order stating the repairs and their cost for which the late incumbent, his executors or administrators, is or are liable."

Delivery of bishop's order.

Sect. 35. "The order shall be signed by the bishop in triplicate, and he shall send one copy to the new incumbent, another to the late incumbent, his executors or administrators, and the other to the registrar of the diocese, to be filed in the registry, and the registrar shall send a copy thereof to the governors."

Repairs to be executed within eighteen months.

Sect. 42. "The new incumbent shall cause the repairs specified in the order to be executed within eighteen months after the date of the order, unless, with the consent of the patron and bishop, he shall decide upon rebuilding the premises in question, in which case the money standing to the credit of his dilapidation account in the books of the governors shall be applied towards the cost of the new building."

Sum payable for dilapidation to be a debt due.

Sect. 36. "The sum stated in the order as the cost of the repairs shall be a debt due from the late incumbent, his executors or administrators, to the new incumbent, and shall be recoverable as such at law or in equity."

By sect. 37, the new incumbent is to pay over the dilapidation money to the governors.

By sect. 38, the governors may advance money to him for the repairs on the security of the benefice (*f*).

By sect. 39, the governors shall keep a dilapidation account of the moneys received and the moneys lent by them.

By sect. 40, the new incumbent shall pay the balance of the cost of the repairs to the governors within six months.

Extension of time within which such payment must be made.

Sect. 41. "The bishop, if from any special circumstances he think fit, may, upon the application of the new incumbent, enlarge the period within which such incumbent is required to pay such last-mentioned sum for any period not exceeding twelve months from the date of the order, and may authorize the payment of such amount either in one sum or by instalments of such amounts and on such days (not being beyond the end of such twelve months) as the bishop shall determine."

(*f*) As to the provisions in 35 & 36 Vict. c. 96, ss. 1, 2, affecting these loans, *vide supra*, pp. 1628, 1629.

Sect. 43. "If the moneys payable under this act to the governors by the new incumbent of any benefice shall not be paid by such incumbent before the expiration of the time specified in this act for such payment to be made, the governors shall give notice thereof to the bishop, and it shall be lawful for the bishop to raise the amount thereof by sequestration of the profits of the benefice."

Payment of money to governors by new incumbent may be enforced by sequestration.

As to execution of works:—

By sect. 44, where money is standing to the credit of the dilapidation account of an incumbent required by this act to execute repairs, the surveyor shall certify from time to time that a certain sum is due, and on such certificate, countersigned by the bishop, the governors shall "cause the amount therein specified to be paid to the person or persons named therein as entitled to receive the same."

Payment by governors on execution of works.

By sect. 45, "The repairs to be executed in the case of a benefice under sequestration, and the repairs to be executed in the case of the refusal or neglect of the incumbent to execute the same (including rebuilding or repairing in case of fire), shall be executed under the direction of the surveyor." The surveyor may employ a builder or contractor under a contract and specifications prepared by him; and payments are to be made from time to time as in the last section; "but neither the governors, the bishop, nor the patron, shall incur any liability at law or in equity to any builder or contractor, or otherwise, under or by virtue of any such specification or contract, further than the obligation on the part of the governors to pay the moneys standing to such dilapidation account in manner aforesaid."

Execution of works if benefice under sequestration or on refusal of incumbent.

Sect. 46. "When the repairs shall have been finished, the surveyor, if the same shall be completed to his satisfaction, shall give a certificate of the same having been completed, which certificate shall be in triplicate, and one of the triplicates shall be delivered to the incumbent or the sequestrator, another registered in the registry of the diocese, and the third delivered to the governors, and such certificate shall be conclusive evidence of the due execution of the prescribed works."

Final certificate of completion of works.

Sect. 47. "No further or subsequent report shall be made as to the buildings belonging to the benefice, and specified in the last-mentioned certificate (except at the request of the incumbent himself), before the end of five years from the filing of the said certificate.

Protection to incumbent from further liability for five years.

"If such benefice shall become vacant within such period of five years, the incumbent or his representatives shall not be liable to any claim for dilapidations in respect of

the buildings specified in the certificate, except for wilful waste.

"The exemption from liability under this present section shall in no case apply to loss or damage by fire where the incumbent at the time of filing the certificate of the due execution of the works shall not have insured, to the satisfaction of the governors, the house of residence and buildings belonging to the benefice in some fit office against loss or damage by fire, in at least three-fifths of the value thereof, and who shall not keep such house and buildings so insured during such period of five years or until the earlier avoidance of the benefice."

Payment of surveyor, secretary and registrar.

By sect. 48, the charges of the surveyor and the fees of the bishop's secretary and registrar, shall, except as otherwise provided, be paid by the incumbent or by the sequestrator, and shall be a debt due from him or them. When the governors advance a sum in respect of surveyor's charges, it shall be paid by them to the surveyor.

Benefice becoming vacant during repairs, liability of outgoing incumbent or his representatives.

Sect. 49. "If an inspection shall have been made of any benefice under this act, and the incumbent liable to execute the prescribed repairs shall vacate such benefice before the surveyor shall have signed a certificate of the completion of the same, such incumbent, his executors or administrators, shall be liable to the payment of all moneys in respect of such repairs (not previously paid by him to the governors in respect thereof), and of the surveyor's inspection, report, and certificate, which such incumbent would respectively have been liable to pay in case he had not vacated, which moneys shall be a debt due from such incumbent, his executors or administrators, to the next incumbent, and shall be recoverable as such at law or in equity; and such next incumbent, whether he shall recover the same or not, shall be liable to pay all such moneys in the same manner as his predecessor in such incumbency would have been liable to pay in case he had continued to be the incumbent of such benefice, and such next incumbent shall be allowed, with the consent of the patron and bishop, to borrow on the security of the profits of the benefice such sum as he shall fail so to recover towards meeting such payments as the governors may be willing and able by law to advance on loan for that purpose."

Execution of works other than those specified in surveyor's report. Special certificate of surveyor.

Sect. 50. "If the incumbent liable to execute repairs shall be desirous of altering or remodelling the buildings belonging to the benefice, or any of them, or of rebuilding the same or any of them, so as to render such repairs or any of them impracticable or unnecessary, it shall be lawful for such incumbent, with the consent of the bishop

and patron, to execute the proposed works in lieu of such repairs; and in such case the surveyor shall, upon the completion of such works to his satisfaction, give a special certificate, certifying that the same have been completed, which certificate shall be signed in triplicate, and one of such triplicates shall be delivered to the incumbent, and another to the bishop, who shall cause the same to be registered in the registry of the diocese, and another to the governors, and such certificate shall have the same effect as a certificate of the completion of the works specified in the order."

Where such additional works do not render impracticable or unnecessary all the works specified in the report.

Sect. 51. "If such additional or substituted works shall not render the whole of such repairs impracticable or unnecessary, then so much of the money standing to the credit of the dilapidation account as the surveyor shall certify to be necessary for the execution of the repairs not so rendered impracticable or unnecessary shall be retained by the governors, and shall be dealt with, as regards certificates and otherwise, in the same manner as if the repairs not so rendered impracticable or unnecessary had been the only repairs specified in the order."

Postponement of works may be allowed on payment of a sum to meet probable further dilapidations.

Sect. 52. "If an incumbent, after having paid to the governors the amount specified in the report, desire to defer the execution of the works specified in the report, or any of them, for a limited period, and the surveyor shall certify in writing that such postponement may be safely made, the bishop, with the consent of the patron, may authorize such postponement, and may require the incumbent to pay to the governors such a sum, annually or in gross, as shall be certified by the surveyor to be proper to meet any probable further dilapidations, and the moneys so paid shall be carried to the credit of his dilapidation account; and if the benefice shall be vacated during the period of postponement, the late incumbent, his executors or administrators, shall not be entitled to be repaid any part of such additional moneys, but he or they shall not be subject to any further claim for dilapidations, and in case of such vacancy the money paid by him to the governors shall be dealt with as if the succeeding incumbent upon his succeeding to the benefice, had paid the same in respect of such repairs and dilapidations."

No sum recoverable for dilapidations except on a surveyor's report.

Sect. 53. "No sum shall be recoverable for dilapidations in respect of any benefice becoming vacant after the commencement of this act, and to which this act shall be applicable, unless the claim for such sum be founded on an order made under the provisions of this act."

As to insurance (*g*):—

Insurance of buildings of a benefice by the incumbent.

Sect. 54. "The incumbent of every benefice shall insure, and during his incumbency keep insured, the house of residence and farm and other buildings for the time being standing on the lands belonging to such benefice, and the outbuildings and offices respectively belonging thereto, and also the chancel of the church when the incumbent is liable to repair the chancel, against loss or damage by fire, in some office or offices for insurance against loss or damage by fire, to be selected by such incumbent, to the satisfaction of the governors, in at least three-fifths of the value thereof."

Filing of annual receipts for the premium.

Sect. 55. "Every such insurance shall be effected in the joint names of the incumbent and the governors, and the incumbent shall cause the receipt for the premium for such insurance for each year to be exhibited at the first visitation of the bishop or archdeacon next ensuing after the same shall become payable; and the following questions shall be added to those annually sent to incumbents under the provisions of the act of the session of the first and second years of her Majesty, chapter one hundred and six (*h*), that is to say, 'In what office and for what amount are the buildings of your benefice insured against fire?' and 'What was the amount and date of the last annual payment for such insurance?'"

Sums received from insurance office on destruction of buildings by fire to be expended in restoring them, &c.

Sect. 56. "In case any building belonging to any benefice, and insured in pursuance of this act, shall be destroyed or damaged by fire, and the office in which the same shall be insured shall elect to pay the sum insured instead of causing the buildings to be reinstated at the expense of the office, the sum so paid shall be paid to the governors and dealt with in the same manner as moneys standing to the credit of a dilapidation account."

Destruction of buildings not insured.
Cost of restoring to be paid by the incumbent, and to be recoverable by sequestration.

By sect. 57, if, when a building shall be destroyed or damaged by fire, such building shall not be insured for an amount sufficient to reinstate the same, the surveyor shall give to the bishop a certificate (in triplicate) specifying the sum which will be required, in addition to the insurance money, for reinstating the building, one of which triplicates shall be filed in the bishop's registry, another sent to the incumbent or sequestrator, and another to the governors; and the incumbent or sequestrator shall have the same opportunity of making objections, and the bishop the same power of consulting another surveyor or taking

(*g*) *Vide supra*, Part V. Chap. II. pp. 1471, 1473, 1482, as to insurance on residence houses built under the provisions of the acts there mentioned.

(*h*) *Vide supra*, pp. 1158—60.

the opinion of counsel, as are given in section 16 (*i*); and the incumbent, if the benefice is not under sequestration, shall pay the amount so specified to the governors within three months from the date of such certificate; and if the amount is not paid, the bishop may raise the same by sequestration; and the amount so raised shall be paid to the governors, and the moneys paid to the governors shall be dealt with in the same manner as moneys standing to the credit of a dilapidation account, and the incumbent shall cause the building to be forthwith reinstated, and the cost thereof shall be paid as the works progress, on certificates, in the manner specified in section 44 (*k*); and if the incumbent shall refuse or neglect to reinstate such building, it may be reinstated as if it were a building belonging to a benefice under sequestration.

If the benefice is under sequestration the sum stated in the certificate of the surveyor shall be a charge upon the moneys from time to time received by the sequestrator as mentioned in section 20; and the provisions in sections 20 and 21 (*l*), with respect to the payment of the profits of the benefice to the governors and the application of the money, shall apply to this section.

The following are miscellaneous provisions:—

Providing for case of buildings of benefice when let on lease.

Sect. 58. "The provisions contained in this act in regard to buildings standing on the lands belonging to any benefice shall not be applicable to the buildings (if any) belonging to the benefice, which shall be comprised in any lease for years or lives, for the time being subsisting, so long as such lease shall be subsisting, except so far as the lessee shall not, by virtue of such lease, be liable to insure, rebuild, or repair such buildings; but it shall be lawful for the surveyor to inspect the buildings comprised in any such lease."

By sect. 59, when such an exemption is claimed the lease or counterpart shall be produced, unless it has already been deposited in the bishop's registry or with the ecclesiastical commissioners.

Remedy on death of incumbent.

By sect. 60, every sum of money raiseable by the bishop by sequestration shall be deemed a debt due from the incumbent; and any money which shall not be recovered by sequestration or otherwise during an incumbency shall continue to be due from the incumbent; and in case of his death while he shall be incumbent, so much thereof as shall remain due shall be paid by his personal representatives.

(*i*) *Vide supra*, p. 1628.
(*k*) *Vide supra*, p. 1635.
(*l*) *Vide supra*, pp. 1629, 1630.

Moneys paid to bishop by succeeding incumbent to be a debt due from prior incumbent.

Sect. 61. "All moneys which respectively would have been raiseable by the bishop by sequestration during an incumbency, and which shall be paid by a succeeding incumbent, or shall be recovered by sequestration during such succeeding incumbency, shall be a debt due from such prior incumbent or his estate to the incumbent by whom or out of whose income, derived from the benefice, the same shall be paid, and shall be recoverable as such at law or in equity."

Form and effect of security.

Sect. 62 gives a form of security (*h*), provides that the certificate of the treasurer to the governors of any sum having been placed to the credit of the account mentioned in the certificate shall be conclusive evidence of the fact, that the governors shall, for the recovery of the sums due upon the said security, have the same remedies as if the advance had been made for repairing or rebuilding under the provisions of the following acts; 17 Geo. 3, c. 53; 21 Geo. 3, c. 66; 7 Geo. 4, c. 66; 1 & 2 Vict. c. 23; 28 & 29 Vict. c. 69 (*i*); and that the receipt of the treasurer of the governors shall be a discharge for all moneys paid to them.

Incumbent to furnish particulars of the value of the benefice.

Sect. 63. "Before the governors shall lend any money on the security of the possessions of the benefice under the provisions of this act they shall require the incumbent to furnish them with a just and particular account in writing, signed by him and verified by his oath or statutory declaration, of the annual profits of the living, and shall procure the consent in writing of the bishop and patron under their respective hands, or, if the patron shall be a corporation aggregate, under the common seal of such corporation."

Patron and ordinary to consent.

Interim investment of moneys.

By sect. 65, moneys paid in to a dilapidation account may be invested; if any surplus remain after paying for the repairs, it shall be applied to pay the principal of any mortgage on the benefice, and subject to this it shall be paid to the incumbent or sequestrator. The governors may from time to time, with the consent of the treasury, frame a scale of per-centages on the sums paid to them, to be retained by them for office expenses.

Providing for death or change of surveyor during repairs.

Sect. 66. "In case of the death, removal from office, or resignation of a surveyor after making an inspection and before granting his final certificate of the completion of the necessary repairs, the previous acts of such surveyor

(*h*) *Vide infra*, Schedule.

(*i*) The provisions of these acts are, by sect. 64, incorporated generally into this act. For an account of them, see Part V. Chap. II.

in regard to such inspection, including his report (if any), shall be adopted by the surveyor appointed to act in his place, who shall proceed in the matter of such inspection, report, and certificate in the same manner as if the inspection had originally been made by him."

Power of surveyor to enter.

Sect. 67 gives power to the surveyor and his servants to enter and inspect the buildings of any benefice, and to execute the works, at seasonable times and hours.

Limitation of actions against him.

Sect. 68 provides that no proceedings shall be taken against a surveyor or any one acting under the act for anything done or omitted under the act, except within three months, and after a month's notice of action; and empowers the defendant in any such proceedings to make a tender of reasonable amends as a bar to the action.

Form of bishop's order and delivery of notices.

Sect. 69. "Every consent by or authority from a bishop under this act shall be in writing under his hand, and all notices, letters, reports, and other documents by this act directed to be sent, delivered, or otherwise notified or given to or left with any bishop, incumbent, officiating clergyman, or person, shall be deemed to have been duly sent, delivered, notified, given, or left respectively, if sent through the post in a prepaid letter, addressed, in the case of an incumbent or officiating minister, to the house of residence of the benefice, or if there shall be no such house of residence, then to one of the churchwardens at his usual place of residence, and in all other cases to the usual or last known place of residence in England of the party."

Existing incumbents (if the bishop consents) not liable to dilapidations for substitution of buildings of equal or greater value. No existing incumbent liable for dilapidations as to buildings pulled down by prior incumbents unless amounts recoverable from prior incumbent.

Sect. 70. "If an incumbent holding a benefice at the time of the commencement of this act shall, prior thereto, (without due authority,) have caused any buildings belonging to such benefice to be pulled down, and shall have substituted other buildings of equal or greater value, such incumbent shall (if the bishop of the diocese consent) not be liable to dilapidations in respect of the buildings so pulled down, provided such substituted buildings shall have been insured pursuant to this act; and no incumbent holding a benefice at the time of the commencement of this act shall be liable for dilapidations in respect of any buildings which shall have been pulled down by a preceding incumbent, unless the incumbent so holding such benefice shall have received or shall be entitled to recover at law or in equity from the last preceding incumbent or his estate the amount chargeable on account of such dilapidations, and in such case the liability of the existing incumbent shall be limited to the amount so received or recoverable at law or in equity."

Removal of

Sect. 71. "Wherever it shall appear that any building

unnecessary part of any glebe house.

belonging to or forming part of any house of residence is unnecessary, it shall be lawful for the bishop, upon the application of the incumbent and with the consent in writing of the patron of the benefice, to authorize by a written instrument under his hand the removal of the said building; and the proceedings, if any, of such removal shall be applied to the improvement of the benefice in such manner as the bishop of the diocese and the patron of the benefice may agree on."

Saving of powers.

Sect. 72 and 73 save all the powers previously possessed by the bishop, archdeacon, or other ordinary, and the powers and provisions contained in the acts mentioned above under sect. 62 (*k*). By 35 & 36 Vict. c. 96, s. 1, where the powers of these acts are exercised concurrently, the mortgagor need only execute one mortgage deed.

Schedule.

The form of mortgage given in the first schedule is as follows:—

Form of mortgage.

"This indenture made the —— day of ——, between A. B., incumbent of the benefice of ——, in the county of —— and diocese of ——, of the one part, and the governors of the bounty of Queen Anne for the augmentation of the maintenance of the poor clergy of the other part. Whereas the said governors, pursuant to 'The Ecclesiastical Dilapidations Act, 1871,' upon the request of the said A. B., and with the consent of the bishop and patron (testified by their having signed [*or* sealed] the instrument of consent hereto annexed), have agreed to advance the sum of —— pounds upon the security of the said benefice: Now this indenture witnesseth that the said A. B., in consideration of the sum of —— pounds having been carried in the books of the said governors to the credit of an account entitled 'The Dilapidation Account of A. B., incumbent of ——,' as evidenced by the certificate hereupon endorsed and signed by the treasurer to the said governors, doth hereby grant unto the said governors all the glebe lands, tithes, rents, rent-charges, moduses, compositions for tithe, salaries, stipends, fees, gratuities, and other emoluments and profits whatsoever arising, coming, growing, renewing, or payable to the incumbent of the said benefice in respect thereof, with all and every their rights, privileges, and appurtenances thereunto belonging, to have, hold, receive, and take the said premises, with their appurtenances, unto the said governors from henceforth for and during the term of

(*k*) *Vide supra*, p. 1640

thirty-five years in as full, ample, and beneficial manner, and with such remedies and powers for obtaining and recovering the same, and every part thereof, to all intents and purposes, as the said incumbent or his successors could or might or ought to have held, enjoyed, received, and taken the same if these presents had not been made: and the said A. B., for himself, his heirs, executors, and administrators, doth hereby covenant with the said governors that the said A. B., during the time he shall continue incumbent of the said benefice, shall and will well and truly pay or cause to be paid unto the said governors interest for the said sum of —— pounds, or so much thereof as shall remain due, at the end of every year, to be computed from the day of the date of these presents, after the rate of —— pounds per centum per annum, by yearly payments, the first of the said payments to be made on the —— day of —— next; and also shall and will, from and after the expiration of one year from the day of the date of these presents, in each and every year during such time as aforesaid, well and truly pay or cause to be paid unto the said governors one equal thirtieth part of the said principal sum of —— pounds, the first of such payments to be made on the —— day of ——, 18 , and shall and will continue such respective payments of the said interest, and on account of the said principal money, so long as he shall continue incumbent of the said benefice, or so long as during his incumbency anything shall remain due upon the security of these presents: provided always, and these presents are upon this condition, that if the said A. B. and his successors shall well and truly pay or cause to be paid the said principal money and interest for the same, in manner and at the times aforesaid, according to the true intent and meaning of the said act and of these presents, and also all costs and charges which shall have been occasioned by the nonpayment thereof, these presents and everything herein contained shall cease and be void: provided also, that it shall and may be lawful for the said A. B. and his successors peaceably and quietly to hold, occupy, possess, and enjoy all and singular the said glebe lands, tithes, rents, rent-charges, moduses, composition for tithes, stipends, fees, gratuities, and other emoluments and profits whatsoever arising or to arise from or in respect of the said benefice, until default shall be made by him or them, respectively, in the payment of the interest and principal or some part thereof, at the times and in the manner aforesaid. In witness, &c."

CHAPTER VI.

LETTING AND ALIENATION.

SECT. 1.—*The General Law before the Statutes of Victoria.*
2.—*The Exchange of Church Property.*
3.—*The Leasing Statutes of Victoria.*
4.—*The Transfer of Property to the Ecclesiastical Commissioners.*
5.—*The Extinguishment of old Leasehold Interests.*
6.—*The Enfranchisement of Copyholds.*

SECT. 1.—*The General Law before the Statutes of Victoria.*

Subjects of chapter.

THE subjects of the actual alienation of church property and the demising or letting of it for purposes of profit are so inextricably entangled, owing to the custom of English conveyancers of turning leases into means of alienation, that the two subjects, viz., practical alienation by lease, and ordinary beneficial letting, will be discussed together in this chapter.

Leases by ecclesiastical persons *de facto*.

After deprivation or resignation.

It should seem that leases of parsons, which are otherwise conformable to the statutes, are valid, although made by a parson *de facto* only, and though he is afterwards lawfully deprived of his benefice (*a*); but that it is different with respect to leases by a bishop *de facto*, although confirmed by the dean and chapter (*b*). If a parson make a lease for *years* of his tithes, it is implied "if he so long continue parson" (*c*); and the lease determines by his deprivation or resignation (*d*). But if a parson make a lease for years if he so long live, *with covenants* for enjoyment accordingly, if he resign, or do any other act whereby he

(*a*) 1 Roll. Abr. 476 (F.), pl. 1; Cro. Eliz. 775; 5 Vin. Abr. 366, pl. 1.

(*b*) *O'Brian* v. *Knivan*, Cro. Jac. 552, 554.

(*c*) *Wheeler* v. *Heydon*, Cro. Jac. 328; 14 Vin. Ab. 68, pl. 11; 7 Bac. Ab. Verdict (M.).

(*d*) 2 Roll. Ab. 718, pl. 10; 2 Vin. 462.

loses the living, covenant will lie against him (*e*). Therefore it is usual to add this clause, "and still so long continue parson or rector;" which leaves him at liberty to avoid the lease by resignation or otherwise (*f*). And if a lease be so made, and the parson be afterwards *deprived unjustly*, the lease is gone and determined, and shall have no longer continuance, although afterwards the deprivation be reversed; but if he appeal from the sentence, then pending the appeal he continues parson until sentence be given (*g*).

Leases by the common law.

By the common law, bishops with the confirmation of the dean and chapter, master and fellows of any college, deans and chapters, master or guardian of any hospital and his brethren, parson or vicar with the consent of the patron and ordinary, archdeacon, prebendary, or any other body politic, spiritual, and ecclesiastical, might have made leases for lives or years without limitation or stint; and so might they have made gifts in tail, or estates in fee, at their will and pleasure; whereupon not only great decay of divine service, but dilapidations and other inconveniences ensued; and therefore they were disabled and restrained by several statutes (*h*).

Corporations *aggregate*, consisting of divers persons, as master and fellows, dean and chapter, might of themselves have made such grants, without confirmation; nor is any confirmation yet required to such leases as they may make by statute (*i*).

But the law did not think fit to trust a single person, or *sole* corporation, as an archbishop, bishop, archdeacon, prebendary, parson, vicar (*k*), with the disposition of estates holden in right of the church; and therefore, by way of restraint, appointed the assent and confirmation of some others, without which their grants should not be valid against the successor (*l*).

(*e*) *Rudge* v. *Thomas*, Roll. Rep. 403, 404; 2 Bulst. 202; 19 Vin. Ab. 148, n. pl. 1.

(*f*) *Wheeler* v. *Heydon*, Brownl. 125; 2 Bulst. 84; 10 Vin. 355, pl. 6; 4 Bac. Ab. Leases (L.); see also Gibson's Codex, 739, 740.

(*g*) *Leathes* v. *Hewitt*, 4 Price, 374.

(*h*) 1 Inst. 44; *Dean and Chapter of Norwich's case*, 3 Co. 75. See Doug. 573, and cases there cited.

(*i*) Gibs. 744.

(*k*) The fee simple of the glebe of a parsonage or vicarage is said by Lord Coke to be in *abeyance*, and consequently the parson or vicar cannot aliene it (1 Inst. 341, 342). *Vide supra*, p. 301; *Doe* d. *Richardson* v. *Thomas*, 9 Ad. & Ell. 556.

(*l*) Gibs. 744. By a constitution of Archbishop Langton all alienations by abbot, prior, archdeacon, dean, or other having any parsonage or dignity, or any inferior clerk, except according to the form of the canon, were forbidden and made void; and

Leases by the common law.

Accordingly, all leases of archbishops and bishops (to bind their successors) were to be confirmed by the dean and chapter, or deans and chapters if there be several chapters; leases of deans, by the bishop and chapter; leases of archdeacons, prebendaries, and the like, by the bishop, dean, and chapter; leases of parsons and vicars, by the patron and ordinary; and leases of the incumbent of a donative, by the patron alone; but if the king be patron of a prebend, or the like, then the king and dean and chapter, and not the bishop, ought to confirm the lease (*m*).

But, where the patron is himself the holder of a benefice, his confirmation is of no avail without the further confirmation of his patron, the patron paramount. Thus in *Doe* d. *Bramall* v. *Collinge* (*n*), the perpetual curate of a curacy augmented by Queen Anne's Bounty granted a lease for years of unopened mines, which had not before been leased, with the confirmation of the ordinary and of the immediate patron, who was the rector of the parish, but without the consent of the patron of the parish; and it was holden void for want of confirmation by the patron paramount.

But all these sole corporations, as archbishops, bishops, archdeacons, prebendaries, and the like (parsons and vicars only excepted), were enabled by 32 Hen. 8, c. 28, hereafter following, to let leases for twenty-one years or three lives, without confirmation: provided that in such leases the conditions and limitations of the said act, as to the expiration of the old lease, the commencement of the new, the reservation of rent, and the like, were punctually observed; but if not, confirmation remained necessary, as before, in order to bind the successor. And with confirmation, long leases of sole corporations continued (so far as that act is concerned) to be good against the successor, as they had been at the common law (*o*).

Leases under disabling statutes of Elizabeth.

Afterwards, by 1 Eliz. c. 19; 13 Eliz. c. 10; and 18 Eliz. c. 11, all corporations, whether sole or aggregate, were disabled from making leases for more than twenty-one years or three lives: and all (except bishops) from making any new lease where the old was not expired or surrendered or ended within three years. In which cases, confirmation was excluded, and could avail nothing; and therefore confirmation is or was of real effect only to two

this constitution was to bind "the greater prelates" also (Lind. 149. See 1 Inst. 144; 3 Co. 75).

(*m*) Gibs. 744; Degge, p. 1, c. 10; Wats. c. 44; 2 Atk. 45.

(*n*) 7 C. B. 939; 13 Jur. 791.

(*o*) Gibs. 744.

sorts of sole corporations, viz. 1. To parsons and vicars (*p*), who being specially excepted out of 32 Hen. 8, c. 28, could not bind their successors without confirmation; and 2. To bishops; who being not included in the restraint of 18 Eliz. c. 11, hereafter mentioned, against *concurrent* leases, might still let such leases at any time, with confirmation; as will appear more particularly in the recital and explanation of the several statutes.

In *Doe* d. *Tennyson* v. *Lord Yarborough*, it was holden that in order to render a lease valid under 13 Eliz. c. 10, it must be made of land which had been previously let, or on which some rent had been reserved. Therefore a lease by a vicar for three lives, of uninclosed and waste land, not proved to have been before let, was holden not to be binding on his successor, although the lessee covenanted therein to inclose the land, and pay a rack rent for it; it was held also, that 32 Hen. 8, c. 28, and 13 Eliz. c. 10, must be taken together, as being "*in pari materiâ*" (*q*). A lease by a rector of his glebe lands, and other rectorial property, made between the years 1803 and 1816, while 13 Eliz. c. 10, continued unrepealed, was holden valid (*r*).

Old law nearly obsolete.

All the old law of leasing, whether enabling or disabling, has been set on a new footing by the statutes of Victoria hereafter set forth, and much of what immediately follows here is of no direct legal import. It is thought however desirable to retain it, partly because of its analogical value in many questions that may arise on the new law, and partly because there may still be vested interests which are governed by it.

Leases by the enabling statute of 32 Hen. 8, c. 28.

By 32 Hen. 8, c. 28, s. 1, "All leases to be made of any manors, lands, tenements, or other hereditaments, by writing indented, under seal, for term of years, or for term of life, by any person or persons being of full age of twenty-one years, having any estate of inheritance either in fee simple or in fee tail, in their own right, or in the right of their churches or wives, or jointly with their wives, of an estate of inheritance made before the coverture or after, shall be good and effectual in the law against the lessors, their wives, heirs, and successors, and every of them, according to such estate as is comprised and specified in every such indenture of lease, in like manner and form as the same shall have been, if the lessors thereof, and every of them, at the time of the making of such

(*p*) And, it should seem, perpetual curates. *Vide supra*, *Doe* d. *Richardson* v. *Thomas*, 9 Ad. & Ell. 556; 1 Per. & Dav. 578, at p. 300.

(*q*) 7 Moore, 258; 1 Bing. 24.

(*r*) *Doe* d. *Coates* v. *Somerville*, 9 D. & R. 130; 6 B. & C. 126.

Leases by 32 Hen. 8, c. 28.

leases, had been lawfully seised of a good, perfect, and pure estate of fee simple thereof, to their own only uses" (*s*).

Sect. 2. "But this shall not extend (1) to any leases to be made of any manors, lands, tenements, or hereditaments, being in the hands of any farmer or farmers, by virtue of an old lease, unless the same old lease be expired, surrendered, or ended within one year next after the making of the said new lease; (2) nor shall extend to any grant to be made of any reversion of any manors, lands, tenements, or hereditaments; (3) nor to any lease of any manors, lands, tenements, or hereditaments which have not most commonly been letten to farm, or occupied by the farmers thereof by the space of twenty years next before such lease thereof made; (4) nor to any lease to be made without impeachment of waste; (5) nor to any lease to be made above the number of twenty-one years or three lives at the most from the day of the making thereof; (6) and that upon every such lease there be reserved yearly during the same lease, due and payable to the lessors, their heirs and successors to whom the same lands should have come after the deaths of the lessors, if no such lease had been made thereof, and to whom the reversion thereof shall appertain, according to their estates and interests, so much yearly farm or rent, or more, as hath been most accustomably made for the same within twenty years next before such lease thereof made; and that every such person to whom the reversion shall appertain after the death of such lessors or their heirs, shall have like remedy and advantage against the lessees, their executors and assigns, as the same lessor might have had against the same lessee; so that if the lessor were seised of any special estate tail of the same hereditaments at the time of such lease, the issue or heir of that special estate shall have the reversion, rents and services reserved upon such lease after the death of the said lessor, as the lessor himself might have had if he had lived."

Sect. 4. "Provided that nothing herein shall extend to give any liberty or power to any parson or vicar of any church or vicarage, to make any lease or grant of any of their messuages, lands, tenements, tithes, profits, or hereditaments belonging to their churches or vicarages otherwise or in any other manner than they might have done before the making of this act."

Why called the enabling statute.

All Leases to be made, &c.]—Before this statute, al-

(*s*) Sir O. Bridg. Rep. 124.

though corporations aggregate of many (as deans and chapters) might have made long leases for lives or years, of themselves, and without any consent or confirmation; yet if such leases had been made by a sole corporation (as bishop, archdeacon, prebendary), and not confirmed by such other person or persons whose consent was necessary, they expired with the lessor, and could not bind the successor. But by this statute, all sole corporations (except parsons and vicars) are *enabled* to make leases for twenty-one years or three lives, without any confirmation whatsoever (the several conditions which follow in the statute being punctually observed); for which reason it is called the *enabling* statute, and so it wholly was, and had nothing in it of restraint, but left aggregate corporations, and also sole corporations *with proper consent,* to their full liberty of going on to make all such leases as they might have made before; without being limited at all to the conditions of this statute, if they had but the same proper confirmation or consent (*t*).

Of what things.

Of any Manors, Lands, Tenements, or other Hereditaments.]—It must be of lands, tenements, or hereditaments, manurable or corporeal, which are necessary to be letten, and whereout a rent by law may be reserved; and not of things that lie of grant, as advowsons, fairs, markets, franchises and the like, whereout a rent cannot be reserved (*u*).

Freehold leases of tithes were formerly void against a successor.

For the better understanding of which rule it will be necessary to take notice of some distinctions which plainly arise out of the books. As, first, all the books agree, that a lease *for three lives*, of tithes or other incorporeal inheritance, will not bind the successor, because he would then be without the tithes or other such incorporeal inheritance, and have no remedy for the rent thereon reserved; for distrain he could not, because there would be no place wherein to take any distress, the things leased or granted being perfectly incorporeal, and invisible; an assize he could not have, because either he had not seisin, or if he had yet there would be nothing to put in view of the recognitors; and an action of debt he could not maintain during the lease, because being for three lives, that is an estate of freehold, which will endure no action of debt so long as it continues, and so the successor in such case would have no manner of remedy for the rent reserved, which would be against the express provision and intent of the several acts. Secondly, it is holden in some books,

(*t*) Gibs. 732.

(*u*) 1 Inst. 44.

Leases by 32 Hen. 8, c. 28.

Of tithes.

that a lease *for twenty-one years* of such incorporeal inheritance, though they have been usually demised, and the ancient rent be thereout reserved, is yet voidable by the successor within these statutes; because, though the rent reserved be good by way of contract between the lessor and lessee, and an action of debt may be maintained for the recovery thereof, yet they say it is not such a rent as is incident to the reversion, nor shall pass with it to the successor; and therefore the successor, having no remedy for the rent, shall not be bound by the lease (*x*).

The doctrine (*y*) of the common law, that incorporeal hereditaments could not be distrained for, having no locality (*z*), was carried to this extent, that an acceptance of rent by the succeeding bishop did not substantiate a freehold demise of tithes, because if the rent afterwards became in arrear, he could not bring either an action for debt and distress, or the species of real action called an assise of rent (*a*).

Yet this doctrine seems to have been shaken by contrary resolutions. For some books expressly hold such lease for years to be good against the successor, because they say he has remedy for the rent by action of debt, and say it has been so judged, and take the diversity between such lease for years and a lease for life. Also they say that the rent issues out of the tithes in point of render, though not in point of remedy, because no distress can be taken for it, but that is supplied by the action of debt which lies for such rent, and shall devolve on the successor; and that such rent does not lie only in privity of contract, as a sum in gross, but is incident to the reversion, otherwise the successor could not have it, being only privy to the estate, not to the personal contracts of his predecessor. And to this opinion the court in one case inclined, but thought it a point of great consequence, and therefore, to avoid it, gave judgment on another point which was clear. Thirdly, all the books agree that a lease for three lives or twenty-one years of a manor with the advowson appendant, or of lands or houses and of tithes, usually let therewith, reserving the ancient rent and the like, is good and shall bind the successor; for though the rent does not issue out of the advowson or tithes, in point of remedy, yet the rent is greater in respect thereof, and the successor has his remedy for the whole rent upon the lands or other corporeal inheritance let

(*x*) 5 Co. 3; Litt. 44.

(*y*) 2 Wooddeson's Lectures, 67; Moore, 778.

(*z*) 2 Inst. 131.

(*a*) *Rickman* v. *Garth*, Cro. Jac. 173; 8 Co. 46 a.

therewith. And Vaughan proves this from the express words of 13 Eliz. c. 10, which are, that all leases by any spiritual or ecclesiastical persons, having any lands, tenements, *tithes* or hereditaments (other than for twenty-one years or three lives), shall be void. So that the statute plainly shows that, some way or other, tithes may be leased for twenty-one years or three lives; and if they cannot be leased singly, it must be with lands usually let therewith (*b*).

5 Geo. 3, c. 17. Ecclesiastical persons may now bring action of debt for rent under leases of tithes, &c.

But now, by 5 Geo. 3, c. 17, ss. 1, 3 (*c*), "Whereas it may be doubtful, whether by the laws now in being, archbishops or bishops, master and fellows, or any other head and members of colleges or halls, deans and chapters, precentors, prebendaries, masters and guardians of hospitals, or any other person or persons having any spiritual and ecclesiastical promotions, heretofore had, or now have, any power to make or grant any lease or leases of tithes, or other incorporeal hereditaments only, which lie in grant, and not in livery, for one, two, or three lives, or for any term or terms of years not exceeding twenty-one, although the ancient rent is thereby reserved, and all other requisites prescribed by the acts of parliament now in being to that end, or any of them, were or are justly observed and performed, by reason that there is generally no place wherein a distress can be taken; and it may be also doubtful whether, in case of leases for life or lives, there is any remedy in law for such persons, by action of debt or otherwise, for recovering the rent in arrear reserved on such leases for life or lives: therefore, for obviating all doubts, and enabling the said persons to make valid leases of such their incorporeal hereditaments, and to recover the rent reserved on leases for one, two, or three lives, and also to make good such leases as have been already granted by them," it is enacted, "that all leases for one, two, or three lives, or any term not exceeding twenty-one years, already made and granted, or hereafter to be made or granted, of any tithes, tolls or other incorporeal hereditament solely and without any lands or corporeal hereditaments, by any such persons as aforesaid, shall be good and effectual in law, against such persons and their successors, as any lease made by such persons of lands or other corporeal hereditaments by virtue of 32 Hen. 8, c. 28,

(*b*) 3 Bac. Abr. 352; Vaugh. 203.

(*c*) This power of bringing actions for debt had by 8 Anne, c. 18, s. 4, been granted to lessors against tenants for life for arrears of rents.

5 Geo. 3, c. 17.

or any other act. And if the rent or yearly sum reserved upon such lease shall be behind or unpaid for twenty-eight days, the said lessors, their executors, administrators and successors respectively may bring action of debt against the lessee, his heirs, executors, administrators or assigns, for recovering the same, as any landlord or lessor or other person may do for recovering of arrears of rent due on any lease for life, lives or years, by the laws now in being."

But, by sect. 2, masters and fellows of colleges, deans and chapters, &c. are disabled from granting leases for any longer term than their statutes allow.

Recovery of rent.

An action of debt lies against the assignee of lessee for years of tithes at common law (*e*).

And it seems also that a lay impropriator may bring an action of debt against the assignee of a lessee for years, because 32 Hen. 8, c. 7, s. 5, puts tithes in the hands of lay impropriators upon the same footing with their corporeal hereditaments, but it does not seem certain that he has the same remedy as to leases for life (*f*).

Rules as to grants.

Freehold leases of tithes are governed by the principles of the common law; and therefore the maxim that no freehold interest can be granted, commencing *in futuro*, has been held applicable to a lease of tithes (*g*).

A disclaimer of title to tithes by a rector has been holden to bind his lessee (*h*).

32 Hen. 8, c. 28. Leases must be by deed.

By Writing indented.]—It must be by deed indented, and not by deed poll, or by parol (*i*).

A contract in the nature of a demise may enure with apt words for that purpose by way of discharge from tithes (*k*). A demise of tithes for such time as lessor shall continue rector or vicar, passes a freehold, such being the estimation of uncertain interests in all species of real property, which may possibly endure for any life or lives (*l*).

(*e*) See *Bally* v. *Wells*, 3 Wils. 25, and the cases therein cited; *Valentine* v. *Denton*, Cro. Jac. 111; *Dolston* v. *Reeve*, 1 Raym. 77; *Dean and Chapter of Windsor* v. *Grover*, 2 Saund. 297; Dyer, 85 a, 85 b; *Tippin* v. *Grover*, Sir T. Raym. 18.

(*f*) 2 Wms. Saund. 304 a; 2 Wood. Lect. 71; Toll. 31.

(*g*) *Brewer* v. *Hill*, 2 Anst. 414; *Edmonds* v. *Booth*, Yelv. 131; Gwill. 228.

(*h*) *Leather* v. *Newitt*, 4 Price, 374.

(*i*) 1 Inst. 44.

(*k*) Cro. Jac. 137.

(*l*) *Brewer* v. *Hill*, 2 Anst. 413; Gwill. 1421: for authorities confirming that all leases and conveyances of tithes (being incorporeal hereditaments lying in grant) must be by *deed*, see Bunb. 2; Yelv. 95; Het. 121; Gwill. 1204; Godb. 354; 1 Leon. 23; Cro. Eliz. 188, 249; Cro. Jac. 137; 2 Anst. 419; Cro. Jac. 613; 4 Bac. Abr. Leases (E. 5); 4 W. & M. 505.

An agreement not under seal to demise a rectory and tithes, and a messuage used as a homestead for collecting the tithes, at an entire rent, has been holden void as to the whole (*m*).

Who are within this statute.

In the Right of their Churches.]—Yet a bishop that is seised in the right of his bishopric, a dean of his sole possessions in the right of his deanry, an archdeacon in the right of his archdeaconry, a prebendary, and the like, are within this statute; for every of them generally is seised *in jure ecclesiæ* (*n*).

And in general, all sole corporations whatsoever (parsons and vicars only excepted) are included within this statute, and are hereby enabled to bind their successors. Accordingly it has been adjudged, on several occasions, that precentors, chancellors, and treasurers of churches, are within the benefit of this statute; only, as to precentors, it has been determined that though there are persons of inferior rank in several churches, who are commonly so called, yet they are not within this statute; but only those dignitaries of that denomination who are properly so called, and who are next to the deans in place and order (*o*).

Expiry of former lease.

Unless the same old Lease be expired, surrendered or ended within one Year next after the making of the said new Lease.]—This surrender must be absolute, and not conditional; for the intent of the makers of the act was, to have a continual and absolute surrender, and not such an illusory surrender, which might be avoided the next day (*p*).

In the case of *Wilson* d. *Eyre* v. *Carter*, the lessor of the plaintiff, being a prebendary of Sarum, brought an ejectment to avoid a lease made by his predecessor, as not being conformable to this proviso, which requires that, upon renewals, the old lease must be expired, surrendered or ended, within one year next after making of the new lease. And his objection was, that the *surrender* made of the former lease was with a condition, that if the then prebendary did not within a week after grant a new lease for three lives, the surrender should be void; whereby (as was contended for the plaintiff) the old term was not absolutely gone, but the lessee reserved a power of setting

(*m*) *Gardiner* v. *Williamson*, 2 B. & A. 336; *Rex* v. *Pickering*, 2 ibid; *Bird* v. *Higginson*, 4 N. & M. 505; *Reg.* v. *Hockworthy*, 2 N. & P. 391.

(*n*) 1 Inst. 44.

(*o*) Gibs. 732; 4 Leon. 51; Cro. Eliz. 350; Palm. 106; 1 Leon. 112; Siderf. 158.

(*p*) *Elmer's case*, 5 Co. 2; 3 Bac. Ab. 345.

Leases by 32 Hen. 8, c. 28.

Expiry of former lease.

it up again. But the court, after two arguments, gave judgment for the defendants: this being within the intent of the statute, which was, that there should not be two long leases standing out against the successor. Here the new lease was made within the week, and from thence it became an absolute surrender both in deed and in law. And the whole was out of the lessee, without further act to be done by him. In the proviso in the act, there is the word *ended* as well as surrender; and can anybody say the first lease is not at an end? This was no more than a reasonable caution in the first lessee, to keep some hold of his old estate, till a new title was made to him (*r*).

Within one Year next after the making of the said new Lease.]—This, as to sole corporations inferior to bishops, is extended by 18 Eliz. c. 11, to three years; and as to bishops themselves, it holds only where they make a new lease without confirmation; for if it be confirmed by the dean and chapter, the years to come in the old lease are not material (*s*).

Grant of reversion.

Nor shall extend to any Grant to be made of any Reversion.]—That is, such grants as are made to commence at a day to come (*t*).

Lands usually letten.

Nor to any Lease of any Manors, Lands, Tenements or Hereditaments, which have not most commonly been letten to Farm or occupied by the Farmers thereof, by the space of twenty Years next before such Lease made.]—So that if it be letten for eleven years (Lord Coke says), at one or several times within these twenty years, it is sufficient (*u*).

Letten to Farm.]—A grant by copy of court roll in fee for life or years, is a sufficient letting to farm within this statute, for he is but tenant at will according to the custom, and so it is of a lease at will by the common law, but those lettings to farm must be made by some seised of an estate of inheritance, and not by a guardian in chivalry, tenant by the curtesy, tenant in dower, or the like (*x*).

Nor to any Lease to be made without Impeachment of Waste.]—Therefore if a lease be made for life, the remainder to another for life, remainder to a third for life; this is not warranted by the statute, because the remainders make the present tenants dispunishable of waste: but if a lease be made to one during three lives, this is good:

(*r*) Strange, 1201.
(*s*) Gibs. 733.
(*t*) Ibid.
(*u*) 1 Inst. 44.
(*x*) Ibid.

for the occupant, if any happen, shall be punished for waste (y).

And although this condition of a good lease is not expressed in 1 Eliz. c. 19, and 13 Eliz. c. 10, yet are both bishops and clergy restrained by the equity of the said statutes from making leases dispunishable of waste; for the statutes were made against unreasonable leases; and it is unreasonable that a lessee shall at his pleasure do waste and spoil (z).

Length of lease.

Nor to any Lease to be made above the Number of Twenty-one Years, or Three Lives at the most, from the Day of the making thereof.]—There must not be double leases in being at one time; as if a lease for years be made according to the statute, he in reversion cannot expulse the lessee, and make a lease for life or lives according to the statute; nor *è converso:* for the words of the statute be, to make a lease for twenty-one years *or* three lives, so as one or the other may be made, and not both (a).

Or Three Lives.]—That is, for three lives, to be all wearing together; and not to one for life, the remainder to a second for life, the remainder to a third for life; which would be a void lease; as it would be, if a lease were let for ninety-nine years, determinable upon three lives. But a lease to one for the lives of three others, or to three for their three lives, is good (b).

At the most.]—It must not exceed three lives, or one and twenty years from the making of it; but (according to Lord Coke) it may be for a lesser term or fewer lives (c).

But in *Smartle* v. *Penhallow*, in 13 Will. 3, where the point was, whether a copyhold for one life, where the custom enabled to grant for three, was good, and it was holden to be good: Holt, Chief Justice, added, This is not like the case of a bishop's lease, which cannot be good for any part, because the statute ties it up to an express form; otherwise, perhaps, had it been, that bishops should make leases for any number of years, not exceeding such a number (d).

Date of lease.

From the Day of the making thereof.]—1 Eliz. c. 19, and 13 Eliz. c. 10, are *from the making*, and not *from the day of the making;* and the distinction seems to be this: where the habendum is for twenty-one years from the making, the day of delivery (which is the making) shall

(y) 1 Inst. 44.
(z) 6 Co. 37; Gibs. 733.
(a) 1 Inst. 44.
(b) Gibs. 733; Wats. c. 42; 2 Atk. 40.
(c) 1 Inst. 44.
(d) 1 Salk. 188; Gibs. 733.

Leases by 32 Hen. 8, c. 28.

Date of lease.

be included; but where it is from the day of the making, or from the day of the date, that day shall not be included as part of the term, but the twenty-one years shall begin on the day following (*e*). The word "from" has occasioned much controversy in the courts of law; the result of which seems to be that it may be either inclusive or exclusive, according to the subject-matter. But the court will construe it so as to effectuate the deed of parties, and not to destroy them; and therefore, where one under a power reserved in his marriage settlement to lease "for twenty-one years in possession, but not in reversion, remainder, or expectancy," granted a lease to his only daughter for twenty-one years, *from the day of the date*, it was adjudged a good lease in *possession* (*f*). So also a lease for lives, to commence *from the date*, shall be construed to include the day of the date, for otherwise the freehold would be conveyed to commence *in futuro*, which cannot be (*g*).

Rent reserved.

And that upon every such Lease there be reserved yearly.]—If the accustomable rent had been payable at four days or feasts of the year; yet if it be reserved payable at one feast, it is sufficient: for the words of the statute be, *reserved yearly* (*h*).

So much yearly Farm or Rent, or more, as hath been most accustomably paid for the same.]—Where not only a yearly rent was formerly reserved, but things not annual, as heriots, or any fine or other profit at or upon the death of the farmer; yet if the yearly rent be reserved upon a lease made by force of this statute, it suffices by the express words of the act (*i*).

But if a couple of capons, or the like, have been expressly reserved in kind or in money, over and above the rent; a subsequent lease not reserving these shall be void (*k*). And so it shall be, where all the great trees have been usually excepted, and then are omitted; because by this means every successor cannot have the benefit of boughs and fruits yearly renewing (*l*).

Or more.]—Therefore if more than the accustomable rent be reserved, it is good, by the express letter of the act (*m*).

(*e*) Gibs. 733.

(*f*) *Pugh* v. *Duke of Leeds*, Cowp. 714, where the authorities on both sides are stated by Lord Mansfield. See also *Dean and Chapter of Ely* v. *Stewart*, 2 Atk. 45; 2 Christian's Blackstone, 319.

(*g*) See *Hatter* v. *Ash*, 1 Raym. 84, with the authorities cited by Mr. Bayley. See also 1 Raym. 280; Doug. Rep. 464.

(*h*) 1 Inst. 44.

(*i*) Ibid.

(*k*) Hardres. 325.

(*l*) Gibs. 734.

(*m*) 1 Inst. 44.

As hath been most accustomably paid for the same.]—If twenty acres of land have been accustomably letten, and a lease is made of those twenty, and of one acre which was not accustomably letten, reserving the accustomable yearly rent, and so much more as exceeds the value of the other acre; this lease is not warranted by the act, for that the accustomable rent is not reserved, seeing part was not accustomably letten, and the rent issues out of the whole (*n*).

But if tenant in tail let part of the land accustomably letten, and reserve a right *pro rata*, or more, this is good; for that is in substance a customable rent (*o*).

So if two coparceners be tenants in tail of twenty acres, every one of equal value, and accustomably letten, and they make partition, so as each have ten acres: they may make leases of their several part of each of them, reserving the half of the accustomed rent (*p*).

Provided that Nothing herein shall extend to give any Liberty or Power to any Parson or Vicar.]—Therefore if either of them make a lease for twenty-one years or three lives, of lands accustomably letten, reserving the accustomed rent, it must also be confirmed by the patron and ordinary; because it is excepted out of this act, and not restrained by 1 Eliz. c. 19, or 13 Eliz. c. 10 (*q*).

Leases of bishops by the disabling statute of 1 Eliz. c. 19.

By 1 Eliz. c. 19, s. 4, "All gifts, grants, feoffments, fines, or other conveyance or estate, to be made, done, or suffered by any archbishop or bishop, of any honours, castles, manors, lands, tenements or other hereditaments, being parcel of the possessions of his archbishopric or bishopric, or united, appertaining or belonging to the same; to any person or persons, bodies politic or corporate, other than to the crown (*r*) (and by 1 Jac. 1, c. 3, not to the crown either); whereby any estate or estates should or may pass from the same archbishops or bishops, other than for the term of twenty-one years or three lives, from such time as any such lease, grant, or assurance shall begin, and whereupon the old accustomed yearly rent or more shall be reserved and payable yearly during the said term of twenty-one years or three lives, shall be utterly void and of none effect, to all intents, constructions and purposes.

All Gifts, Grants, &c.]—Neither this act, nor 13 Eliz.

(*n*) 1 Inst. 44.
(*o*) Ibid.
(*p*) Ibid.
(*q*) Ibid.

(*r*) If a bishop make a grant to the crown, which is confirmed by the dean and chapter before the grant is enrolled, this is well enough. Degge, 164.

Leases by bishops under 1 Eliz. c. 19.

c. 10, which are called the *disabling* acts, nor any other act or statute whatsoever, do in any sort alter or change the *enabling* statute of 32 Hen. 8, c. 28, aforegoing; but leave it for a pattern in many things, for leases to be made by others. And no lease made according to the limitations of this statute of 1 Eliz. c. 19, or of 13 Eliz. c. 10, here next following, and not warranted by the statute of the 32 Hen. 8, c. 28, if it be made by a bishop or any sole corporation, but it must be confirmed by the dean and chapter, or others that have interest; as has been said in the case of the parson and vicar (*s*).

As to copyholds.

Gifts, Grants, Feoffments, Fines, or other Conveyance, or Estates.]—Neither bishops by this act, nor other ecclesiastical or collegiate corporations by the said act 13 Eliz. c. 10, are restrained from making grants of *copyholds* in fee, in tail, or for lives, or for any number of years, according to the custom of the manor; nor is confirmation necessary to make such grants good, though it be made by a sole corporation, as by bishop, prebendary, or the like (*t*).

Whereupon the old accustomed yearly Rent or more shall be reserved.]—It was holden by Hale, C. J., that the accustomed rent mentioned in this statute, and in the following statute of 13 Eliz. c. 10, ought to be understood of the rent reserved upon the last lease, and not upon the first; for that rent having been altered since cannot be called the accustomed rent (*u*).

Other grants.

Rent.]—For this reason a grant of the next avoidance of a benefice, is void against the successor; because it is one of those things which are incorporeal, and lie in grant only, and such an interest, out of which a *rent* cannot be reserved (*x*).

Shall be utterly void.]—Forasmuch as this and 13 Eliz. c. 10, make all such leases other than for the term of twenty-one years or three lives to be utterly void; therefore, generally speaking, at this day, no ecclesiastical or collegiate person, or corporation, can *aliene* any of their manors, lands or tenements, by any ways or means whatsoever; for though before these statutes they might have aliened, yet by the said statutes they are now restrained (*y*).

Houses.

However, by 14 Eliz. c. 11, all but bishops, that is, all those who are restrained by the 13 Eliz. c. 10, have some liberty given them as to alienating of *houses*. But this

(*s*) 1 Inst. 44, 45; *The Marchioness of Blandford* v. *Duchess of Marlborough*, 2 Atk. 544.

(*t*) Wats. c. 42; 4 Co. 23, 24.

(*u*) Gibs. 736; *Morrice* v. *Antrobus*, Hardr. 326.

(*x*) Gibs. 736.

(*y*) Wats. c. 42.

seems to be restrained to such houses only, as by the said statute may be let for forty years, namely, to houses in cities, boroughs or market towns (z).

Queen Anne's bounty.

But by 1 Geo. 1, st. 2, c. 10, s. 13, in case of lands or other estates purchased for the augmentation of small livings by the governors of Queen Anne's bounty, exchanges may be thereof made by the concurrence of the governors, incumbent, patron and ordinary; for any other estate in lands or tithes of equal or greater value.

Enclosures.

And it is said, that if a parish be upon the design of inclosing, and a parson had tithes in kind, and common for beasts in the fields, a decree may be had in chancery, that he shall take a quantity of ground in lieu thereof (a). However, an act of parliament will do this; and this is the usual way.

Good against grantor.

Shall be utterly void and of none Effect.]—Yet they are good against the lessor, if it be a sole corporation; or so long as the dean or other head of the corporation remains, if it be a corporation aggregate of many; for the statute was made in benefit of the successor (b).

When confirmed by successor.

To all Intents, Constructions and Purposes.]—Nevertheless, the acceptance of rent by the successor, may affirm a lease (otherwise *voidable*) for his own time (c).

It is indeed regularly true, that where the successor accepts a rent after the death of the predecessor, upon a *void* lease made by the predecessor, such acceptance will not affirm the lease; but this rule must be understood of such a lease as is void *ipso facto*, without entry or any other ceremony; and therefore, if a parson, vicar or prebendary, make a lease not warrantable by the statutes, for twenty-one years, rendering rent, and dies, here no acceptance of rent by the successor will affirm this lease, because the same was void without entry or other ceremony; but if a parson, vicar or prebendary make a lease not warrantable within the before-mentioned statutes, for life or lives, reserving rent, and dies, and the successor before entry accept the rent, this lease shall bind him for the time, for this being an estate of freehold, could not be void before entry (d).

But if a bishop, who has the inheritance in fee simple in him, make a lease for lives or years not warranted by the said statutes, not being absolutely void by his death, but only voidable by the entry of the successor; if the

(z) Wats. c. 42.
(a) Ibid.
(b) 1 Inst. 45.
(c) Gibs. 745. *Vide infra*, pp. 1660, 1661.
(d) Degge, p. 1, c. 10.

Leases by bishops under 1 Eliz. c. 19.

When confirmed by successor.

successor accept the rent before entry, be it for lives or years, he affirms the lease for his life (*e*).

But wheresoever the acceptance of rent binds, whether a sole or aggregate corporation, it must, in order to such binding, appear to be their own act: and therefore in such case, if the bailiff of a bishop accepts the rent, without order, this binds not the bishop. But if he acquaints the bishop that several rents are in arrear, and has an order from him to receive them, and receives (among others) the rent of a voidable lease, and pays all the rents to the bishop, without giving him notice of the said voidable lease, this has been judged such an acceptance as affirms a lease; because the bishop of himself ought to take notice what leases were made by his predecessor (*f*).

In like manner, with regard to a corporation aggregate, where the master of a college accepted rent, having no express authority from the corporation to accept it, it was adjudged that this did not affirm a voidable lease during the continuance of such master; because the act of the head singly cannot divest the members of their right (*g*).

But no acceptance of rent by the successor avails (as has been said) where the lease is absolutely and *ab initio* void (*h*).

Where a voidable lease may be affirmed by the acceptance of rent, it may be affirmed by distraining, or bringing an action for rent, after the death of the predecessor; and also by bringing an action of waste against the lessee (*i*).

Doe d. *Pennington* v. *Taniere*.

In *Doe* d. *Pennington* v. *Taniere* (*k*) the facts were these: "A dean and chapter were empowered by a local act to grant building leases of certain lands for ninety-nine years, provided that in every such lease there was a covenant by the lessee to build. They granted a lease for ninety-nine years, omitting the covenant.

"During the supposed term, after the death of the dean under whom the lease had been granted, the lessee remained in possession and continued to pay the reserved rent to the succeeding deans and chapter, who distributed it among themselves. The Court of Queen's Bench held, that if the lease was voidable only, it was made good, as against each successive dean and chapter, for their own

(*e*) Degge, p. 1, c. 10. See *Bishop of Oxford's case*, Palm. 75; *Overton* v. *Sydall*, Poph. 121.

(*f*) Gibs. 745; 1 Roll. Abr. 476.

(*g*) Gibs. 746.

(*h*) Gibs. 746; *Rickman* v. *Garth*, Cro. Jac. 173; Co. Lit. 45 b.

(*i*) Gibs. 746.

(*k*) 12 Ad. & El. 998 (A.D. 1848).

times respectively, by such their receipt and distribution of the rent.

"And that, if the lease was absolutely void, such receipt and distribution were evidence from which, without proof of any instrument under seal, a demise from year to year might be presumed against them; the presumption in such a case being the same against a corporation aggregate as against an ordinary person."

Doe d. *Bramall* v. *Collinge*.

But in *Doe* d. *Bramall* v. *Collinge* (*l*), decided about the same time, the Court of Common Pleas held that a void lease was not set up against the lessor's successor by his acceptance of rent; such acceptance only making a tenancy from year to year. In this case the tenancy was treated as one from year to year, and the tenant received six months' notice to quit before the action was brought.

Leases of other corporations sole and aggregate, by the disabling statute 13 Eliz. c. 10, and other statutes.

By 13 Eliz. c. 10, s. 2, "All leases, gifts, grants, feoffments, conveyances, or estates to be made, had, done, or suffered by any master and fellows of any college, dean and chapter of any cathedral or collegiate church, master or guardian of any hospital, parson, or any other having any spiritual or ecclesiastical living, of any houses, lands, tithes, tenements or other hereditaments, being any parcel of the possessions of any such college, cathedral church, chapel, hospital, parsonage, vicarage, or other spiritual promotion, or any ways appertaining or belonging to the same; to any person or persons, bodies politic and corporate (other than for the term of one and twenty years, or three lives, from the time as any such lease or grant shall be made or granted, whereupon the accustomed yearly rent or more shall be reserved and payable yearly during the said term), shall be utterly void and of none effect to all intents, constructions, and purposes" (*m*).

Sect. 3. "Provided that this shall not be construed to make good any lease or other grant to be made by any such college or collegiate church within either of the universities of Oxford or Cambridge, or elsewhere within the realm of England, for more years than are limited by the private statutes of the same college" (*n*).

18 Eliz. c. 11.

And by 18 Eliz. c. 11, s. 1, "Whereas since the making of the said statute of the 13 Eliz. c. 10, divers of the said ecclesiastical and spiritual persons and others having spiritual or ecclesiastical livings, have from time to time made leases for twenty-one years or three lives long before the expiration of the former years, contrary to the true mean-

(*l*) 7 C. B. 939; 13 Jur. 791.

(*m*) *Crane* v. *Taylor*, Hobart's R. 269; Sir O. Bridg. 269.

(*n*) *The Dean and Chapter of Ely* v. *Stewart*, 2 Atk. 45.

18 Eliz. c. 11.

ing and intent of the said statute:" it is enacted, that "all leases to be made by any of the said ecclesiastical, spiritual or collegiate persons, or others, of any their said ecclesiastical, spiritual or collegiate lands, tenements or hereditaments, whereof any former lease for years is in being, not to be expired, surrendered or ended within three years next after the making of any such new lease, shall be void, frustrate and of none effect."

All Leases, Gifts, Grants, &c.]—Corporations aggregate might always let long leases without any confirmation; and so might sole corporations, with confirmation, until this act was made; none but bishops being restrained by the 1 Eliz. c. 19. But by this statute all other corporations, sole and aggregate, are put under the same restraint that bishops were; and the two acts being of the same tenor and form, what has been observed upon the former act will help towards the right understanding of several clauses in this act also.

Charges on glebe lands by parsons.

Littleton says, if the parson of a church charge the glebe land of his church by his deed, and after the patron and ordinary confirm the same grant, then such grant shall stand in its force according to the purport thereof. But in this case it behoves that the patron have a fee simple in the advowson; for if he has but an estate for life or in tail in the advowson, the grant shall not stand, but during his life, and the life of the parson which granted the same (*o*).

Upon which there are divers things to be noted:

(1) The confirmation of the grant; which indeed is but a mere assent by deed to the grant. And therefore it is holden, that if there be parson, patron and ordinary, and the patron and ordinary give licence by deed to the parson, to grant a rent-charge out of the glebe, and the parson grants the rent-charge accordingly, this is good, and shall bind the successor; and yet here is no confirmation subsequent, but a licence precedent.

(2) The ordinary alone, without the dean and chapter, may agree thereunto, either by licence precedent or confirmation subsequent; for the dean and chapter has nothing to do with that which the bishop does as ordinary in the lifetime of the bishop.

(3) But if the bishop be patron, there the bishop cannot confirm alone, but the dean and chapter must confirm also; for the advowson or patronage is parcel of the pos-

(*o*) Litt. s. 528; Degge, 167. For the law as to Charges on Benefices, *vide infra*, Part V., Chap. VII.

session of the bishopric; and therefore the bishop, without the dean and chapter, cannot make the grant good, but only during his own life, after the decease of the incumbent, either by licence precedent or confirmation subsequent.

(4) He that is patron must be patron in fee simple; for if he be tenant in tail or tenant for life, his confirmation or agreement is not good to bind any successor, but such as come into the church during his life. But if the estate tail be barred, it shall stand good for ever (*p*).

For a confirmation, being in the nature of a charge upon the advowson, can operate no further, in order to the binding of the successor, than according to the degree of estate or interest which the patron has who confirms. And therefore where a tenant in tail is patron, to render the confirmation valid, the issue in tail must also confirm; otherwise the presentee of such issue shall hold the benefice discharged of such lease (*q*).

In like manner, if the patron who confirms has granted the next avoidance, the clerk of such grantee shall not be bound without the grantee's joining in the confirmation (*r*).

And so where there are coparceners or tenants in common of an advowson, they must all join in the confirmation to bind the next incumbent, unless they have agreed before to present by turns (*s*).

Leases by corporations.

By any Master and Fellows of any College, Dean and Chapter of any Cathedral or Collegiate Church.]—That is to say, by the major part of such body corporate, as it is enacted by 33 Hen. 8, c. 27 (*t*).

What sort of confirmation is requisite.

But such major part are to attend in person, and to be present together at the executing of such act; thus in the case of *The Dean and Chapter of Fernes*, in Ireland, which was concerning the confirmation of a lease made by the bishop, it was adjudged that the confirmation was ill, because the dean was not only not present, but acted by a proctor, who was a *stranger* to the chapter, and not of the body. Agreeable to which are the rules of the civil law, that he shall make no deputation in such a case but to one of the chapter only.

And in the same case it was said further, upon the authority of the Year Books, that neither would this, nor any other act that had charged the revenues of the church, have been good, though the dean had done it by one of

(*p*) 1 Inst. 500.
(*q*) Gibs. 745; 1 Roll. Abr. 480.
(*r*) Gibs. 745; Cro. Car. 582.
(*s*) Gibs. 745.
(*t*) *Vide supra*, p. 201.

Leases by corporations.

What sort of confirmation is requisite.

the chapter *as his commissary*: for (as is there alleged) though the dean may have his president or commissary to execute his spiritual jurisdiction, yet such commissary cannot charge the possessions of the church. And therefore, besides the authority of the president, sub-dean, or the like, for the exercise of the decanal office, a distinct proxy to one or more members of the chapter, who may represent him in the passing of grants, confirmations, and other chapter acts, is necessary to make them good and valid in law.

And their assent must be given by each member singly, and not in a confused and uncertain manner; and this must be, when they are capitularly assembled in one certain place; and not a consent given by the members, in several places, and at several times. Which was the case of the last cited act of the dean and chapter of Fernes. The chapter consisted of ten persons, and only three were present (together with the dean's proctor), when the chapter seal was fixed to the confirmation; afterwards three others of the prebendaries subscribed it: and this was adjudged ill, as being the act of particular persons only, and not of the corporation, by reason they were not assembled in one place, and in a capitular manner, that is, the act was not done *simul et semel*, at the same time and place, as the law requires.

But it was there agreed and acknowledged, that in case the dean and chapter be capitularly assembled in *any place*, their acts shall be good, though such assembly is not holden in the *chapter-house*; and the act of the dean and major part of the chapter so assembled is properly the act of the corporation, although the rest do not agree, or be absent through their own default (*t*).

A confirmation after the death of the bishop is void (*u*).

Who included under statutes.

Master and Fellows of any College.]—This includes all colleges, by what name soever incorporated, and of what nature soever the foundations be, ecclesiastical, temporal or mixed; the statute being construed most largely and beneficially against long and unreasonable leases (*x*).

Dean and Chapter of any Cathedral or Collegiate Church.]—For the same reason, though it is said dean and chapter, it extends to chapters where there are no deans (*y*).

Master or Guardian of any Hospital.]—In like manner, this shall extend to all manner of hospitals, be the hospital

(*t*) Gibs. 744; Dav. 42.
(*u*) Degge, p. 163.
(*x*) 11 Co. 76.
(*y*) Gibs. 736; 1 Mod. 204.

incorporated by any other name; or be it a sole corporation, or corporation aggregate (*z*).

Or any other having any Spiritual or Ecclesiastical Living.]—That this is a *general* law, as it concerns all the clergy, has been often declared and adjudged, though at first much doubted. But it was always agreed, notwithstanding this general clause, that bishops were not included, because the statute begins with an order inferior to them (*a*).

Leases of houses under 14 Eliz. c. 11.

Of any Houses.]—But by 14 Eliz. c. 11, s. 5, this shall not extend to any grant, assurance, or lease of any houses belonging to any persons or bodies politic or corporate aforesaid, nor to any grounds to such houses appertaining, which houses be situate in any city, borough, town corporate or market town, or the suburbs of any of them: but that all such houses and grounds may be granted, demised and assured, as by the laws of this realm, and the several statutes of the said colleges, cathedral churches, and hospitals, they lawfully might have been before the making of 13 Eliz. c. 10, or lawfully might be if the said statute were not; so always that such house be not the capital or dwelling-house used for the habitation of the persons abovesaid, nor have ground to the same belonging above the quantity of ten acres; provided, that no lease of any such houses shall be permitted to be made by force of this act in reversion, nor without reserving the accustomed yearly rent at the least, nor without charging the lessee with the reparation, nor for longer term than forty years at the most; nor any houses shall be permitted to be aliened, unless that in recompense thereof there shall be good, lawful, and sufficient assurance made in fee simple absolutely to such colleges, houses, bodies politic or corporate, and their successors, of lands as of good value, and of as great yearly value at the least, as so shall be aliened, any statute to the contrary notwithstanding.

Lease of acres.

So a lease by a vicar for twenty-one years, of property belonging to the vicarage in London, not being the vicar's house of habitation, nor having ground attached above ten acres, made within three years of the expiration of the existing lease has been holden valid (*b*).

But this statute also, referring only to such persons or bodies corporate as were specified in the statute of 13 Eliz. c. 10, does not extend unto bishops; and bishops had no power to let houses otherwise than according to the said

(*z*) 11 Co. 76.

(*a*) Gibs. 736, citing 4 Co. 76; 1 Mod. 205; Sav. 129.

(*b*) *Vivian* v. *Blomberg*, 3 Scott, 681.

Lease of houses under 14 Eliz. c. 11.

statute of 1 Eliz. c. 19, nor might they make exchanges for any recompense or consideration (*c*).

And by the express words of the act, no lease of any such houses shall be made *in reversion:* for which reason, when the dean and chapter of St. Paul's made a lease of a house for forty years, which house was then in lease for ten years to come, to a stranger, it was adjudged, without argument, not to be a good lease, because in reversion; but otherwise, if both leases had been to the same person, because the acceptance of the second lease by the lessee would have made the first lease void (*d*).

Other than for the Term of One and Twenty Years, or Three Lives.]—Although ecclesiastical *corporations aggregate* are not within 32 Hen. 8, c. 28, yet is that statute a pattern for leases by them made, in many things which are not here specified. And as to leases made by *sole corporations*, according to this statute, they are not good without confirmation, unless they be also made according to the limitations of the said statute (*e*).

Ecclesiastical corporations might in some cases lease lands upon charitable trusts (*f*).

Confirmation where two chapters.

Where a bishop has two chapters, the concurrent lease must have been confirmed by both, except where the union not being extant, there has been immemorial usage to the contrary (*g*).

Concurrent leases by bishops.

But in all cases where concurrent leases are made, the new lease, although it may be made *a die confectionis*, is not to take effect in interest till the old lease be expired, surrendered or ended, that is, the new lessee cannot enjoy the land till such time, for the new lease commences presently by estoppel only, not in interest; yet it seems that the rent is due from the first commencement of the lease, so that the bishop or other being lessor is entitled to two rents, and may bring an action of debt to recover the rent reserved upon the second lease, during the continuance of the former; for the rent must be reserved and made payable during the term, and not from the determination of the former lease, else such concurrent leases will be void, as contrary to the statute (*h*).

Concurrent leases are good under the proviso of a private settlement "to lease only for twenty-one years;" and they

(*c*) 4 Bac. Ab. Leases (E. 3); Wood. b. 2, c. 3; Degge, pt. 1, c. 10.

(*d*) Gibs. 739; Cro. Eliz. 561; O. Bridg. R. 123; 1 Vent. 246.

(*e*) Gibs. 736; Cro. Eliz. 894; 1 Bing. 24.

(*f*) *Walker* v. *Richardson*, 2 Mee. & W. 882.

(*g*) See *Case of Bishop of Waterford and Lismore*, 12 Co. 71 a.

(*h*) Wats. c. 42.

were valid under the 13 Eliz. c. 19, till restrained by the 18 Eliz. c. 11 (*i*), the reason being, that the inheritance is not charged upon the whole with more than twenty-one years (*k*).

A bishop could not make a concurrent lease for years to bind his successor where there is a precedent lease for a life in being, nor can he make a concurrent lease *for life* to bind the successor where there is a precedent lease *for years* in being, because the words of the statute enjoin that upon leases made by bishops the ancient rent must be reserved and yearly payable; and the rent reserved upon the grant for three lives in reversion, although it be due, yet the successor has no remedy for it during the lease for years by distress, nor by action for debt, before 5 Geo. 3, c. 17 (*l*), because it was reserved upon a lease for life, and so it is due or payable according to the intent of the statute (*m*).

But where the second lease is made to the same person to whom the former lease was made, and not to a stranger, it seems that the former lease is wholly vacated by the same person accepting the concurrent lease (*n*).

So if a lease for lives be made to the lessee for years, the former will merge in the latter lease, or rather the lease for years would be surrendered by accepting the lease for life, and the successor would be bound by it (*o*).

Ecclesiastical leases of portions of lands usually let together.

By 39 & 40 Geo. 3, c. 41, s. 1, "Where any honours, castles, manors, messuages, lands, tithes, tenements, or other hereditaments, being parcel of the possessions of any archbishop, bishop, master and fellows, dean and chapter, master or guardian of any hospital, or any other person or persons, or body or bodies politic or corporate, having any spiritual or ecclesiastical living or promotion, and having been anciently or accustomably demised by one lease under one rent, or divers rents issuing out of the whole, now are or shall hereafter be demised by several leases to one or several persons under an apportioned or several rents, or where a part only of such honours, manors, messuages, lands, tithes, tenements, or other hereditaments as last mentioned, are or shall be demised by a separate lease or leases, under a less rent or less rents than was or were accustomably reserved for the whole by such former

Where new leases are made of the several parts at apportioned rents, such rents to be deemed ancient rents.

(*i*) See *Read* v. *Nash*, 1 Leon. 148, and *Fox* v. *Collyer*, 1 Anders. 6, cited and agreed in 2 Doug. Rep. 573; *Goodtitle* v. *Funucan*, Ed. 3.

(*k*) O. Bridg. 125.

(*l*) *Vide supra*, p. 1651.

(*m*) *Mosler* v. *Wright*, Cro. Eliz. 141; More, 253.

(*n*) Wats. c. 44; Cro. Eliz. 564; Gibs. 739; 5 Co. 11 b.

(*o*) Degge, p. 119, c. 10.

lease, and the residue thereof is or shall be retained in the possession or occupation of the lessor or lessors, the several and distinct rents reserved on the separate demises of the several specific parts thereof, comprised in and demised by such several leases, shall be deemed and taken to be the ancient and accustomed rents for such specific parts respectively."

Aggregate apportioned rents to equal old rent.

Sect. 3. "Where the whole of any such honours, castles, manors, messuages, lands, tithes, tenements, or other hereditaments, accustomably demised by one lease, shall be demised in parts by several leases, after the passing of this act, the aggregate amount of the several rents which shall be reserved by such separate leases be not less than the old accustomed rent or rents theretofore reserved by such entire lease, and that where a part only shall be so demised by any such separate lease, and the residue shall be retained in the possession of the lessor or lessors, the rent or rents to be reserved by such separate lease or leases shall not be less in proportion to the fine or fines to be received on granting such lease or leases, than the rent or rents accustomed to be reserved for the whole of the said premises was in proportion to the fine received on granting the last entire lease."

No greater rent than part will bear.

Sect. 4. "No greater proportion of the accustomed rent be reserved by any separate lease hereby confirmed or allowed to be granted, than the part of the premises thereby severally demised will reasonably bear and afford a competent security for."

Specific thing may be charged on any part.

Sect. 5. "Where any specific thing, incapable of division or apportionment, shall have been reserved or made payable to the lessor or lessors, his or their heirs or successors, the same may be wholly reserved and made payable out of a competent part of such lands or tenements demised by any such several lease as aforesaid."

What leases not authorized.

By sects. 6, 7, "Nothing herein contained shall extend to authorize or confirm any lease whereon no annual rent is or shall be reserved to the lessor or lessors, his or their successors or assigns: or to authorize the reservation of any rent on any such lease made by any master, &c. of any college in the universities, &c. in any other manner than is required by 18 Eliz. c. 11."

Where stipends for curates, &c. reserved.

Sect. 8. "Where any such accustomably entire leases as aforesaid shall have usually contained covenants on the part of the lessee or lessees for the payment or delivery, or shall have in any other manner subjected or charged such lessee or lessees to or with the payment or delivery, of any sum or sums of money, stipend, augmentation, or

other thing, to or for the use of any vicar, curate, schoolmaster, or other person or persons, other than and besides the lessor or lessors, and his or their heirs or successors, all or any such leases as shall hereafter be granted of the same lands or tenements in severalty as aforesaid shall and may lawfully provide for the future payment and delivery of such sum or sums of money, stipends, augmentations, or other things, by and out of any part or parts of the lands or tenements accustomably charged therewith, not being of less annual value than three times the amount of the payment so to be charged thereon, exclusive of the proportion of rent or other annual payments to be reserved to the lessor or lessors."

Leases under Enclosure Acts.

41 Geo. 3, c. 109.

By 41 Geo. 3, c. 109, s. 38, "It shall be lawful for the rector or vicar for the time being of any parish wherein the lands and grounds intended to be enclosed shall be situate, by indenture or indentures, under his hand and seal, with the consent and approbation of the bishop of the diocese, and of the patron of the said rectory or vicarage, to lease or demise all or any part or parts of the allotment or allotments to be set out and allotted to any such rector or vicar, by virtue of any such act, to any person or persons whomsoever, for any term not exceeding twenty-one years, to commence within twelve calendar months next after executing the award, so that the rent or rents for the same shall be thereby reserved to the rector or vicar for the time being, by four equal quarterly payments in every year, and so that there be thereby also reserved and made payable to such rector or vicar the best and most improved rent or rents that can reasonably be had or gotten for the same, without taking any fine, foregift, premium, sum of money, or other consideration, for the making or granting any such lease or demise, and so that no such lessee by any such lease or demise be made dispunishable for waste, by any express words to be therein contained; and so that there be inserted in every such lease power of re-entry on non-payment of the rent or rents to be thereby reserved, within a reasonable time to be therein limited, after the same shall become due, and so that a counterpart of such lease be duly executed by the lessee or lessees to whom such lease shall be so made as aforesaid; and every such lease shall be valid and effectual, any law or usage to the contrary notwithstanding."

1 & 2 Geo. 4, c. 23.

By 1 & 2 Geo. 4, c. 23, where any leases granted under the above act shall determine before the effluxion of the term, it shall be lawful for the incumbent, with the consent of the ordinary and patron, to grant new leases for the

remainder of the term, and under the same provision as former leases.

6 & 7 Will. 4, c. 115.

Rectors, with consent of bishop, may demise the allotments.

By 6 & 7 Will. 4, c. 115, s. 31, "It shall and may be lawful for the rectors of the said rectories and the vicars of the said vicarages respectively for the time being, by indentures under their respective hands and seals, with the consent and approbation of the bishop of the diocese for the time being, and of the patron of the said rectories and vicarages, from time to time to lease and demise all or any part of the allotments to be set out and allotted to them respectively by virtue of this act, to any person or persons whomsoever, for any term not exceeding twenty-one years, so that the rent or rents for the same shall be thereby reserved to such rectors and vicars for the time being by four equal quarterly payments in every year, and so that there be thereby reserved to such rectors and vicars the best and most improved rent or rents that can be reasonably gotten for the same, without taking any fine, foregift, premium, sum of money, or other consideration for granting any such lease, and so that no such lessee by any such lease or demise be made dispunishable for waste by any express words to be therein contained, and so that there be inserted in every such lease power of re-entry on non-payment of rent or rents to be thereby reserved within a reasonable time, to be therein limited, after the same shall become due, and so that a counterpart of such lease be duly executed by the lessee or lessees to whom such lease shall be made as aforesaid; and every such lease shall be valid and effectual, any law or usage to the contrary notwithstanding."

May charge improvements.

By sect. 30 of the same act they may erect buildings, and may charge the expenses of such buildings, and of planting, fencing, etc. their allotments, upon them, by way of mortgage or demise.

6 & 7 Will. 4, c. 20.

By 6 & 7 Will. 4, c. 20, it is enacted as follows:—

Restrictions on ecclesiastical persons granting leases.

Sect. 1. "No archbishop or bishop, ecclesiastical corporation sole or aggregate, dignitary, canon, or prebendary, or other spiritual person, nor any master or guardian of any hospital, shall grant any new lease of any house, land, tithes or other hereditaments, parcel of the possessions of his or their see, chapter, dignity, canonry, prebend, benefice or hospital, by way of renewal of any lease, which shall have been previously granted of the same for two or more lives, until one or more of the persons for whose life such lease shall have been so made shall die, and then only for the surviving lives or life, and for such new life or lives as, together with the life or lives of such survivor or

survivors, shall make up the number of lives, not exceeding three in the whole, for which such lease shall have been so made as aforesaid; and that where any such lease shall have been granted for forty years, no such archbishop, bishop, ecclesiastical corporation sole or aggregate, dignitary, canon, prebendary, spiritual person, master, or guardian shall grant any new lease, by way of renewal of the same, until fourteen years of such lease shall have expired; and that where any such lease shall have been made as aforesaid for thirty years, no such archbishop, bishop, ecclesiastical corporation sole or aggregate, dignitary, canon, prebendary, spiritual person, master, or guardian shall grant any new lease by way of renewal of the same, until ten years of such lease shall have expired; and where any such lease shall have been granted for twenty-one years, no such archbishop, bishop, ecclesiastical corporation sole or aggregate, dignitary, canon, prebendary, spiritual person, master, or guardian shall grant any new lease, by way of renewal of the same, or (in the case of archbishops or bishops) concurrently therewith, until seven years of such lease shall have expired; and that where any such lease shall have been granted for years, no such archbishop, bishop, ecclesiastical corporation sole or aggregate, dignitary, canon, prebendary, spiritual person, master, or guardian shall grant any lease, by way of renewal of the same or otherwise, for any life or lives."

Recitals to be evidence.

By sect. 2, where any renewed lease is granted it shall contain statements or recitals showing that the lessor is empowered to grant it, and the recitals of the lease shall be taken as evidence of the fact.

By sect. 3, a penalty is imposed on persons introducing recitals into leases, knowing the same to be false.

Ecclesiastical persons may grant certain leases conformable to ancient practice.

Sect. 4. " In cases where it shall be certified in manner hereinafter mentioned, that for ten years now last past it hath been the usual practice (such practice having in the case of a corporation sole commenced prior to the time of the person for the time being representing such corporation) to renew such leases for forty, thirty, or twenty-one years respectively, at shorter periods than fourteen, ten, or seven years respectively, nothing herein contained shall prevent any archbishop, bishop, ecclesiastical corporation sole or aggregate, dignitary, canon, prebendary, spiritual person, master or guardian, from granting a new lease conformably to such usual practice; provided that such usual practice shall be made to appear to the satisfaction of the archbishop of the province, in the case of a lease granted by such archbishop or by a bishop, and in the case of a lease

6 & 7 Will. 4, c. 20.

granted by any other corporation or person, to the satisfaction of such archbishop, and also of the bishop having jurisdiction over such corporation or person, and shall, before the granting of such lease, be certified in writing under the hand of the archbishop in the one case, and of the archbishop and bishop in the other case; the certificate so signed by an archbishop only to be afterwards deposited in the registry of such archbishop, and the certificate so signed by an archbishop and also by a bishop to be afterwards deposited in the registry of such bishop, which certificate shall be conclusive evidence of the facts thereby certified."

Not to prevent exchanges.

By sects. 5 and 6, this act is not to prevent ecclesiastical persons effecting exchanges under certain conditions, or granting leases under special statutes.

Or leases for same term as preceding leases.

Sect. 7. "Nothing in this act contained shall prevent a lease from being granted, with a view to confirm any title or otherwise, for the life or lives of the same person or persons, or for the lives or life of the survivors or survivor of them, or for the same term of years, and commencing at the same period, as the lease last granted for a life or lives, or a term of years respectively."

Act not to render valid illegal leases.

Sect. 8. "No lease not authorized by the laws and statutes now in force shall be rendered valid by anything in this act contained."

Leases contrary to this act void.

Sect. 9. If any lease contrary to this act shall have been granted since the first day of March, 1836, or shall be granted after the passing of this act, every such lease shall be void to all intents and purposes whatsoever: provided always, that nothing in this act contained shall be deemed or taken to affect any lease granted or to be granted pursuant to any covenant or agreement entered into previously to the first day of March, 1836.

6 & 7 Will. 4, c. 64.

A statute passed in the same session (*p*), enacts that leases granted under this last act are not to be void by reason of not containing the several recitals mentioned in section 2.

Bonds to defraud the Disabling Statutes.

By 18 Eliz. c. 11, s. 2, it is enacted, that every bond and covenant for renewing or making of any lease or leases, contrary to the true intent of the said act of the 18 Eliz. c. 11, or of the act of the 13 Eliz. c. 10, shall be utterly void.

In *Rudge* v. *Thomas* (*q*), a parson covenanted with another, that he should have his tithes for thirteen years; afterwards he resigned, and another parson was inducted;

(*p*) 6 & 7 Will. 4, c. 64.

(*q*) 3 Bulst. 202; Gibs. 737.

the lessee brought an action of covenant against the lessor, and the defendant pleaded 18 Eliz. c. 11, in bar. But Coke, Dodderidge, and Haughton agreed, that the covenant was not made void by this statute; which was only intended to void bonds and covenants contrary to 13 Eliz. c. 10, but does not extend to bonds and covenants made for the enjoyment of leases which become void by the common law, as leases do by resignation, or the like.

But when a dean and canons made bonds among themselves, to ascertain to each other the benefit of particular leases, and the whole body engaged, under such and such forfeitures, to make the leases respectively as there should be occasion; such bonds were declared to be void by this statute. And so it was, where the dean and chapter obliged themselves to make to one a lease of lands, which were then in lease to another for fifteen years to come: the covenant was declared void upon this statute (*r*).

But this statute does not avoid bonds and covenants touching leases of *houses* in cities, boroughs, corporations or markets, according to 14 Eliz. c. 11, s. 5 (*s*).

College leases.

By 18 Eliz. c. 6, further regulations are made as to college leases, which, however, have all been practically superseded by more recent legislation.

Leases of houses of residence.

Besides the restrictions above mentioned, it is enacted by 1 & 2 Vict. c. 106, s. 59, that all contracts for letting houses in which any spiritual persons is required by the bishop to reside shall be void; and a penalty of 40*s*. a day is imposed on all persons attempting to hold possession contrary to this act (*t*).

Apportionment.

It should be here observed that by virtue of 11 Geo. 2, c. 19, s. 15, 4 & 5 Will. 4, c. 22, and lastly 33 & 34 Vict. c. 35, all rents and other periodical payments are due from day to day, and are apportionable where the incumbent lessor dies or vacates his preferment at a day other than that on which such rent or payment becomes due, between him and his successor.

SECT. 2.—*The Exchange of Church Property.*

17 Geo. 3, c. 53.

The statute 17 Geo. 3, c. 53, an act primarily intended to facilitate the erection and improvement of houses of residence for the parochial clergy (*u*), has the following provisions relating to this subject (*x*):

(*r*) Gibs. 738; Moor. 789.

(*s*) Gibs. 738; Hob. 269.

(*t*) *Vide supra*, pp. 1149, *et seq.*

(*u*) *Vide supra*, p. 1459: and generally throughout this section compare Part V., Chap. II.

(*x*) Parsons, not being able to aliene, could not *exchange* their

17 Geo. 3, c. 53.
Where new buildings are necessary for the residence of the incumbent, the ordinary, &c. may purchase any convenient house within one mile of the church; and a certain portion of land.

Sect. 10. "Where new buildings are necessary to be provided or erected for the habitation and residence of the rector, vicar, or other incumbent, pursuant to the authority hereby given, it shall and may be lawful for the ordinary, patron, and incumbent of every such living or benefice, to contract, or to authorize, if they shall think fit, the person so to be nominated by them as aforesaid, to contract, for the absolute purchase of any house or buildings, in a situation convenient for the habitation and residence of the rector or vicar of such living or benefice, and not at a greater distance than one mile from the church belonging to such living, benefice, or chapelry; and also to contract for any land adjoining or lying convenient to such house or building, or to the house or building belonging to any parochial living or benefice, having no glebe lying near or convenient to the same, not exceeding two acres, if the annual value of such living, to be ascertained as aforesaid, shall be less than one hundred pounds per annum, nor two acres for every one hundred pounds per annum, if of greater value, and to cause the purchase-money for such house or buildings to be paid out of the money to arise under the powers and authorities of this act; in all which cases the said buildings and lands shall be conveyed to the patron of such living or benefice, and his heirs, in trust, for the sole use and benefit of the rector, vicar, or other incumbent of such living or benefice for the time being, and their successors, and shall be annexed to such church or chapel, and be enjoyed and go in succession with the same for ever; but no contract so made by the nominee shall be valid, until confirmed by the ordinary, patron, and incumbent, by writing under their hands; and every such purchase deed shall be in the form or to the effect contained in the schedule hereunto annexed, and shall be registered in such manner, and in such office, as the other deeds are hereby directed to be registered."

Purchase-money for such land to be raised by sale, &c. of part of the glebe or tithes.

Sect. 11. "When any such land lying near to the parsonage house and buildings belonging to such living or benefice, or to be so purchased or exchanged as aforesaid, shall be thought fit to be taken and used as a convenience for the same, the purchase-money or equivalent for such land shall be raised and had by sale or exchange of some part of the glebe or tithes of such living or benefice, which shall appear to the said ordinary, patron, and incumbent

glebes (*Turther's case* in 40 Eliz.). Bishop Gibson says there is a case in the Chancery Reports in 5 Car. I. of *Morgan* v. *Clerk*, where such an exchange was accomplished by decree of the Court of Chancery. (Gibs. 661.)

most convenient for that purpose; and every such sale or exchange shall be by deed, in the form or to the effect contained in the schedule hereunto annexed, and registered as hereinbefore directed."

These provisions were much extended by 55 Geo. 3, c. 147. This act, reciting that "in divers ecclesiastical benefices, perpetual curacies, and parochial chapelries, the glebe lands, or some part or parts thereof, lie at a distance from and are inconvenient to be occupied with the parsonage or glebe houses; and the parsonage or glebe houses of divers benefices, perpetual curacies, and parochial chapelries, are mean and inconvenient; and it would often tend much to the comfort and accommodation, and thereby also to promote the residence of the incumbents of such benefices, perpetual curacies, and parochial chapelries, if the glebe lands and parsonage or glebe houses thereof could be by law exchanged for other lands of greater value, or more conveniently situated, and for other and more convenient houses: and whereas there are also divers lands and tenements which have been accustomed to be granted or demised by the incumbent for the time being of certain ecclesiastical benefices, perpetual curacies, or parochial chapelries, for one, two, or three lives, or for a term or terms of years absolutely or determinable on a life or lives, as being holden by copy of court roll or otherwise, under some manor or lordship belonging to such benefices, perpetual curacies, or parochial chapelries, and it would therefore be advantageous to the said benefices if the same lands and tenements, or some of them, or some part thereof, were annexed as glebe to the living or benefice to which they belong:" enacts, "that it shall be lawful for the parson, vicar, or other incumbent for the time being, of any ecclesiastical benefice, perpetual curacy, or parochial chapelry, by deed indented, and to be registered in manner hereinafter mentioned, and with the consent of the patron of such benefice, perpetual curacy, or parochial chapelry, and of the bishop of the diocese wherein the same is locally situate (to be signified as hereinafter is mentioned), to grant and convey to any person or persons, and to his, her, or their heirs and assigns, or otherwise, as he or they shall direct or appoint, or to any corporation sole or aggregate, and his or their successors, the parsonage or glebe house, and the outbuildings, yards, gardens, and appurtenances thereof, and the glebe lands, and any pastures, feedings, or rights of common or way appendant, appurtenant, or in gross, or any or either of such house, outbuildings, yards, gardens, and glebe lands, pastures, feedings, or

55 Geo. 3, c. 147.

Power to exchange parsonage houses and glebe lands for other houses and lands.

55 Geo. 3, c. 147.

rights of common or way, or any part or parts thereof, belonging to any such benefice, perpetual curacy, or parochial chapelry, in lieu of and in exchange for any house, outbuildings, yards, gardens, and appurtenances, and any lands, or any or either of them, whether lying within the local limits of such benefice, perpetual curacy, or parochial chapelry or not, but so as that the same be situate conveniently for actual residence or occupation by the incumbent thereof, the same also being of greater value or more conveniently situated than the premises so to be given in exchange, and being of freehold tenure, or being copyhold of inheritance, or for life or lives, holden of any manor belonging to the same benefice, and also for the parson, vicar, or incumbent for the time being of the same benefice, perpetual curacy, or parochial chapelry, by the same or a like deed, and with the like consent, and testified as aforesaid, to accept and take in exchange to him and his successors for ever, from any person or persons, or corporation sole or aggregate, any other house, outbuildings, yards, gardens, easements, and appurtenances, and any other lands, or any or either of such house, outbuildings, yards, gardens, lands, easements, and appurtenances, the same respectively being of freehold tenure, or being copyhold of inheritance, or for life or lives, holden of any manor belonging to the same benefice, and being of greater value or more conveniently situated, in lieu of and in exchange for such parsonage or glebe house, outbuildings, yards, gardens, glebe lands, and appurtenances, and such pastures, feedings, and rights of common or way, or any or either of them, so to be granted and conveyed, and which said house, outbuildings, yards, gardens, lands and appurtenances so to be accepted and taken in exchange, by any parson, vicar, or other incumbent, shall for ever, from and after such grant and conveyance thereof, be the parsonage and glebe house and glebe lands and premises of the said benefice, perpetual curacy, or parochial chapelry, to all intents and purposes whatsoever, and shall become annexed to the said benefice, perpetual curacy, or parochial chapelry, to all intents and purposes whatsoever, and be holden and enjoyed by such incumbent and his successors accordingly, without any licence or writ of *ad quod damnum;* and that the whole, or any part or parts of the said house, outbuildings, lands, and premises so to be annexed, which before such annexation were of copyhold tenure, shall for ever, from and after such annexation, become and be of freehold tenure, the Statute of Mortmain, or any other statute or law to the contrary notwithstand-

ing (*y*); . . . . Provided that in all cases when such exchange shall be made by any owner or owners having any less estate or interest than in fee simple of or in the message, buildings, lands, and premises so to be by him, her, or them granted or conveyed in exchange, or being any corporation aggregate or sole, or person or persons under any legal disability, the parsonage house, out-buildings, and glebe lands respectively to be so taken in exchange as aforesaid, shall at the time of making such exchange be of equal value with, or not of less value than the said messuage, buildings, lands, and premises respectively so to be granted and conveyed in exchange to such parson, vicar, or other incumbent."

Tithes of exchanged lands.

By sect. 2, the premises given in exchange are to be subject to the same tithes as those taken in exchange (unless it be agreed between the parties to such exchange that the same shall become and be subject to the render or payment of tithes in kind) from and immediately after such conveyance in exchange, in case such first-mentioned lands are situate in the same parish, vicarage, or parochial chapelry, with the said lands or premises before glebe thereof, or belonging thereto, but not otherwise.

Title to lands.

Sect. 3 provides for cases where the title of the person conveying the lands in exchange is disputed, and enacts that after the exchange the incumbent is not to be evicted.

Power to annex premises belonging to manors, and heretofore grantable and demisable as copyhold or otherwise.

By sect. 4, "It shall and may be lawful to and for the parson, vicar, or other incumbent of any ecclesiastical benefice, perpetual curacy, or parochial chapelry, of or to which benefice, perpetual curacy, or parochial chapelry, any manor or lordship is parcel or appurtenant, and as parcel of or belonging to which manor or lordship any lands or tenements are or have been usually granted or demised, or grantable or demisable by copy of court roll, or otherwise, for any life or lives, or for any term or number of years absolutely or determinable on any life or lives, by deed indented (and to be registered as hereinafter mentioned) with the consent of the patron and bishop (to be testified as hereinafter mentioned) to annex to the said benefice, perpetual curacy, or parochial chapelry, as and for glebe land, or parsonage or glebe house or houses and buildings thereof, all or any part or parts of such lands or tenements, whether lying within the local limits of such benefice, perpetual curacy, or parochial chapelry, or not, and that from and after such annexation the said lands

(*y*) The proviso here omitted was repealed by 6 Geo. 4, c. 8, s. 2.

55 Geo. 3, c. 147.

and tenements so annexed shall cease to be thereafter grantable or demisable by any incumbent of the said benefice, perpetual curacy, or parochial chapelry (otherwise than as glebe lands are or shall be by law grantable or demisable), but shall from thenceforth be and become, and be deemed and taken to be the glebe lands and parsonage or glebe house or houses of and annexed to such benefice, perpetual curacy, or parochial chapelry, for ever, to all intents and purposes whatsoever, without any licence or writ of *ad quod damnum*, the Statute of Mortmain, or any other statute or law to the contrary notwithstanding: provided always, that no such annexation shall in any wise annul, determine, or affect any grant or demise then previously made and actually existing of the said lands and tenements so to be annexed as last aforesaid."

Such annexations not to annul existing grants or demises.

Power to annex parsonage houses, &c. by benefaction.

By sect. 5, "Where there shall be no existing parsonage or glebe house on any ecclesiastical benefice, perpetual curacy, or parochial chapelry, or where the existing parsonage or glebe house, or the outbuildings thereof, on any such benefice, perpetual curacy, or parochial chapelry, shall be inconvenient or too small or incommodiously situate, it shall be lawful from and after the passing of this act for any person or persons, being owners in fee simple, or for any corporation sole or aggregate, with or without confirmation, as the case may require, and by and with such consent, and to be signified as hereinafter mentioned, of the incumbent, patron, and bishop, to give, grant, and convey, by deed indented, and to be registered as hereinafter is mentioned, to any parson, vicar, or other incumbent of such benefice, curacy, or chapelry, for the time being, who shall also have power to accept the same, any messuage, outbuildings, yard, garden, orchard, and croft, or any of them, with their appurtenances, or any right of way, or other easement, whether lying within the local limits of such benefice, perpetual curacy, or parochial chapelry or not, but so as that the same be conveniently situate for actual residence or occupation by the incumbent thereof; and which messuage, outbuildings, yard, garden, orchard, and croft, with their appurtenances or right of way, or other easement, shall for ever from and after such grant and conveyance thereof be and become annexed to and be deemed and taken to be the parsonage or glebe house, outbuildings, yard, garden, orchard, croft, appurtenances and right of way or other easement of the said benefice, curacy, or chapelry, to all intents and purposes whatsoever, and be holden and enjoyed by the said incumbent and his successors accordingly, without any

licence or writ of *ad quod damnum*, the Statute of Mortmain, or any other statute or law to the contrary notwithstanding; and from and after such grant and annexation it shall be lawful for the incumbent for the time being of the said benefice, curacy, or chapelry, to which such grant and annexation shall have been made (with the consent in writing of such patron and bishop under their hands and seals to be duly registered as hereinafter is mentioned), to take down and remove any parsonage or glebe house, and outbuildings, or any part thereof, which before such annexation belonged to the said benefice, curacy, or chapelry (if the same or part thereof cannot be better applied to the permanent advantage of such benefice, curacy, or chapelry), and with the like consent as aforesaid, to apply the materials, or the produce thereof, if sold, towards some lasting improvement of the said benefice, curacy, or chapelry: provided always, that nothing herein contained shall extend to enable any persons being infants or lunatics, or femes covert without their husbands, to make any such gift, grant, or conveyance; anything in this act contained to the contrary in anywise notwithstanding."

By sect. 6, reciting 17 Geo. 3, c. 53, and 21 Geo. 3, c. 66, "and that there are many ecclesiastical benefices, perpetual curacies, and parochial chapelries to which no glebe land, or only a small portion of glebe land is belonging; and it is therefore expedient to enable the making provision by purchase, for the annexation of glebe land to such benefices, perpetual curacies and parochial chapelries;" it is enacted, that "it shall be lawful for the parson, vicar, or other incumbent for the time being, of any ecclesiastical benefice, perpetual curacy, or parochial chapelry, the existing glebe whereof shall not exceed five statute acres, with the consent of the patron and bishop, to be signified as hereinafter mentioned, to purchase any lands not exceeding in the whole twenty statute acres, with the necessary outbuildings thereon, whether being within the local limits of the said benefice, perpetual curacy, or parochial chapelry, or not, but so as that the same be situate conveniently for building a parsonage or a glebe house and outbuildings, and for gardens and glebe thereof, or for any of the said purposes, and for actual residence and occupation by the incumbent thereof, such land being of freehold tenure, or being copyhold of inheritance, or for life or lives, holden of any manor or lordship belonging to the same benefice, perpetual curacy, or parochial chapelry; and which lands so purchased shall for ever, from and after the grant and conveyance thereof, be and become annexed to and glebe

Power to purchase land,

to be annexed to benefices as glebe land thereof.

55 Geo. 3, c. 147.

of such benefice, perpetual curacy, or parochial chapelry, to all intents and purposes whatsoever, and be holden and enjoyed by such incumbent, and his successors accordingly, without any licence or writ of *ad quod damnum;* and the whole or any part or parts of the said lands, which before such annexation were or was of copyhold tenure, shall for ever, from and after such annexation, become and be of freehold tenure; the Statute of Mortmain or any other statute or law to the contrary notwithstanding."

Copyhold land so purchased to be holden as freehold.

6 Geo. 4, c. 8.

Exchanges may be made for lands or tenements that are copyhold, and not held of a manor belonging to the benefice, &c.;

By 6 Geo. 4, c. 8, s. 3, it is further provided, that "It shall and may be lawful for the parson, vicar or other incumbent for the time being of any ecclesiastical benefice, perpetual curacy or parochial chapelry, to grant and convey, in the manner, and by and under the several powers, provisions, conditions, and restrictions contained in the said act of 55 Geo. 3, c. 147, and in this act, to any such person or persons, or corporation, as in the said first-mentioned act are described, any such lands or tenements as are described in the same act belonging to his benefice, in lieu of and in exchange for any lands or tenements of the description mentioned in the said first-mentioned act, as those which are thereby authorized to be accepted and taken in exchange by any such parson, vicar or other incumbent, although such last-mentioned lands or tenements may be copyhold of inheritance holden of a manor not belonging to such ecclesiastical benefice, perpetual curacy or parochial chapelry: provided always, that no such exchange be made without the consent of the lord of the manor of which the lands to be taken in exchange are holden: provided always, that from and immediately after such conveyance, the lands or tenements accepted and taken in exchange by any such parson, vicar or other incumbent, shall become and be of freehold tenure, and the lands or tenements by him granted and conveyed, and which before such conveyance belonged to his benefice, perpetual curacy or parochial chapelry, shall become copyhold of the same manor, and subject to the same rents, fines, services, customs, and manorial rights and properties, to all intents and purposes, as the lands or tenements so to be accepted and taken in exchange were subject to before the making of such exchange."

with consent of lord of manor.

Lands, &c. so taken by incumbent to become freehold premises granted by him. Copyhold.

55 Geo. 3, c. 147.

Power to mortgage.

By sect. 7 of 55 Geo. 3, c. 147, the incumbent is enabled to raise money for effecting the purposes of the act by mortgage of the tithes and emoluments of his benefice to an amount not exceeding two years' income; but this money may be raised in addition to money already raised for building or repairing the house of residence, under 17 Geo. 3,

c. 53. By 28 & 29 Vict. c. 69, s. 1, this is extended to any sum not less than 100*l.*, and not more than three years' net income.

By sect. 8, the governors of Queen Anne's bounty are empowered to lend money for promoting the purposes of this act.

By sect. 9, any college or hall within the universities of Oxford or Cambridge, or any other corporate bodies, being owners of the patronage of ecclesiastical livings or benefices, may do the same, either upon interest or without any interest for their money.

Consent of patron and bishop to all deeds of exchange, mortgage or purchase.

By sect. 10, "When any parson, vicar, or other incumbent as aforesaid, shall be desirous of effecting any exchange, purchase, or mortgage under the provisions of this act, the consent of the patron and bishop to every deed of exchange, conveyance, or mortgage shall, before the same shall be signed and sealed by the parson, vicar, or other incumbent, be signified by the said patron and bishop respectively being made parties to and signing and sealing the said deed in the presence of two or more credible persons, who shall by indorsement thereon attest such signing and sealing, and in which attestation it shall be expressed that the same deed was so signed and sealed by such patron and bishop before the execution thereof by such parson, vicar, or other incumbent."

Other provisions.

By sect. 11, provision is made as to peculiars.

By sect. 12, powers analogous to those contained in the Lands Clauses Consolidation Act, 1845 (*z*), are given to owners of limited estates and corporations of conveying land, either for exchange or sale, under this act.

But by sect. 13, persons under legal incapacity are not to convey (except in exchange) more than five acres.

Where exchange or purchase shall be made, notice to be previously given.

By sect. 14, as amended by 6 Geo. 4, c. 8, "In all cases where any exchange or purchase shall be made under the authority of this act, three calendar months' previous notice, describing the particulars, extent and situation of the premises respectively to be given and taken in exchange or purchased, shall be given of the intention to make such exchange or purchase, by the insertion of the same notice for three successive weeks in some one and the same newspaper of and in general circulation in each county wherein the premises so to be given and taken in exchange or purchased, or any part thereof, are situate: and also by affixing such notice in writing on a conspicuous part of the door of the church or chapel of each parish or

(*z*) 8 Vict. c. 18.

55 Geo. 3, c. 117.

chapelry wherein such premises, or any part thereof, are situate, on three Sundays successively whereon divine service shall be performed, and shortly before the commencement of such service on each Sunday in such church or chapel.

A map and valuation on actual survey to be made of the premises to be given and taken in exchange or purchased.

By sect. 15, "Whenever any exchange or purchase is intended to be made under the authority of this act, a map or maps under an actual survey, on oath (which oath any justice of the peace is hereby authorized to administer) by some competent surveyor to be approved of by the patron, bishop, and incumbent, shall in cases of exchange be made and taken of the whole of the said glebe lands, or of such part or parts thereof as will sufficiently enable the bishop to judge of the convenience and expediency of the proposed exchange, and also of the glebe or parsonage house, buildings, and premises, any part of which it is proposed to exchange, as well as of the other lands, house, buildings, and premises, proposed to be taken in exchange; and shall in cases of purchase be made and taken of the whole of the lands or hereditaments so to be purchased; and in cases of exchange the same surveyor shall in like manner make a valuation on oath (to be administered as aforesaid) of the said glebe lands and glebe or parsonage house, buildings, and premises, and also of the lands, house, buildings, and premises intended to be taken in exchange, and in cases of purchase the same surveyor shall in like manner make a valuation on oath of the lands or hereditaments so intended to be purchased; and every such valuation shall include and distinctly specify the value of all timber and other trees growing thereon, and of the rights of common, and of all mines, minerals, and quarries (if any), and of all other rights, profits, and advantages whatsoever (if any) to the said premises, or either of them, or any part or parcel of the same, respectively belonging."

Bishop to issue a commission of inquiry.

By sect. 16, "In all cases, as well of exchange as of purchase under this act, the bishop, on receiving such map or maps and valuation, shall, if he shall in the first instance so far approve of the said exchange or purchase, issue a commission of inquiry under his hand and seal, directed to such persons as he shall think proper, not being fewer than six in number, and of whom three at the least shall be beneficed clergyman actually resident in the neighbourhood of the benefice, perpetual curacy, or parochial chapelry, whereto it shall be proposed to annex any buildings or lands by exchange or purchase under the authority of this act, and of whom one shall be a barrister at law of three years' standing at the least, to be named by the senior

judge in the last preceding commission of nisi prius for the county in which the said benefice, perpetual curacy, or parochial chapelry, shall be situate (*a*), and the return to which commission of inquiry shall be made and signed by a majority of the persons therein named, after an actual inspection by them of all the premises, with such map and valuation before them, and not otherwise, and three at least of the persons making and signing the same shall be either three such beneficed clergymen actually resident as aforesaid, or two at least of such beneficed clergymen resident as aforesaid, together with such barrister as aforesaid; and in no case whatever shall any exchange or purchase be effected under the authority of this act, unless such commission shall have been previously issued and returned, and unless the return to such commission, so made and signed as aforesaid, shall certify that, after an actual inspection and examination of the premises, such exchange or purchase, in the judgment of the persons making the said return, is fit and proper to be made, and will promote the permanent advantage or convenience of the incumbent of such benefice, perpetual curacy, or parochial chapelry, and his successors in the same."

Consent for patrons in case of minority, lunacy or marriage.

By sect. 17, "Whenever the patron of any benefice, perpetual curacy, or parochial chapelry, to which the provisions of this act extend, shall happen to be a minor, idiot, lunatic, or feme covert, it shall and may be lawful for the guardian, committee, or husband of every such patron to transact the several matters, and execute the requisite deeds as aforesaid, for such patron, who shall be bound thereby in such manner as if he or she had been of full age or sound mind, or feme sole, and had done such acts and executed such deeds."

By sect. 18, provision is made for the consent of the patron where livings belong to the crown, or to the Duchy of Lancaster.

Deeds and instruments to be deposited in the archbishop's or bishop's registry.

By sect. 19, "One part of all deeds and instruments to be made and executed in pursuance of or for carrying into execution this act, together with the maps and valuations, and the commissions of inquiry and the returns to the same hereinbefore directed, shall, within twelve calendar months next after the date or dates thereof, be deposited in the office of the registrar of the diocese wherein such benefice, perpetual curacy, or parochial chapelry shall be locally situate,

(*a*) In Middlesex by the Chief Justice of the Queen's Bench or Common Pleas (1 Geo. 4, c. 6, s. 1). In Lancaster or Durham, by the Chief Justice or senior judge of the Court of Common Pleas for the particular county palatine (6 Geo. 4, c. 8, s. 1).

55 Geo. 3, c. 117.

to be perpetually kept and preserved therein, except as to those benefices which are under the peculiar jurisdiction of any archbishop or bishop, in which case the several documents before mentioned shall be deposited in the office of the registrar of that peculiar jurisdiction, to which any such benefice, perpetual curacy, or parochial chapelry shall be subject, and such registrars shall respectively so deposit and preserve the same, and shall give and sign a certificate of such deposit thereof to be written on a duplicate, or on any other part or parts of the said deeds, or any or either of them, or on some other separate parchment, paper, or instrument; and every such deed or instrument shall be produced at all proper and usual hours at such registry, to every person applying to inspect the same, and an office copy of each such deed or instrument, certified under the hand of the registrar (and which office copy so certified the registrar shall in all cases grant to every person who shall apply for the same), shall in all cases be admitted and allowed as legal evidence thereof in all courts whatsoever; and every such registrar shall be entitled to the sum of ten shillings and no more (over and besides the stamp duty, if any) for such commission and the previous requisites thereof; and the sum of five shillings and no more for so depositing as aforesaid the deeds, settlements, map, survey, valuation, commission, and instruments and so aforesaid, certifying such deposit thereof; and the sum of one shilling and no more for each such search; and the sum of sixpence and no more (over and besides the said stamp duty) for each folio of seventy-two words of each such office copy so certified as aforesaid."

56 Geo. 3, c. 52. Incumbent with consent of patron and bishop may apply money arising from sale of timber for or towards exchange or purchase of parsonage house or glebe lands.

By 56 Geo. 3, c. 52, s. 1, "It shall and may be lawful for the incumbent of any benefice, perpetual curacy, or parochial chapelry, with the consent of the patron of such benefice, perpetual curacy, or parochial chapelry, and of the bishop of the diocese wherein the same is locally situate, or of the archbishop or bishop to whom the peculiars wherein such benefice, perpetual curacy, or parochial chapelry is situate shall belong (such consent to be signified in manner as in the said recited act is mentioned), to pay and apply the monies to arise by sale of any timber cut and sold from the glebe lands of such benefice, perpetual curacy, or parochial chapelry, or from any other land, whether copyhold, holden under any manor of such benefice, perpetual curacy, or parochial chapelry, or otherwise, the timber whereof belongs to such benefice, perpetual curacy, or parochial chapelry, either for equality of exchange, or towards and in part of equality of exchange, or for the

price or purchase-money, or towards and in part of the price or purchase-money of any house, outbuildings, yards, gardens and appurtenances, or any lands, or any or either of them, by the said recited act authorized to be taken in exchange or to be purchased, and from and after such exchange or purchase to be annexed to and to be and become the parsonage and glebe house and glebe lands and premises of such benefice, perpetual curacy, or parochial chapelry, as in the said recited act (*i. e.*, 55 Geo. 3, c. 147) is mentioned."

1 & 2 Vict. c. 106.

Where new buildings are necessary, bishop may purchase any conveniently situated house, and a certain portion of land.

By 1 & 2 Vict. c. 106, s. 70, "Where new buildings are necessary to be provided for the residence of the incumbent of any benefice, exceeding in value one hundred pounds a-year, and avoided after the passing of this act, and where such buildings cannot be conveniently erected on the glebe of such benefice, it shall be lawful for the bishop to contract, or to authorize, if he shall think fit, the person so to be nominated by him as aforesaid to contract, for the absolute purchase of any house or buildings in a situation convenient for the residence of the incumbent of such benefice, and also to contract for any land adjoining or lying convenient to such house or building, or to contract for any land upon which a fit house of residence can be conveniently built, and to raise the purchase-money for such house or buildings and land adjoining, or for such land upon which a house of residence can be conveniently built (as the case may be), by mortgage of the glebe, tithes, rents, and other profits and emoluments arising or to arise from such benefice, in the same manner in all respects as is hereinbefore directed with respect to the mortgage hereinbefore authorized or directed to be made, which mortgage shall be binding upon the incumbent and his successors, and he and they and their representatives are hereby made liable to the payment of the principal, interest, and costs, in the same manner and to the same extent as hereinbefore directed with respect to the aforesaid mortgage; and the receipt of such nominee or nominees as aforesaid shall be a sufficient discharge to the person or persons who shall advance or pay the money so to be raised: provided always, that no greater sum shall be charged on any benefice under the authority of this act than four years' net income and produce of such benefice (after such deduction as aforesaid)."

Buildings and lands to be conveyed to patron in trust for the incum-

Sect. 71. "The buildings and lands so to be purchased shall be conveyed to the patron of such benefice and his heirs or successors, as the case may be, in trust for the sole use and benefit of the incumbent of such benefice for the

bent for the time being.

time being and his successors, and shall be annexed to such benefice, and be enjoyed and go in succession with the same for ever; but no contract of purchase made by the nominee shall be valid until confirmed by the bishop by writing under his hand; and every such purchase deed shall be in the form or to the effect contained in the schedule hereunto annexed, and shall be registered in such manner and in such office as the other deeds are hereby directed to be registered."

1 & 2 Vict. c. 23.

Old benefice houses in certain cases may be converted into farming buildings for the tenants of the glebe.

By 1 & 2 Vict. c. 23, s. 6, "When it shall happen that any existing house and offices belonging to any benefice shall be unfit for the residence of the incumbent thereof, and shall be incapable of being enlarged or repaired so as to be rendered fit for his residence; and it shall be so certified to the bishop of the diocese wherein such benefice shall be situate by some competent surveyor or architect, and that it will be advantageous to the benefice that such house and offices should be suffered to remain, it shall be lawful for such incumbent, with the consent in writing of such bishop (such consent to be registered in the registry of such bishop), to allow such house and offices to remain standing as a dwelling-house and offices, or to convert the same into farming buildings for the use and occupation of the occupier or occupiers of the glebe lands belonging to such benefice; and from and after the complete erection or the purchase of a new house and offices to the satisfaction of the bishop of the diocese, such old house and offices shall from thenceforth be used for and converted to the purposes aforesaid; and the house and offices to be so erected or purchased shall from thenceforth to all intents and purposes be deemed and taken to be the residence house of and for such benefice, without the necessity of obtaining any licence or faculty for that purpose."

Power to incumbent (with consent of patron and ordinary and archbishop) to sell house of residence if inconveniently situated or under special circumstances.

Sect. 7. "Where the residence house, gardens, orchard, and appurtenances belonging to any benefice shall be inconveniently situate, or for other good and sufficient reasons it shall be thought advisable to sell and dispose thereof, it shall and may be lawful for the incumbent of such benefice, and he is hereby authorized and empowered, with the consent and approbation of the ordinary and patron thereof, and of the archbishop of the province, to be signified by their executing the deed or conveyance hereby authorized to be made, absolutely to sell and dispose of such house, gardens, orchard, and appurtenances, any or either of them, with any land contiguous thereto not exceeding acres, to any person or persons whomsoever, either altogether or in parcels, and for such sum or sums of money

as to such ordinary and patron and archbishop as shall appear fair and reasonable, and upon payment of the purchase-money for the same as hereinafter mentioned by deed indented to convey and assure such house, gardens, orchard, land, and appurtenances unto and to the use of the purchaser or purchasers thereof, his or their heirs or assigns, or as he or they shall direct or appoint."

Another statute (*b*) was passed, on purpose to fill up this blank, with the word "twelve."

Purchase-monies to be paid to the governors of Queen Anne's bounty;

Sect. 8. "The monies to arise from such sale or sales as aforesaid shall be paid to the said governors of the bounty of Queen Anne; and that the receipt or receipts of the treasurer for the time being of the said governors shall be and be deemed and taken to be an effectual discharge to the person or persons paying such monies, or for so much thereof as in such receipt or receipts shall be expressed; and after obtaining such receipt or receipts such purchaser or purchasers shall be absolutely discharged from the money for which such receipt or receipts shall be given, and shall not be answerable or accountable for the loss, misapplication, or nonapplication of such monies or any part thereof."

to be applied to buy or build a house for incumbent's residence.

Sect. 9. "The monies to arise from such sale or sales as aforesaid shall, after payment of all costs, charges, and expenses of such sale or sales, be applied (*c*) and disposed of by the said governors in or towards the erection or purchase of some other house and offices, or the purchase of an orchard, garden, and appurtenances, or land for the site of a house, any or either of them, together with land contiguous thereto, and not exceeding twelve acres, suitable for the residence and occupation of the incumbent of such benefice, and approved of by the said ordinary and patron, such approval to be signified under the respective hands of such ordinary and patron, and to be deposited in the registry of such ordinary; and such house shall from thenceforth be deemed and taken to be the house of residence of such benefice for all purposes whatsoever."

Purchase from persons under disability.

By sect. 14, in case of the purchase of land for the purposes of that act the powers and provisions of 7 Geo. 4, c. 66, enabling persons under disability to sell lands, were to be applied. This act has, however, practically been superseded by the larger provisions of 28 & 29 Vict. c. 69, s. 4, which are as follows:—

"It shall be lawful for the principal officer of any

(*b*) 1 & 2 Vict. c. 29.

(*c*) Till such application, they are, by 2 & 3 Vict. c. 49, s. 14, to be invested and accumulated.

28 & 29 Vict. c. 69.

public department holding any messuages, buildings, lands, tenements, or hereditaments for or on behalf of her Majesty, or otherwise for the public use or the use of such department, and for every body politic, corporate, or collegiate, and corporation aggregate or sole, and for all trustees, guardians, commissioners, or other persons having the control, care, or management of any hospital, school, charitable foundation, or other public institution, and for all other persons by the Lands Clauses Consolidation Act, 1845 (*d*), empowered to sell and convey or release lands by any assurance under the hand and seal or under the common seal, as the case may be, of such principal officer, body, or corporation, or under the hands and seals, or hand and seal, of such trustees, guardians, commissioners, or other persons or person, to grant and convey or release, either by way of voluntary gift or of sale, to the said governors, in fee simple or otherwise, any messuages, buildings, lands, tenements or hereditaments to be used as and for parsonages or residences for incumbents of benefices, or the outbuildings, yards, gardens, or appurtenances thereto, or as and for sites or for enlarging sites for such parsonages or residences or the outbuildings, yards, gardens, or appurtenances thereto, and all such assurances may be made according to the form contained in the 20th section of the act 1 Vict. c. 20, or as near thereto as the circumstances of the case will admit, or in any other form which the said governors may approve: but no such assurance or assurances from the same body or persons, otherwise than upon a sale for the fair value, shall comprise (including the site of any buildings) more than one acre, and upon every such assurance by way of sale the purchase-money may be paid to the seller or sellers, or as he or they shall appoint, and the receipt of them or him, or their or his appointees, shall be a sufficient discharge for the same, except that in the case of a sale for more than 20*l.* by a tenant for life, or other person having only a partial estate, the purchase-money shall be paid to and applied by two trustees in manner provided by the 71st section of the Lands Clauses Consolidation Act, 1845."

2 & 3 Vict. c. 49.

Power of sale given by 1 & 2 Vict. c. 23, extended.

By 2 & 3 Vict. c. 49, s. 17, "In any case in which any dwelling-house, shop, warehouse, or other erection or building (other than the house of residence) belonging to any benefice shall be so old and ruinous as that it would be useless or inexpedient to expend money in repairing and maintaining the same, or for other good and sufficient

(*d*) 8 Vict. c. 18.

reasons it shall be thought advisable to sell and dispose of the same, it shall and may be lawful for the incumbent of such benefice, and he is hereby authorized and empowered, with the consent and approbation of the ordinary and patron thereof and of the archbishop of the province, to be signified in the manner prescribed by the last-mentioned act, absolutely to sell and dispose of such dwelling-house, shop, warehouse, or other erection or building, with the yards, gardens, orchard, croft, and appurtenances thereto belonging, or any of them, to any person or persons whomsoever, either altogether, or in parcels, and for such sum or sums of money as to such ordinary, patron, and archbishop shall appear fair and reasonable, and upon payment of the purchase-money for the same as hereinafter mentioned, by deed indented, or in the case of copyhold or customary hereditaments by surrender or other customary mode of assurance, to convey and assure the hereditaments which shall be so sold unto and to the use of the purchaser or purchasers thereof, his or their heirs or assigns, or as he or they shall direct or appoint."

By sect. 18, the purchase-monies are to be paid to the governors of Queen Anne's bounty."

Purchase-monies to be appropriated to the particular benefice on account of which the same shall have been received, and to be subject, in regard to the application thereof, to all the powers, regulations, &c. of the said governors.

By sect. 19, "All the monies to arise from any such sale or sales as aforesaid (subject nevertheless, in the case of any lands or hereditaments which shall have been appropriated or annexed to any benefice by or with the concurrence of the said governors of the bounty of Queen Anne, to any stipulation or agreement which the said governors in their discretion may think proper to make for payment thereout of the costs and expenses of such sale or sales or any part thereof) shall be appropriated by the said governors to the particular benefice to which the hereditaments comprised in such sale shall have previously belonged, and shall be applicable and disposable by them for the benefit and augmentation of such benefice in such and the same manner, and with such and the same powers of investment, and other powers and authorities, in all respects, according to the rules and regulations of the said governors for the time being, as if the said monies, or the stocks or funds which might be purchased therewith, were then originally appropriated by the said governors to such benefice out of the general funds and profits of the said governors, or otherwise, for the benefit and augmentation thereof."

Who are to consent as patrons.

Sect. 20. "In any case in which upon the sale of any such lands or hereditaments as aforesaid, the patronage of the benefice to which the same shall belong shall be in the crown, or the advowson and right of patronage of such

2 & 3 Vict. c. 49.

benefice shall be part of the possessions of the duchy of Cornwall, or the patron of such benefice shall be a minor, idiot, lunatic or feme coverte, then and in every such case the consent required by this act on the part of the patron of such benefice shall and may be testified by the execution of such deed or assurance or other writing as aforesaid by such and the same persons as by 1 & 2 Vict. c. 23 (*a*), are in like cases directed or authorized to testify the consent of the patron to the exercise of the several powers given by the said act, or by certain other acts therein mentioned or referred to; and that in all other cases the consent required by this act on the part of the patron of any benefice shall be given by the person or persons who would be entitled to present or nominate or to collate to such benefice in case the same were actually vacant at the time of giving such consent."

Re-sale of lands purchased by Queen Anne's bounty, or otherwise annexed to benefice.

As to the resale of lands formerly purchased or annexed by or with the consent of the governors to particular benefices, where such lands "are situate elsewhere than within the parish or parishes of such benefice, or some adjoining parish or parishes," it is provided by sect. 15, that it shall be lawful for the incumbent of the benefice (with the consent of the governors, ordinary and patron "absolutely to sell and dispose of the said lands or hereditaments, or any part thereof, to any person or persons whomsoever, either together or in parcels, and either by public sale, or by private contract, for such sum or sums of money as to the said governors, ordinary, and patron shall seem fair and reasonable; and upon payment of the purchase-money for the same, as hereinafter directed, by deed indented, or, in the case of any lands or hereditaments of copyhold or customary tenure, by surrender or other customary mode of assurance, to convey and assure the lands or hereditaments comprised in such sale, unto and to the use of the purchaser or purchasers thereof, his, her, or their heirs, executors, administrators or assigns respectively, or as he, she, or they shall direct or appoint." The consent of the patron and ordinary is to be testified by their executing the conveyance, except in the case of copyhold or customary freeholds, where it may be testified by writing under hand and seal to be produced to the lord or steward of the manor.

By sect. 16, this power is extended to cases where the lands "shall be situate within the parish or parishes of such benefice, or some adjoining parish or parishes, but on account of any special circumstance or circumstances a sale of the said lands or hereditaments or any part thereof shall be deemed advantageous." Only in these cases the further consent of the archbishop is required.

(*a*) *Vide supra*, p. 1476.

Powers for defining and exchanging glebe.

By 5 & 6 Vict. c. 54 (one of the Tithe Redemption Acts), sect. 5, " For the purpose of defining and settling the glebe lands of any benefice, on the application of the spiritual person to whom the same belongs in right of such benefice, and with the consent of the landowner or landowners having or claiming title to the land so defined as glebe, and being in possession thereof, the tithe commissioners shall, during the continuance of the commission, as well before as after the completion of any commutation, have the same powers which they have for ascertaining, drawing, and defining the boundaries of the lands of any landowners on their application; and also upon the like application of any spiritual person the said commissioners shall have power to exchange the glebe lands, or any part thereof, for other land within the same or any adjoining parish, or otherwise conveniently situated, with the consent of the ordinary and patron of the benefice and of the landowner or landowners having or claiming title to the land so to be given in exchange for the glebe lands, and being in actual possession thereof as aforesaid, such consent to be testified as their consent under the first-recited act (*b*) is testified to anything for which their consent is therein required; and in every such case the tithe commissioners shall make an award in like manner as awards are made, under the first-recited act (*b*), setting forth the contents, description and boundary of the glebe lands, as finally settled by them, and of the lands awarded to the several parties to whom any lands theretofore part or reputed part of the glebe lands are to be awarded; and every such award shall have all the incidents of an agreement confirmed by the said commissioners for giving land instead of tithes, and in every case of exchange shall operate as a conveyance of the lands theretofore part or reputed part of the glebe lands to the several persons to whom the same shall be awarded, and to their heirs and successors, executors and administrators, as the case may be; and such lands shall thereupon be holden by the same tenure, and upon the like uses and trusts, and subject to the like incidents, as the land awarded as glebe in exchange for the same was formerly holden; and the expense of so defining, exchanging, and settling any glebe lands shall be borne in such manner as the tithe commissioners shall think just."

Glebe lands may be exchanged although no commutation be pending.

By 9 & 10 Vict. c. 73, s. 22, the provisions of 5 & 6 Vict. c. 54, " for the exchange of glebe lands for other lands shall authorize and be deemed to have authorized the exchange of glebe lands for other lands, although at the time

(*b*) 6 & 7 Will. 4, c. 91.

of such exchange, or of the applications in relation thereto, no proceedings for or concerning the commutation of tithes in the parish in which such glebe lands may be situate shall have been pending, and whether the commutation of tithes in such parish shall or shall not have been completed."

Copyhold and other lands may be exchanged for glebe.

By 23 & 24 Vict. c. 93, s. 41, "So much of the said recited acts as provides that the land given to any spiritual person in exchange for glebe of any benefice shall be free from incumbrances, and shall not be of copyhold or customary tenure, subject to arbitrary fine or the render of heriots, shall be repealed, and all conditions, charges, incumbrances and every other incident affecting the land so given shall upon such an exchange be transferred to the said glebe taken in exchange for the same land; and the glebe land taken in exchange for any copyhold or customary land shall be held of the lord of the same manor, under the same rent, custom and services, as the said copyhold or customary land previously was or ought to have been held, and without any new admittance in respect thereof, but the consent of the lord of the same manor shall be necessary to any exchange in which any land of copyhold or customary tenure shall be included."

Lands of bishops, deans and chapters.

By 3 & 4 Vict. c. 113, s. 68 (*e*), for the purposes of that act, and with the consent of the bishop or chapter as the case may be, lands and hereditaments belonging to any bishop or chapter may be sold or exchanged by the ecclesiastical commissioners.

By 5 & 6 Vict. c. 26, s. 8, these provisions are extended and may be put in force for procuring new residence houses for bishops, deans, or canons under that act.

SECT. 3.—*The Leasing Statutes of Victoria* (*f*).

These statutes are 5 Vict. sess. 2, c. 27; 5 & 6 Vict. c. 108, and 21 & 22 Vict. c. 57.

By 5 Vict. sess. 2, c. 27, provision is made for the letting of glebe lands on agricultural leases by the incumbents.

5 Vict. sess. 2, c. 27.

Agricultural leases.

By sect. 1, any incumbent may by deed, with the consent of the patron and bishop (and of the lord of the manor where the lands, being copyhold, &c., could not usually be let without his licence), who are to be parties to the deed, let any part of the glebe with the buildings and cottages thereon, for a term not exceeding fourteen years in possession. The best rent is to be gotten, to be paid

(*e*) *Vide supra*, p. 232.

(*f*) By 1 & 2 Vict. c. 23, s. 7, extending 17 Geo. 3. c. 53, s. 11, houses of residence and glebe may, in certain cases, be sold in order to purchase better houses of residence. *Vide supra*, p. 1686.

quarterly; and the lessee is to covenant for payment of the rent, rates and taxes, not to assign or underlet the premises without the consent of the incumbent, patron and bishop, to cultivate the lands according to the best system of husbandry, to leave the premises in good repair, to insure against fire, and to lay out the insurance monies, when there is a fire, in rebuilding; all timber and minerals are to be reserved, and there is to be a power of re-entry for non-payment of rent and in case of felony, bankruptcy, &c., or breach of covenant by the lessee. Leases for twenty years may be granted where a more expensive mode of cultivation is to be entered on, or where draining or building is to be done.

Restrictions on powers of letting.

By sect. 2, the house of residence and ten acres of ground round it, if there be so much land within five miles of it, otherwise all the land within five miles of it, are excepted from the provisions of this act.

Appointment of surveyors.

By sect. 3, before any lease is made a surveyor is to be appointed by bishop, patron and incumbent, who shall make a map of the lands intended to be let and the other lands of the benefice, so that the bishop and patron may have full opportunities of judging, and shall certify that the lands are fit to be let, and what is the best way of cultivating or improving them and the best rent to be gotten; and his map and report is to be signed by him, verified before a justice of the peace and delivered to the bishop; but an old map may be used.

Evidence of compliance.

By sect. 4, an acknowledgement in writing by the incumbent shall be evidence of the execution of the counterpart of the lease, and the execution of the lease by bishop and patron that the other conditions required by the act have been complied with.

Surrender of leases.

By sect. 5, no surrender of any lease made under this act shall be valid for any purpose unless the bishop, patron, and incumbent are parties to and execute the instrument of surrender, and a surrender shall only have force from the time when the instrument is so executed.

Peculiars.

Sect. 6 enables bishops having jurisdiction over peculiars to execute in these peculiars the powers given by this act to the bishop of the diocese: but where there are peculiars not belonging to any bishop or archbishop, the powers are to be executed by the bishop of the diocese within which such peculiars are locally situate.

Consent of patrons.

Sects. 7—11 make provision for the giving of the consent of the patron where he is under legal disability or beyond seas, or where the patronage is in the crown, the duke of Cornwall, corporations, or more than one set of patrons.

Consent in several capacities.

By sect. 12, where one person happens to fill more than one of the positions of bishop, patron, lord of the manor, or incumbent, he may consent and act once for all his several capacities.

Lands holden in trust.

By sect. 13, the provisions of this act are extended to the case of lands vested in trustees, whereof at least three-fourths of the net income are payable to an incumbent authorized to lease under this act; and the trustees are to execute the lease.

Documents.

By sect. 14, provision is made for the deposition of documents in the registry of the diocese or peculiar, and for making copies of such documents evidence.

Green v. *Jenkins.*

In the case of *Green* v. *Jenkins* (*g*), it was holden by the Lord Chancellor (Lord Campbell) and the Lord Justice Turner (*dissentiente* Lord Justice Knight Bruce) that this statute does not operate to restrict any power of leasing possessed by incumbents under the old law.

5 & 6 Viet. c. 108.

By 5 & 6 Vict. c. 108, The Ecclesiastical Leasing Act, 1842, all ecclesiastical corporations, aggregate or sole (except colleges or corporations of vicars choral, priest vicars, senior vicars, custos and vicars or minor canons, and ecclesiastical hospitals or the masters thereof), are empowered to lease by deed any lands or houses for any term of years not exceeding ninety-nine in possession only

Building leases.

"to any person who may be willing to improve or repair "the present or any future houses thereon, or any of them, "or to erect other houses instead thereof, or to erect any "houses or other buildings on any lands whereon no build-"ing shall be standing, or who shall be willing to annex "any part of the same lands to buildings erected or to be "erected on the said lands, or any part thereof, or other-"wise to improve the said premises or any part thereof." The lessee may be allowed to take down and sell the old buildings, and may make ways, passages, drains, reservoirs, yards, etc., and may dig up and carry away earth, clay or gravel in order to build or repair. The best rent is to be reserved, payable half-yearly; and there are to be covenants to build or repair within a specified time, to keep in repair, to pay rent, rates and taxes, to insure in special insurance offices, to use the insurance money, when there has been a fire, in rebuilding, to yield up possession at the end of the term, to give a copy of any assignment of the lease to the reversioner within twenty-one days after it has been made; and there are to be powers of entry to inspect the premises and of re-entry for nonpayment of rent or

(*g*) 1 De G. F. & J. 454; 6 Jur. N. S. 515; 27 Beav. 440; 28 Beav. 87; 5 Jur., N. S. 906.

breach of covenants. Counterparts of the leases are to be executed by the lessees.

By sect. 2, for the first six years, or any other six years to be specified, a smaller rent may be reserved than is afterwards or at other times during the term reserved.

Less rent for six years.

By sect. 3, the ecclesiastical corporation may lay out and appropriate any part of the ground which they are empowered to lease for streets, avenues, gardens, squares or manfacturing yards, either in such manner as shall be provided in the lease or by a general deed enrolled within six months after execution in one of the Courts of Record at Westminster.

Dedication of squares and gardens.

By sect. 4, ecclesiastical corporations may in the same manner grant licences or privileges with respect to any water flowing in or through their lands, and may let any wayleaves, waterleaves, canals, watercourses, tramroads or railways for a term not exceeding sixty years in possession only, for the best rent or toll to be paid half-yearly; so that there be a power of re-entry or making void the licence or lease for non-payment of rent, and so that the grantee or lessee execute a counterpart of the grant or lease. And there may be a condition in the grant or lease compelling the grantee or lessee to repair or help to repair any ways, and to keep open any watercourses.

Way and water leases.

By sect. 6, ecclesiastical corporations may in the same manner let for a term not exceeding sixty years in possession only mines, minerals, quarries or beds, with the right of opening the same, or of working any other mine from them, with such portions of land and such facilities of way or passage as may be expedient for getting the minerals or stone. No premium or fine is to be taken for the lease, and it is to reserve such rents or royalties, and have such powers and covenants as may be approved by the ecclesiastical commissioners, having due regard to the custom of the district.

Mining leases.

By sect. 5, where a void lease has been granted, an ecclesiastical corporation may, in the same manner as they might grant a lease, or by general deed purporting to have been granted under this act, and with the consent hereafter required, confirm such void lease. In the same manner a surrender of any lease under this act may be accepted; and upon such surrender mines or quarries may be leased afresh for the full term of this act; so may land or houses, if less than a quarter of the old term remains unexpired; if, however, a quarter or more remains unexpired, they may only be let again for a term not exceeding the old unexpired term, and at not less than the old rents:

Confirmation of void leases.

Confirmation of void leases.

but the old lease may be divided, and separate leases at apportioned rents may be made of the property, so long as such apportioned rent is in no case less than 40*s.* or more than one-fifth of the rack-rent value of the land and houses comprised in it when built and finished.

No fine or premium, however, may be asked for any confirmation or for a surrender or re-grant of any lease, and the lessee is to consent to any such confirmation or new lease and to execute a counterpart.

Effect on existing powers.

By sect. 8, this act is not to affect any existing powers of leasing, except that where once this act has been put in force, every lease granted otherwise than under it shall reserve the best improved rent, payable half-yearly.

Restrictions on powers of leasing.

By sect. 9, the houses of residence of any corporation sole, or member of a corporation aggregate, with the offices, appurtenances, pleasure grounds, &c., are not to be leased; nor is any grant of minerals, ways or watercourses which might lessen the enjoyment of any such house of residence to be made; and this act is not to be construed to enable persons disabled from leasing by any local or private act of parliament.

Evidence.

By sect. 7, the execution of the lease, grant or general deed by the persons required to consent thereto is to be evidence that all the conditions required by the act have been complied with.

Surrender of old leases.

By sects. 16, 17, it is provided that leases granted otherwise than under this act may be surrendered, and new leases according to this act granted at once upon such surrender to the surrenderor or to any other person. Provisions are made for deducting the value of the interest surrendered from the rents or royalties which would otherwise have been payable on a lease granted under this act, and for the interests of under-lessees.

Dilapidations.

By sect. 19, no person shall be liable for dilapidations in respect of any houses or buildings let on lease under this act.

Consent to leases.

By sects. 20, 21, the parties who are to consent to all leases, grants or general deeds are defined, and their consent is ordered to be evidenced by executing the deed. These consenting parties are the ecclesiastical commissioners in all cases: the patron also where a lease is granted by the incumbent of a benefice; and the lord of the manor where the lands or hereditaments to be leased are of copyhold or customary tenure and the lease is such as would in ordinary cases require his licence.

By sects. 22—28, the same provisions as to the consent of patrons in special circumstances, the power of consent-

ing in more than one character, and the extension of the act to lands held in trust for ecclesiastical corporations, are enacted as in the act preceding, 5 Vict. sess. 2, c. 27.

Documents.

By sect. 29, provision is made for the deposit of the counterparts of the leases, grants, or general deeds with the ecclesiastical commissioners and for making copies thereof evidence.

As to fines.

Sect. 30 makes absolutely void any lease, grant, or confirmation for which any fine or premium directly or indirectly shall have been given (*h*).

Application of increased income.

By sects. 10—13, it is provided that the ecclesiastical commissioners shall either receive directly, or gain to the extent of having a smaller sum to pay to the bishop in consequence of, any improvement in the value of any see arising from leases granted under this act (*i*); and similarly that they shall receive any increase in the incomes of any cathedral chapter from improved value of the chapter property which shall give to the dean and canons of such chapter more than is allowed by 4 & 5 Vict. c. 39 to the deans and canons of St. Paul's, Westminster and Manchester (*k*); that they shall receive the improved value of all archdeaconries over an annual income of 500*l.*; and that they may by order in council within three years from the date of any lease, after giving notice to the patron and allowing him to be heard before the privy council, appropriate any part of the rents or royalties payable on any lease made by the incumbent of a benefice, "in making additional provision for the cure of souls." But the annual income of the benefice is never to be left at less than 300*l.*, or less than 500*l.* if the population amount to 1,000, or 600*l.* if to 2,000.

Reservation in mining leases.

By sect. 14, where the lease is one of minerals or quarries, in all cases from three-fourths to a moiety, as may be determined by order in council, of the improved value shall be paid to the ecclesiastical commissioners and "shall be subject to the provisions relating to monies payable to them," and the remainder only shall be deemed the "improved value" for the purpose of the foregoing sections (*l*).

21 & 22 Vict. c. 57.

Leases in consideration of premiums.

By 21 & 22 Vict. c. 57, The Ecclesiastical Leasing Act, 1858, sect. 1, the provisions of the preceding act are much altered and are extended to enable all ecclesiastical corporations with the consents required, if it shall seem to

(*h*) *Sed vide infra*, 21 & 22 Vict. c. 57.

(*i*) Repealed by 13 & 14 Vict. c. 94, s. 16.

(*k*) See 31 & 32 Vict. c. 114, s. 11.

(*l*) Repealed as to rectors, vicars or incumbents of any benefice with cure of souls by 21 & 22 Vict. c. 57, s. 10.

the ecclesiastical commissioners to be for the permanent advantage of the estate of the corporation, to lease their lands, houses, mines, minerals, or other property, either in consideration of premiums or partly of premiums or not, and for any term and subject to such covenants, stipulations, conditions, and agreements on the part of the lessee as the ecclesiastical commissioners may think proper: and further, with the same consents (except the consent of the lord of the manor in cases of copyhold) to sell, exchange and make partition of their property for an equivalent in money, lands or hereditaments, or partly in one and partly in the other or otherwise. Provided only that where a sale is to be made of lands belonging to the incumbent of a benefice three months' notice must first be given to the bishop of the diocese.

Payment to ecclesiastical commissioners.

By sect. 2, all sums of money payable in respect of premiums on the granting of leases or on sales, exchanges, or partitions, and all rents, royalties and other reservations reserved or made payable by any lease (except "monies which in respect of any sale which shall become due and payable by way of perpetual annual chief or other rent or rent-charge") (*m*), are to be paid to the ecclesiastical commissioners. The commissioners may leave the money on mortgage of the lands, or may invest it in the public stocks or funds. And the money is to be applied by them in the purchase of other lands and hereditaments; and the lands and hereditaments so purchased or received by way of partition and exchange are to be conveyed to the ecclesiastical corporation, and to be subject to the same powers of lease, sale, exchange and partition as the original lands.

Power to mortgage.

By sect. 3, in order to raise money to pay for equality of exchange or partition, or to purchase land or any outstanding leasehold interest in land belonging to any ecclesiastical corporation, the corporation with the consent of the ecclesiastical commissioners may borrow on mortgage.

By sects. 4, 5, power is given to enter into and vary contracts, to grant licences or permissions to search for mines, to accept surrenders of leases and release breaches of covenant by lessees: and the expenses incurred in putting these provisions in operation may be charged on the property of the corporation, if at least one-twentieth of the principal be paid off every year.

Apportionment of rents.

By sect. 8, where the interest of a lessee under any ecclesiastical corporation in part of the lands in his lease

(*m*) 28 & 29 Vict. c. 57.

is determined by sale or purchase under this act, the ecclesiastical commissioners may by a memorandum in writing apportion the old rent between the land so sold or purchased and the lands still retained under the lease, and such apportioned rent becomes the ancient and accustomed rent for these latter lands.

Provisions as to increased value.

By sect. 10, all the provisions contained in the 5 & 6 Vict. c. 108, as to the improved value of any (*n*) dignities, offices, or benefices, are extended to improved values gained under this act: and it is further provided (in extension of sect. 13 of that act) that, where any improvements are made in the income of any benefice, the ecclesiastical commissioners may, in the manner indicated and after the notice to the patron required in the former act, at any time or times after the beginning of the improvement, without regard to the limit of three years imposed by the former act, cause such portion of the improved income as they shall think expedient to be paid to them. This however is not to operate retrospectively, nor to affect the incumbent in possession at the time of the granting of the lease.

By the same section incumbents of benefices with cure of souls are exempted from the operation of sect. 14 of the former act.

No lease to be granted of land acquired under the act, except at rack-rent.

By sect. 9, "No lease of any lands purchased or acquired, or in which the estate or interest of a lessee, or of a holder of copyhold or customary land, shall be purchased or acquired by any ecclesiastical corporation under this act, shall (except under the express power contained in 5 & 6 Vict. c. 108, or in this act) be made or granted otherwise than from year to year, or for a term of years in possession, not exceeding fourteen years, at the best annual rent that can be reasonably gotten, without fine, and the lessee not to be made dispunishable for waste or exempted from liability in respect of waste."

Relation of this act to other acts.

This act in many of its provisions, especially those contained in sects. 4 and 8, runs parallel with those contained in 14 & 15 Vict. c. 104, and its amending acts, which will be mentioned shortly.

There is, however, this peculiarity that what is authorized under the one set of acts to be done by the ecclesiastical commissioners is required by the other set of acts to be done by the church estates commissioners.

Sect. 6, however, of 21 & 22 Vict. c. 57, provides that

(*n*) It is presumed that these words do not include bishoprics, which were exempted from the operation of the former act by 13 & 14 Vict. c. 94, s. 16.

Relation of this act to other acts.

no sale, exchange, or partition shall be made under this act which could be made under 14 & 15 Vict. c. 104, so long as that act (which was a temporary one, continued from time to time) is in force.

Sect. 7 provides that nothing in the act shall repeal any powers or provisions vested in the ecclesiastical commissioners by 6 & 7 Vict. c. 37, or by any acts relating to the ecclesiastical commissioners, or in the acts relating to the enfranchisement of copyholds or the inclosure of lands, or in the Church Building Acts; but this act shall be cumulative thereof or alternative therewith.

Isle of Man.

By 29 & 30 Vict. c. 81, neither this act nor 5 & 6 Vict. c. 108, are to apply to the Isle of Man.

How leases of lands acquired by any corporation under this act may be made.

By 14 & 15 Vict. c. 104, s. 9 (*o*), "No lease of any lands purchased or acquired or in which the estate or interest of a lessee, or of a holder of copyhold or customary lands, is purchased or acquired by any ecclesiastical corporation under this act, shall, except as hereinafter provided, be granted by such ecclesiastical corporation, otherwise than from year to year, or for a term of years in possession not exceeding fourteen years, at the best annual rent that can be reasonably gotten, without fine, the lessee not to be made dispunishable for waste or exempted from liability in respect of waste: provided always, that it shall be lawful for such ecclesiastical corporation, with the approval of the church estates commissioners, from time to time to grant mining or building leases of any such lands, for such considerations, upon such terms, and generally in such manner as such commissioners, under the circumstances of each case, may think fit; and it shall be lawful for such commissioners to require that any portion of the rent received on any such lease shall be invested and disposed of in like manner as herein provided with respect to monies to be received on the sale of any lands by any such corporation."

Lands assigned as endowments, how to be leased.

By 23 & 24 Vict. c. 124, providing for the assignment of new estates, in lieu of the old ones, to archbishops and bishops:

Sect. 8. "No lands assigned or secured as the endowment of any see under this act shall be granted by the archbishop or bishop otherwise than from year to year, or for a term of years in possession not exceeding twenty-one years, at the best annual rent that can be reasonably gotten, without fine, the lessee not to be made dispunishable for waste or exempted from liability in respect of waste, and so that

(*o*) The rest of this act will be dealt with later. *Vide infra*, p. 1703.

in every such lease such or the like covenants, conditions and reservations be entered into, reserved, or contained with or for the benefit of the archbishop or bishop and his successors as under 5 & 6 Vict. sess. 2, c. 27, s. 1, are to be entered into, reserved, or contained in a lease granted under that enactment to or for the benefit of the incumbent and his successors, or as near thereto as the circumstances of the case will permit; but where, under the said section of the last-mentioned act, any consents are provided for or required, the consent only of the archbishop or bishop for the time being shall be requisite: provided always, that it shall be lawful for the archbishop or bishop, with the approval of the estates committee of the ecclesiastical commissioners testified under the common seal of the said commissioners, which the said committee are hereby empowered to affix to any lease for this purpose, from time to time to grant mining or building or other leases of any such lands, for such periods, for such considerations, upon such terms, and generally in such manner as such committee under the circumstances of each case may think fit, and it shall be lawful for such committee to require that any portion of the rent reserved on any such lease shall be payable to the said ecclesiastical commissioners."

Estates committee, where required, to manage the lands assigned.

Sect. 11. "The estates committee shall, when required by any archbishop or bishop to whom lands may have been asssigned as an endowment under this act, undertake the management of such lands, and receive the rents and profits thereof during the incumbency of the archbishop or bishop; and in every such case as aforesaid the estates committee, during their management, may grant all such leases as might have been granted by such archbishop or bishop if the lands had continued under his or their management, and may, with the approval of such archbishop or bishop, grant such other leases as might have been granted by him or them, with the approval of the estates committee; and the commissioners shall, during the time such lands are under the management of the said estates committee, pay to such archbishop or bishop the annual income to secure which the lands may have been assigned."

Leases by dean or chapter when re-endowed.

By 31 & 32 Vict. c. 114, which provides for the vesting of capitular estates in the ecclesiastical commissioners in any case where it may be expedient (*p*), sect. 9, "After the passing of this act none of the deans and chapters mentioned in the schedule to 31 Vict. c. 19, and no dean and

(*p*) *Vide infra*, pp. 1702, 1713.

chapter after the making of any order in council respecting them in pursuance of this act, shall demise any lands vested in them otherwise than from year to year, or for a term of years in possession, not exceeding twenty-one, at the best annual rent that can be reasonably got, without fine, and shall not make the lessee dispunishable for or exempt from liability in respect of waste; and in every such lease such or the like covenants, conditions, and reservations shall be entered into, reserved, or contained with or for the benefit of the dean and chapter, and their successors, as under section 1 of 5 & 6 Vict. sess. 2, c. 27, are to be entered into, reserved, or contained with or for the benefit of the lessor and his successors in a lease granted under that section, or as near thereto as the circumstances admit."

SECT. 4.—*The Transfer of Property to the Ecclesiastical Commissioners.*

It should now be mentioned that by force of various statutes promoted by the ecclesiastical commissioners (*q*) the old estates of all archbishops and bishops, and most of the cathedral and collegiate deans and chapters, have become vested in the ecclesiastical commissioners. The commissioners are then to restore to the bishop or dean and chapter sufficient lands to produce the income now appointed for them. In the case of bishops the estates committee of the ecclesiastical commissioners may be required by the bishop to manage the lands for him, and the arrangements are to be revised from time to time on each avoidance. Till sufficient new lands have been transferred by the ecclesiastical commissioners to the see or dean and chapter, they are to pay a fixed annual income instead thereof. By 27 & 28 Vict. c. 70, minor cathedral corporations may with the consent of their visitor transfer all their property to the ecclesiastical commissioners in consideration of a fixed annual income. The whole subject will be treated more fully in the chapter on "The Ecclesiastical Commissioners."

As to bishops, deans and chapters.

Minor ecclesiastical corporations.

SECT. 5.—*The Extinguishment of old Leasehold Interests.*

Statutes relating to this subject.

Besides the foregoing provisions another set of enactments have been passed enabling ecclesiastical corpora-

(*q*) 23 & 24 Vict. c. 124; 29 & 30 Vict. c. 111; 31 Vict. c. 19; 31 & 32 Vict. c. 114.

tions, or the ecclesiastical commissioners in their right, to do away with the old system of leasing ecclesiastical property; and for this purpose either to buy up the interest of lessees or to sell the reversion to them or to make exchange of interest in different lands.

The acts are 14 & 15 Vict. c. 104, and its continuing acts, 17 & 18 Vict. c. 116, and 23 & 24 Vict. c. 124.

14 & 15 Vict. c. 104.

Ecclesiastical corporations may sell, exchange and enfranchise.

By 14 & 15 Vict. c. 104, entitled "An Act to facilitate the Management and Improvement of Episcopal and Capitular Estates in England," sect. 1, every ecclesiastical corporation sole or aggregate, with the approval in writing of the church estates commissioners (whose consent alone is to be sufficient by sect. 5), may sell to any lessee of lands under them their reversion, estate and interest in such lands, for such consideration, upon such terms and in such manner as they may think fit; and they may, with the like approval, enfranchise copyhold or customary lands holden of any manor of theirs; or exchange with any lessee of lands under them all or any of the lands comprised in such lease, or their reversion, estate and interest therein for any other lands of freehold, copyhold or customary tenure, or for the estate and interest of the lessee in any other of their lands; and may receive or pay money by way of equality of exchange. They are also empowered with the like approval to purchase the estate and interest of any lessee of lands under them, or any holder of copyhold or customary land in their manors. The church estates commissioners are to "pay due regard to the just and reasonable claims of the present holders of lands under lease or otherwise arising from the long-continued practice of renewal."

Apportionment of rent.

By sect. 2, where the lessee surrenders his estate or interest in part of the lands holden by him under the ecclesiastical corporation, the church estates commissioners may, by a memorandum in writing, apportion the old rent between the lands surrendered and the lands still retained under the lease, and such apportioned rent becomes the ancient and accustomed rent for these latter lands.

Interest of lessee.

By sects. 3, 4, the interest acquired by any lessee under this act is to be deemed in equity to be acquired in respect of his lease, and shall be subject to the same trusts and charges and covenants for renewal with and other rights of sub-lessee as the former lease or a renewal of it would have been. And where lands have been sub-let, and notice of such underlease is given to the ecclesiastical corporation, the interest of the lessee shall not be purchased by them without the consent of the sub-lessee.

Payment to ecclesiastical commissioners.

By sects. 6, 7, all monies to be received by any ecclesiastical corporation for sale, exchange, or enfranchisement under this act may be allowed to remain on mortgage of the lands in question; but when paid are to be paid into the Bank of England to an account to be appointed by the church estates commissioners, and are to be applied in payment for equality of exchange, or in the purchases authorized by the act, or in buying other lands for the corporation. The monies may be invested in government stocks till they are required; and any other monies applicable to the purchase of lands for the corporation may be applied for the purposes of this act.

Provisions where increase or diminution of income.

By sect. 8, if any person being a corporation sole or member of a corporation aggregate shall receive an increase of his income in virtue of his office in consequence of what has been done under this act, the church estates commissioners may require and enforce payment at any time of such annual or other sum by such person in respect of his increased income as they may think fit: and they may, if they please, make such payment a condition of their approval under the act. And where any person suffers diminution of income they are to compensate him "out of any monies received by them under this act on behalf of such corporation or the investments thereof."

Definitions.

By sect. 11, tithes, but not advowsons, are to be deemed to be included under the word "lands;" and the expression "ecclesiastical corporation" is to include archbishops, bishops, deans and chapters, deans, archdeacons, canons, prebendaries and other dignitaries or officers of, and minor ecclesiastical corporations in, cathedral or collegiate churches; but is not to include Christ Church, Oxford, or any college or hospital, or "any parson, vicar, or perpetual curate or other incumbent of any benefice" (*r*).

This act was originally limited to three years; but has since been continued by various acts, the last being 35 & 36 Vict. c. 88.

17 & 18 Vict. c. 116.

Extension of sect. 2 of previous act.

By 17 & 18 Vict. c. 116, s. 2, the provisions as to apportionment of rent, where a portion of the lands holden under a lease are surrendered by the lessee under sect. 2 of 14 & 15 Vict. c. 104, are extended to all cases where a portion of the lands holden under a lease are sold, exchanged or enfranchised, if the church estates commissioners deem it expedient to apportion the rent.

(*r*) This provision is repealed by 24 & 25 Vict. c. 105, s. 3; and the same power of sale is given to incumbents of benefices as to other ecclesiastical corporations.

By sect. 3, trustees of leases or other interests under ecclesiastical corporations, who are empowered to raise money for purchasing the renewal of leases, may raise money for purchasing the reversion or enfranchisement under these acts.

Trustees may raise money.

By sect. 4, upon any treaty for sale, purchase or exchange under these acts the value of the fee simple of the estate and the annual value thereof may be referred to arbitration, and the finding of the arbitrators shall be adopted in computing the terms of the sale, purchase or exchange, "regard being had, in the final settlement of "such terms, in every such case, to the just and reasonable "claims of the present holders of land under lease or "otherwise, arising from the long continued practice of "renewal." Provision is made for the appointment of arbitrators.

Arbitration.

By sect. 10, the same provisions as to arbitration are extended to cases where the ecclesiastical commissioners have become the owners of the lands formerly belonging to ecclesiastical corporations and wish to deal with the lessees under them.

By sects. 6, 7, money paid into the bank under the 6th section of 14 & 15 Vict. c. 104, is to be apportioned by the church estates commissioners in such a manner as to set apart for the permanent endowment of the ecclesiastical corporation a sum, which will secure to that corporation a permanent net income equal to that which they would have received from the lands had they not been dealt with under these acts; and the residue is to be handed over to the common fund of the ecclesiastical commissioners. And where an ecclesiastical corporation takes land under these acts they may be required to pay over to the church estates commissioners a sum of money "equivalent to the surplus share thereof."

Distribution of money.

Sect. 11. "In computing the due regard to be paid "to the just and reasonable claims of the present holders "of lands under lease or otherwise, arising from the long "continued practice of renewal, the basis of compensation "may, at the discretion and with the approval of the church "estates commissioners, be that laid down by the episcopal "and capitular revenues commissioners in their report of "1850 or according to the recommendations laid down in "the lords' report on the same subject in 1851."

Basis on which claims are to be computed.

By sect. 12, the expectation of a life shall not be calculated according to the *Northampton* tables, or upon any tables less favourable to the duration of life than those appended to the twelfth report of the registrar general of

births, deaths and marriages, or any others to be from time to time issued by authority.

Provision for determining right of renewal.

Provision is also made by sect. 5 of this act for determining by trial at law the right of renewal of any lands held for a life or lives or for years by copy of court roll from or under any ecclesiastical corporation, whenever such corporation or the ecclesiastical commissioners dispute the right, or the person claiming the right desires to have the question decided.

23 & 24 Vict. c. 124.

The act 23 & 24 Vict. c. 124, dealing more especially with relations between the ecclesiastical commissioners and former tenants under ecclesiastical corporations, has completed the series of enactments with reference to the extinguishment of the old system of ecclesiastical leases.

Power to corporations, with approval of the church estates commissioners, to sell lands in possession, for facilitating negotiations with lessees.

By sect. 16, "Where it appears to the church estates commissioners that inconvenience is occasioned in the negotiations between any ecclesiastical corporation, sole or aggregate, and its lessees (in relation to property which it is now authorized to dispose of) by reason of its disability to sell or exchange intermixed or other lands held by such corporation in possession, or for some other estate which it is not now authorized to dispose of, it shall be lawful for such ecclesiastical corporation, with the approval in writing of the said church estates commissioners, to sell any such lands (whether of freehold or copyhold or customary tenure), or to exchange any such lands for other lands or any estate or interest therein; and all the provisions of the act 14 & 15 Vict. c. 104, as amended by the act 17 & 18 Vict. c. 116, and this act, authorizing the receiving or paying of money by way of equality of exchange, and concerning the payment, application, and investment of any money payable to or for the benefit of any such corporation on any such sale, exchange or enfranchisement as is mentioned in the said act 14 & 15 Vict. c. 104, and all other the provisions of the said acts in anywise applicable for effectuating any such sale, exchange or enfranchisement or in consequence thereof, shall, so far as the nature of the case may require, extend and be applicable to and in consequence of any sale or exchange authorized by this act."

Schools and incumbents of benefices.

By sect. 17, small portions of lands holden under leases usually renewed for schools may be conveyed to trustees for the schools without consideration. By sects. 18, 19, a similar course may be taken with respect to lands usually leased for no or merely nominal fines for the endowment of the incumbent of any parish or chapelry, and with respect to rents or other annual payments usually reserved by any such corporation on any lease for the benefit of any such incumbent.

By sect. 20, "In any case in which any estate or interest under any lease or grant made by any such ecclesiastical corporation may be vested in any person or persons as a trustee or trustees, whether expressly or by implication of law, with power to raise money for the purpose of procuring a renewal of such lease or grant, and in every other case in which a power is vested in any person or persons for that purpose, it shall be lawful for such person or persons to raise money for the purpose of purchasing the reversion of or otherwise enfranchising the property comprised in such lease or grant, and to apply the same accordingly, in the same manner, and subject to the same conditions, *mutatis mutandis*, so far as the same may be applicable to the case, as such person or persons might by virtue of such power have raised money for the purpose of renewing such lease or grant and have applied the same accordingly."

Trustees and others having power to raise money for renewals may raise money for enfranchisements.

The effect of this and other sections upon settlements of and other dealings with the leasehold estates by the lessees, and the respective rights of tenants for life and remaindermen under such settlements, were fully considered in the cases of *Hayward* v. *Pile* (*t*) and *In re Wood's Estate* (*u*).

By sects. 26, 27, provision is made for the rights of lessees and under lessees *inter se*.

By sect. 28, the powers and provisions in 14 & 15 Vict. c. 104, s. 2, and 17 & 18 Vict. c. 116, s. 2, as to apportionment shall extend to authorize the apportionment of heriots and fines certain and the substitution of money payments for heriots; and shall extend to all cases of surrender, conveyance or assignment to the ecclesiastical commissioners of lands in which they have a reversionary interest, and all cases of sale, exchange and enfranchisement of a part of the lands comprised under any lease, grant or copy of court roll.

Apportionment.

By sect. 29, where there is a difficulty in making out the lessee's title the ecclesiastical commissioners may pay the money into the Bank of England as under the Lands Clauses Consolidation Act, 1845 (*x*).

Payment into bank.

Sect. 30 preserves the rights and obligations imposed by special acts in particular cases.

Sects. 31, 32, extend the power of partition and confirm the powers of partition and exchange.

(*t*) 5 L. R., Ch. App. 214.
(*u*) 10 L. R., Eq. 572.
(*x*) 8 Vict. c. 18.

The following provisions are made in the act for ascertaining the interests of lessees:—

In estimating value of 21 years' leases an extension to 11th October, 1884, to be allowed.

Sect. 21. "In estimating, for the purposes of any sale, purchase, or exchange, under the said acts of 14 & 15 Vict. c. 104, and 17 & 18 Vict. c. 116, and this act, or any of them, the value of the estate or interest of any lessee of any lands holden of any archbishop or bishop, or of the ecclesiastical commissioners, under any lease granted for a term of twenty-one years, an extension of the unexpired term to the 11th day of October, 1884, at the accustomed rate of fine, shall, as a rule, be allowed, and a like extension at the accustomed rate of fine shall, for the purposes of sale, purchase or exchange, be allowed in the case of any lease for lives, the extent and value of which shall be computed by arbitrators in default of an agreement between the parties to be less than the extent and value of a term ending on the said 11th day of October, 1884."

In estimating the value of mining leases an extension to 1884 to be allowed.

Sect. 22. "The said ecclesiastical commissioners, or any ecclesiastical corporation aggregate or sole, in carrying out the powers of leasing mines and minerals vested in them, shall, in the granting to the lessees of mines and minerals holden of the ecclesiastical commissioners or any ecclesiastical corporation aggregate or sole, whether for years or for lives, an extended term or estate therein, and fixing the terms of such grant, have regard to the value of the estate and interest of the lessees of all such mines and minerals under any lease or leases heretofore ordinarily renewable on the payment of a fine, and shall as a rule in computing such value estimate and include an extension of the existing unexpired term or estate of the lessees to the 11th day of October, 1884, at the accustomed rate of fine, and in the case of such of the said leases for lives as, according to the expectancy of human life according to the life tables which are appended to the twelfth annual report of the registrar general of births, deaths, and marriages in England, would not determine until after the said 11th day of October, 1884, shall have regard to the actual value of the estate and interest of the lessees."

Differences between mining lessees and lessors to be referred to arbitration.

Sect. 23. "In case any such lessees shall require any extended term in such mines and minerals to be granted to them, and any difference shall arise between the said ecclesiastical commissioners or other ecclesiastical corporation and such lessees thereupon, or as to the value so to be estimated, or as to the rents to be reserved, or the term of years to be granted, or other the terms and conditions on which such lease for any extended term or estate shall be granted, it shall be lawful for either party to

require the other party to join in referring to arbitration the matter or matters so in difference, and the same shall be referred to arbitration."

Upon treaty for sale, &c. either party may require reference to arbitration.

Sect. 24. "In any case where a treaty shall have been or shall be entered into under the said acts 14 & 15 Vict. c. 104, and 17 & 18 Vict. c. 116, and this act, or any of them, for any sale, exchange or purchase, it shall be lawful for either party to require the other party to join in referring to arbitration the finding of the annual value of the property comprised in the lease or grant, and of the value of the fee simple, and when such values have been found it shall be binding on both parties if either party require to proceed to such sale, exchange or purchase, on terms to be computed according to such finding: Provided always, that whenever the ecclesiastical commissioners shall decline to enter into a treaty with a lessee for either the sale of the reversion or the purchase of the term of or in the lands held by such lessee, it shall nevertheless be lawful for such lessee, at any time within two years after the said commissioners shall have so declined to treat, to require that his estate and interest therein shall be purchased by the ecclesiastical commissioners so declining to treat as aforesaid, and that the value of such estate and interest shall be ascertained by such methods and with such extension of the unexpired term on his said lease as are by this act provided in respect of other leaseholds."

Valuation of lands and houses.

Sect. 25. "Provided always, that under any arbitration under the said act of 17 & 18 Vict. c. 116, or this act, where any lease shall relate to lands (except building ground or houses), the beneficial interest of the lessee shall be valued at the same rate of interest at which the value of the fee simple has been determined, and where such lease shall relate to houses or to building ground it shall be lawful for the arbitrator or arbitrators, or umpire, as the case may be, simply to find the gross sum to be paid for such sale or enfranchisement, in such manner as he or they may deem just: provided also, that regard shall be had to any consideration given to the lessee by this act on account of the long continued practice of renewal: provided further, that in the case of houses the umpire shall, notwithstanding anything in the last-mentioned act or this act contained, be appointed by her Majesty's principal secretary of state for the Home Department."

Power to trustees and persons having interests to charge enfran-

Sect. 35. "And whereas in some cases leases or grants made by ecclesiastical corporations are in settlement, or held in trust, without power to raise money for renewals, or the manner prescribed for raising money for renewals

chisement monies on the lands enfranchised, &c.

may not be applicable for raising the money required for purchase or enfranchisement: it shall be lawful for any person or persons being a trustee or trustees, expressly or by implication of law, of any such lease or grant, or any person being under any will or other settlement in the actual possession or receipt of the rents and profits of the lands comprised in such lease or grant, upon purchasing the reversion or otherwise procuring the enfranchisement of such lands, to charge such lands (or where the whole thereof is settled to the same uses, trusts, or purposes, any part thereof, exclusively of the residue thereof,) with the payment to any person advancing any money paid for such purchase or enfranchisement, and for the expenses incident to such purchase or enfranchisement, or for either of those purposes, of the money so advanced, with interest thereon at a rate not exceeding five pounds per centum per annum, and to convey or cause to be conveyed such lands by way of mortgage for securing such payment accordingly; and such charge shall be effectual, as well on the subsisting term or estate under such lease or grant as on the reversion or interest acquired by such purchase or enfranchisement, and not only against the person making the same, and all persons claiming through him or for whom he may be a trustee, but also against all persons claiming any estate or interest in the same lands through or under the same will or settlement, but so as not to prejudice any prior charge or incumbrance, under-lease, or tenancy affecting such lands; and, subject and without prejudice to such charge and mortgage so made as aforesaid, the interest acquired by such purchase or enfranchisement shall be subject in equity as is provided by section three of the said act 14 & 15 Vict. c. 104 (*y*), concerning the interest in land acquired by any lessee under that act."

Wherever estate under such lease or grant is vested in trustees, and monies are vested in same trustees, they may raise out of such monies sufficient for renewal of lease, &c.

Sect. 36. "Wherever the estate and interest under any such lease or grant may be vested in any trustee or trustees, either expressly or by implication of law, and any monies, stocks, funds, or securities for money are vested in the same trustees or trustee, upon the same or like trusts, it shall be lawful for such trustees or trustee, with the consent of the person or persons entitled for the time being to the beneficial receipt of the dividends or annual proceeds of such monies, stocks, funds, or securities, if such person or persons shall be capable of giving consent, or if there shall be no person capable of giving consent,

(*y*) *Vide supra*, p. 1703.

or if such consent shall be withheld, and the trustee or trustees shall consider such a course essential to the interest of the parties entitled under the settlement, then with the sanction and approbation of the Court of Chancery, to be obtained on petition to the said court, to raise out of such monies, or by sale of such stocks, funds, or securities, a sufficient sum for the purpose of purchasing the reversion of, or otherwise enfranchising, the property comprised in such lease or grant, and of procuring, if necessary for the purpose of enfranchisement, the renewal of such lease or grant, and to pay and apply the same accordingly, and all payments and applications of monies, or of the proceeds of the sale of such stocks, funds, or securities so made as aforesaid, shall be valid and binding on all persons interested under the trust, will, or settlement under or by which such monies, stocks, funds, or securities for money may be held in trust or settled as aforesaid."

Lands in the lease or other lands settled to like uses may be sold or mortgaged to raise money for purchase of reversion under direction of the Court of Chancery.

Sect. 37. "Where any such lease or grant may be vested in any person or persons as a trustee or trustees, whether expressly or by implication of law, and other lands, whether freehold, copyhold, or leasehold, are vested in the same trustees or trustee upon the same or like trusts, or are settled to the same uses or purposes, or as near thereto as the different tenures of the lands admit, or where any person is under any will or settlement in the actual possession or receipt of the rents and profits of the lands comprised in such lease or grant and of other lands settled to like trusts or uses as aforesaid, it shall be lawful for such trustees or trustee, or such person as aforesaid, with the sanction and approbation of the Court of Chancery, to be obtained on petition to the said court, to raise money, either by sale or mortgage of all or any part of the property comprised in the lease or grant, and the other lands, whether freehold, copyhold, or leasehold, vested in such trustee or trustees, or settled as aforesaid, as the said court shall direct, for the purpose of purchasing the reversion of or otherwise enfranchising the property comprised in such lease or grant, in such manner, and subject to such provisions for protecting or adjusting the equities arising under such purchase or enfranchisement and such mortgage or sale as aforesaid, as the court shall think fit; and all sales and mortgages effected for the purposes aforesaid shall be valid and binding on all persons interested under the trust, will, or settlement under which such lands may be held in trust or settled as aforesaid."

Trustees empowered to

Sect. 38. "In any case in which the estate and interest under any lease or grant made by any ecclesiastical cor-

sell estates held under lease.

poration may be vested in any trustee or trustees, and such trustee or trustees shall not have power to sell, it shall be lawful for such trustee or trustees, with the consent in writing of the person or persons entitled for the time being to the beneficial receipt of the rent or annual proceeds thereof, if such person or persons shall be capable of giving consent, or if there shall be no person capable of giving consent, or if such consent shall be withheld and the trustee or trustees shall consider a sale essential to the interests of parties entitled under the settlement, then, with the sanction and approbation of the Court of Chancery, to be obtained on petition to the said court (z), to sell and dispose of all or any part of such property; and in every such case the purchase money shall be paid to such trustee or trustees, whose receipt shall be a good discharge for the same, and the money so paid to such trustee or trustees shall be invested and be held by him or them upon the same trusts, as far as the circumstances of the case will admit, as the leasehold property, if not sold, would have been subject to; and such investment may, with the sanction and approbation of the Court of Chancery, be made in the purchase of other leasehold estates, whether held under any ecclesiastical corporation or not."

Persons empowered to raise money for enfranchisement may give lands in exchange for reversion.

Sect. 39. "Any person authorized under this act or otherwise to raise any money for the purchase of the reversion of any lease or grant may exchange with the corporation by which such lease or grant was made, or with the ecclesiastical commissioners, any part of the lands comprised in such lease or grant, for the reversion, estate, or interest of such corporation or the ecclesiastical commissioners in any other part of the lands comprised therein, or may exchange such lands or any part thereof for the reversion, estate, or interest of the corporation by which any lease or grant was made in any lands comprised in any other lease or grant held under the same trusts, or settled to the same uses, trusts, or purposes."

Provision as to arbitration.

Sect. 41. "Where by this act it is provided that any matter in difference shall be referred to arbitration, or where any difference shall arise between the commissioners and any body or person touching the annual or other sums of money to be paid to any archbishop or bishop as herein directed, or touching the value or nature of the estates proposed to be assigned as endowment for any archbishop

(z) Where the person entitled to the beneficial receipt of the rent is a lunatic, the petition should nevertheless be made to the Court of Chancery, and not to the lord chancellor or lords justices sitting in lunacy (*Re Cheshire*, 7 L. R., Ch. App. 50).

or bishop, the matter in difference shall be referred to two arbitrators, one to be appointed by each party, and all the provisions of 'The Common Law Procedure Act, 1854' (*a*), applicable in the case of such an arbitration, shall apply accordingly; and for the purpose of the application of the said act this act shall be deemed the 'document' authorizing the reference to arbitration; and, where any matter is so referred, the award of the arbitrators or umpire shall be final."

Not to affect Christ Church, Oxford, or Collegiate Church at Manchester.

Sect. 44. "Nothing in this act contained, except sections eighteen, nineteen, and forty-two, shall in any manner affect or apply to the cathedral church of Christ in Oxford, nor shall anything in this act contained affect or apply to the cathedral or collegiate church of Manchester, or to the parish of Manchester Division Act, 1850" (*b*).

By 31 & 32 Vict. c. 114, the act giving power to the ecclesiastical commissioners to take by scheme the estates of deans and chapters:—

Arbitration with lessees under deans and chapters, whose estates are transferred to the commissioners.

Sect. 10. "In all cases where an agreement has been or shall be entered into, or a treaty has been or shall be commenced or is or shall be pending between a dean and chapter and any of their lessees, for any sale and purchase under 14 & 15 Vict. c. 104, 17 & 18 Vict. c. 116, or 23 & 24 Vict. c. 124, and the capitular estate is transferred to the commissioners under the provisions of this act, it shall be competent to the church estates commissioners to approve and confirm as heretofore such agreement, and to continue and bring to a conclusion and approve such treaty: provided always that in the event of the church estates commissioners declining to approve such agreement or treaty, the ecclesiastical commissioners shall be bound to purchase the lessee's interest, if required by the lessee, with all the benefits as to arbitration and otherwise to which lessees are entitled under the above-mentioned acts or any of them; and in every case the costs of such arbitration and award shall be in the discretion of the said arbitrators or umpire as the case may be."

SECT. 6. *The Enfranchisement of Copyholds.*

Ecclesiastical persons or corporations, when lords of manors, were subject like all other lords of manors to the provisions for compulsory enfranchisement of copyholds in

(*a*) 17 & 18 Vict. c. 125. (*b*) 13 & 14 Vict. c. 51.

General copyhold acts.

certain cases, as provided by the various acts, 4 & 5 Vict. c. 35, 6 & 7 Vict. c. 23, 7 & 8 Vict. c. 55, and 15 & 16 Vict. c. 51.

These acts were in fact cumulative of the powers of enfranchisement specially given to ecclesiastical corporations by the statutes mentioned in the last section.

21 & 22 Vict. c. 94.

Acts not to extend to ecclesiastical manors, where tenant has not a right of renewal.

Now, however, it is provided by 21 & 22 Vict. c. 94, s. 4, that "the copyhold acts shall not extend to any manors belonging, either in possession or reversion, to any ecclesiastical corporation, or to the ecclesiastical commissioners for England, where the tenant hath not a right of renewal."

Application of consideration moneys in cases where enfranchisements might have been effected under 14 & 15 Vict. c. 104.

By the same act, sect. 5, "Whenever it shall appear to the copyhold commissioners that an enfranchisement under the Copyhold Acts is one which might have been effected under the provisions of the act 14 & 15 Vict. c. 104, so long as that act or any act for continuing the same shall be in force, the moneys or rent-charges which form the consideration of such enfranchisement shall be paid and applied to the same account and in the same manner as if such enfranchisement had been effected under the said act 14 & 15 Vict. c. 104; and all the provisions of the said last-mentioned act which affect the application of enfranchisement moneys under that act shall be applicable to such enfranchisements as aforesaid, made under the provisions of the copyhold acts; and the church estates commissioners and ecclesiastical commissioners shall respectively have the same powers over such consideration moneys, or the interest accruing thereon, or upon land, rent-charges or securities acquired in respect of such enfranchisements, and also over or against any ecclesiastical corporation interested therein, as such commissioners respectively would have had if such enfranchisement had been effected with the consent of the church estates commissioners, and under the provisions of the said act 14 & 15 Vict. c. 104, or any act continuing the same: but where any ecclesiastical corporation within the meaning of the said last-mentioned act, or the said ecclesiastical commissioners have only a reversionary interest in the manorial rights extinguished by enfranchisement, the consideration for such enfranchisement shall be dealt with in the manner directed by the 39th section of the Copyhold Act, 1852 *(c)*, until the time when the said reversionary interest in the same manorial rights would, if the same had not been extinguished, have come into possession, when the

Appropriation of enfranchisement moneys in cases of ecclesiastical manors.

(c) That is treated as belonging to a settled estate, and paid into the Bank of England.

said consideration or any government securities in which it may have been invested shall, upon petition to the Court of Chancery, be paid or transferred to the said church estates commissioners, who shall be considered the parties become absolutely entitled to such money, to be dealt with as if they had come into possession thereof in consequence of an enfranchisement effected under the said act 14 & 15 Vict. c. 104."

Enfranchisement money for the use of any spiritual person may be paid to the governors of Queen Anne's bounty.

Sect. 17. "Any compensation or consideration money paid for the use of any spiritual person in respect of his benefice or cure may, at the option of the lord, be paid to the 'governors of Queen Anne's bounty for the augmentation of the maintenance of the poor clergy,' and when so paid shall be applied and disposed of by the said governors as money in their hands appropriated for the augmentation of such benefice or cure should by law, and under the rules of the said governors, be applied and disposed of; and the receipt of the treasurer of the said governors shall be a sufficient discharge for such money, and the person paying the same to such treasurer shall not be concerned to see to the application or disposal thereof."

Notice to be given to the ecclesiastical commissioners in cases wherein they are interested.

Sect. 19. "Where any land proposed to be enfranchised under this act shall be held of a manor belonging either in possession or reversion to an ecclesiastical corporation within the meaning of the act 14 & 15 Vict. c. 104, the ecclesiastical commissioners for England shall have notice of such proceedings, and shall have the same power of expressing assent to or dissent from such proceedings as is by this act directed with respect to persons entitled to the next estate of inheritance in reversion or remainder, and the provisions of the Copyhold Acts respecting such notices and all proceedings thereon (except as otherwise by this act is provided) shall be applicable to such cases."

24 & 25 Vict. c. 105.

By 24 & 25 Vict. c. 105, reciting that there are ecclesiastical benefices to which belong manors, lands and hereditaments which by custom the incumbents have had power to lease for lives or long terms of years, it is enacted, that (sect. 1) no prebendary of any prebend, not being a prebend in any cathedral or collegiate church, and no rector, vicar, perpetual curate or incumbent, who becomes, after the passing of the act, entitled to any manors, lands or hereditaments, shall make any grant thereof by copy of court roll or lease in consideration of any fine, premium or foregift; but the same may be dealt with under 5 & 6 Vict. sess. 2, c. 27, 5 & 6 Vict. c. 108, and 21 & 22 Vict. c. 57 (*d*).

Prohibits leases by copy of court roll.

(*d*) *Vide supra*, Sect. 3.

Not to interfere with present interests.

By sect. 2, nothing in the act is to interfere with the right of any then present incumbent, or affect any grant heretofore made, or any right of renewal or tenant right if any such there be; nor prejudice any existing power of sale, exchange or enfranchisement under any statute now in force, or any right of admission of any person to copyholds according to the custom of the manor.

Provisions in 23 & 24 Vict. c. 124, applied to this act.

By sect. 3 the provisions of 23 & 24 Vict. c. 124, so far as they "relate to powers for the raising or application of "money by trustees, allowances to lessees, arbitration, "valuation, rate of interest, apportionment of rent, and "substitution of title on exchange," shall be applied *mutatis mutandis* to cases under this act, relating to rectors, vicars and perpetual curates. But the proceeds of any sales or enfranchisements and any monies received by way of equality of exchange shall be applied according to the provisions in 5 & 6 Vict. c. 108, and 21 & 22 Vict. c. 57.

25 & 26 Vict. c. 52.

By 25 & 26 Vict. c. 52, s. 1, the prohibition contained in the previous act shall extend not only to cases where a fine or premium is asked for the grant or lease, but to all cases where the grant or lease is made for a longer term or in a different manner from that prescribed by 5 & 6 Vict. sess. 2, c. 27, 5 & 6 Vict. c. 108, and 21 & 22 Vict. c. 57.

By sect. 2, the provisions in sect. 3 of the previous act are extended to prebendaries of any prebend not being a prebend of a cathedral or collegiate church.

CHAPTER VII.

CHARGES ON BENEFICES WITH CURE OF SOULS.

Special restraint on charging benefice with cure.

BESIDES the general restraints imposed by law upon the waste or dilapidation of ecclesiastical property, the alienation of it by sale or lease or exchange, or the burdening of it, in the hands of the successor, by the grant of new and unnecessary offices, a special enactment has been made as to benefices with cure of souls, forbidding the imposition of any charge thereon by their incumbents; so that, even during the tenure of the incumbency, such a benefice cannot be charged with payments to other persons, and such charges if made are absolutely void.

The act is 13 Eliz. c. 20, intituled " An Act touching Leases of Benefices and other Ecclesiastical Livings with Cure."

How long the lease of a benefice shall endure.

Sect. 1. " That the livings appointed for ecclesiastical ministers may not by corrupt and indirect dealings be transferred to other uses, be it enacted by the authority of this present parliament, that no lease after the fifteenth day of May next following the beginning of this parliament, to be made of any benefice or ecclesiastical promotion with cure, or any part thereof, and not being impropriated, shall endure any longer than while the lessor shall be ordinarily resident and serving the cure of such benefice without absence above fourscore days in any one year, but that every such lease, so soon as it or any part thereof shall come to any possession or use above forbidden, or immediately upon such absence, shall cease and be void; and the incumbent so offending shall for the same lose one year's profit of his said benefice, to be distributed by the ordinary among the poor of the parish: and that all chargings of such benefices with cure hereafter with any pension, or with any profit out of the same to be yielded or taken, hereafter to be made, other than rents to be reserved upon leases hereafter to be made according to the meaning of this act, shall be utterly void."

No pension or profit to be charged.

Cases on act.

43 Geo. 3, c. 84, wholly repealed this act, but 57 Geo. 3, c. 99, repealed 43 Geo. 3, c. 84, and revived 13 Eliz. c. 20. Every case that had then been decided upon this

subject, and all the principles which governed such decisions, were reviewed and discussed in the judgment of Lord Denman in *Saltmarshe* v. *Hewett* and *Skrine* v. *Hewett* (*a*). A rule nisi was obtained on behalf of the defendant in each of these causes, for setting aside the warrant of attorney, judgment, and sequestration therein.

Saltmarshe v. Hewett.

The warrant of attorney (dated June 23rd, 1821), given by the defendant to the plaintiff Saltmarshe, was to confess judgment for 3,600*l.* and it had a defeasance which recited as follows:—That Saltmarshe had agreed to purchase an annuity for his, Hewett's, life, of 244*l.* a year, for 1,800*l.*; that the said annuity was, or was intended to be, secured to Saltmarshe by Hewett's bond in the penal sum of 3,600*l.* of even date with the warrant of attorney, and also by indenture of the same date, to which Saltmarshe and Hewett were parties, and whereby Hewett charged the said annuity upon his rectory of Rotherhithe, and the glebe lands, &c.; that the parties had agreed that the said annuity should also be secured by a warrant of attorney from Hewett to confess judgment for 3,600*l.*, which Hewett had accordingly executed; and that the purchase-money had been paid by Saltmarshe. After this recital, it was declared that the judgment on the warrant of attorney was to be entered up as a collateral security only for payment of the annuity, and that no execution should issue on such judgment unless and until the payment of the same or some part thereof should be twenty-one days in arrear after any of the specified days of payment; but that in case of such arrear, then, and so often as it should so happen, it should be lawful for Saltmarshe to sue out such execution on the said judgment as he should think fit, and also to sequester the rectory, and all and singular or any of the glebe lands, &c. thereto belonging, or any other benefice or benefices which Hewett might take in lieu thereof, and for that purpose to instruct counsel, &c., to act for both the parties in such proceedings as should be necessary to obtain an immediate sequestration of the said rectory or other ecclesiastical preferment, to the intent that, by virtue of all or any of the ways aforesaid, the said Saltmarshe, his executors, &c. might recover the arrears of the said annuity, and all costs, &c.

In *Skrine* v. *Hewett*, the warrant of attorney (dated February 18th, 1826), began by reciting that Hewett had agreed to sell Skrine an annuity of 256*l.* per annum for 1,950*l.*, to be secured by and made chargeable upon, and

(*a*) 1 Ad. & El. 812; 3 Nev. & Man. 656.

to be issuing and payable out of, all and singular the rectory of Ewhurst, and the rectory of the parish church of Rotherhithe, and also to be secured by Hewett's warrant of attorney, and a judgment to be entered up thereon for 3,900*l.* and costs. It then recited an annuity deed, whereby the said annuity was to be charged and chargeable upon, and issuing and payable out of, the said rectories, and whereby it was also declared that the judgment was to be considered as a security for the said annuity; that in case default should be made in the payment thereof for twenty-one days, it should be lawful for Skrine to issue thereupon one or more writs of *fi. fa. de bonis ecclesiasticis*, and such other writ or writs as he should think fit to ground the same, indorsed to levy 3,900*l.* and costs, in order that Skrine might sequester all and singular the glebe lands, &c. belonging to the said rectories, and thereby be in possession in trust for better securing to him all arrears then due on the said annuity, and all future payments thereof. The indenture also stipulated that execution was not to be sued out before default, but might issue as often as the annuity should be in arrear. After this recital, the warrant of attorney proceeded, "in pursuance of the said agreement, and for further securing the said annuity," to authorize the attornies to confess judgment for 3,900*l.* with costs. Judgments were entered up on the warrants of attorney; and sequestrations were afterwards issued in two causes for arrears of the respective annuities.

Lord Denman, C. J.—"This was a rule calling upon the plaintiff to show cause why the warrant of attorney in the said rule mentioned, the judgment and writ of sequestration should not be set aside.

"And the question to be decided is, whether that warrant of attorney is void, as being contrary to the statute of 13 Eliz. c. 20. The warrant of attorney is to confess judgment in an action of debt for 3,600*l.*, and the defeasance thereto, upon which the question turns, is in the following form. (His lordship then read the defeasance.) It is therefore expressly provided, that in case the said annuity, or any part thereof, shall be in arrear for a certain time therein specified, '*then and so often as it shall so happen*, it shall be lawful for the said A. Saltmarshe, his heirs, &c. to sue out such execution or executions, upon or by virtue of the said judgment, as he or they shall think fit, or be advised; and also to sequester the said rectory of Rotherhithe, and all and singular or any of the glebe lands, buildings, &c. thereto belonging.' So that if we had been called upon now for the first time to put a

Saltmarshe v. *Hewett.*

"construction upon the act of parliament, it seems hardly to admit of a doubt but that the rectory of Rotherhithe is charged with the payment of the annuity in the event of its being in arrear, or, in other words, that the said benefice is charged with a 'profit, out of the same to be yielded and taken.' Cases, however, have been brought under our notice, bearing (as they certainly do) upon the point in question. In support of the rule, reliance was placed upon the case of *Flight* v. *Salter* (*b*); and against it, upon the recent case of *Colebrook and others* v. *Layton* (*c*). In the former case the warrant of attorney directly referred to the annuity deed, and was declared to be 'for the purpose of securing the said annuity,' and to the end and intent that a sequestration may be obtained or procured, and continued by the said Thomas Flight, his executors, &c. pursuant to the hereinbefore recited indenture.' In the latter case it was averred, by *affidavit*, 'that the warrant of attorney was given for the express purpose of charging the said vicarage and curacy with the payment of the annuity, and for the purpose of enabling the plaintiffs to sue out the before-mentioned executions.' Upon the discussion of this case of *Colebrook and others* v. *Layton*, the authorities were brought under the consideration of the court, and particularly the case of *Flight* v. *Salter*, upon which then, as now, reliance was placed to set aside the judgment entered upon the warrant of attorney, which was then in question. *The court, however, distinguished (and we think rightly) between the impeachment of the warrant of attorney depending upon affidavit, and an objection to the warrant of attorney which is presented to the notice of the court upon the face of the instrument itself. And accordingly, as the court then thought, and we are now of opinion, that there was not sufficient relation or connection between the warrant of attorney and the annuity deed to show that the benefice was to be charged to pay the annuity, in the event of its being in arrear, the rule to set aside the judgment was discharged.* In the present case, however, from the language of the defeasance, to which reference has been already made, we are of opinion that enough appears to show that the warrant of attorney was given 'to charge the benefice,' and is, therefore, void by the statute. In adopting this distinction, we think that we are not only deciding in conformity to the authorities and the meaning of the statute, but are, probably, laying down as intelligible a rule as can easily be

(*b*) 1 B. & Ad. 673. (*c*) 4 B. & Ad. 578; 1 Nev. & Man. 374.

"suggested, for preventing the recurrence of those questions which have been so frequently raised, in a very short time, upon the construction of these instruments.

"It seems proper to add, that the authorities cited to us (with the exception of *Colebrook and others* v. *Layton*, which is of a more recent date), namely, *Shaw* v. *Pritchard* (*d*), *Flight* v. *Salter* (*e*), *Gibbons* v. *Hooper* (*f*), and *Doe* v. *Carter* (*g*), were brought under the consideration of the Court of Common Pleas, in the case of *Newland* v. *Watkin* (*h*). There a rule had been obtained to set aside the plaintiff's warrant of attorney, judgment and sequestration. The warrant of attorney is not set out, but the report states that the defendant, a clergyman, gave it to the plaintiff 'to enter up judgment *for the arrears of the annuity*, and in the warrant expressly authorized him to issue sequestration.' The court, having taken time to consider, made the rule absolute, deciding that the plaintiff should no further enforce his writ of sequestration, but should not be subject to an action of trespass. The reasons of the court are not given, but the decision was as already stated.

"Upon the whole, we are of opinion that this security cannot be supported, and that the rule must be made absolute."

In *Skrine* v. *Hewett*, rule absolute.

Alchin v. *Hopkins.*

A composition with a clergyman in consideration that his future income may be received by a trustee, and applied in liquidation of his debts, after providing for a curate, is void under this act (*i*).

Walthew v. *Crafts.*

In a later case, to a declaration in covenant by a sequestrator for rent due under a lease, whereby D., the rector of S., demised to the defendant the rectory and parsonage, with the tithes, except the parsonage house, &c., for a term of fourteen years, if the rector should so long live, at the yearly rent of 980*l.*, the defendant pleaded, that, before the execution of the lease, D. was indebted to V. and M. and others, and in consideration thereof, and of

(*d*) 10 B. & C. 241; 5 Man. & Ry. 180.

(*e*) 1 B. & Ad. 673.

(*f*) 2 B. & Ad. 734.

(*g*) 8 T. R. 57, 300.

(*h*) 9 Bing. 113.

(*i*) *Alchin* v. *Hopkins*, 4 M. & Scott, 615; 1 Bing. N. R. 99. See also *Johnson* v. *Brazier*, 3 Nev. & M. 653; 1 Ad. & Ell. 624; *Cottle* v. *Warrington*, 5 B. & Ad. 447; 2 Nev. & M. 227; *Metcalfe* v. *Archbishop of York*, 6 Simon, 224; *Moore* v. *Ramsden*, 3 Nev. & P. 180. As to warrant of attorney, *Bendry* v. *Price*, 7 Dowl. P. C. 753; *Bishop* v. *Hatch*, ibid. 763; 4 Jur. 318.

Walther v. Crafts.

a further sum to be lent by V., and of the defendant consenting to be V.'s agent, D. agreed with the defendant and V. to charge the rectory of S. with that sum and the others, by making the lease in the declaration mentioned, and appointing the defendant receiver of the tithes, rents, &c. in order that he might apply the rent reserved by the lease in payment of the monies so to be charged on the benefice; that the money was advanced by V., and that D. in pursuance of the agreement, and in order to charge the benefice, executed the lease, and also an indenture appointing the defendant receiver; that the lease was part of the same transaction, and was a charging of the benefice contrary to the statute. On special demurrer to this plea:—It was holden that, under the second indenture, there was an equitable assignment or valid appropriation of so much of the rent as was necessary to pay V. and M. their debts; and that such assignment was a charge upon the benefice, and therefore the lease, which was part of the same transaction, was void under the act (*k*).

Long v. Storie.

And where a rector, who was also the patron of a living, gave warrants of attorney to various creditors, who had mortgages on the advowson, subject to an agreement that the judgment to be entered up by the first mortgagee should have priority over the rest, whenever execution should be issued:—It was holden, that the agreement pointed so particularly to making the judgments charges on the living, that the court could not give effect to it by granting an injunction and a receiver (*l*).

Hawkins v. Gathercole.

And in spite of the language in 1 & 2 Vict. c. 110, s. 13, now modified by later acts, providing that all judgments of the Superior Courts at Westminster entered up and registered against any person should operate as a charge upon all lands, rectories, advowsons, tithes and other hereditaments of or to which the person should be seised, entitled or possessed for any estate or interest, it was holden by the lords justices, reversing a decision of Lord Cranworth, when vice-chancellor, that a judgment so entered up and registered against a clergyman does not create a charge upon his benefice entitling the judgment creditor to the appointment of a receiver (*m*).

What charges may be made.

Charges however may in certain cases be made by the incumbents on benefices with cure for the purpose of

(*k*) *Walthew v. Crafts*, 6 Ex. 1.

(*l*) *Long v. Storie*, 3 De Gex & Sm. 308.

(*m*) *Hawkins v. Gathercole*, 6 De G. M. & G. 1; 1 Sim. N. S. 63; 14 Jur. 1103; 1 Jur. N. S. 481.

building or repairing the house of residence, or for buying plots of land convenient to be annexed to the glebe (*n*).

In these cases the charges can only be made with the consent of certain persons specified in the statutes authorizing them, and where one of the persons to consent, e. g. the bishop of the diocese, himself takes the charge, the transaction will be considered contrary to the principles of equity, and the charge will be holden void in his hands (*o*).

By 6 & 7 Will. 4, c. 71, ss. 77, 78, and 2 & 3 Vict. c. 62, ss. 16, 17, incumbents were empowered to charge the expenses, to which they as tithe owners were put in obtaining a proper tithe commutation, on the lands of the benefice for a certain number of years (*p*).

Incumbents are also by 1 & 2 Will. 4, c. 45, s. 21, and 28 Vict. c. 42, empowered to charge their benefices for the benefit of chapels and district churches within the limits of their parishes (*q*).

Benefices without cure may be charged.

But the act 13 Eliz. c. 20, applies only to benefices with cure of souls; and it has been in fact holden that a canonry of Windsor having no cure of souls attached may be assigned, and that, on bill filed by a mortgagee, a receiver will be appointed (*r*).

In *Butcher* v. *Musgrave*, being an action by another mortgagee of the same canonry, the Court of Common Pleas on the 23rd June, 1840, decided that an action of ejectment would not lie for the canonry in question, it being a mere office, of which the sheriff could not give possession; and that ejectment did not lie for the residentiary house in which the canon resided, as it appeared vested in the corporation, and not in the canon (*s*).

(*n*) *Vide supra*, Part V., Chap. II., Sect. 1.

(*o*) *Greenlaw* v. *King*, 3 Beav. 49 (1840).

(*p*) *Vide supra*, p. 1522.

(*q*) *Vide infra*, Chapter on the Augmentation of Benefices.

(*r*) *Grenfell* v. *Dean, &c. of Windsor*, 2 Beav. 550.

(*s*) Cited in *Grenfell* v. *Dean, &c. of Windsor*, 2 Beav. 550.

CHAPTER VIII.

TAXES.

SECT. 1.—*First Fruits and Tenths.*
2.—*Land Tax.*
3.—*Rates.*

THIS Chapter is intended to comprise the several charges or taxes imposed by the State on the revenues arising from the property of the church.

SECT. 1.—*First Fruits and Tenths.*

First fruits.

Annates, primitiæ, or *first fruits,* were the value of every spiritual living by the year, which the pope, claiming the disposition of all ecclesiastical livings within Christendom, reserved out of every living (*a*).

History.

What pope first imposed first fruits may be doubtful (*b*). Hume, in his history of Edward I., says "the levying of first fruits was also a new device begun in this reign, by which his holiness thrust his fingers very frequently into the purses of the faithful; and the king seems to have unwarily given way to it." Blackstone, discoursing of first fruits and tenths (*c*), says, "they were originally a part of the papal usurpations over the clergy of these kingdoms, first introduced by Pandulph, the pope's legate, during the reigns of King John and Henry III. in the see of Norwich, and afterwards attempted to be made universal by the Popes Clement V. and John XXII. about the beginning of the fourteenth century. The first fruits *primitiæ*, or *annates*, were the first year's old profits of the spiritual preferment, according to a rate or *valor* made under the direction of Pope Innocent IV. by Walter, Bishop of Norwich, in 38 Hen. 3, and afterwards advanced in value by commission from Pope Nicholas III., A. D. 1292, 20 Edw. 1. Which valuation of Pope Nicholas is still preserved in the Exchequer (*d*). The tenths, or *decimæ*, were the tenth part of the annual profit of each living by the same valuation." When the first

(*a*) 12 Co. 45.
(*b*) 4 Inst. 120.
(*c*) Vol. i. p. 283.
(*d*) 3 Inst. 154.

fruits and tenths were transferred to the king by 26 Hen. 8, c. 3, confirmed by 1 Eliz. c. 4, commissioners were appointed in each diocese to make a new *valor beneficiorum*, by which the clergy are at present rated. This is commonly called the *King's Books*, and a transcript of it is given in Ecton's *Thesaurus*, and Bacon's *Liber Regis* (*e*). The reason alleged by the canonists for the exaction of these first fruits by the pope was, *pro conservando decenti statu suo, ut qui omnium curam habet de communi alatur* (*f*).

In the 34 Edw. 1, at a parliament held at Carlisle, great complaint was made of intolerable oppressions of churches and monasteries by William Testa (called *Mala Testa*) and the legate of the pope, and principally concerning first fruits; at which parliament the king, by the assent of his barons, denied the payment of first fruits of spiritual promotions within England, which were founded by his progenitors and the nobles and others of the realm for the service of God, alms and hospitality. And to this effect he wrote to the pope; and thereupon the pope relinquished his demand of first fruits of abbeys; in which parliament the first fruits for two years were granted to the king (*g*).

In the 50 Edw. 3, the commons complain, amongst other grievances from the court of Rome, that the pope's collector that year (a thing never before done) had taken the first fruits of every benefice whereof he had made provision or collation; whereas he was used to take first fruits only of benefices vacant in the court of Rome (*h*).

In truth this tribute or revenue of first fruits was gradually by little and little imposed by the bishop of Rome on such vacant benefices as himself conferred and bestowed; and this was often complained of as a very great grievance; so that in the council at Vienna, Clement V., who was made pope in the year 1305, forbade the receiving thereof, and ordered the same to be laid aside, and that the twentieth part of the sacerdotal revenues should instead thereof be annually paid to the bishop of Rome; but this not taking effect, the pope so retained the said *annates* to his exchequer, as that it long remained one of the most considerable parts of his revenue (*i*).

(*e*) 1 Bl. Com. 285, with the note of Mr. Christian.

(*f*) God. Rep. Can. 337; see the case of First Fruits and Tenths, 12 Co. 45.

(*g*) Ibid.

(*h*) Degge, pt. 2, c. 15.

(*i*) God. 337.

Tenths.

Tenths, decimæ, are the tenth part of the yearly value of all ecclesiastical livings (*k*).

These tenths the pope (after the example of the high priest among the Jews, who had of the Levites a tenth part of the tithes), claimed as due to himself by divine right. And this portion or tribute was by ordinance yielded to the pope in the 20 Edw. 1, and a valuation then made of the ecclesiastical livings within this realm, to the end the pope might know and be answered of that yearly revenue; so as the ecclesiastical livings chargeable with the tenth (which was called spiritual) to the pope were not chargeable with the temporal tenths or fifteenths granted to the king in parliament, lest they should be doubly charged; but their possessions acquired after that taxation were liable to the temporal tenths or fifteenths, because they were not charged to the other. So as the tenths of ecclesiastical livings were not yielded to the pope *de jure* after the example of the high priest among the Jews, for then he should have had the tenths of all ecclesiastical livings whensoever they were acquired, but he contented himself with what he had got, and never claimed more; and that he might the better keep and enjoy that which he had got, the popes did often after grant the same for certain terms to divers of the kings of England, as by our historians appears (*l*).

Taken from the pope.

By 25 Hen. 8, c. 20, s. 2, "No person shall be presented and nominated or commended to the bishop of Rome for the office of an archbishop or bishop, nor send nor procure there for any bulls, breeves, palls or other things requisite for an archbishop or bishop, nor shall pay any sums of money for *annates*, first fruits, nor otherwise for expedition of any such bulls, breeves or palls; but the same shall utterly cease, and no longer be used within this realm."

Given to the king.

And by 26 Hen. 8, c. 3, s. 1, "The king, his heirs and successors, kings of this realm, shall have from time to time to endure for ever, of every person who shall be nominated, elected, prefected, presented, collated, or by any other means appointed to have any archbishopric, bishopric, abbacy, monastery, priory, college, hospital, archdeaconry, deanry, provostship, prebend, parsonage, vicarage, chauntry, free chapel, or other dignity, benefice, or promotion spiritual, of what name, nature or quality soever they be, or to whose foundation, patronage, or gift soever they belong, the first fruits, revenues and profits thereof for one year."

(*k*) 4 Inst. 120, 121. (*l*) 2 Inst. 627, 628.

Sect. 8. " And he shall also yearly have united to his imperial crown for ever, one yearly rent or pension amounting to the value of the tenth part of all the revenues, rents, farms, tithes, offerings, emoluments, and of all other profits as well called spiritual as temporal, belonging to any archbishopric, bishopric, abbacy, monastery, priory, archdeaconry, deanry, hospital, college, house collegiate, prebend, cathedral church, conventual church, parsonage, vicarage, chauntry, free chapel, or other benefice or promotion spiritual, of what name, nature or quality soever they be, within any diocese of this realm or in Wales (*m*)."

Compounding for and payment of first fruits

By sect. 1, every person, before any actual or real possession or meddling with the profits of his benefice, shall pay or compound for the first fruits to the king's use, at reasonable days, and upon good sureties.

Sect. 2. " And the chancellor of England and master of the rolls, jointly and severally, or such other persons as the king shall depute by commission under the great seal, shall have power to examine and search for the true value of such first fruits, and to compound for the same, and to limit reasonable days of payment thereof upon good surety by writing obligatory: and if composition be made for the same before the lord chancellor or master of the rolls, then the writings obligatory or money taken for the same shall be delivered to the clerk of the hanaper for the king's use; and if composition be made before any other persons so deputed by the king as aforesaid, then the same shall be delivered to the treasurer of the chamber or elsewhere as the king by commission under the great seal shall appoint."

Sect. 3. Whose acquittance respectively shall be a sufficient discharge.

" And such writings obligatory shall be of the same effect as writings obligatory made by any lay person by authority of the statute of the staple; and, upon certificate thereof into the chancery, like process and execution shall be thereupon had, as upon certificate of writings obligatory of the statute of the staple."

" And the sum of 8*d.* (over and above the stamps) shall be paid for such writing obligatory, and no more; and 4*d.* for an acquittance."

By 2 & 3 Anne, c. 20, s. 7, one bond only shall be given for the several payments.

By 26 Hen. 8, c. 3, s. 3, " Persons so deputed as aforesaid shall every six months deliver to the treasurer of the chamber, or elsewhere to such other commissioners as

(*m*) See 2 & 3 Edw. 6, c. 20.

the king shall appoint, as well all such money as all such specialties and bonds, by indenture to be made between them; and if any such person so deputed, his heirs, executors or administrators, shall conceal or embezzle any of the said specialties or bonds, and do not deliver them according to the tenor of this act, he shall forfeit his office, and make fine and ransom at the king's will."

Penalty on not paying or compounding.

By sect. 4, "If any person shall enter into the possession or meddle with the profits of his spiritual promotion before he hath paid or compounded as aforesaid, and be convict thereof by presentment, verdict, confession or witness, before the said lord chancellor, or such other as shall have authority by commission to compound for the same; he shall be accepted and taken an intruder upon the king's possession, and shall forfeit double value."

Value how to be ascertained.

In order to ascertain the valuation, it was enacted by sects. 9, 10, that the chancellor of England should have power to direct into every diocese commissions in the king's name under his great seal, as well to the archbishop or bishop as to such other persons as the king should appoint, commanding them to examine and inquire of the true yearly values of all the manors, lands, tenements, hereditaments, rents, tithes, offerings, emoluments, and all other profits as well spiritual as temporal, appertaining to any such benefice or promotion; with a clause to be contained in every such commission, that they should deduct and allow these deductions following and none other, that is to say, the rents resolute to the chief lords, and all other annual and perpetual rents and charges which any spiritual person is bound yearly to pay to any person, or to give yearly in alms by reason of any foundation or ordinance, and all fees for stewards, receivers, bailiffs and auditors, and synods and proxies: and with another clause to be contained in their commission, that they should certify under their seals, at such days as should be limited by the said commissions, as well the whole and entire value as the deductions aforesaid.

Sect. 25. And furthermore, all fees which any archbishop, bishop, or other prelate of the church is bound yearly to pay to any chancellor, master of the rolls, justices, sheriffs, or other officers, or ministers of record, for temporal justice to be done or ministered within their diocese or jurisdictions, were to be deducted by the commissioners in their valuation.

In what diocese to be rated.

And by sect. 12, every archbishopric, bishopric, and other benefice and promotion above specified, shall be severally and distinctly rated in the proper diocese where

they be, wheresoever their possessions or profits shall happen to lie.

The unfortunate consequence of this valuation having been made in Henry the Eighth's time is, that the actual revenue of Queen Anne's bounty averaged for many years only 14,000*l.* (*n*).

Year when to commence.

By 28 Hen. 8, c. 11, s. 1, the year in which the first fruits shall be paid, shall begin and be accounted immediately after the avoidance; and the profits belonging to any archdeaconry, deanry, prebend, parsonage, vicarage, or other spiritual promotion, benefice, dignity, or office during the vacation (chauntries only excepted), shall go to the successor towards the payment thereof.

Incumbent dying.

By sect. 23, a person presented or collated to a parsonage or vicarage, not exceeding eight marks a year (that is, according to the valuation then to be made), was not to pay first fruits except he lived three years after his admission; and in the composition there was to be a clause, that if the incumbent died within three years, the obligation should be void.

And by 1 Eliz. c. 4, s. 6, "if an incumbent live to the end of half a year next after the avoidance, so as he hath received or without fraud might lawfully have received the rents and profits of that half year, and before the end of the next half year shall die or be lawfully evicted, removed, or put out by judgment at common law without fraud: he, his heirs, executors, administrators and sureties, shall be charged but only with a fourth part of the first fruits, any bond or other matter to the contrary notwithstanding. And if he live for one whole year next after such avoidance, and before the end of half a year then next following shall die or be removed as aforesaid; he shall be charged but with half of the first fruits. And if he live to the end of one whole year and an half, and before the end of six months then next following shall so die or be removed, he shall be charged but only with three parts of the first fruits. And if he shall live to the end of two whole years, and not be lawfully evicted, removed, or put out as aforesaid, he shall pay the whole."

Within what time archbishops and bishops shall pay.

By 6 Ann. c. 54, s. 5, "every archbishop and bishop shall have four years allowed him, when he shall compound for the same, for the payment of his first fruits, which shall commence from the time of restitution of his temporalties: and in every year he shall pay one fourth part; and if he die or be removed before the four years be expired, he shall

(*n*) Report of Select Committee, 1837.

be discharged of so much as did not become due or payable at or before the time of his death or removal, in like manner as the heirs, executors and administrators of rectors and vicars shall be discharged."

There were in 1837 two archbishoprics and twenty-three bishoprics liable to first fruits, but only eighteen bishoprics liable to tenths; and out of 10,498 benefices with or without cure of souls, there were only 4,898 which remained liable to tenths, and of that number 4,500 were also liable to first fruits (*o*).

Deans, archdeacons, prebendaries, how to pay.

By 6 Ann. c. 54, s. 6, "deans, archdeacons, prebendaries, and other dignitaries, shall compound for their first fruits in like manner as rectors and vicars: and in case of death or removal within the time usually allowed to rectors and vicars for payment of their first fruits, they shall be in the like condition, and have the same benefit as is allowed to rectors and vicars."

Tenths to be deducted out of the first fruits.

And whereas by 26 Hen. 8, c. 3, there was no provision for deduction of the tenths of that same year for which the first fruits were due to be paid, whereby there became a double charge; therefore by 27 Hen. 8, c. 8, ss. 1, 2, 3, it is enacted as follows: viz. "for reformation thereof, the king's highness, for the entire and hearty love that his grace bears to the prelates and other incumbents chargeable to the payment of the tenth and first fruits, of his excellent goodness is pleased and contented that it be enacted, that at the composition, allowance and deduction shall be made of the tenth part out of the first fruits, which tenth shall be paid to the king for that first year."

Grants of exemption from first fruits and tenths to continue.

By 1 Eliz. c. 4, s. 7, all grants made to the universities or any college or hall therein, and to the college of Eton and Winchester, by any kings of this realm or by act of parliament, for the discharge of first fruits and tenths, shall remain in force.

What livings are exempted from first fruits according to the valuation in the king's books.

By 1 Eliz. c. 4, s. 5, vicarages not exceeding the yearly value of 10*l*. after the rate and value upon the records and books of the rates and values for the first fruits and tenths remaining in the exchequer (according to the valuation made in the 26 Hen. 8), and parsonages not exceeding the like yearly value of ten marks, shall be discharged of first fruits.

And the reason why vicarages not exceeding 10*l*. should be freed of this charge, and parsonages of ten marks should pay, was because the vicarages in former times, and when the valuation was taken, had a great

(*o*) Report of Select Committee on First Fruits, Sess. 1837.

income by voluntary offerings, which falling to little or nothing upon the dissolution of monasteries this favour was afforded them in their first fruits (*p*).

What livings are exempted from first fruits and tenths according to their clear yearly value.

And by 6 Ann. c. 24, s. 2, all ecclesiastical benefices with cure of souls, not exceeding the clear yearly value of 50*l.* by the improved valuation of the same, shall be discharged for ever from the first fruits and tenths.

Sect. 4. But this shall not discharge any benefices with cure of souls, the tenths whereof were granted away by any of her majesty's predecessors in perpetuity. That is to say, it shall not discharge them of such *tenths;* but, if such livings do not exceed the said clear yearly value of 50*l.* by the said improved valuation, they shall be discharged for ever from *first fruits* (*q*).

Sect. 7. "Also this shall not diminish any annual sum, stipend, pension or annuity heretofore granted to any person, body politic or corporate, and charged upon the said revenues of first fruits and tenths or any part thereof; but in case it shall so happen that by discharging such small livings the first fruits and tenths which shall hereafter be collected in any diocese or dioceses shall not be sufficient to pay such annual sums as they now stand charged with, then the whole revenues of the first fruits and tenths throughout the kingdom shall be liable to make good such deficiency, during the continuance of such grants."

And for ascertaining the said clear yearly value, the bishops of every diocese or guardians of the spiritualties (*sede vacante*), and the ordinaries of peculiars and places of exempt jurisdiction, were required by the said act of 6 Anne, c. 24, s. 3, as well by the oaths of witnesses as by other lawful means, to inform themselves of the clear improved yearly value of every benefice with cure of souls within their respective jurisdictions, the clear improved yearly value whereof did not then exceed 50*l.*, and were to certify the same under hand and seal into the exchequer, which certificate being made and filed in the said court, was to ascertain the clear yearly value of such benefices to be discharged.

St. George's Chapel in Windsor exempted from first fruits and tenths.

Also, by 1 Eliz. c. 4, s. 8, the dean and canons of the free chapel of St. George within the Castle of Windsor, and all the possessions thereof, shall be discharged of tenths and first fruits.

Hospitals and schools ex-

By 1 Eliz. c. 4, s. 13, also, "nothing herein shall charge any hospital or the possessions thereof employed for the

(*p*) Degge, pt. 2, c. 15.

(*q*) 6 Anne, c. 27, s. 1.

empted from first fruits and tenths.

relief of poor people, or any school, or the possessions or revenues thereof, with the payment of tenths or first fruits."

Lessor to pay first fruits and tenths and not the lessee.

By 26 Hen. 8, c. 17, farmers and lessees of any manors, lordships, lands, parsonages, vicarages, portions of tithes, or other profits or commodities belonging to any archbishop, bishop, or other prelate or spiritual person, or spiritual body corporate or politic, shall be discharged of first fruits or tenths; but the lessors and owners shall pay the same.

Account of first fruits and tenths payable to be sent to clerks on institution.

By 1 Vict. c. 20, s. 8, "The treasurer for the time being of the bounty of Queen Anne shall, upon or immediately after the receipt of every return of institutions made by the bishops of the respective dioceses in England or Wales, or other ordinaries, deliver or transmit by the post or otherwise to every clerk or other person instituted to any ecclesiastical benefice, an account or statement in writing of the payments (if any) which are to be made by him for or in respect of the first fruits and yearly tenths of such benefice, and of the times and manner of making such payments."

Notice of arrears to be sent to the party omitting to pay.

Sect. 9. "When and as often as it shall appear to the treasurer for the time being of the governors of the bounty of Queen Anne that any person liable to the payment of first fruits or tenths shall have omitted or neglected to pay the same respectively for one calendar month over or after the proper time for such payment, the said treasurer for the time being shall thereupon give to each such person a notice in writing, or transmit the same by the post addressed to him at the place of residence belonging to the benefice or other ecclesiastical preferment in respect of which such payment is required, or other his usual place of residence, if known to the said treasurer, stating the amount then appearing to be due from such person for or in respect of first fruits and tenths respectively; and that such notice shall from time to time be repeated as often as the said treasurer may deem expedient; and that in particular between the twenty-ninth day of September and the twenty-fifth day of December in every year such a notice shall be given, sent or transmitted as aforesaid to every archbishop, bishop, or other dignitary, rector, vicar or other person from whom any first fruits or yearly tenths or any sum or sums of money in respect thereof, may then appear to be due, to the end that the payments of such first fruits and tenths may in no case be omitted or neglected through ignorance or inadvertence."

Provisions of

Sect. 10. "All the laws, statutes and provisions touch-

ing or concerning the said revenues of first fruits and tenths, and the imposing, charging, assessing and levying, and the true answering and payment of the said first fruits and tenths, or touching the charge or discharge or alteration of them or any of them, or any matter or thing relating thereto, which were in force immediately before the passing of this act, and which are not hereby or hereinbefore altered or repealed, shall be, remain and continue in their full force and effect, and shall hereafter be observed and put in due execution according to the tenor or purport of the same and every of them in all things, excepting such as are in or by this act altered or repealed."

Former acts relating to first fruits and tenths to continue in force, except where altered by this act.

By 26 Hen. 8, c. 3, s. 8, the tenths are to become due yearly at the feast of the Nativity of our Lord God.

Times of payment of tenths.

And by 3 Geo. 1, c. 10, s. 3, if any person charged with the payment of tenths shall not pay or duly tender the same yearly before the last day of April succeeding the feast of the Nativity whereon the same shall become due; then upon certificate thereof made by the collector or receiver, on or before the first day of June following, he shall be allowed upon his account all such sums as any persons against whom such certificates shall be made should or ought to have paid. And in every such case the treasurer, chancellor and barons of the exchequer shall issue upon every such certificate such process as to them shall seem proper and reasonable, against every such person against whom such certificate shall be made, his executors or administrators, whereby the same may be truly levied and paid to the said collector or receiver. And every sum so levied and paid the collector or receiver shall bring to account, and charge himself therewith in his next account.

By 26 Hen. 8, c. 3, s. 15, and 2 & 3 Edw. 6, c. 20, persons making default in payment were to be deprived of their benefice; and the reason of this severe penalty was because upon the Reformation many clergymen scrupled and denied to pay these tenths to the king, being (as they supposed) a duty properly due to the pope (*r*).

Forfeiture on nonpayment of tenths.

But now by 3 Geo. 1, c. 10, s. 2, persons making default of payment shall forfeit double value of the tenths.

By 26 Hen. 8, c. 3, s. 12, the bishops were charged to collect the tenths, and upon their certificate into the exchequer on non-payment by any incumbent, process was to be issued out of the said court against such incumbent, his executors and administrators; or for insufficiency of

Tenths a charge upon executors, administrators and successors.

(*r*) Degge, pt. 2, c. 15.

Tenths a charge upon executors, administrators and successors.

them, against the successors of such incumbent; whereby the king might be truly answered and paid.

And by 27 Hen. 8, c. 8, s. 4, in cases whereby the successor shall be chargeable to the payment of tenths unpaid in the time or life of his predecessor, he may distrain such goods of his predecessor as shall be upon the premises, and retain the same till the predecessor, if he be alive, and if he be dead till his executors or administrators, shall pay the same; and if the same shall not be paid in twelve days, then he may cause the goods to be appraised by two or three indifferent persons to be sworn for the same; and according to the same appraising may sell so much thereof as shall pay the same and also the reasonable costs that shall be spent by the occasion of distraining and appraising the same; and if no such distress can be found, then such predecessor if he be alive, and if he be dead his executors or administrators, may be compelled to the payment thereof by bill in chancery, or by action or plaint of debt at common law.

But by 3 Geo. 1, c. 10, s. 1, the bishops are discharged from the said collection: nevertheless, all former statutes for the imposing, charging, assessing and levying, and the true answering and payment of the first fruits and tenths, not altered by the said statute of 3 Geo. 1, shall continue in force.

Case of tenths where there is no incumbent.

And by 7 Edw. 6, c. 4, s. 3, if any promotion spiritual should chance to be or remain in such sort void, that no incumbent could be conveniently provided, the bishops were to certify the same specially; in which case it is enacted, that the king may levy and take all the glebe lands, tithes, issues or profits of such benefice, until he be paid the whole arrearages of the tenths.

Members of cathedrals and colleges to pay separately.

By 26 Hen. 8, c. 3, s. 22, in cathedral churches and colleges, every distinct head and member shall pay according to his own respective salary, and not for any others.

Collector to give acquittances.

By 3 Geo. 1, c. 10, s. 2, the collector shall give acquittances under his hand to the persons paying the same, which shall be a sufficient discharge; for every of which acquittances shall be paid the sum of 6*d.* and no more.

To pay the tenths into the exchequer.

And by 7 Edw. 6, c. 4; 3 Geo. 1, c. 10, s. 2, he shall pay the same yearly into the exchequer before or on the last day of May.

His estate chargeable.

And by 34 & 35 Hen. 8, c. 2; 13 Eliz. c. 4; 27 Eliz. c. 3; 3 Geo. 1, c. 10, s. 2, such collector and receiver, his lands and tenements, shall stand charged for the true payment of such sums as he shall receive.

And by 26 Hen 8, c. 3, s. 17; 3 Geo. 1, c. 10, s. 2, no officer of the exchequer shall take of any such collector or receiver any reward for making his account or *quietus est* in the exchequer, on pain of forfeiting his office, and making fine at the king's will.

Passing his accounts.

By 6 & 7 Will. 4, c. 77, one of the objects of the act, which is to be carried into effect by the ecclesiastical commissioners, is, that on the alteration of the incomes of the several sees made according to that act the first fruits shall be apportioned, so as to leave the same aggregate sum payable to the governors of Queen Anne's bounty, but to divide that sum pro ratâ according to the new incomes of the several sees, throwing also a portion of the charge on the excess of income of the sees of Durham and Ely, which is received by the commissioners for the purposes of their general fund.

Apportionment of first fruits to new incomes of bishops.

The same rule was to be applied to the tenths.

By 4 & 5 Vict. c. 39, s. 4, where the estates of holders of dignities, prebends and offices are vested in the commissioners, the holders thereof are to be discharged from all liability to pay first fruits and tenths; and the commissioners are yearly to pay over to the treasurer of Queen Anne's bounty one-twentieth of the estimated first fruits of the estates as an average compensation for the loss of the first fruits; and are also to pay the regular tenths of all these offices and of the sinecure rectories in their possession annually to the said treasurer.

On estates vested in commissioners.

It will be shown hereafter how the receipt and management of all first fruits and tenths has now been given to the governors of Queen Anne's bounty (*q*). The use of the funds by way of loans to the incumbents of benefices for the building and repairing of their houses, the purchase of small portions of glebe, &c. has been already mentioned (*r*). The ultimate application of the funds to the augmentation of the poorer benefices and otherwise to the relief of spiritual destitution will also be mentioned hereafter.

Present application of first fruits and tenths.

Sect. 2.—*Land Tax.*

Besides the liability to first fruits and tenths, ecclesiastical property in England, in common with all other real estate, is subject to land tax.

This tax has been often imposed at various periods of our history, but the act which first put the tax and the assessment of it on a regular footing was 38 Geo. 3, c. 5.

History of tax.

(*q*) *Vide post*, Chapter on Queen Anne's Bounty.
(*r*) *Vide supra*, Part V., Chap. II.

This act expressly (by sect. 4) charged all manors, lands, tithes, annuities and other yearly profits and all hereditaments; and special provision is made for the seizing and sale of tithes, where the tax on them is unpaid (by sect. 42).

Redemption of land tax.

By 38 Geo. 3, c. 60, various provisions were made for the redemption of land tax by persons having any interest in the land, and for keeping the tax on foot as an annuity in favour of the redemption, where his interest was only a partial one (sect. 37). But these provisions, except as to contracts already made or begun, are repealed by 42 Geo. 3, c. 116. There was also an act, 39 Geo. 3, c. 21, which was repealed by the same act.

Wilson v. *Grey*.

In the case of *Wilson* v. *Grey* (*s*), a contract for the sale of lands, with their appurtenances, belonging to a rectory, was entered into under the 38 Geo. 3, c. 60, and 39 Geo. 3, c. 6, which enabled ecclesiastical corporations to sell lands for the redemption of land tax. Before the payment of the purchase-money into the Bank of England, as directed by the acts, and the execution of the conveyance, the 39 Geo. 3, c. 21 was passed, which enacted that no minerals under lands belonging to any ecclesiastical corporation which should be sold should pass to the purchaser; and that the provisions of this act should, in the execution of the former acts, be applied as if they had been specially enacted in those acts:—The conveyance did not pass the minerals except by general words.

It was holden, nevertheless, that the minerals passed to the purchaser.

Corporations and trustees for public purposes may contract for the redemption of land tax.

By 42 Geo. 3, c. 116, s. 9, "It shall be lawful for all bodies politic and corporate, and companies, notwithstanding any statutes of mortmain or other statutes or acts of parliament to the contrary, and for all feoffees or trustees for charitable or other public purposes, having any estate or interest in any manors, messuages, lands, tenements, or hereditaments whereon any land tax shall be charged, to contract and agree for the redemption of such land tax or any part thereof."

All persons (except tenants at rack rent or of crown lands, &c.) may contract for redemption of land tax.

Sect. 10. "It shall also be lawful for all other persons having any estate or interest in any manors, messuages, lands, tenements, or hereditaments whereon any land tax shall be charged (except tenants at rack rent for any term of years, or from year to year, or at will, and except tenants holding under the crown any lands or tenements within the survey and receipt of the exchequer or the duchy of Lancaster, or, under the duke of Cornwall, any

(*s*) 3 L. R. Eq. 117.

lands or tenements belonging to and parcel of the duchy of Cornwall, for any term of years, or from year to year, or at will), to contract and agree for the redemption of such land tax or any part thereof."

It was holden in a case turning on a similar section in the act of 38 Geo. 3, c. 5, that an incumbent of a benefice is a person entitled to redeem the land tax, and that the tax may be kept on foot for the benefit of his assignees or representatives (*t*).

Governors of Queen Anne's Bounty may contract for redemption of the land tax on livings not contracted for by incumbents.

By sect. 15, "It shall be lawful for the governors of the bounty of Queen Anne for the augmentation of the maintenance of the poor clergy to contract and agree for the redemption of the land tax charged or hereafter to be charged upon the lands, tithes, or other profits arising from any living or livings within the meaning of the charter granted in the reign of Queen Anne, or any act or acts now in force directing the application of such bounty, which shall not have been contracted for by the incumbent or incumbents thereof."

Trustees of property given for the benefit of the poor clergy may contract for redemption of the land tax on livings.

Sect. 16. "It shall be lawful for the trustees for the time being of any trust property heretofore given by any will for the purpose of being laid out in the purchase of lands or impropriate tithes for the benefit of the poor clergy in England, with such consent as is required by such will, to contract and agree for the redemption of the land tax charged or hereafter to be charged upon the lands, tithes, or other profits arising from such living or livings belonging to the Church of England as the trustees for the time being, with such consent as aforesaid, shall think fit."

Patrons of livings may contract for the redemption of the land tax thereon not redeemed by incumbents.

Sect. 17. "Where the land tax charged upon the glebe lands, tithes, or other profits of any living or livings in the patronage of any college, cathedral church, hall, or house of learning in either of the universities of Oxford or Cambridge, or in the patronage of either of the colleges of Eton or Winchester, or of any trustee or trustees for any such college, cathedral church, hall, or house of learning as aforesaid, or in the patronage of any other bodies politic or corporate, or companies, or feoffees or trustees for charitable or other public purposes, or other person or persons, shall not then have been redeemed by the incumbent or incumbents of such living or livings, it shall be lawful for the corporations of such colleges, cathedral churches, halls, or houses of learning respectively, or for such other bodies politic or corporate, or companies, or other person

(*t*) *Kilderbee* v. *Ambrose*, 24 L. J., Ex. 49.

or persons aforesaid in whose patronage any such living or livings shall be, to contract and agree for the redemption of such land tax, upon the same terms and with the same benefits and advantages as the incumbent or incumbents of such living or livings could or might have contracted to redeem the same."

The consideration for the redemption shall be so much in the Three per Cents. as will produce a dividend exceeding the amount of the land tax redeemed by 1-10th.

Sect. 22. "The consideration to be given for the redemption of any such land tax as aforesaid shall be so much capital stock of public annuities transferable at the Bank of England bearing interest after the rate of three pounds per centum per annum, commonly called the Three Pounds per Centum Consolidated Annuities and the Three Pounds per Centum Reduced Annuities, or one of them, as will yield an annuity or dividend exceeding the amount of the land tax so to be redeemed as aforesaid by one tenth part thereof, such capital stock to be transferred to the commissioners appointed by 26 Geo. 3, c. 31, for the reduction of the national debt, in trust for the purposes of this act."

Governors of Queen Anne's Bounty may lay out money in redeeming land tax on livings and in purchasing rent-charges granted by incumbents.

By sect. 44, "It shall be lawful for the governors of the bounty of Queen Anne for the augmentation of the maintenance of the poor clergy from time to time to apply any sum or sums of money or other funds which under or by virtue of any laws now in force, or of the charter granted in the reign of Queen Anne, now is or are or hereafter shall be applicable towards the augmentation of any living or livings within the meaning of such laws or charter respectively, in and for the redemption of the land tax charged or hereafter to be charged upon the lands, tithes, or other profits arising from any such living or livings which at any time before or on or after the 24th day of June, 1802, shall have been or shall be contracted for by the incumbent or incumbents of such living or livings (with the consent of the said governors), or which may be contracted for by the said governors in pursuance of this act, and the transfer or payment of the consideration for such redemption by the said governors, or by their order or direction, shall, from the quarter day next preceding the making thereof, wholly exonerate and discharge the lands, tithes, or other profits of such living or livings from such land tax, which shall from thenceforth sink and be extinguished for the benefit of such living or livings; and it shall also be lawful for the said governors from time to time to apply any such sum or sums of money, or other funds as aforesaid, in, for, and towards the purchasing any rent-charge or rent-charges which shall have been or shall be granted under the authority of any of the said recited

acts or of this act, by any incumbent or incumbents of any living or livings which the said governors have already agreed or shall hereafter agree to augment; and every such rent-charge, when so purchased, shall be surrendered to the incumbent for the time being of the living upon which the same shall have been charged, to the intent that the same may sink and be extinguished for the benefit of such living or livings."

Trustees for the poor clergy may lay out trust money in redeeming land tax on livings.

Sect. 45. "It shall be lawful for the trustees for the time being of any trust property heretofore given by any will for the purpose of being laid out in the purchase of lands or impropriate tithes for the benefit of the poor clergy in England (with such consent as is required by such will) to apply from time to time any sum or sums of money or other funds which by virtue of such will now is or are or hereafter shall be applicable for the purpose aforesaid, in, for, or towards the redemption of any land tax charged or to be charged upon the lands, tithes, or other profits arising from any living or livings belonging to the Church of England which at any time before or on or after the said 24th day of June, 1802, shall have been or shall be contracted for by the incumbent or incumbents of such living or livings, with the consent of the said trustees, or of such other persons whose consent is required by such will, or which may be contracted for by the said trustees, in pursuance of this act; and the transfer or payment of the consideration for such redemption by the said trustees, or by their order or direction, shall, from the quarter day next preceding the making thereof, wholly exonerate and discharge the lands, tithes, or other profits of such living or livings from such land tax, which shall from thenceforth sink and be extinguished for the benefit of such living or livings; and every such redemption of land tax by virtue of this act, for the benefit of such living or livings, shall be deemed valid and effectual in the law, and equivalent, to all intents, constructions, and purposes, to a purchase or purchases of lands or tithes for that purpose under the trusts of such will, any statutes of mortmain or other statute or law to the contrary notwithstanding."

Power to sell for redemption of land tax.

By sect. 51, for the purpose of redeeming the land tax on lands belonging to persons (other than corporations, feoffees, or trustees), the persons in possession, but who shall not have the absolute estate (except tenants at rack rent), may sell part of the lands and heriots, for redemption of the land tax, and also rent reserved out of lands granted for beneficial leases, or by copies of court roll, or

Power to sell for redemption of land tax.

may mortgage the lands, or grant any rent-charge to the amount of the land tax (*u*).

By sect. 60, similar powers are given of enfranchising copyhold or customary estates with the approbation of the Court of Chancery.

By sect. 67, timber may be cut down, with the approbation of the Court of Chancery, and the produce applied in the redemption of the land tax, as in cases of real estate, and the land tax shall merge in the lands, unless otherwise ordered by the courts.

By sect. 77, the governors of the charity for the relief of the widows and children of clergymen, with the consent of the commissioners appointed according to sect. 72, which is, however, now repealed (*x*), for regulating and approving all sales made by corporations, may sell lands given by will for redeeming the land tax on other lands vested in them.

Where the land tax on any glebe, &c. of any living belonging to colleges, &c. shall be redeemed, it may be provided for by sale of any lands belonging thereto, or grant of a rent-charge, but such college, &c. shall be entitled to a rent-charge out of the living, unless it be declared otherwise at the time of presentation.

Sect. 78. "Where the land tax charged upon the glebe lands, tithes, or other profits of any living or livings in the patronage of any college, cathedral church, hall, or house of learning, in either of the universities of Oxford and Cambridge, or in the patronage of either of the colleges of Eton or Winchester, or of any trustee or trustees for any such college, cathedral church, hall, or house of learning, or in the patronage of any other corporation aggregate, shall have been or shall be redeemed by or on the behalf of any such college, cathedral church, hall, or house of learning, or by any such corporation aggregate, by virtue of any of the provisions of the said recited acts or of this act, it shall be lawful for any such college, cathedral church, hall, or house of learning, or for any such trustee or trustees thereof respectively as aforesaid, or for any such corporation aggregate, to provide for such redemption by sale of any lands, tenements, or hereditaments belonging to such corporations respectively, or by the grant of any rent-charge which they could or might respectively lawfully make for the redemption of any land tax charged on the lands belonging to such corporations, and the land tax so redeemed shall be forthwith extinguished; but every such college, cathedral church, hall, or house of learning respectively, or such corporation aggregate, shall nevertheless be entitled to an annual rent-charge issuing out of

(*u*) It seems that under this section the vendor may not himself be the purchaser; and in a case where the rector purchased in the name of his curate, the Court of Chancery held the title made through him a bad one (*Grover* v. *Hugell*, 3 Russ. 428).

(*x*) By 35 & 36 Vict. c. 63.

such living equivalent to the amount of the land tax redeemed, unless it shall be declared in writing under the common seal of the body or bodies having such right of patronage or nomination, at the time of presenting or nominating any clerk or clerks to such living or livings, that such rent-charge shall be suspended during his or their incumbency or respective incumbencies, which declaration the body or bodies entitled to nominate to such living or livings shall from time to time be competent to make: Provided always, that such suspension shall be without prejudice to the right of the said body or bodies respectively to recover such rent-charge after the next or any future avoidance: provided also, that any declaration made by any such body at the time of redeeming the said land tax shall be as available during the incumbency of the then rector, vicar, or curate, as if it had been made at the time of his being preferred to such living."

Where any rector shall be entitled to the patronage of any vicarage or perpetual curacy, and the land tax on the glebe, &c. shall be redeemed by him, he may provide for such redemption by sale of part of the glebe belonging to the rectory, but the incumbent of the rectory, when not holding the vicarage, &c. shall be entitled to an annual rent-charge out of the vicarage.

Sect. 79. "Where any ecclesiastical rector shall in right of his rectory be entitled to the patronage or donation of or to any vicarage or perpetual curacy, and there shall not be any glebe land belonging to such vicarage or perpetual curacy which shall be eligible or proper to be sold for the purpose of redeeming the land tax charged on the glebe lands, tithes, or other profits thereof, and such land tax shall have been or shall be redeemed by such ecclesiastical rector, then and in such case it shall be lawful for such ecclesiastical rector, whether he shall be also incumbent of the vicarage or perpetual curacy or not, to provide for the redemption of such land tax by sale of part of the glebe lands belonging to such rectory in the same manner in all respects as he could or might provide for the redemption of the land tax charged on the glebe lands, tithes, or other profits thereof, and the land tax so redeemed shall be forthwith extinguished; but whenever and so long as such rectory and vicarage or perpetual curacy respectively shall be held by different incumbents, the incumbent for the time being of such ecclesiastical rectory shall be entitled to an annual rent-charge issuing out of the vicarage or perpetual curacy equivalent to the amount of the land tax charged thereon at the time of such redemption as aforesaid."

Mines, &c. shall not pass by conveyance of land sold, nor advowsons, &c. though appendant to the land.

Sect. 80. "No mines or minerals, or seams or veins of coal, metals, or other profits of the like nature, belonging to any manors, messuages, lands, tenements, or hereditaments, which shall be sold by any bishop or other ecclesiastical corporation aforesaid, for the purpose of redeeming any land tax, whether the same shall be opened or unopened,

nor any right, title, or claim to open or work the same, nor any advowson or right of patronage or presentation to any living or ecclesiastical benefice, or right of nomination to any perpetual curacy, shall pass by any conveyance of such manors, messuages, lands, tenements, or hereditaments, either by express or general words in such conveyance, although such advowson, right of patronage or presentation or nomination, may be appendant or appurtenant to such manors, messuages, lands, tenements, or hereditaments: and such mines or minerals, seams or veins of coal, metal, or other profits aforesaid, together with all proper and necessary powers for opening and working the same, and such advowsons, rights of patronage or presentation, or nomination, shall be always absolutely excepted and reserved to such bishops or other ecclesiastical corporations aforesaid, as fully and effectually, to all intents and purposes, as if the same were in such conveyance expressly excepted and reserved."

When redeemed by bishops.

Sect. 88, made provision as to the land tax when redeemed by bishops or other ecclesiastical corporations on lands customarily let by them, and as to the mode of estimating the future rent on these lands.

When by reversioners.

By sect. 123, where any person having an estate other than of inheritance shall redeem the land tax out of his own property, the estate shall be chargeable with the amount of the stock transferred or money paid, and a yearly sum by way of interest equal to the land tax redeemed; but reversioners shall be liable to payment of the interest only from the time of their coming into possession; and when the land tax has been redeemed by reversioners they shall be entitled to a yearly sum equal thereto until the estates vest in them (*x*).

Governors of Queen Anne's Bounty and trustees of any property given for the benefit of the poor clergy may purchase land tax for augmenting livings, which shall issue as a fee-farm out of the lands.

By sect. 161, the first part of which is now repealed (*y*), "It shall also be lawful for the said governors of the bounty of Queen Anne, notwithstanding any such statutes or law to the contrary, to accept and take any land tax which shall have been so purchased as a fee-farm rent as aforesaid, and which shall be given or bequeathed to them by any deed, will, or otherwise, for the purpose of augmenting any such living or livings as aforesaid, and to apply the same for or towards the augmentation of such living or livings accordingly, and the incumbent or incumbents for the time being of such living or livings shall hold and enjoy such land tax, and all powers and remedies

(*x*) See *Kilderbee* v. *Ambrose*, 24 L. J. Ex. 49, *supra*, p. 1737.

(*y*) By 35 & 36 Vict. c. 63.

for the recovery thereof, in the same manner as if such land tax had been purchased by the said governors, and annexed to such living or livings in pursuance of this act."

Gifts of land tax redeemed for the augmentation of any living shall be valid.

Sect. 162. "Every gift or disposition of any land tax which shall have been redeemed under the provisions of the said recited acts, or which shall be redeemed or purchased under the provisions of this act, made by the person or persons entitled thereto by deed, will, or otherwise, for the augmentation of any living or livings whatever, shall be valid and effectual; and such land tax shall be held and enjoyed by or for the benefit of the incumbent or incumbents for the time being of the living or livings which shall be so augmented thereby, according to the tenor of such deed, will, or instrument of gift; any statutes of mortmain or other statute or law to the contrary notwithstanding."

Sales by rectors and vicars.

By 54 Geo. 3, c. 173, s. 6, "For the purpose of redeeming any land tax by any rector or vicar, or for the purpose of raising any money for reimbursing the stock or money previously transferred or paid for the redemption of such land tax, or for purchasing and assignment of such land tax, under the powers and provisions of the said acts, or any of them, the land sold or proposed to be sold for those purposes, or any of them, under the powers of the said acts or any of them, shall not necessarily be confined to such a quantity of any lands belonging to such rector or vicar as shall appear to the commissioners authorizing the same necessary to be sold for such purposes, but that any sale of lands hereafter to be made for any of the purposes aforesaid shall be deemed and considered good and effectual sales, notwithstanding the restrictions contained in any of the said acts, although the lands so sold, or proposed to be sold, shall appear to the said commissioners more than shall be necessary for the purposes thereof; provided the said commissioners shall be satisfied that such proposed sale shall, under all circumstances, be beneficial or likely to prove beneficial to the rector or vicar making such sale, and to their respective successors; and provided the ordinary shall signify his consent to such sale, by any writing under his hand, to be produced before the said commissioners."

Discharge of small livings from land tax.

By this act and many previous ones provision was made for exempting in certain cases benefices or charitable institutions having an annual income of less than 150*l*. This provision was greatly extended by 57 Geo. 3, c. 100, which, after reciting what had been done towards the

Discharge of small livings from land tax.

exoneration of small livings and charities under the last-mentioned acts and others now expired, and further reciting that "it may be expedient to augment the incomes of "other small livings or other ecclesiastical benefices and "of charitable institutions not already exonerated from "land tax," proceeds to enact that two or more of the commissioners appointed under the great seal pursuant to 54 Geo. 3, c. 173, might "direct the exoneration and dis-"charge of the land tax charged upon the messuages, "lands or other hereditaments belonging to any livings "or other ecclesiastical benefices or charitable institu-"tions, in cases where the whole clear annual income of "such livings or other ecclesiastical benefices or charit-"able institutions respectively shall not exceed the sum of "150*l.*, without the transfer or payment of any considera-"tion for the same, in the manner and under the directions "and restrictions in this act mentioned."

By sects. 2, 3, incumbents are to send in statements of the value of their livings for this purpose.

By sects. 4, 6, the commissioners are to certify what lands are discharged of tax.

By sect. 5, these provisions shall extend to exonerate farms with which two or more livings have been jointly augmented through the assistance of Queen Anne's bounty.

By sect. 7, small livings never yet assessed to the tax may be exonerated from liability to assessment.

Sect. 9 has a provision in aid of tenants at rack rent of lands holden under such small livings.

By sect. 17 of the same act,—

Surplus stock arising by sales, &c. made by archbishops, &c. may be applied in purchasing assignments of land tax redeemed.

"Where the land tax charged upon any lands, tithes, or other hereditaments belonging to any archi-episcopal or episcopal see, or to any rectory or vicarage, shall have been redeemed by any archbishop, bishop, rector or vicar for the time being, by and out of the private monies belonging to such archbishop, bishop, or rector or vicar, and it shall happen that any stock shall be standing in the names of the commissioners for the reduction of the national debt, or in the name of the accountant-general of the Court of Chancery, or in the names or name of any trustees or trustee on account or for the use of any such archi-episcopal or episcopal see, or rectory or vicarage, which shall have arisen from any sale, mortgage or grant, and which shall not have been applied for the purposes for which such sale, mortgage or grant, shall have been made, it shall be lawful for the archbishop or bishop, or rector or vicar for the time being, by and under the direc-

tion and authority of the commissioners appointed or to be appointed by letters patent under the great seal, to treat and agree with the archbishop, bishop, rector or vicar, who shall have so redeemed such land tax, or with the executors, administrators or assigns of such archbishop, bishop, rector or vicar, for the purchase of an assignment from them respectively of the land tax so redeemed; and for the purpose of completing the purchase of such assignment, it shall be lawful for the said last-mentioned commissioners or any two or more of them to order and direct that the consideration for such purchase shall be paid or transferred by sale or transfer of a sufficient part of such stock; and the governor and company of the Bank of England and the said commissioners for reduction of the national debt, and the said accountant-general and also such trustees or trustee as aforesaid, are hereby respectively authorized and required, upon the production of such order, signed by any two or more of the said commissioners under the great seal, by sale or transfer of a sufficient part of such stock, to pay or transfer to the person or persons assigning such land tax the money or stock specified in such certificate; and the receipt or receipts of such person or persons shall be sufficient discharges for the money or stock so to be paid or transferred; and upon any such payment or transfer being made as hereby is directed, and upon an assignment being made of such land tax to the archbishop, bishop, rector or vicar for the time being (and which assignment shall not be liable to any stamp duty), such land tax shall forthwith become merged and extinguished for the benefit of the see or living, the hereditaments belonging to which respectively or any of them shall have been charged with the said land tax."

Sect. 3.—*Rates.*

By common law.

It has been said already that by the common law ecclesiastical persons were to be quit of tolls, pontage, &c. for their ecclesiastical goods; and that, according to the old view of the law, they were not, unless expressly charged, made chargeable for any of the general burdens imposed upon the subjects of the realm, as to highways, bridges, gaols, watch and ward, &c.; but that the modern view is otherwise (*z*).

(*z*) *Vide supra*, pp. 629—631.

Poor rates.

It has been long holden, though the law at first was uncertain, that incumbents of benefices are liable to the rates for the relief of the poor according to 43 Eliz. c. 2 (*a*).

These rates have been imposed on them not only in respect of their glebes, but also in respect of tithes, even tithes of fish, and apparently even oblations (*b*) and pensions (*c*).

There does not appear, however, to be any authority for the rating of surplice fees.

Mode of assessment.

The house and glebe lands of the incumbent will, it seems, be rated in the same manner as other lands in the parish.

It will be seen that several questions have arisen and several cases decided which require consideration as to the way in which tithe or tithe commutation rent-charge is to be assessed.

Tithe rent-charge liable to rates.

By the first Tithe Commutation Act, 6 & 7 Will. 4, c. 71, s. 69, "Every rent-charge payable as aforesaid "instead of tithes shall be subject to all parliamentary, "parochial and county and other rates, charges and as- "sessments in like manner as the tithes commuted for "such rent-charge have heretofore been subject."

What deductions are to be made in rating a tithe commutation rent-charge.

The principles upon which tithe or corn-rents in lieu of tithe used to be valued were thus laid down in the case of *Rex* v. *Joddrell* (*d*). In this case, by an act of parliament the tithes in a parish were extinguished, and in lieu thereof the rector was entitled to a corn rent. In a rate for the relief of the poor, he was assessed for the full amount of that corn rent, after deducting the amount of parochial dues levied on the rector. The farmers in the parish, who paid the corn rent to the rector, were rated upon the *bonâ fide* amount of the rack rent paid by them to their landlords. It was holden, that as the tithe is an outgoing, the corn rent or compensation for tithes was not to be added, as required by the rector, to the amount upon which the farmer is rateable; and in respect of that portion of the annual profit or value, consisting of corn rent, the rector was to be assessed. Another objection was, that the farmer's share of the profit ought to have been rated, or that the rector should have been rated proportionably less; and this objection prevailed on the ground of inequality, because the farmer was rated, not

(*a*) *Rex* v. *Turner*, 1 Str. 77; 1 E. & Y. 734; *Rex* v. *Carlyon*, 3 T. R. 385; 2 E. & Y. 359.

(*b*) *Rex* v. *Carlyon*, 3 T. R. 385; 2 E. & Y. 359.

(*c*) 2 W. Bl. 1252; 2 E. & Y. 341.

(*d*) 1 B. & Ad. 403.

for the full value of the land which comprised the landlord's and tenant's profit, but for the rack rent, which was the landlord's profit only, while the rector was rated for the full value of his corn rent; for it was said, that the *ratio* which the rent of land bears to its average annual profit or value ought to have been ascertained, and that the rector ought to have been assessed for his tithe rent in the same *ratio*. It was holden, that in estimating the amount at which the rector ought to be rated, the land-tax ought to be deducted from the full amount of his corn rent, provided the tenants of the other lands in the parish paid the land-tax without being allowed for it by the landlord, but not if such allowance was made. It was also holden, that the ecclesiastical dues, including tenths, synodals, &c., ought to be deducted, because they are payable in respect of the rectory, the profits of which constitute the only fund out of which they can be paid; but it was holden, that the expenses of providing for the duties of the incumbency, in respect of which the rector claimed a deduction, were not to be allowed, because such duties ought to be performed personally by the rector.

6 & 7 Will. 4, c. 96.

All rates to be made on the net annual value of the property.

By the act to regulate parochial assessments, 6 & 7 Will. 4, c. 96, passed in the same year as the first Tithe Commutation Act, sect. 1, no rate for the relief of the poor shall be of force, "which shall not be made upon an estimate of the net annual value of the several hereditaments rated thereunto; that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenants' rates and taxes and tithe commutation rent-charge, if any, and deducting therefrom the probable average annual costs of the repairs, insurance and other expenses, if any, necessary to maintain them in a state to command such rent: Provided always, that nothing herein contained shall be construed to alter or affect the principles or different relative liabilities (if any) according to which different kinds of hereditaments are now by law rateable."

Exemptions not universally applicable.

Many of the deductions specified in this section are inapplicable to tithe rent-charge; while a tithe-owner is subject to other charges and outgoings which are not mentioned in this section. The exceptions contained in this section must therefore be taken as instances applicable to one class of property and applied analogically to other classes of property (*e*).

(*e*) Per Coleridge J., in *Reg.* v. *Goodchild*, E., B. & E. 41; 27 L. J., M. C. 233.

Rex v. *Capel.*

Shortly after this act was passed came the decision in *Rex* v. *Capel* (*h*). This decision established that tithes are hereditaments under 6 & 7 Will. 4, c. 96, s. 1, and that a tithe-owner is rateable at their net annual value, *i. e.* at such a sum as the tithes might reasonably be expected to let for from year to year, free of the usual tenants' rates and taxes, and deducting the amount of ecclesiastical dues payable in respect thereof.

Reg. v. *Goodchild.*

The next case on this subject, which decided many important points, is that of *Reg.* v. *Goodchild* (*i*). This case decided that the following are proper deductions to be made from the rent-charge:—estimated loss by non-payment; estimated law expenses in enforcing payment; other estimated expenses of collection; all usual tenants' rates and taxes, including therein tenants' property tax, and, where they are charged, lighting rate and general rate; first-fruits; tenths; and ecclesiastical dues. The following deductions, however, were not to be made:—land-tax, and any claim in respect of the personal services of the incumbent, or expenses of providing for the duties of the incumbency. This last deduction had previously been disallowed in *Rex* v. *Joddrell* (*k*).

In the case of *Reg.* v. *Goodchild*, two other claims were made—for the salary of a curate (that is, an assistant to, not a substitute for, the incumbent), and for the amount paid towards the salary of a minister of a district church or chapel in the parish; and the court held, that where the circumstances were such as to make the employment of an assistant curate morally necessary, his reasonable stipend should form a deduction; and that if the salary of the minister of the district church was compulsorily payable by the incumbent of the mother church, the incumbent might make this a deduction.

Lastly, a claim was made in this case for a deduction in respect of tenants' profits, *i. e.*, that profit which a tenant would expect for undertaking the trouble and cost of collection and the risk of loss, and guaranteeing the payment of a fixed rent to the owner of the rent-charge. This question was not decided on the first hearing; but the case being afterwards re-argued, the court held, that the question whether any allowance in respect of this should be made, and the amount of such allowance (if any), de-

(*h*) 4 P. & D. 87; 12 Ad. & El. 382; 4 Jur. 886.

(*i*) E., B. & E. 1; 27 L. J., M. C. 233.

(*k*) 1 B. & Ad. 403.

pended on the particular facts of each case, and must be a question to be determined by the sessions (*l*).

Reg. v. *Hawkins.*

In the case of *Reg.* v. *Hawkins* (*m*), argued and decided at the same time as *Reg.* v. *Goodchild,* it was holden, that no deduction should be made in respect of monies paid annually to Queen Anne's bounty for liquidation of principal and interest of a mortgage debt, borrowed for the purpose of rebuilding or repairing the residence-house.

Two of the points, however, decided in the case of *Reg.* v. *Goodchild* have since been otherwise decided.

Frend v. *Tolleshunt Knights.*

In the case of *Frend* v. *Tolleshunt Knights* (*n*), it was holden, that the minister of a district chapel, part of whose endowment consisted in a rent-charge granted under the powers of several statutes by the incumbent of the mother church out of all his rectory, with powers of distress and entry in the event of non-payment, was not liable to be rated in respect of this rent-charge; though, if he had exercised his power of entry and possessed himself of the tithes, he would have been rateable.

Lawrence v. *Tolleshunt Knights.*

And in the subsequent case of *Lawrence* v. *Tolleshunt Knights* (*o*) it was expressly holden, thereby overruling part of the judgment in *Reg.* v. *Goodchild* (*p*), that the incumbent of the mother church was rateable in respect of the whole rent-charge received by him, without deduction for the amount compulsorily paid over by him to the minister of the district church. It remains to be seen whether this severe principle will be applied to cases of pensions granted under the Incumbents' Resignation Act, 1871 (*q*).

Reg. v. *Sherford.*

In *Reg.* v. *Sherford,* the Queen's Bench (*r*), holding that the principle of the decision of the House of Lords in *The Mersey Docks' Case* (*s*) is, that all property capable of beneficial occupation is to be assessed to the poor rate irrespectively of the amount of remunerative value to the particular occupier, and that this principle is not consistent

(*l*) E., B. & E. 60: See a very able Report of the Cases of *Reg.* v. *Goodchild,* &c., and Supplement thereto, by F. Meadows White, Esq. (Shaw & Sons), 1858.

(*m*) 27 L. J., M. C. 248. And see Mr. White's Report.

(*n*) 1 El. & El. 753; 28 L. J, M. C. 169.

(*o*) 2 B. & S. 533; 31 L. J., M. C. 148.

(*p*) *Supra.*

(*q*) *Vide supra*, pp. 521—528.

(*r*) 2 L. R., Q. B. 503 (1867). Before this decision the court had in *Williams* v. *Llangeinwen* (1 B. & S. 699; 31 L. J., M. C. 54) allowed this deduction, and in *Wheeler* v. *Bunnington* (1 B. & S. 709; 31 L. J., M. C. 57) refused it in the special circumstances of the case.

(*s*) 11 H. L. 443; 35 L. J., M. C. 1.

with the decision in *Reg.* v. *Goodchild* (*t*), in which, on rating a tithe rent-charge, a deduction was allowed to the incumbent in respect of the salary of a curate whose services were necessary, in addition to those of the incumbent himself, to the due discharge of the duties of the benefice, and which can only be supported on the ground, that the incumbent was bound to employ a curate whom he had to pay out of the subject-matter in respect of which he was rated, and the occupation by him of the rent-charge was rendered *pro tanto* less beneficial, decided that the latter case must, therefore, be taken as overruled, and such a deduction ought not to be allowed.

Whether compensations in lieu of tithes are or are not rateable.

It seems to be a question turning on the construction of the particular statute in each case whether corn rents, annuities or land given in lieu of tithes by some local act of parliament are rateable to the poor or not. In the cases of *Lowndes* v. *Horne* (*u*), *Rex* v. *Boldero* (*v*), and *Rex* v. *Wistow* (*x*), it was holden that the corn rents were rateable. In *Hackett* v. *Long Bennington* (*y*), land given in lieu of tithes was holden to be rateable.

But annuities given in lieu of tithes and charged on land, where the tithes were not extinguished in specie, were holden not to be rateable in the cases of *Rex* v. *Great Hambleton* (*z*), and *Reg.* v. *Shaw* (*a*).

And where it is expressly provided by the statute that the corn rent shall be free and clear of all taxes and deductions, it is not rateable (*b*).

Highway rates.

It has been said that by the old law incumbents were not considered to be rateable in respect of their benefices to the repair of the highways (*c*). Ever since, however, the Highway Act of 13 Geo. 3, c. 78, they have been holden rateable in respect of their benefices to the repair of the highways (*d*).

The present Highway Act, 5 & 6 Will. 4, c. 50, by sect. 27, expressly charges "all property now liable to be rated and assessed to the relief of the poor," with the highway rates (*e*).

(*t*) *Supra.*

(*u*) W. Black. 1252; 2 E. & Y. 340.

(*v*) 4 B. & C. 467; 6 D. & R. 557.

(*x*) 5 Ad. & El. 250; 6 Nev. & M. 657; 2 H. & W. 95.

(*y*) 16 C. B., N. S. 38; 33 L. J., M. C. 1.

(*z*) 1 Ad. & El. 145.

(*a*) 12 Ad. & El., N. S. 419; 12 Jur. 651; 17 L. J., M. C. 137.

(*b*) *Chatfield* v. *Ruston*, 5 D. & R. 675; 3 B. & C. 863; *Mitchell* v. *Fordham*, 9 D. & R. 335; 6 B. & C. 274.

(*c*) *Vide supra*, pp. 630, 1745.

(*d*) *Rex* v. *Lacy*, 5 B. & C. 702; 8 D. & R. 457; *Chanter* v. *Glubb*, 9 B. & C. 479.

(*e*) *Rex* v. *Sussex Justices*, 3 Nev. & M. 263; *Rex* v. *Buckinghamshire Justices*, 1 B. & C. 485.

Sewers rates.

It does not seem a settled point whether tithe, or rent-charge in lieu of tithe, is liable to be rated by the commissioners of sewers (*f*).

In *Reg.* v. *Goodchild* (*g*), in the particular circumstances of the case, the rent-charge was holden not to be liable to sewers rate. Apparently, wherever tithe was not charged to sewers rate, the rent-charge in lieu of it is not chargeable; but in cases where tithe was charged to sewers rate a question may still arise whether the fixed rent-charge in lieu of tithe is or is not now chargeable (*h*).

The glebe and house of the incumbent are apparently liable, like other land and houses, to this rate.

General and lighting rate in metropolis.

It has been decided, in the case of *Reg.* v. *Goodchild* (*g*), that tithe rent-charge in the metropolis is liable to the general rate and the lighting rate imposed under the provisions of the Metropolis Local Improvement Act, 18 & 19 Vict. c. 120, s. 161. There is, apparently, no question as to the liability of the land and house of a benefice to these rates.

Lighting and health rates.

All houses and lands within the districts to which the acts severally apply are liable to be rated to the lighting rate and the rate for purposes of public health, under the acts 3 & 4 Will. 4, c. 90, and 11 & 12 Vict. c. 63.

By 14 & 15 Vict. c. 50, these rates are specially imposed upon "tithes, tithe rent-charges, moduses, compositions real, and other payments in lieu of tithe;" and it is provided that these tithes and rent-charges shall be rateable to the lighting rate, under 3 & 4 Will. 4, c. 90, in the same proportion of their annual value as land, that is, one-third of the proportion payable by houses and buildings; and to the health rate, under 11 & 12 Vict. c. 63, in the same proportion of their annual value as land used as arable, meadow or pasture ground only, that is, one-fourth of the net annual value.

Church rate.

The rector or impropriator of the great tithes is, in the absence of any legal custom to the contrary, liable to the repairs of the chancel, and is, in consideration thereof, discharged from the ordinary liability incident to every parishioner to contribute to the repairs of the body of the church, that is, to church rate.

(*f*) See Callis on Sewers, 131; Com. Dig. Sewers, E. 5; Wood, 1 Inst. 176; *Sondy* v. *Wilson*, 3 Ad. & Ell. 248; 23 Hen. 8, c. 5; 7 Ann. c. 33; 3 & 4 Will. 4, c. 22, ss. 13, 14; as to sewers in the metropolis, 11 & 12 Vict. c. 112; 18 & 19 Vict. c. 120, ss. 161, 165.

(*g*) E., B. & E. 1; 27 L. J., M. C. 233.

(*h*) See Mr. White's Report of *Reg.* v. *Goodchild*, &c., pp. 75, 76; *supra*, p. 1748.

Rate under 5 Geo. 4, c. 36.

But where money is borrowed, under 5 Geo. 4, c. 36, to repair or rebuild the church, part of the money may be expended in repairing or rebuilding the chancel (*i*); and the rector or impropriator of the great tithes is liable to be rated towards the repayment of the money so borrowed, and cannot claim exemption from rates levied for this purpose, as he could from an ordinary church rate (*k*).

The following provisions for the recovery of rates on a rent-charge, and for the power of the owner of the rent-charge to appeal against the rates, are contained in the Tithe Commutation Acts.

How rates and charges are to be recovered.

By 6 & 7 Will. 4, c. 71, s. 70, "All rates and charges to which any such rent-charge is liable shall be assessed upon the occupier of the lands out of which such rent-charge shall issue; and, in case the same shall not be sooner paid by the owner of the rent-charge for the time being, may be recovered from such occupier in like manner as any poor rate assessed on him in respect of such lands; and any occupier holding such lands under any landlord, and who shall have paid any such rate or charge in respect of any such rent-charge, shall be entitled to deduct the amount thereof from the rent next payable by him to his landlord for the time being, and shall be allowed the same in account with his landlord; and any landlord or owner in possession who shall have paid any such rate or charge, or from whose rent the amount of any such rate or charge in respect of any such rent-charge shall have been so deducted, or who shall have allowed the same in account with any tenant paying the same, shall be entitled to deduct the amount thereof from the rent-charge, or by all other lawful ways and means to recover the same from the owner of the rent-charge, his executors and administrators; Provided that the owner of every such rent-charge shall have and be entitled to the like right of demanding, inspecting, and taking copies of every assessment containing such rate or charge, and of appeal against the same, and the like power of prosecuting such appeal, and the like remedies in respect thereof, as any occupier or ratepayer has or may have in the case of poor rates, although such rate or charge is herein made assessable upon the occupier, and the owner of the rent-charge is not mentioned by name in such assessment."

For the assessment and recovery of rates.

By 7 Will. 4 & 1 Vict. c. 69, s. 8, "All rates and charges to which any rent-charge payable in lieu of tithes

(*i*) *Rippin and Wilson* v. *Bastin*, L. R., 2 Adm. & Eccl. 386. See *Rex* v. *Barker*, 6 Ad. & El. 388.

(*k*) *Smallbones* v. *Edney and Queen*, L. R., 3 P. C. 444; 7 Moo. P. C., N. S. 286.

shall be liable may be assessed upon the owner of the rent-charge, and the whole or any part thereof may be recovered from any one or more of the occupiers of the lands out of which such rent-charge shall issue, in case the same shall not be sooner paid by the owner of the rent-charge upon whom the same shall be assessed, in like manner as any poor rate assessed on such occupier or occupiers in respect of such lands may be recovered, upon giving to such occupier twenty-one days' notice in writing previous to any one of the half-yearly days of payment of the rent-charge, and the collector's receipt for the payment of such rates and charges, or of any part thereof, shall be received in satisfaction of so much of the rent-charge by the owner thereof: but no occupier shall be liable to pay at any one time, in respect of such rates and charges, any greater sum than the rent-charge payable in respect of the lands occupied by him in the same parish shall amount to for the current half-year in which such notice shall have been given."

Name of each occupier and sum charged on him to be specified by assessor on notice from owner.

By 2 & 3 Vict. c. 62, s. 3, "The assessor or collector of any rate or tax shall, within forty days after the receipt of a notice in writing signed by any land-owner or tithe-owner interested therein, specify in his assessment made for the purpose of collecting and levying such rate or tax the names of the several occupiers of tithes, lands, and tenements subject to such rate or tax, as well as the sum assessed on the tithes, lands, or tenements held by each such occupier."

PART VI.

FABRICS AND OFFICERS OF FABRICS OF THE CHURCH.

CHAPTER I.

INTRODUCTORY.

It remains to consider the law applicable to the following subjects:—

1. The fabric of churches and chapels and the ground attached by consecration thereto, apart from the questions of ornament, already treated of under the head of Liturgy and Ritual (*a*), and monuments of the dead, treated of under the head of Burial (*b*).

2. Officers having duties connected with the fabric and the churchyards, such as—

   1. Churchwardens, with their Assistant Sidesmen or Questmen—and herein of the Law of Vestries.
   2. Trustees under the Compulsory Church Rate Abolition Act, 1868.
   3. Parish Clerks.
   4. Sextons.
   5. Organists.
   6. Vestry Clerks.

(*a*) *Vide supra*, Part III., Chap. XI., Sect. 4.

(*b*) *Vide supra*, Part III., Chap. X., Sect. 7.

CHAPTER II.

CHURCHES AND CHURCHYARDS.

SECT 1.—*Founding of Churches.*
2.—*Consecration and Dedication of Churches.*
3.—*Chancel.*
4.—*Aisle.*
5.—*Churchyard.*
6.—*Repairs, Alterations and Faculties.*
7.—*Church Seat.*
8.—*Church Way.*
9.—*Church Rate.*

SECT. 1.—*Founding of Churches.*

Origin of word.

DR. BURN observes that the ancient Saxon word is *cyrce*, the Danish *kircke*, the Belgic *kercke*, the Cimbric *kirkia* or *kurk;* probably from the Greek word Κυρίακον, belonging to the Lord, or Κυρίου οἶκος, the Lord's house; so that we have lost the ancient pronunciation of the word (except in the northern parts of England and in Scotland) by softening the letters *c* or *ch*, as we have done in many cases; which letters the ancient Greeks and Romans always pronounced hard, as the letter *k*.

Ancient manner.

The ancient manner of founding churches was, after the founders had made their application to the bishop of the diocese, and had his licence, the bishop or his commissioners set up a cross, and set forth the ground, where the church was to be built; and then the founders might proceed in the building of the church: and when the church was finished, the bishop was to consecrate it, but not till it was endowed; and before, the sacraments were not to be administered in it (*a*).

For albeit churches or chapels may be built by any of the king's subjects, yet before the law take knowledge of them to be churches or chapels, the bishop is to consecrate or dedicate the same: and this is the reason, that a church or not a church, a chapel or not a chapel, shall be tried and certified by the bishop (*b*).

(*a*) Degge, part i. c. 12; Gibs. 188.

(*b*) 3 Inst. 203.

Freehold.

It is to be borne in mind that the freehold of churches and churchyards is in the rector or vicar, the chancel in the rector. In the case of perpetual curates it is questionable whether the freehold be not in the lay impropriator (*c*).

Power of incumbent.

It is partly a consequence of this law as to freehold, and partly of the law as to the use of all things connected with the church being under the control of the incumbent, such as the playing of the organ (*d*) during service and the like, that the custody of the key of the church and the ringing of bells on all occasions is subject to his control, and the ringing contrary to his order becomes an ecclesiastical offence: although, on the other hand, some authority in this matter is vested in the churchwardens.

Thus in *Lee* v. *Matthews* (*e*) Sir John Nicholl said,—"The minister has, in the first instance, the right to the possession of the key, and the churchwardens have only the custody of the church under him. If the minister refuses access to the church on fitting occasions, he will be set right, on application and complaint to higher authorities."

In *Dewdney* v. *Good and Ford* (*f*), the churchwarden was ordered to deliver up a duplicate key to the church which he had obtained.

Canons as to bell ringing.

By Can. 88 of 1603, "The churchwardens or questmen, and their assistants, shall not suffer the bells to be rung superstitiously upon holidays or eves abrogated by the Book of Common Prayer, nor at any other times, without good cause, to be allowed by the minister of the place and by themselves."

Can. 111. "The churchwardens shall present all persons who, by untimely ringing of bells, do hinder the minister or preacher."

Can. 15. "Upon Wednesdays and Fridays, weekly, the minister, at the accustomed hours of service, shall resort to the church or chapel; and warning being given to the people by tolling of a bell, shall say the Litany."

Can. 67. "When any is passing out of this life, a bell shall be tolled, and the minister shall not then slack to do his last duty. And after the party's death (if it so fall out) there shall be rung no more but one short peal, and one other before the burial, and one after the burial."

"Although the churchwardens may concur in directing the ringing or tolling of the bells on certain public and

(*c*) *Vide supra*, p. 309.

(*d*) *Vide supra*, p. 929.

(*e*) 3 Consist. 173.

(*f*) 7 Jur., N. S. 673; *vide Ritchings* v. *Cordingley*, 3 L. R., Adm. & Eccl. 113; *et infra*, p. 1795.

"private occasions, the incumbent nevertheless has so far the control over the bells of the church, that he may prevent the churchwardens from ringing or tolling them at undue hours and without just cause. Indeed, as the freehold of the church is vested in the incumbent, there is no doubt that he has a right to the custody of the keys of the church, subject to the granting admission to the churchwardens, for purposes connected with the due execution of their office. Proceedings may be instituted in the Ecclesiastical Court against churchwardens who have violently and illegally persisted in ringing the bells without consent of the incumbent. The citation may be as follows:—'For 'violently and outrageously breaking into the belfry of the 'parish church of ——, and without the leave and per-'mission of the rector, and in defiance of his authority, 'several times ringing the bells in the said church'" (*g*).

Lord Stowell gave the following opinion on this subject:—

"*Case.*

"Churchwardens insist they have a right at all times to ring the bells at the church, to the great annoyance of the rector and family, whose house is close to the church.

"*Opinion.*

"I think that the bells cannot be rung without the consent of the rector; the 88th Canon is precise to this point, and is, I conceive, binding upon the churchwardens.

"I think that the churchwardens might be articled against for breach of the canon, and permitting or directing the bells to be rung without and against the consent of the rector at times not proper or stated for that purpose. If the bells are so constantly rung as really to be what they are described—a nuisance, the parties who are guilty of that nuisance might be punished at the common law, and the mere consent of the churchwardens would not be a sufficient defence to such a prosecution. I do not know that any injunction could be obtained pending such a suit, but a fresh citation might be taken out for each offence.

"If the rector could induce them to come to some agreement as to the times of ringing, it would be the most desirable way upon the whole of settling this matter. "WM. SCOTT.

"Doctors' Commons, Jan. 29, 1793." (*h*)

(*g*) The statement is taken from an opinion of Dr. Phillimore; it was also contained in the last edition of Burn's Ecclesiastical Law, vol. i. p. 135.

(*h*) Mr. Toker's MSS. p. 333.

Bell-ringing.

This was so ruled by Dr. Lushington in *Redhead* v. *Wait* (*i*). In *Daunt* v. *Crocker* (*k*), a criminal suit promoted by the incumbent for ringing the church bells, it was holden by the present judge of the Arches Court, that it is not sufficient to allege that the ringing took place without the consent of the incumbent; it must be alleged to have been against his express wish.

The offence of creating a disturbance of divine service in church, or of brawling in the church or churchyard, has been dealt with in former chapters (*l*).

Robbing of churches.

If a man do break and enter a church in the night of intent to steal, this is burglary, for the church is the mansion house of Almighty God (*m*).

And here is to be noted a diversity between a spiritual man of the church consecrated to the service of God, and goods dedicated to divine service, or merely ecclesiastical; for laying of violent hands upon a person in holy orders the Ecclesiastical Court used to have connsance, but for the violent taking away or consuming of the ornaments of the church or goods dedicated to divine service, that court (Lord Coke says) has no conusance, for that it is not given to them; as for taking away of the Bible, the Book of Common Prayer, the chalice, and the like, or for the taking away of an image out of the church; but remedy must be taken for these at the common law (*n*). Nevertheless I am disposed to agree with Dr. Watson, who says, a libel may be also in the spiritual court against the offender, *pro salute animæ et reformatione morum*, although not to recover damages (*o*).

Sanctuary.

Anciently, the church and churchyard was a sanctuary, and the foundation of abjuration; for whoever was not capable of this sanctuary, could not have the benefit of abjuration; and therefore he that committed sacrilege, because he could not have the privilege of sanctuary, could not abjure. This abjuration was, when a person had committed felony, and for safeguard of his life had fled to the sanctuary of a church or churchyard, and there before the coroner of that place, within forty days, had confessed the felony, and took an oath for his perpetual banishment out of the realm into a foreign country, choosing rather to lose his country than his life; but the foreign country into which he was to be exiled might not be amongst infidels (*p*).

(*i*) 6 Law Times, N. S. 580.
(*k*) 2 L. R., Adm. & Eccl. 41.
(*l*) *Vide supra*, Part III., Chap. XI., Sect. 5, pp. 936—940; Part IV., Chap. I., p. 1083.
(*m*) 3 Inst. 64.
(*n*) 2 Inst. 492.
(*o*) Wats. c. 39.
(*p*) 3 Inst. 115.

But by 21 Jac. 1, c. 28, s. 7, it was enacted, that *no sanctuary, or privilege of sanctuary, shall be admitted or allowed in any case.* By which act, such abjuration as was at the common law, founded upon the privilege of sanctuary, was wholly taken away.

And the law was so favourable for the preservation of sanctuary, that if the felon had been in prison for the felony, and before attainder or conviction had escaped and taken sanctuary in the church or churchyard, and the gaolers or others had pursued him, and brought him back again to prison, upon his arraignment he might have pleaded the same, and should have been restored again to the sanctuary (*q*).

SECT. 2.—*Consecration and Dedication of Churches* (*r*).

No church till consecration.

The law (as was said before) takes no notice of churches or chapels till they are consecrated by the bishop: but the canon law supposes, that, with consent of the bishop, divine service may be performed, and sacraments administered in churches and chapels not consecrated; inasmuch as it provides, that a church shall have the privilege of immunity, in which the divine mysteries are celebrated, although it be not yet consecrated: and there are many licences to that effect (granted on special occasions) in our ecclesiastical records (*s*). This, however, is an exception to the general rule, "that a church is to be consecrated as soon as may be." Another exception obtained in cases of extreme necessity; for if the church was destroyed by fire, the service might be performed in chapels, tents, or in the open air, before the consecrated altar table (*t*).

No consecration before endowment.

And after a new church is erected, it may not be consecrated, without a competent endowment. And this was made a law of the Church of England in the 16th Canon of the Council of London, "A church shall not be consecrated, until necessary provision be made for the priest." And the canon law goes further; requiring the endowment, not only to be made before consecration, but even to be ascertained and exhibited before they begin to build. And the civil law is yet more strict; enjoining, that the endowment be actually made, before the building be begun (*u*).

(*q*) 3 Inst. 217.
(*r*) *Vide* 2 Ought. 249, & sqq.
(*s*) Gibs. 190; De Cons. i. 12; X. 3, 49, 9.
(*t*) De Cons. i. 30; Inst. J. C. ii. 18.
(*u*) Gibs. 189.

Which endowment was commonly made, by an allotment of manse and glebe by the lord of the manor, who thereby became patron of the church (*x*). Other persons, also, at the time of dedication, often contributed small portions of ground: which is the reason why in many parishes the glebe is not only distant from the manor, but lies in remote divided parcels (*y*).

Consecration enjoined.

By a constitution of Otho, "The dedication of churches is known to have had its beginning under the Old Testament, and was observed by the holy fathers under the New Testament; under which it ought to be done with the greater care and dignity, because that under the Old Testament were only offered sacrifices of dead animals, but under the New Testament is offered for us upon the altar by the hands of the priest, the heavenly, living and true sacrifice, the only begotten Son of God. Wherefore the holy fathers provided, that so sublime an office should not be performed (unless in case of necessity) but in places dedicated. Now because we have seen and heard, that so wholesome a mystery is contemned, or at least neglected, by some; having found many churches, and some of them cathedrals, which, although they have been built of old time, yet have not as yet been consecrated with the oil of sanctification: therefore, being desirous to remedy so dangerous a neglect, we do decree, that all cathedral, conventual, and parochial churches, which are now built and the walls thereof perfected, be consecrated by the diocesan bishops, or others authorized by them, within two years: and let it be so done within the like time, in all churches hereafter to be built. And to the end that so wholesome a mystery and ordinance may not pass into contempt; if such places be not dedicated within two years from the time of the finishing thereof, they shall be interdicted from the solemnities of the mass, until they be consecrated, unless they be excused for some reasonable cause. Moreover, by the present ordinance, we do forbid the abbots and rectors of churches to pull down ancient consecrated churches, under pretence of building larger or more beautiful, without licence and consent of the diocesan: and the diocesan shall diligently consider, whether it be expedient to grant or to deny such licence: and if he shall grant the same, let him take care that the work be finished as soon as may be" (*z*).

(*x*) *Vide supra*, p. 1459.
(*y*) Ken. Par. Ant. 222, 223.
(*z*) Athon, 7.

Interdicted from the solemnities of the Mass.]—That is, from the solemn or high mass; but not from the common celebration of mass, or other inferior offices (*a*).

And also by a constitution of Othobon: "The rector or vicar of an unconsecrated church shall apply to the bishop, (if it can conveniently be done,) otherwise to the archdeacon that he may apply to the bishop, within a year after the building of the church, for the consecration thereof: upon pain that such rector, vicar or archdeacon, making default, shall be suspended from their office till they comply: and the bishop shall exact nothing therefore, but the accustomed procuration" (*b*).

Time of consecration.

The consecration of churches may be performed, indifferently, on any day: so it was established by a decretal epistle of Pope Innocent II. (*c*). And according to the calculation of learned men, Constantine's famous dedication of the church at Jerusalem, in a full synod, was on a Saturday, and not on the Sunday (*d*).

And this consecration ought to be in the time of divine service. The gloss upon the canon law makes a doubt whether this is not of the substance of the consecration: but, be that as it will, it is certainly very decent (*e*).

Form of consecration.

The Emperor Justinian, in his care of the church, has prescribed a form of consecration of churches (or rather of the ground upon which it is to be built) in this manner: his law is, "That none shall presume to erect a church, until the bishop of the diocese hath been first acquainted therewith, and shall come and lift up his hands to heaven, and consecrate the place to God by prayer, and erect the symbol of our salvation, the venerable and truly precious rood" (*f*). The canon law also requires, that the bishop should mark out the consecrated ground, erect the cross, celebrate mass, &c. (*g*).

In the Church of England, every bishop is left to his own discretion, as to the form of consecrating churches and chapels: only by the statute of the 21 Hen. 8, c. 13 (*h*), for limiting the number of chaplains, it was assigned as one reason why a bishop may retain six chaplains because he must occupy that number in the consecration of churches.

There was a form drawn up in the convocation, in the year 1661, (occasioned, as some think, by the offence taken at Bishop Laud's ceremonious manner of consecrating

(*a*) Athon, 7.
(*b*) Ibid. 83.
(*c*) X. 3, 40, 2.
(*d*) Gibs. 189.
(*e*) Ibid.
(*f*) Cod. 47; Nov. 5, cap. 1; Nov. 131, cap. 10.
(*g*) De Cons. 1.
(*h*) Now repealed.

St. Katherine's Creed-Church in London,) but this was not authorized nor published (*i*).

Bishop Laud's form.

Which form of Bishop Laud's in the aforesaid instance, is said (but probably the account is inaccurate) to have been thus: He came on a Sunday, being the 16th day of January, 1630, to the west door of that church; and some persons, who were prepared for that purpose, spoke aloud these words, *Open, open ye everlasting doors, that the King of Glory may enter in.* Immediately the doors were opened, and the bishop and some other doctors entered; then he kneeled, and with eyes lifted up, and his arms spread, he pronounced the place to be holy, in the name of the Father, and of the Son, and of the Holy Ghost. Then he threw some of the dust of the church into the air, several times, as he approached the chancel; and when he came to the rails of the communion table, he bowed towards it several times. Then they all went round the church, repeating the 100th psalm, and afterwards a form of prayer, which concluded thus: "*We consecrate this church, and set it apart to thee, O Lord Christ, as holy ground, not to be profaned any more to common use.*" Returning to the communion table, he pronounced curses against those who should profane that place, and at every curse he bowed towards the east, and said, *Let all the people say Amen.* Afterwards he pronounced blessings on all those who should be benefactors, and repeated, *Let all the people say Amen.* Then there was a sermon; and after that the sacrament was administered; and when he came near the altar, he bowed seven times; and coming to the bread, he gently lifted up the napkin, which he laid down again, and withdrew, and bowed several times; then he uncovered the bread, and bowed as before; the like he did with the cover of the cup; then he received the sacrament, and gave it to some principal men; after which, many prayers being said, the solemnity of the consecration ended (*k*).

Form of A.D. 1712.

Again, in the year 1712, a form of consecrating churches and chapels and churchyards or places of burial was sent down from the bishops to the lower house of convocation, on the 2nd day of April, and was altered by the committee of the whole house, and reported to the house on the 9th day of the same month, which was agreed to, with some alterations: which form, as it did not receive the royal assent, was not enjoined to be observed; but is

(*i*) Gibs. 189; Johns. 20. (*k*) 2 Rushw. Hist. Coll. 77.

now generally, though not necessarily, used, and is as follows:—

Preparations in order to the Consecrating of a Church.

The church is to be pewed (l), and furnished with a reading desk, Common Prayer, and great Bible, and one or more surplices, as also with a pulpit and cushion, a font, and a communion table, and with linen and vessels for the same.

The endowment, and the evidences thereof, are to be laid before the bishop, or his chancellor, some time before the day appointed, in order to the preparing of the act or sentence of consecration against that day.

An intimation of the bishop's intention to consecrate the church, with the day and hour appointed for it, is to be fixed on the church door at least three days before.

A chair is to be set for the bishop on the north side of the communion table, within the rails; and another for his chancellor without the rails, on the same side.

All things are to be prepared for a communion. The church is to be kept shut, and empty, till the bishop comes, and till it be opened for his going in.

The Form of Consecrating a Church.

The bishop is to be received at the west door, or at some other part of the church or churchyard, which is most convenient for his entrance, by some of the principal inhabitants (m).

At the place where the bishop is received, a petition is to be delivered to him by some one of the persons who receive him, praying that he will consecrate the church.

The petition is to be read by the register.

The bishop, his chaplains, the preacher, and the minister who is to read divine service, together with the rest of the clergy, if any other be present, enter the church, and repair to the vestry, or (if there be no vestry) to some convenient part of the church, where, as many as are to officiate, put on their several habits; during which time the parishioners

(l) This would probably be now omitted,—chairs or moveable seats may be used.

(m) If the church to be consecrated be a new church, built in an old parish; then to be met by the minister of the place, the churchwardens, and some of the principal inhabitants.

Form of consecration.
A.D. 1712.

are to repair to their seats, and the middle aisle is to be kept clear.

As soon as the church is quiet, the bishop and his chaplains, with the preacher, and the minister who is to officiate, and the rest of the clergy, if any other be present, return to the west door, and go up the middle aisle to the communion table, repeating the 24th psalm alternately, as they go up, the bishop one verse, and they another.

PSALM XXIV.

1. The earth is the Lord's, and all that therein is: the compass of the world, and they that dwell therein.

2. For he hath founded it upon the seas: and prepared it upon the floods.

3. Who shall ascend into the hill of the Lord, or who shall rise up in his holy place?

4. Even he that hath clean hands, and a pure heart: and that hath not lift up his mind unto vanity, nor sworn to deceive his neighbour.

5. He shall receive the blessing from the Lord: and righteousness from the God of his salvation.

6. This is the generation of them that seek him: even of them that seek thy face, O Jacob.

7. Lift up your heads, O ye gates; and be ye lift up, ye everlasting doors: and the King of glory shall come in.

8. Who is the King of glory? it is the Lord, strong and mighty, even the Lord mighty in battle.

9. Lift up your heads, O ye gates, and be ye lift up, ye everlasting doors: and the King of glory shall come in.

10. Who is the King of glory? even the Lord of hosts, He is the King of glory.

The bishop and the chaplains go within the rails; the bishop to the north side of the communion table, and the chaplains to the south side: the minister officiating goes to the reading desk, and the preacher to some convenient seat near the pulpit.

The bishop, sitting in the chair, is to have the instrument or instruments of donation and endowment presented to him by the founder, or some proper substitute: which he lays upon the communion table, and then standing up, and turning to the congregation, says—(*n*)

"Dearly beloved in the Lord: forasmuch as devout and holy men, as well under the law as under the gospel, moved either by the secret inspiration of the Blessed

(*n*) This not needful, if it be a new church built in an old parish.

Spirit, or by the express command of God, or by their own reason and sense of the natural decency of things, have erected houses for the public worship of God, and separated them from all profane and common uses, in order to fill men's minds with greater reverence for his glorious majesty, and affect their hearts with more devotion and humility in his service; which pious works have been approved and graciously accepted by our heavenly Father: Let us not doubt but he will also favourably approve our godly purpose, of setting apart this place in solemn manner, to the performance of the several offices of religious worship, and let us faithfully and devoutly beg his blessing on this our undertaking."

Then the bishop kneeling, says the following prayer:—

"O Eternal God, mighty in power, and of majesty incomprehensible, whom the heaven of heavens cannot contain, much less the walls of temples made with hands, and who yet hast been graciously pleased to promise thy especial presence in whatever place even two or three of thy faithful servants shall assemble in thy name to offer up their praises and supplications unto thee; vouchsafe, O Lord, to be present with us, who are here gathered together, with all humility and readiness of heart, to consecrate this place to the honour of thy great name; separating it from henceforth from all unhallowed, ordinary, and common uses, and dedicating it to thy service, for reading thy holy word, for celebrating thy holy sacraments, for offering to thy glorious Majesty the sacrifices of prayer and thanksgiving, for blessing thy people in thy Name, and for the performance of all other holy ordinances: Accept, O Lord, this service at our hands, and bless it with such success, as may tend most to thy glory, and the furtherance of our happiness both temporal and spiritual, through Jesus Christ our blessed Lord and Saviour." *Amen.*

After this, let the bishop stand up, and turning his face toward the congregation, say:—

"Regard, O Lord, the supplications of thy servants: and grant, that whosoever shall be dedicated to thee in this house by baptism, may be sanctified with the Holy Ghost, delivered from thy wrath and eternal death, and received as a living member of Christ's Church, and may ever remain in the number of thy faithful and elect children. *Amen.*

"Grant, O Lord, that they who at this place shall in their own persons renew the promises and vows made by

Form of consecration. A.D. 1712.

their sureties for them at their baptism, and thereupon shall be confirmed by the bishop, may receive such a measure of the Holy Spirit, that they may be enabled faithfully to fulfil the same, and grow in grace unto their lives end. *Amen.*

"Grant, O Lord, that whosoever shall receive in this place the blessed sacrament of the body and blood of Christ, may come to that holy ordinance with faith, charity and true repentance; and, being filled with thy grace and heavenly benediction, may to their great and endless comfort, obtain remission of their sins, and all other benefits of his passion. *Amen.*

"Grant, O Lord, that by thy holy word which shall be read and preached in this place, and by thy Holy Spirit grafting it inwardly in the heart, the hearers thereof may both perceive and know what things they ought to do, and may have power and strength to fulfil the same. *Amen.*

"Grant, O Lord, that whosoever shall be joined together in this place in the holy estate of matrimony, may faithfully perform and keep the vow and covenant betwixt them made, and may remain in perfect love together unto their lives end. *Amen.*

"Grant, we beseech thee, blessed Lord, that whosoever shall draw near unto thee in this place, to give thee thanks for the benefits which they have received at thy hands, to set forth thy most worthy praise, to confess their sins unto thee, and to ask such things as are requisite and necessary, as well for the body as the soul,—may do it with such stedfastness of faith, and with such seriousness, affection, and devotion of mind, that thou mayest accept their bounden duty and service, and vouchsafe to give whatever in thy infinite wisdom thou shalt see to be most expedient for them: All which we beg for Jesus Christ his sake, our blessed Lord and Saviour." *Amen.*

The bishop sitting in his chair.

Then the sentence of consecration is to be read by the chancellor, and signed by the bishop, and by him ordered to be registered, and then laid upon the communion table.

After this, the person appointed is to read the service for the day, except where it is otherwise directed.

Proper psalms, lxxxiv., cxxii., cxxxii.

First lesson, 1 Kings, viii. from verse 22 to verse 62, inclusive.

Second lesson, Heb. x. from verse 19 to verse 26 inclusive.

After the collect for the day, the minister who reads

the service stops till the bishop hath said the following prayer :—

"O most blessed Saviour, who by thy gracious presence at the feast of dedication didst approve and honour such religious services, as this which we are now performing unto thee, be present at this time with us also by thy Holy Spirit; and, because holiness becometh thine house for ever, sanctify us we pray thee, that we may be living temples, holy and acceptable unto thee; and so dwell in our hearts by faith, and possess our souls by thy grace, that nothing which defileth may enter into us; but that, being cleansed from all carnal and corrupt affections, we may ever be devoutly given to serve thee in all good works, who art our Saviour, Lord, and God, blessed for evermore." *Amen.*

Then the minister proceeds in the service of the day, to the end of the general thanksgiving. After which the bishop says the following prayer [if it be not one of the fifty new churches] :—

"Blessed be thy name, O Lord, that it hath pleased thee to put it into the heart of thy (*o*) *servant N.* to erect this house to thy honour and worship. Bless, O Lord, (*p*) *him*, *his* family, and substance, and accept the work of *his* hands; remember *him* concerning this; wipe not out this kindness that *he* hath shewed for the house of *his* God and the offices thereof; and grant that all who shall enjoy the benefit of this pious work may shew forth their thankfulness by making a right use of it, to the glory of thy blessed name, through Jesus Christ our Lord." *Amen.*

If the church that is to be consecrated be one of the fifty new churches which are ordered to be built by the late acts of parliament (*q*), *the bishop says* :—

"Blessed be thy name, O Lord God, that it hath pleased thee by thy good Spirit to dispose our gracious sovereign and the estates of this realm, to supply the spiritual wants of thy people, by appointing this and many other churches to be erected and endowed for thy worship and service; multiply thy blessings upon them, for their pious regard to thy honour, and to the good of souls; remember them concerning this, and wipe not out the kindness they have shewed to thy church, and to the offices thereof; and grant that our gracious king may see and long enjoy the fruits of his godly zeal, in the edification of the members

(*o*) Or servants.

(*p*) Throughout this prayer, for *him*, *his*, *he*, *hath*; say *them*, *they*, *their*, *she*, *her*, *have*, as the occasion shall require.

(*q*) 9 Anne, c. 17; 10 Anne, c. 20; 1 Geo. 1, st. 2, c. 23.

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of our church, and in the reduction of those, in the spirit of meekness, who dissent from it: that we may all live together in the unity of the Spirit, and in the bond of peace, through Jesus Christ our Lord." *Amen.*

Then the minister who officiates is to go on with the prayer of St. Chrysostom, *and the* Grace of our Lord Jesus Christ.

Then a psalm is to be sung, viz. xxvi. 6, 7, 8, *with* Gloria Patri.

COMMUNION SERVICE.

The bishop standing on the north side of the communion table, as before, reads the communion service.

After the collect for the king, he says the following prayer:—

"O most glorious Lord God, we acknowledge that we are not worthy to offer unto thee any thing belonging to us; yet we beseech thee, in thy great goodness graciously to accept the dedication of this place to thy service, and to prosper this our undertaking: receive the prayers and intercessions of us, and all others thy servants, who either now or hereafter entering into this house shall call upon thee; and give both them and us grace to prepare our hearts to serve thee with reverence and godly fear: Affect us with an awful apprehension of thy Divine Majesty, and a deep sense of our own unworthiness; that so, approaching thy sanctuary with lowliness and devotion, and coming before thee with clean thoughts and pure hearts, with bodies undefiled, and minds sanctified, we may always perform a service acceptable to thee, through Jesus Christ our Lord." *Amen.*

The two chaplains are to read, one the epistle, and the other the gospel.

The Epistle, 2 Cor. vi. 14 to 17 inclusive.

The Gospel, John ii. 13 to 18 inclusive.

Then the bishop reads the Nicene Creed. After which, a psalm is sung, viz. Psalm c.

THE SERMON.

The sermon being ended, and all who do not receive the holy communion returned, and the doors shut, the bishop proceeds in the communion service; and he and the clergy having made their oblations, the churchwardens collect the offerings of the rest of the congregation.

After the communion, and immediately before the final blessing, the bishop says the following prayer:—

"Blessed be thy name, O Lord God, for that it pleaseth thee to have thy habitation among the sons of men, and to

dwell in the midst of the assembly of the saints, upon earth; bless, we beseech thee, the religious performance of this day: and grant that in this place, now set apart to thy service, thy holy name may be worshipped in truth and purity to all generations, through Jesus Christ our Lord." *Amen.*

"The peace of God, which passeth all understanding, keep your hearts and minds in the knowledge and love of God, and of his Son Jesus Christ our Lord: and the blessing of God Almighty, the Father, the Son, and the Holy Ghost, be amongst you, and remain with you always." *Amen.*

CONSECRATION OF A CHURCHYARD TOGETHER WITH THE CHURCH.

When the service in the church is finished, the bishop, clergy and people proceed to the churchyard. And the bishop, standing in the place prepared for the performance of the office there, the act or sentence of consecration is read by the chancellor, and signed by the bishop, and ordered to be registered.

After which the bishop says the following prayer:—

"O God, who has taught us in thy holy word, that there is a difference between the spirit of a beast that goeth downwards to the earth, and the spirit of a man which ascendeth up to God who gave it; and likewise by the example of thy holy servants, in all ages, has taught us to assign peculiar places, where the bodies of thy saints may rest in peace, and be preserved from all indignities, whilst their souls are safely kept in the hands of their faithful Redeemer: Accept, we beseech thee, this charitable work of ours, in separating this portion of ground to that good purpose; and give us grace, that by the frequent instances of mortality which we behold, we may learn and seriously consider, how frail and uncertain our condition here on earth is, and so number our days, as to apply our hearts unto wisdom. That in the midst of life thinking upon death, and daily preparing ourselves for the judgment that is to follow, we may have our part in the resurrection to eternal life, with Him who died for our sins, and rose again for our justification, and now liveth and reigneth with Thee and the Holy Ghost, one God world without end. *Amen.*

"The grace of our Lord Jesus Christ, and the love of God, and the fellowship of the Holy Ghost, be with us all evermore." *Amen.*

Form of consecration. A.D. 1712.

Consecration of a Churchyard singly.

The ordinary service for the day is to be read at the church, except where it is otherwise ordered.

Psalms xxxix. xc.

First lesson, Gen. xxiii.

Second lesson, John v. verse 21 to verse 30 inclusive, or 1 Thess. iv. 13, to the end.

When the service at the church is over, the bishop, clergy and parishioners repair to the ground which is to be consecrated: and the bishop, standing in the place prepared for the performance of the office, says:—

"The glorious majesty of the Lord our God be upon us; prosper thou the work of our hands upon us, O prosper thou our handywork."

Then the instrument of donation is presented to the bishop.

Next, the act or sentence of consecration is read by the chancellor, and signed by the bishop, and ordered to be registered.

This done, the bishop reads the prayer that is before directed to be used in a churchyard which is consecrated together with the church.

Then are sung two staves of the 39th psalm, viz. v. 5, 6, 7, 8.

After which the bishop lets them depart with the blessing.

"The peace of God which passeth all understanding, keep your hearts and minds in the knowledge and love of God, and of his Son Jesus Christ our Lord; and the blessing of God Almighty, the Father, the Son, and the Holy Ghost, be amongst you, and remain with you always." *Amen* (*o*).

Power for bishop to sign instrument of consecration at churchyard without presence of chancellor, &c.

By 30 & 31 Vict. c. 133, s. 1, "Where any ground adjoining to an existing churchyard has been or is added thereto, the bishop of the diocese may if he thinks fit, at the churchyard or in the church to which it belongs, by his own hand, or by the hand of any bishop of the United Church of England and Ireland lawfully appointed as his commissary, sign an instrument declaring or recording the consecration of such ground, without the presence of the chancellor or registrar of the diocese being necessary; and the signature of the bishop to such instrument shall be attested by the chancellor or by a surrogate or by any two clergymen of the diocese and shall be in the following form, endorsed on a plan of the ground so added:—

(*o*) *Vide* 2 Oughton, 269, *et seq.*, as to consecration of churchyards.

I., A. B., bishop ——, do hereby declare and record the ground added to the churchyard of ——, as on the written plan, to be consecrated ground and part of the said churchyard; and such instrument, so signed and attested, on being deposited in the registry of the diocese, shall have the same effect as a sentence of consecration" (*p*).

Other churches not to be prejudiced thereby.

According to the general law, in the consecration of a new church, provision is to be made, that no damage accrue, in point of rights or revenues, to any other church (*q*).

Procuration.

A reasonable procuration is due to every bishop who consecrates a church, from the person or persons praying such consecration; not for the consecration, but for the necessary refreshment of the bishop and his servants. For whereas ordinations, institutions, and other acts of the like nature, are performed by the bishop within his own walls; this draws him sometimes to a great distance from his palace, where proper accommodations cannot be procured: and therefore, as in his visitations, so also in his consecration of churches, the law has provided a reasonable procuration. At first, the laws of the church forbad the demanding or taking any thing, but what the founder voluntarily offered (and some even forbad that); but afterwards the prohibition was limited, *saving the honest and lawful customs of the ecclesiastics*, and (as it is in the foregoing constitution of Othobon) *except the due procuration:* the measure and proportion of which must be determined by the usage of every diocese. In Archbishop Warham's time, the see of Bath and Wells being vacant, there is returned among the revenues of the vacancy, for the consecration of three churches, 10*l.*; that is, 3*l.* 6*s.* 8*d.* each (*r*).

The church of Elsefeld, in the diocese of Lincoln, was consecrated in the year 1273; for which was paid a procuration of two marks (*s*).

New table of fees on consecration.

By 30 & 31 Vict. c. 135, the two archbishops, their vicars general, and the lord chancellor, with the consent of the lords of the treasury, were empowered to settle a table of fees to be paid to the chancellors, vicars general, registrars, secretaries and other officers on (*inter alia*) the consecration of churches and churchyards, and the granting of faculties for alterations in churches and churchyards. A

(*p*) *Vide supra*, pp. 853, 854; *infra*, p. 1772.

(*q*) Gibs. 189.

(*r*) Gibs. 190.

(*s*) Ken. Par. Ant. 515.

New table of fees on consecration.

table of fees fixed according to this statute was published in the *London Gazette* of March 19, 1869.

This table was, as to the points above-mentioned, as follows:—

	Vicar General, Chancellor, Archdeacon or Official.			Registrar or other officer by usage performing the duty.			Secretary of Archbishop or Bishop.			Apparitor.		
	£	s.	d.	£	s.	d.	£	s.	d.	£	s.	d.
1. Consecration of a Church and Burial Ground	3	3	0	7	7	0	1	1	0	1	1	0
2. Consecration of a Cemetery or Burial Ground	2	2	0	6	6	0	1	1	0	1	1	0
4. Faculty for alterations in Churches or Churchyards .	1	1	0	3	13	6		...		0	10	6

"1 & 2. The chancellor's fee includes the approval of plans, the perusal of the petition and other papers, the settling the sentence, and the approval of the draft act. The registrar's fee includes the perusal of the deeds of conveyance, the drawing and engrossing of the petition, and the sentence and the notarial act, the necessary attendance at the consecration, and the registering the deeds and the act in the register book of the diocese. The secretary's fee includes the inspection of plans and correspondence prior to the papers being sent to the registry. The apparitor's fee includes all necessary citations and attendance on the bishop at the consecration.

"4. The chancellor's fee includes the perusal of the petition, the order for the notice or citation as the case may be, the perusal of the certificate and other papers, and making the decree. The registrar's fee includes the perusal of the minutes of vestry and the petition, the drawing of the notice or citation and attending the chancellor for his order, the preparation of the certificate and attendance on the chancellor for his decree, and the drawing and signing the faculty. The apparitor's fee includes the service of the notice or citation, but is exclusive of one shilling a mile for travelling expenses if the citation is to be personally served in the country" (*s*).

(*s*) By 30 & 31 Vict. c. 133, ss. 2, 3, where additional land to a churchyard is to be consecrated only, no fees are to be paid except 5*s*. to the registrar.

A church once consecrated, may not be consecrated again. To which general rule of the canon law, one exception was, *unless they be polluted by the shedding of blood;* and in that case, the canon supposes a re-consecration; though the common method in England was, a *reconciliation* only, as appears by many instances in our ecclesiastical records (*t*). But in point of ruins or decay, the only exception to the general rule, laid down in the canon, is, *unless they be burnt* (that is, says the gloss, *for the greater part thereof, and not otherwise*). And a decretal epistle of Innocent III., where the *roof* was consumed, is, *that since the walls were entire, and the communion table not hurt,* neither the one nor the other ought to be re-consecrated. Thus, a chapel in the suburbs of Hereford, which belonged to the priory of St. John of Jerusalem, had been from the time of the dissolution of monasteries, applied to secular uses and profaned, by making the same a stall for cattle, and a place for laying up their hay and other provender; yet because the walls and roof were never demolished, a *reconciliation* was judged sufficient. In like manner, when another chapel had been long disused, and was *repaired,* and made fit for divine service, the tenor of the reconciliation was, *the same chapel from all canonical impediment, and from every profanation (if any there were) contracted and incurred, as much as in us lieth, and so far as lawfully we may, by the authority aforesaid we do exempt, relax and reconcile the same* (*u*).

Re-consecration.
Old law.

But on the contrary, when the church of Southmalling had not only been polluted in manner as aforesaid, but was also *new-built,* and then used for divine offices without new consecration, Archbishop Abbot interdicted the minister, churchwardens, and parishioners, from the entrance of the church, until the said church and churchyard thereof should be again consecrated (*x*).

When a churchyard has been *enlarged,* there is a new consecration of the additional part (*y*).

It was decided by the present learned Chancellor of Rochester, that an ecclesiastical court cannot entertain a suit as to the allotment of seats in a place for divine worship, unless such place be a legally consecrated building (*z*); and that where the altar of a consecrated church has been removed, a re-consecration is necessary to found

Modern cases.

(*t*) This reconciliation was also allowed by the decretal of Gregory X. 3, 40. 4.

(*u*) Gibs. 189.

(*x*) Ibid. 190.

(*y*) Ibid.

(*z*) *Battiscombe* v. *Ev*?, 9 Jur., N. S. 210 (1862).

Re-consecration. Modern cases.

the jurisdiction of the ecclesiastical court. This was the old law of the church, but the authority of this case, as well as that of Dr. Lushington, in the case of the *Parishioners of Hanwell* (*a*), has been affected by a more recent decision of the privy council: which was as follows:—

L., the tenant and occupier of the manor-house in the parish of W., instituted a suit in the chancery court of *York* against P., the incumbent and perpetual curate, for perturbation of a pew holden by L. as appurtenant to the manor-house, and occupied by him therewith for nearly forty years. P., the incumbent, admitted the destruction of the pew by his orders and direction, but pleaded to the jurisdiction of the court, on the ground that the church was not in law a church, never having been re-consecrated since its general repair in 1825. The judicial committee decided that, it appearing from the evidence, that the church of W. had been repaired and rebuilt under a faculty, upon its old foundation, the tower and eastern wall and windows never having been removed, and some of the offices of the church having been performed during the repairs, it had never ceased to be a parish church, so as to require re-consecration, but remained subject to the authority of the diocesan; and that the judgment of the court below overruling the protest to the jurisdiction was right (*b*).

After this decision, which turned principally upon the peculiar facts of the case, the statute 30 & 31 Vict. c. 133 (*c*), was passed, which enacted as follows:—

30 & 31 Vict. c. 133. Where communion table has been moved, or walls of church have been partly demolished, marriages, &c. to be valid, although the church be not re-consecrated or reconciled.

Sect. 12. " Whereas doubts are entertained whether in cases where a church or chapel has been re-built, repaired or enlarged, and the external walls have been partly destroyed, or the position of the communion table altered, a re-consecration of such church or chapel be not necessary in order to the due and valid administration of divine offices there: be it declared and enacted, that all marriages, rites and ceremonies heretofore or hereafter celebrated or performed in a consecrated church or chapel which may have been rebuilt, repaired, or enlarged prior to such celebration or performance, and wherein such marriages, rites, and ceremonies might have been legally solemnized or performed previously to such rebuilding, repair, or enlargement, shall be valid and effectual for all purposes, notwithstanding that upon such repair or en-

(*a*) *Turner* v. *Parishioners of Hanwell*, 1 Notes of Cases, 368.

(*b*) *Parker* v. *Leach*, L. R., 1 P. C. 312.

(*c*) *Vide supra*, p. 853.

largement the external walls of such church or chapel may not have remained entire, or the position of the communion table may have been altered; and notwithstanding that since the rebuilding, repair, or enlargement no re-consecration of such church or chapel may have taken place."

Removal of chapel.

In *Clayton* v. *Dean* (*d*), which is referred to in the Chapter on Chapels (*e*), a faculty was granted for removing a consecrated chapel to another site; but the learned judge who granted the faculty observed, that it was possible that different legal considerations might apply to the case of a parish church.

59 Geo. 3, c. 134.

By 59 Geo. 3, c. 134, one of the Church Building Acts, sect. 40, a general provision was made for the pulling down of old parish churches and rebuilding them on new sites, as follows:—

Power to pull down or remove old church.

"Where any parish shall be desirous of extending and increasing the accommodation in the parish church, and it shall be found necessary or expedient to that end to take down the existing church, and to rebuild the same on the same site, or on a more convenient site, it shall and may be lawful for the churchwardens of any such parish, with the consent of the vestry, or persons possessing the powers of vestry, and with the consent also of the ordinary, patron, incumbent and lay impropriator, if any such there be, to take down such existing church, and to rebuild the same upon the same or upon a new site."

Rates to be levied.

This section goes on to empower the churchwardens to levy church rates for these purposes; but this power, like that of levying other church rates, is affected by the Compulsory Church Rate Abolition Act, 31 & 32 Vict. c. 109.

Transfer of endowments.

By 3 Geo. 4, c. 72, s. 30, the commissioners, that is now the ecclesiastical commissioners, may transfer the endowments of the old churches to the new ones. These provisions are further extended by 8 & 9 Vict. c. 70, s. 1. The whole matter will be found treated of more at length in the Chapter on the Building of Churches (*f*).

Dedication to the saint.

In a form of consecrating churches, which we meet with in a canon of the synod holden at Celchyth under Wulfred, Archbishop of Canterbury, in the year 816, it is ordained, that when a church is built, it shall be consecrated by the proper diocesan, who shall take care that the saint, to whom it is dedicated, be pictured on the wall, or on a

(*d*) 7 Notes of Cases, 46.

(*e*) Part VI., Chap. III.

(*f*) *Vide infra*, Part IX., Chap. V.

Dedication to the saint.

tablet, or on the altar. And Sir William Dugdale had an old transcript of a decree made by Robert de Winchelsea, Archbishop of Canterbury, and confirmed by Walter Reynolds, his immediate successor, whereby the parishioners through that whole province were commanded to provide, that the image of that saint to whose memory the church was dedicated, should be carefully preserved in the chancel of every parish church. And Dr. Kennet says, he remembers in the chancel of the church at Postling, in Kent, on the side of the north wall, about five feet from the ground, there was a small square tablet of brass, with a Latin inscription in old characters, telling the time when the church was dedicated to the Virgin Mary.

Feast of the dedication.

The *wake*, or customary festival for the dedication of churches, signifies the same as vigil or eve. The reason of the name is best given from an old manuscript legend of St. John Baptist: "Ye shall understand and know how the evens were first founded in old times. In the beginning of holy church it was so, that the people came to the church with candles burning, and would wake and come with lights towards night to the church in their devotions: and after, they fell to lechery, and songs, and dances, harping and piping, and also to gluttony and sin; and so turned the holiness to cursedness. Wherefore the holy fathers ordained the people to leave that waking and to fast the even. But it is still called *vigil*, that is *waking* in English; and it is also called the *even*, for at even they were wont to come to church" (*g*).

SECT. 3.—*Chancel.*

Origin of name.

Chancel, *cancellus*, seems properly to be so called *a cancellis*, from the lattice-work partition betwixt the quire and the body of the church, so framed as to separate the one from the other, but not to intercept the sight.

Rubric.

By the rubric before the Commer Prayer it is ordained, that *the chancels shall remain as they have done in times past.*

That is to say, distinguished from the body of the church in manner aforesaid; against which distinction Bucer (at the time of the Reformation) inveighed vehemently, as tending only to magnify the priesthood; but

(*g*) See too Ken. Par. Ant. 609—614.

though the king and parliament yielded so far, as to allow the daily service to be read in the body of the church, if the ordinary thought fit; yet they would not suffer the chancel itself to be taken away or altered (*h*).

Other names for.

The chancel was originally known by a variety of names, one of the most common being βῆμα, or tribunal; and this word had also various significations, denoting sometimes the ambo or reading-desk, sometimes the altar, sometimes the seats or thrones of the bishops and presbyters, sometimes the whole space where these thrones and the altars stood. The name of sanctuary was also applied to this part of the church; and it would seem in some of the canons to have borne the name of "chorus," whence is derived our English "quire" or "choir." The highest part of the chancel had the various names of "*apsis*," "*exedra*," "*conchula bematis*," all words that signify any arched or spherical building (*i*).

Right of vicar in church.

It was holden by the Exchequer Chamber, affirming the judgment of the Court of Queen's Bench, that though the freehold of a parish church may be in a lay rector, the right of the possession of the church is in the minister and churchwardens; and therefore a lay rector cannot maintain trespass against the vicar of the parish for breaking open a door leading from the churchyard into the chancel (*k*).

SECT. 4.—*Aisle.*

Derivation of the word.

Aisle is said to proceed from the French word *aile* (*ala*), a wing; for that the Norman churches were built in the form of a cross, with a *nave* and two *wings*.

Aisle a private property.

An aisle in a church which has time out of mind belonged to a particular house, and been maintained and repaired by the owner of that house, is part of his frank tenement; and the ordinary cannot dispose of it, or intermeddle in it. And the reason is, because the law in that case presumes, that the aisle was erected by his ancestors, or those whose estate he has, and is thereupon particularly appropriated to their house. But otherwise it is, if he has only used to sit and bury in the aisle, and not repaired it; for the constant sitting and burying, without reparation, does not gain any peculiar property therein; but the aisle being repaired at the common charge of the parish, the

(*h*) Gibs. 199.

(*i*) Cf. 1 Bingh. 297; as to seats in the chancel, *vide infra*, Sect. 7.

(*k*) *Griffin* v. *Deighton*, 33 L.J., Q. B. 181; *et vide supra*, p. 298.

common right of the ordinary takes place, and he may, from time to time, appoint whom he pleases to sit there (*l*).

Old decisions.

And in the case of *Corven* v. *Pym*, in 10 Jac. 1, it was resolved, that albeit the freehold of the church be in the parson, yet if a lord of the manor, or any other, has a house within the town or parish, and he and all those whose estate he has in the mansion-house of the manor or other house, has had a seat in an aisle of the church for him and his family only, and have repaired it at its proper charges; it shall be intended, that some of his ancestors, or of the parties whose estate he has, did build and erect that aisle for him and his family only; and therefore if the ordinary endeavour to remove him, or place any other there, he may have a prohibition (*m*).

And in *Francis* v. *Ley*, in 12 Jac. 1, in the Star Chamber, it was resolved by the court, that if an inhabitant and his ancestors only have used, time out of mind, to repair an aisle in a church, and to sit there with his family to hear divine service, and to bury there; this makes the aisle proper and peculiar to his house, and he cannot be displaced or interrupted by the parson, churchwarden, or ordinary himself: but the constant sitting and burying there, without using to repair it, does not gain any peculiar property, or pre-eminence therein. And if the aisle has been used to be repaired at the charge of all the parish in common, the ordinary may then, from time to time, appoint whom he pleases to sit there, notwithstanding any usage to the contrary (*n*).

Modern cases.

And in a very recent case it has been ruled as follows:—that the freehold of a side aisle or chapel or lesser chancel may be vested in a private person, though such chapel or chancel forms an integral portion of, and is under the same roof with, a parish church.

The enjoyment of such a chapel or chancel, and the right to its exclusive use, is not necessarily annexed to a dwelling-house (*o*). Immemorial repair of a chapel or lesser chancel which is part of a parish church, coupled with other acts of ownership, is evidence of a freehold of inheritance in it being vested in those who have executed the repairs and exercised the acts of ownership (*p*).

Upon bill filed to establish a right to a side aisle or lesser chancel as part of the parish church, against the lord of

(*l*) Gibs. 197; *Lonsler* v. *Haywood*, 1 Y. & Jer. 583.

(*m*) 3 Inst. 202.

(*n*) Cro. Jac. 366.

(*o*) Though the contrary seems to have been laid down in some old cases, 12 Co. 106; 2 Keb. 92; 2 Bulst. 150; 1 Sid. 88.

(*p*) *Chapman* v. *Jones*, L. R., 4 Ex. 273 (1869).

the manor, who claimed it as appendant to the manor or manor-house, it appearing that the chancel was an ancient chapel, coeval with the church, and that it was a private chapel erected by the lord of the manor:—It was holden, that immemorial use and occupation, coupled with reparation, entitled the lord of the manor by prescription to the perpetual and exclusive use of the chancel; and that this right might exist, notwithstanding that the freehold might not be in the person prescribing, and although the estate or house to which the chancel was appendant might not be situate in the parish (*q*).

Reason of the law.

And the reason of any person's property in an aisle, is from the prescription to repair and use it alone; because it is from thence presumed, that the aisle was erected by him whose estate he has, with the assent of the parson, patron, and ordinary, to the intent to have it only to himself (*r*).

Remedies.

And therefore where any person has good title to such aisle; if the ordinary places another person therein with the proprietor, the proprietor may have his action upon the case against the ordinary; and if he be impleaded in the spiritual court for the same, a prohibition will lie; or if any private person sits therein, or keeps out him that has the right, or buries his dead there without his consent; an action upon the case lies for the proprietor (*s*).

Sect. 5.—*Churchyard* (*t*).

Rector's rights.

It is clear that by the common law the rector has the freehold in the churchyard, qualified undoubtedly by the rights of the parishioners, but he may bring an action for trespass if his right be unjustly invaded (*u*).

Mortmain.

By 15 Ric. 2, c. 5, "Whereas it is contained in the statute *De Religiosis* (7 Edw. 1, st. 2), that no religious, nor other whatsoever he be, do buy or sell, or under colour of gift or term, or any other manner of title whatsoever, receive of any man, or in any manner by gift or engine cause to be appropriated unto him any lands or tenements, upon pain of forfeiture of the same, whereby the said lands and tenements in any manner might come to mortmain; and if any religious or any other do against the said statute by art or engine in any manner, that it be lawful to the king and to other lords, upon the said lands and tenements

(*q*) *Churton* v. *Frewen*, L. R., 2 Ex. 634 (1866).

(*r*) 12 Co. 105.

(*s*) Wats. c. 39.

(*t*) *Vide supra*, Part III., Chap. X., on Burial.

(*u*) 1 Curteis, 260.

Mortmain.

to enter, as in the said statute doth more fully appear; and now of late by subtle imagination, and by art and engine, some religious persons, parsons, vicars, and other spiritual persons, have entered in divers lands and tenements which be adjoining to their churches, and of the same, by sufferance and assent of the tenants, have made churchyards, and by bulls of the bishop of Rome have dedicated and hallowed the same, and in them do make continually parochial burying without licence of the king and of the chief lords; therefore it is declared in this parliament, that it is manifestly within the compass of the said statute."

Fence.

By a constitution of Archbishop Winchelsea, the parishioners shall repair the fence of the churchyard at their own charge (*x*).

And Lord Coke says, that the parishioners ought to repair the inclosure of the churchyard, because the bodies of the more common sort are buried there, and for the preservation of the burials of those that were or should have been, while they lived, the temple of the Holy Ghost (*y*).

And if the churchyard be not decently inclosed, the church, which is God's house, cannot decently be kept, and therefore this the parishioners ought to do, by custom known and approved; and the conusance thereof belongs to the ecclesiastical court (*z*).

But nevertheless, if the owners of lands adjoining to the churchyard, have used time out of mind to repair so much of the fence thereof, as adjoins to their ground; such custom is a good custom; and the churchwardens have an action against them at the common law for the same (*a*).

By canon.

By Can. 85 of 1603, "The churchwardens or questmen shall take care, that the churchyards be well and sufficiently repaired, fenced, and maintained with walls, rails or pales, as have been in each place accustomed, at their charges unto whom by law the same appertaineth."

By statute.

By the statute of *Circumspectè agatis*, 13 Edw. 1, st. 4, "If prelates do punish for leaving the churchyard unclosed," "the spiritual judge shall have power to take knowledge, notwithstanding the king's prohibition."

Where suits to be.

Nevertheless, if the churchwardens sue a person in the Court Christian, supposing by their libel, that he and all they whose estate he has in certain land next adjoining to the churchyard, have used time out of mind to repair all the fences of the churchyard which are next adjoining

(*x*) Lind. 253.
(*y*) 2 Inst. 489.
(*z*) Ibid.
(*a*) 2 Rolle's Abr. 287; Gibs. 194.

to the said land, a prohibition will lie; for this ought to be tried at the common law, inasmuch as this is to charge a temporal inheritance (*b*).

The churchwardens, by virtue of their office, are bound to see that the footpaths are kept in proper order, and the fences in repair (*c*). The abstract law, stated in the foregoing paragraphs, must be considered as affected in its application by the Compulsory Church Rates Abolition Act, 1868 (*d*).

Trees.

A constitution of Stratford says: "Seeing it is prohibited by the law both ecclesiastical and secular, for laymen to have power to dispose of things ecclesiastical; in order therefore that the scandal of such usurpation may be utterly abolished, whereby certain parishioners of the parishes within our province, not knowing the limits of their own power, or rather not regarding the same, have cut down, or rooted up the trees, or mowed the grass growing in the churchyards of the churches or chapels of our said province, against the will of the rectors or vicars of such churches or chapels, or others deputed by them for the custody or cure thereof, and have sacrilegiously applied the same to their own use, or to the use of the churches, or of other persons, at their will and pleasure; from whence peril of souls, contentions, and grievous scandals do arise betwixt the ministers of such churches and their parishioners: we do declare by the authority of the present council, that persons guilty of such contempt shall incur the sentence of the greater excommunication, until they shall make sufficient amends and satisfaction" (*e*).

Against the will of the Rectors or Vicars.]—This is, in churches where there is a rector only, or a vicar only. But if in the same church there be both rector and vicar, it may be doubted (says Lindwood) to whether of them the trees or grass shall belong. But I suppose (says he) they shall belong to the rector; unless in the endowment of the vicarage they shall be otherwise assigned (*f*).

Whether the trees belong to the rector or vicar.

In *Bellamy's case*, in 13 Jac. 1, this point, unto which of the two the trees do belong, was considered but not determined; where the vicar sued the parson impropriate in the spiritual court, for cutting them down; and the suit being for damages, and an action of trespass lying at common law, a prohibition was granted, and afterwards upon the same grounds a consultation denied; but what became

(*b*) 2 Rolle's Abr. 287; 6 East, 315.

(*c*) 1 Curteis, 621.

(*d*) *Vide supra*, p. 1775; *infra*, pp. 1791, 1817.

(*e*) Stratford, Lindw. 267.

(*f*) Lindw. 267.

Whether the trees belong to the rector or vicar.

of the main point, that is, to whom the trees of right belonged, appears not; only Rolle seems to make the right turn upon this, that they did belong to him who is bound to repair; which determination agrees well with what is said in the statute here following, namely, that the parson shall not cut them down, but when the chancel wants reparation (*f*).

Or to the Use of the Churches.]—That is, to the use of the fabric of the church; which it is not lawful to do, without the consent of the rector or vicar to whom they belong. And it is very reasonable, that neither rector nor vicar do fell such trees but for evident necessity of the reparation of the manse of the rectory, or of the chancel. But if the nave of the church want repairing, the rector or vicar will do well (says Lindwood) not to be difficult in granting leave to cut down one or two for that use (*g*).

35 Edw. 1, st. 2.
As to trees in the church-yard.

By 35 Edw. 1, st. 2, or the statute *Ne rector prosternat arbores in cœmiterio:* "Because we do understand, that controversies do oftimes grow between parsons of churches and their parishioners, touching trees growing in the churchyard, both of them pretending that they do belong unto themselves; we have thought it good, rather to decide this controversy by writing than by statute. Forasmuch as a churchyard that is dedicated is the soil of a church, and whatsoever is planted belongeth to the soil; it must needs follow, that those trees which be growing in the churchyard are to be reckoned amongst the goods of the church, the which laymen have no authority to dispose; but as the Holy Scripture doth testify, the charge of them is committed only to priests to be disposed of: And yet seeing those trees be often planted to defend the force of the wind from hurting the church; we do prohibit the parsons of the church, that they do not presume to fell them down unadvisedly, but when the chancel of the church doth want necessary reparation: neither shall they be converted to any other use, except the body of the church doth need like repair; in which the parsons of their charity shall do well to relieve the parishioners, with bestowing upon them the same trees; which we will not command to be done, but we will commend it when it is done."

Rather to decide this Controversy by Writing than by Statute.]—And therefore Lord Coke calls this law a

(*f*) 2 Rolle's Abr. 337; Gibs. 207, 208.

(*g*) Lindw. 267.

treatise only; and adds, that it is but a declaration of the common law (*h*).

But when the Chancel of the Church doth want necessary Reparations.]—If it appear that the person whose right they are, intends to cut them down for other purposes; a prohibition will be granted, to hinder waste: and so likewise to hinder the cutting down of such trees in the churchyard, as are for the defence of the church. And if the trees be actually cut down by any person for other use than is here specified; it is thought that he may be indicted and fined upon this statute (*i*).

On this subject of waste and felling timber, the reader is referred to the previous Chapter on Waste and Dilapidations (*j*).

Way.

Although the church and churchyard be the parson's and be consecrated; yet a man may prescribe to have a way through the church or churchyard (*k*).

Door.

No one can make a private door into the churchyard, without the consent of the minister whose freehold the churchyard is, and a faculty also from the bishop for the same.

Building upon it.

In the case of *The Rector and Parishioners of St. George's Hanover-square* v. *Steuart*, in 13 Geo. 2, the parish was cited to appear in the Bishop of London's court, to show cause why a licence should not be granted to Mr. Steuart, to erect a charity school on part of the churchyard. And upon motion of the rector and parishioners, a prohibition was granted; for the ecclesiastical court has nothing to do with this, and cannot compel them without their consent (*l*).

In recent times a faculty to build a *Vestry Room* on consecrated ground has been granted (*m*).

Conversion to secular uses.

And a faculty for altering the boundaries of a churchyard and diverting part of the consecrated ground to secular purposes has been refused (*n*).

A faculty has been granted for the erection of a school house upon consecrated ground (*o*).

Boundary.

In *Pew* v. *The Churchwardens of St. Mary Rotherhithe*, in 8 Geo. 2, Pew was libelled against in the spiritual

(*h*) Gibs. 208.

(*i*) 11 Co. 49; Gibs. 208.

(*j*) Part V., Chap. V.

(*k*) 2 Roll. Abr. 265: *vide infra*, Sect. 8.

(*l*) Str. 1126.

(*m*) *Campbell* v. *The Parishioners of Paddington and others*, 16 Jur. 646; 2 Roberts. 558; see also *Harper* v. *Forbes and Sisson*, 5 Jur., N. S. 275; *Reg.* v. *Twiss*, L. R., 4 Q. B. 407.

(*n*) *The Rector and Churchwardens of St. John's, Walbrook* v. *The Parishioners*, 2 Roberts. 515; 16 Jur. 645.

(*o*) *Russell* v. *Parish of St. Botolph's*, 5 Jur., N. S. 300.

Boundary.

court, for nuisance and encroachment on the churchyard; to which he pleaded that he was the owner of four tenements, which formerly stood on the ground in question, and that his present building was upon the old foundation, and did not project further. And this not being a matter properly triable there, a prohibition was granted. For though interrupting the use of a churchyard, as a churchyard, is properly cognizable in the ecclesiastical court; yet the bounds of it, which is matter of freehold, ought not to be determined there (*p*).

In *Hilliard* v. *Jefferson*, in 9 Will. 3, a parson was libelled against the defendant in the spiritual court of York, for having cut elms in the churchyard; and a prohibition was granted upon suggestion that they grew on his freehold (*q*).

Right of rector to compensation for loss of churchyard.

Where a portion of a churchyard is taken under the powers of an act of parliament incorporating the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), the rector is entitled to the interest of the purchase-money, even though the burial ground had been previously closed, so that he was in receipt of no fees from burials (*r*). But where a churchyard is taken under similar powers, and the amount to be paid by the takers to the then incumbent is to be settled by arbitration, it has been holden that the arbitrator should not award to the incumbent an amount calculated upon the value that might be put upon the lands divested of their ecclesiastical position, but only so much as will compensate him for his actual loss (*s*).

Adlam v. *Colthurst.*

The case of *Adlam* v. *Colthurst* should be mentioned here; it was on this wise.—In a suit promoted by one parishioner against another for having, without lawful authority, caused human bones and portions of the soil to be removed from a churchyard to a field belonging to the defendant, the Court of Arches decreed that the defendant had offended against the laws ecclesiastical, and issued a monition to him to replace in the burial ground, before a certain day, the bones and earth so removed. The defendant failed to comply with the order, alleging that he was unable to do so by reason that the field in which the bones and earth had been placed was no longer in his occupation or possession:—It was holden, that his conduct

(*p*) Str. 1013. *Sed vide infra*, p. 1859.

(*q*) L. Raym. 212.

(*r*) *Ex parte Rector of Liverpool*, L. R., 11 Eq. 15: 20 W. R. 47; *Ex parte Rector of St. Martin's, Birmingham*, L. R., 11 Eq. 23.

(*s*) *Stebbing* v. *Metropolitan Board of Works*, L. R., 6 Q. B. 37. As to the right of a perpetual curate with respect to the churchyard, *vide supra*, p. 309.

amounted to contempt of court, and that, unless he obeyed the monition within six days, and certified that he had done so, the court would pronounce him in contempt, and signify the contempt to the Court of Chancery (*t*).

SECT. 6.—*Repairs, Alterations and Faculties.*

Anciently by the bishops.

Anciently, the bishops had the whole tithes of the diocese; a fourth part of which, in every parish, was to be applied to the repairs of the church; but upon a release of this interest to the rectors, they were consequently acquitted of the repairs of the churches (*u*).

Next by the rectors.

And by the canon law, the repair of the church belongs to him who receives this fourth part, that is, to the rector, and not to the parishioners (*x*).

Finally by the inhabitants.

But custom (that is, the common law) transfers the burden of reparation, at least of the nave of the church, upon the parishioners, and likewise sometimes of the chancel, as particularly in the city of London in many churches there, and this custom the parishioners may be compelled to observe, where such custom is (*y*). Where there is no such custom, the parson is to repair the chancel (*z*).

Repair of the chancel in particular, by the rector.

But, generally, the parson is bound to repair the chancel. Not because the freehold is in him, for so is the freehold of the church; but by the custom of England, which has allotted the repairs of the chancel to the parson, and the repairs of the church to the parishioners; yet so, that if the custom has been for the parish, or the estate of a particular person, to repair the chancel, that custom shall be good; which is plainly intimated by Lindwood as the law of the church, and is also confirmed by the common law in the books of reports. But as to the obligation resting upon the parson, or upon the vicar, concerning that, the books of common law say nothing; and so it is wholly left upon that foot on which the law of the church has placed it (*a*).

Sometimes by the vicar.

As to the vicars, it is ordained by a constitution of Archbishop Winchelsea, that the chancel shall be repaired

(*t*) *Adlam* v. *Colthurst*, L. R., 2 Adm. & Eccl. 30.
(*u*) Degge, part 1, c. 12.
(*x*) 1 Salk. 164.
(*y*) Lindw. 53.
(*z*) 1 Raym. 59, per Holt, C. J.
(*a*) Gibs. 199; *Pense* v. *Prouse*, 1 Raym. 59.

by the rectors and vicars, or others to whom such repair belongs (*b*).

Whereupon Lindwood observes, that where there is both rector and vicar in the same church, they shall contribute in proportion to their benefice (*c*).

Which is to be understood, where there is not a certain direction, order, or custom, unto which of them such reparation should appertain (*d*).

By lay impropriators.

And as rectors or spiritual persons, so also impropriators, are bound of common right to repair the chancels. This doctrine under the limitations expressed in the foregoing article is clear and uncontested; there has been some doubt as to how they shall be compelled to do it; whether by spiritual censures only, in like manner as the parishioners are compelled to contribute to the repairs of the church, since impropriations are now become lay fees; or whether by sequestrations (as incumbents, and, as it should seem, spiritual impropriators of all kinds, may be compelled) (*e*). The better opinion seems to be, that the spiritual court may grant sequestration upon an impropriate parsonage for not repairing the chancel (*f*).

Dr. Gibson observes, that impropriations, before they became lay fees, were undoubtedly liable to sequestration: that the king was to enjoy them in the same manner as the religious had done, and nothing was conveyed to the king at the dissolution of monasteries but what the religious had enjoyed, that is, the profits over and above the finding of divine service, and the repairing of the chancel, and other ecclesiastical burdens; and the general saving (he says) in the 31 Hen. 8, c. 13, may be well extended to a saving of the right of the ordinary in this particular, which right he undoubtedly had by the law and practice of the church, which said right is not abrogated by any statute whatsoever (*g*).

And he observes further these things: 1. That although (as was expressly alleged in the two cases above referred to) this power has been frequently exercised by the spiritual courts; yet no instances appear, before these, of any opposition made. 2. That in both the said instances, judgment was given, not upon the matter or point in hand, but upon errors found in the pleadings. 3. That one argument against the allowing the ordinary such jurisdiction, was *ab*

(*b*) Lind. 253.
(*c*) Ibid.
(*d*) Ibid.
(*e*) Gibs. 199.
(*f*) M. 29 Car. 2, 3 Keb. 829; T. 22 Car. 2, 2 Ventr. 35; S. C., 2 Mod. 257.
(*g*) Gibs. 199.

inconvenienti, that such allowance would be a step towards giving ordinaries a power to augment vicarages; as they might have done, and frequently did, before the dissolution (*h*).

Where there are more impropriators than one (as is very frequently the case) and the prosecution is to be carried on by the churchwardens to compel them to repair, it seems advisable for the churchwardens first to call a vestry, and there (after having made a rate for the repair of the church and other expenses necessary in the execution of their office) that the vestry do make an order for the churchwardens to prosecute the impropriators at the parish expense. In which prosecution, the court will not settle the proportion amongst the impropriators, but admonish all who are made parties to the suit to repair the chancel, under pain of excommunication. Nor will it be necessary to make every impropriator a party, but only to prove that the parties prosecuted have received tithes or other profits belonging to the rectory sufficient to repair it; and they must settle the proportion amongst themselves. For it is not a suit against them for a sum of money, but for a neglect of the duty which is incumbent on all of them. Though it may be advisable to make as many of them parties as can be come at with certainty.

Repairing the chancel a discharge from the repairs of the church.

Repairing of the chancel is a discharge from contributing to the repairs of the church. This is supposed to be the known law of the church in the gloss of John de Athon, upon a constitution of Othobon (hereafter mentioned) for the reparation of chancels; and is also evident from the ground of the respective obligations upon parson and parishioners to repair, the first the chancel, the second the church; which was evidently a division of the burden, and, by consequence, a mutual disengaging of each from that part which the other took. And therefore, as it was declared in *Serjeant Davies's case* (*i*), that there could be no doubt but the impropriator was rateable to the church, for lands which were not parcel of the parsonage, notwithstanding his obligation, as parson, to repair the chancel; so, when this plea of the farmer of an impropriation (*k*), to be exempt from the parish rate because he repaired the chancel, was refused in the spiritual court, it must probably have been a plea offered to exempt other possessions also from church rates (*l*).

(*h*) Gibs. 199.
(*i*) 2 Rolle's Rep. 211.
(*k*) 2 Keb. 730, 742.
(*l*) Gibs. 199, 200.

Duty of sequestrator.

The sequestrator of a rectory is bound to keep the chancel in repair (*m*).

By sect. 54 of 1 & 2 Vict. c. 106, a part of the profits of a living sequestered by the bishop for non-residence is to be applied to the repairs of the chancel.

Duty of parishioners.

A suit was brought by the churchwardens of Clare, in the diocese of Norwich, against the Bishop of Ely, as impropriator of a portion of the great tithes, to compel him to repair the chancel. The bishop pleaded, that from time immemorial the parishioners had by custom repaired the chancel. A prohibition was granted to try the issue by jury, and their verdict was in favour of the bishop. Sir John Nicholl held the finding of the jury decisive of the case, and that custom controlled in this instance the general law,—that the parson repairs the chancel (*n*).

Repairing a chapel of ease no discharge from the repair of the church.

If there be a chapel of ease within a parish, and some part of the parish have used, time out of mind alone, without others of the parishioners, to repair the chapel of ease, and there to hear service, and to marry, and all other things, but only they bury at the mother church, yet they shall not be discharged of the reparation of the mother church, but ought to contribute thereto, for the chapel was ordained only for their ease (*o*).

So in the said case, if the inhabitants who have used to repair the chapel, prescribe that they have, time out of mind, used to repair the chapel, and by reason thereof have been discharged of the reparation of the mother church, yet this shall not discharge them of the reparation of the mother church, for that is not any direct prescription to be discharged thereof, but it is by reason thereof a prescription for the reparation of the chapel (*p*).

If the chapel be three miles distant from the mother church, and the inhabitants who have used to come to the chapel have used always to repair the chapel, and there marry and bury, and have never within sixty years been charged to the repair of the mother church, yet this is not any cause to have a prohibition, but they ought to show in the spiritual court their exemption, if they have any, upon the endowment (*q*).

But if the inhabitants of a chapelry prescribe to be dis-

(*m*) 1 Consist. 312, per Lord Stowell.

(*n*) *The Bishop of Ely* v. *Gibbons and Goody*, 4 Hagg. 162; see *Seger and Hill* v. *Dean and Chapter of Christ Church*, suit for not repairing the chancel, cited by Sir J. Nicholl, 3 Phill. 90.

(*o*) 2 Rolle's Abr. 289.

(*p*) 2 Rolle's Abr. 290.

(*q*) Ibid.

charged *time out of mind* of the reparation of the mother church, and they are sued for the reparation of the mother church, a prohibition lies upon this surmise (*r*).

If there be a parish church and chapel of ease within the same parish, and the chapel of ease has time out of mind had all spiritual rights, except sepulture, and this has been used to be done at the parish church, and therefore they who have used to go to the chapel of ease have used time out of mind to repair a part of the wall of the churchyard of the parish church, and in consideration thereof, and because that they who are of the chapel of ease have used time out of mind to repair the chapel of ease at their own costs, they have been time out of mind discharged of the reparation of the parish church, this is a good prescription; and therefore if they be sued in the spiritual court to repair the parish church, a prohibition lies (*s*).

If the chapel of ease has used time out of mind to have all divine services except burial, and the inhabitants within the chapelry have likewise always repaired the chapel, and prescribe in consideration of 3*s*. 4*d*. a year to be paid for the reparation of the mother church to be discharged of the reparation of the mother church; if the inhabitants of the chapelry are sued for the reparation of the mother church, a prohibition lies upon this modus (*t*).

In *Ball* v. *Cross*, in 1 Will. 3, the inhabitants of a chapelry within a parish were prosecuted in the ecclesiastical court for not paying towards the repairs of the parish church; and the case was, those of the chapelry never had contributed, but always buried in the mother church, till about Henry the Eighth's time the bishop was prevailed on to consecrate them a burial place, in consideration of which they agreed to pay towards the repair of the mother church. All which appeared upon the libel. And it was holden by Holt, Chief Justice, that those of a chapelry may prescribe to be exempt from repairing the mother church, as where it buries and christens within itself, and has never contributed to the mother church; for in that case it shall be intended coeval and not a latter erection in ease of those in the chapelry; but here it appears that the chapel could be only an erection in ease and favour of them of the chapelry, for they of the chapelry buried at the mother church till Henry the Eighth's time, and then undertook to contribute to the repairs of the mother church (*u*).

(*r*) 2 Rolle's Abr. 290.
(*s*) Ibid.
(*t*) Ibid.
(*u*) 1 Salk. 164, 165.

Churches united, how to be repaired.

If two churches be united, the repairs of the several churches shall be made as they were before the union (*x*).

Ecclesiastical judge shall cause the repairs to be done.

"The archdeacon shall cause chancels to be repaired by those who are bound thereunto" (*y*).

By a constitution of Reynolds: "We enjoin the archdeacons and their officials, that in the visitation of churches, they have a diligent regard to the fabrick of the church, and especially of the chancel, to see if they want repair: and if they find any defects of that kind, they shall limit a certain time under a penalty, within which they shall be repaired. Also they shall inquire by themselves or their officials in the parishes where they visit, if there be ought in things or persons which wanteth to be corrected; and if they shall find any such, they shall correct the same either then or in the next chapter" (*z*).

Fabric.]—The fabric of the church consists of the walls, windows, and covering (*a*).

Old law as to penalty for not repairing.

Under a Penalty.]—Where the penalty is not limited, the same is arbitrary (says Lindwood): but this cannot intend here (he says) the penalty of *excommunication;* inasmuch as it concerns the parishioners *ut universos,* as a body or whole society, who are bound to the fabric of the body of the church: For the pain of excommunication is not inflicted upon a whole body together, although it may be inflicted upon every person severally, who shall be culpable in that behalf. And the same may be observed as to the penalty of *suspension;* which cannot fall upon the parishioners as a community or collective body. Yet the archdeacon in this case, if the effect be enormous, may enjoin a penalty, that after the limited time shall be expired, divine service shall not be performed in the church, until competent reparation shall be made: so that the parishioners may be punished by suspension or interdict of the place. But if there are any particular persons who are bound to contribute towards the repair, and, although they be able, are not willing, or do neglect the same; such persons may be compelled by a monition to such contribution, under pain of excommunication: that so the church may not continue for a long time unrepaired through their default (*b*).

But this was before the time that churchwardens had the special charge of the repairs of the church, and also

(*x*) Degge, part 1, c. 12. *Vide supra,* Part II., Chap. XIV., Sect. 1.

(*y*) Othobon, Ath. 112.

(*z*) Reynolds, Lind. 53.

(*a*) Ibid.

(*b*) Ibid.

before the passing of the Compulsory Church Rate Abolition Act (31 & 32 Vict. c. 109).

The ecclesiastical court had only the power to compel the repairing, not the building of a church (*c*).

"Forasmuch as archdeacons and other ordinaries in their visitations, finding defects as well in the churches as in the ornaments thereof, and the fences of the churchyard, and in the houses of the incumbent, do command them to be repaired under pecuniary penalties; and from those who do not obey do extort the same penalties by censures, wherewith the said defects ought to be repaired, and thereby inrich their own purses to the damage of the poor people; therefore that there may be no occasion of complaint against the archdeacons and other ordinaries and their ministers by reason of such penal exactions, and that it becometh not ecclesiastical persons to gape after or inrich themselves with dishonest and penal acquisitions; we ordain, that such penalties, so often as they shall be exacted, shall be converted to the use of such repairs, under pain of suspension *ab officio* which they shall *ipso facto* incur, until they shall effectually assign what was so received to the reparation of the said defects" (*d*).

No prohibition in case of repairs of church or public chapel.

By the statute of *Circumspectè agatis*, 13 Edw. 1, st. 4, "If prelates do punish for that the church is uncovered, or not conveniently decked," "the spiritual judge shall have power to take knowledge, notwithstanding the king's prohibition."

The Church.]—This is intended not only of the body of the church, which is parochial, but also of any public chapel annexed to it; but it extends not to the private chapel of any, though it be fixed to the church, for that must be repaired by him that has the proper use of it, for he that has the profit ought to bear the burden. And this the parishioners ought to do, by custom known and approved: and the conusance thereof is allowed to the ecclesiastical court by this act (*e*).

Churchwardens' duty.

By Can. 85 of 1603, "The churchwardens or questmen shall take care and provide that the churches be well and sufficiently repaired, and so from time to time kept and maintained, that the windows be well glazed, and that the floors be kept paved plain and even."

Even as to chancel.

Although churchwardens are not charged with the repairs of the chancel, yet they are charged with the super-

(*c*) 1 Ld. Raymond, 112.
(*d*) Stratford, Lind. 224.
(*e*) 2 Inst. 489; 3 Bl. Com. 92.

visal thereof, to see that it be not permitted to dilapidate and fall into decay: and when any such dilapidations shall happen, if no care be taken to repair the same, they are to make presentment thereof at the next visitation.

Law as to faculties with reference to alterations.

No alteration, either by way of addition or diminution in the fabric or utensils or ornaments of the church, ought, according to strict law, to be made without the legal sanction of the ordinary. That legal sanction is expressed by the issue of an instrument called a faculty, and in no other way (*f*).

The court, however, to use Lord Stowell's expression, is not hungry after jurisdiction in really small matters of no general moment or significance. It also often happens that a faculty issues to *confirm* what has been illegally but usefully done. It has been ruled that if the question as to the alteration comes to be litigated, the bishop's consent, unless expressed by the issue of a faculty from his court, does not bind the court before which the litigation takes place (*g*).

An ornament illegally put up cannot be legally taken down without the monition of the ordinary. The peace and good order of the church require this rule, which is firmly established in practice (*h*).

Questions of faculty belong, as a general rule, to the civil procedure of the court. On an appeal to the privy council, therefore, no bishop sits on the tribunal as a judge; though, as in the Knightsbridge church cases (*i*), an archbishop and a bishop sat as assessors. Questions arising out of disobedience to a monition may, and generally do, assume a criminal shape; and a clerk in holy orders may be proceeded against criminally for making alterations without a faculty; but such a course is inexpedient.

It may be well to observe that the term "ordinary" applies in legal intendment to the bishop and the chancellor of his court.

A faculty may be granted to sell ornaments or utensils found to be unnecessary, as in the case of old bells when a new peal is set up, and the like.

It is the practice of the court to take a view of the

(*f*) *Vide supra*, Part III., Chap. X., on Burial, as to law respecting putting up of monuments.

(*g*) *Harper* v. *Forbes and Sisson*, 5 Jur., N. S. 275; *Ritchings* v. *Cordingley*, A.D. 1870, L. R., 3 Ad. & Ecc. 118.

(*h*) *Ritchings* v. *Cordingley*, L. R., 3 Ad. & Ecc. 118.

(*i*) *Westerton* v. *Liddell*, Moore's Special Report.

church in cases of difficulty arising out of suggested alterations (*k*). This course has often been pursued.

Principal decisions.

It will be found that, in the following decisions, these principles of law are put in execution (*l*).

Hopton, &c. v. Minister, &c. of Kemerton.

In the case of *Hopton and Quarrell* v. *Minister and Churchwardens of Kemerton* (*m*), the judge said:—"It is the bounden duty of the ordinary never to grant a faculty for expensive alterations in any church, which are professed not to be paid by a church rate, unless the judge has before him the most ample security that the funds will be otherwise provided for than by the parish" (*n*).

Sieveking and Evans v. Kingsford.

In *Sieveking and Evans* v. *Kingsford*, articles having been filed under the Church Discipline Act (3 & 4 Vict. c. 86), against a clergyman for making certain alterations in his church without having first obtained a legal sanction to them, he gave an affirmative issue thereto. The court then requested the archdeacon of the district in which the church is situated to inspect such alterations, and to report to it as to their nature and propriety, which he did. It was ruled, in the particular circumstances of the case, that the court will adopt the recommendation of such a report, unless it contains some grievous misstatement of fact, or erroneous conclusion of law.

The court ordered a confirmatory faculty to issue in regard to those alterations which met with the archdeacon's approval, and admonished the clergyman to restore the church in every other respect to the state it was in before he commenced the alterations (*o*).

Cardinall v. Molyneux.

In *Cardinall* v. *Molyneux*, a case in a court of equity, the defendant J. M., the incumbent of a parish church, in March, 1859, without the consent of the churchwardens

(*k*) *E.g.*, in the case of *Hopton and Quarrell* v. *Vicar and Churchwardens of Kemerton*, just mentioned; by the Chancellor of Ely in the stone altar case, *Faulkner* v. *Litchfield;* by Lord Stowell in *Bardin* v. *Calcott*, 1 Consist. 145; by Dr. Lushington in *Westerton* v. *Liddell;* and by Mr. Pemberton Leigh, one of the lords of the Privy Council, in the same case on appeal.

(*l*) *Vide supra*, as to mode of proceeding to obtain a faculty, Part IV., Chap. VI., pp. 1254, 1259.

(*m*) Judgment of Dr. Phillimore, chancellor of the diocese of Gloucester, published by W. Benning & Co., London, 1848.

(*n*) This was also said to be the uniform practice of the Court of Arches; and the case of *Roop and Clark* v. *Vicar, &c. of Chesterfield* was referred to, where the faculty was not allowed to pass till a bond in the sum of 3,200*l.* had been given by the applicants, with sureties, for the performance of the intended alterations and the payment of all the expenses attending the same.

(*o*) *Sieveking and Evans* v. *Kingsford*, 36 L. J. (N. S.) Eccl. 1 (1866).

Cardinall v. Molyneux.

or parishioners, and without a faculty, directed the defendant G. to remove the pews, sittings, and gallery from the church, for sale by auction by the defendant R., and J. M. also directed G. to make other alterations in and about the church. The plaintiff, one of the churchwardens, on behalf of himself and others, filed a bill for, and on the 12th of May, 1859, obtained, an injunction against all the defendants; and the court then directed that the incumbent and churchwardens should be at liberty to lay before the judge in chambers proposals for fitting up the interior of the church, and providing proper accommodation for the minister and parishioners for the performance of divine service, which proposals were to be subject to the approbation of the bishop and archdeacon of the diocese. Proposals were submitted to the bishop, who made suggestions in reference to the repewing of the church, pointing out the necessity for obtaining a faculty. In May, 1860, J. M. and the other churchwarden petitioned the chancellor of the diocese to grant a faculty to them to perform the works therein mentioned, which were, as to some of them, not in accordance with the bishop's approval. The plaintiff objected to the proposed faculty, and the surrogate refused to grant it. In December, 1860, the chief clerk certified that it would be fit and proper that the interior of the church should be fitted up according to the plan and particulars stated in the schedule, which had been approved by the bishop and archdeacon; but to this the incumbent would not assent. On motion by the plaintiff for a perpetual injunction until a faculty for the purpose of enabling the alterations to be made had been obtained, the court made the order, and ordered that the defendants should take and concur in all necessary proceedings for the purpose of obtaining a faculty for repairing and restoring the church, according to the scheme set forth in the schedule to the certificate of the chief clerk (*p*).

Dewdney v. Good and Ford.

In *Dewdney* v. *Good and Ford*, one of the churchwardens of the parish of G., accompanied by another parishioner, acting upon a resolution of the vestry of the parish, but against the expressed prohibition of the rector, and without any lawful authority from the bishop of the diocese, broke open with a crowbar the principal door of the parish church, and with the assistance of some workmen, proceeded to alter the position of the pulpit, and to pull down and re-arrange certain of the seats within the

(*p*) *Cardinall* v. *Molyneux*, 7 Jur., N. S. 254 (1861).

church. It was holden, that all who took part in these proceedings had been guilty of a grave ecclesiastical offence. They were ordered to restore that which had been altered, and to pay the costs of the suit, and the churchwarden to deliver up to the rector a new key he had fitted to the door of the church (*q*).

Ritchings v. *Cordingley.*

In *Ritchings* v. *Cordingley*, a ledge or super-altar was placed on the holy table in a parish church by the order of the incumbent, without the consent of the ordinary; after a lapse of many months a vestry meeting was holden, at which a resolution was passed that the churchwardens should take steps to remove the super-altar; the morning after the vestry meeting the defendant, one of the churchwardens, went to the church with a workman, and found the church door locked; the workman, acting by the orders of the defendant, picked the lock, entered the church in company with the defendant, and pulled down the super-altar:—It was holden that the conduct of the defendant was illegal (*r*).

Bishop of St. Davids v. *De Rutzen.*

The following was a very important case with respect both to the law as to repairs and as to the unlawfulness of removing, without a faculty, portions of the building or ornaments of the church.

A., in right of his wife, owned the greater part of three adjoining parishes, the joint population of which was very small. In 1843, a sum of money was obtained from the public works loan commissioners, on the security of a mortgage of the rates of one of the three parishes (B.), for the express purpose of building a new church in that parish; but such sum of money was appropriated towards the expenses of building a new church in another of the three parishes, and no portion of it had been repaid by the parish B. In 1844, at the instance of A., the three parishes were, by an order of her Majesty in council, united for all ecclesiastical purposes. In 1843, divine service was performed in the parish church of B. for the last time, it being then in a state of great dilapidation. In the following year the roof of the church, the pews, font and other fittings were removed by the servants and by the directions of A., but without any legal authority. The new church erected in the adjoining parish to B. was large enough to hold the church-going population of the three parishes, but was inconveniently placed for a large portion of them. No visitations of the archdeacon are

(*q*) *Dewdney* v. *Good and Ford*, 7 Jur., N. S. 637 (1861).

(*r*) *Ritchings* v. *Cordingley*, L. R., 3 Ad. & Ecc. 118 (1870).

Bishop of St. Davids v. De Rutzen.

holden in this district; and at those of the bishop, in 1851, 1854 and 1857, his attention was not particularly called to the state of the parish church of B.:—It was decided that the parishioners have a right to demand that divine offices should be celebrated in their own parish church, unless such right has been limited by lawful authority; that, notwithstanding the delay in instituting proceedings, the court was bound to order A. to restore the ancient parish church of B., to the state it was in when he had it dismantled, and to condemn him in the costs of the suit (*s*).

Stamp duty on licence or faculty.

By 33 & 34 Vict. c. 97, schedule, tit. "Licence," the stamp duty on a licence "for licensing or authorizing any "matter relating to a consecrated building or ground, or "anything to be constructed, set up or taken down or "altered therein, or to be removed therefrom," is 10*s*.

But a "licence granted to any spiritual person to per- "form divine service in any building approved by the "archbishop or bishop in lieu of any church or chapel "whilst the same is under repair or is rebuilding, or in "any building so approved for the convenience of the in- "habitants of a parish resident at a distance from the "church or consecrated chapel," is subject to no duty.

The fees of ecclesiastical officers on the grant of a faculty, as fixed under 30 & 31 Vict. c. 135, have been already given (*t*).

Who has the property in the goods of the church.

A person may give or dedicate goods to God's service in such a church, and deliver them into the custody of the churchwardens, and thereby the property is immediately changed (*u*).

And if a man erect a pew in the church, or hang up a bell in the steeple, they do thereby become church goods (though they are not expressly given to the church), and he may not afterwards remove them; if he does, the churchwardens may sue him (*x*).

The soil and freehold of the church and churchyard is in the parson; but the fee simple of the glebe is in abeyance (*y*). And if the walls, windows, or doors of the church be broken by any person, or the trees in the churchyard be cut down, or grass there be eaten up by a stranger: the incumbent of the rectory (or his tenant if they be let) may have his action for the damages (*z*).

But the goods of the church do not belong to the in-

(*s*) *Bishop of St. Davids* v. *De Rutzen*, 7 Jur., N. S. 884 (1861).

(*t*) *Vide supra*, p. 1772.

(*u*) Degge, part 1, c. 12.

(*x*) *Starky* v. *Churchwardens of Watlington*, 2 Salk. 547.

(*y*) 1 Inst. 341.

(*z*) Wats. c. 39.

cumbent, but to the parishioners; and if they be taken away, or broken, the churchwardens shall have their action of trespass at the common law (*a*). As in *Bucksal's Case*, in 12 Jac. 1. But whereas it is there said, that suit shall not be therefore in the spiritual court; a later judgment, in 18 Car. 2, says, that though the churchwardens had an action at common law, against those who had taken away the bells, yet the more proper remedy was in the spiritual court, because at the common law only damages would be recovered, but the spiritual court would decree the restoring of the thing itself (*b*).

But in a later case, prohibition was granted to stay a suit in the spiritual court for taking away two bells out of the steeple; for the churchwarden is a corporation, and the property is in him, and he may bring trover at common law (*c*). The former case, however, appears to contain the true law on the subject.

Alienation of goods of church.

By the civil law, the goods belonging to a church are forbidden to be alienated or pawned, unless for the redemption of captives, for relief of the poor in time of great famine and want, or for paying the debts of the church; if a supply cannot be otherwise raised, or upon other cases of necessity or great advantage to the church. And in every alienation, the cause must be first examined, and the decree of the prelate intervene, with the consent of the whole clergy or chapter (*d*).

But by the laws of England, the goods belonging to a church may be aliened: yet the churchwardens alone cannot dispose of them, without the consent of the parish: and a gift of such goods by them without the consent of the sidemen or vestry is void (*e*). There have been cases in which a faculty has been obtained for selling certain goods, such as pictures, belonging to the church.

Faculty for.

SECT. 7.—*Church Seat* (*f*).

Origin of the distinct property in seats.

Before the age of the Reformation, no seats were allowed, nor any distinct apartment in the church assigned to distinct inhabitants, except for some very great persons. The seats that were, were moveable, and the property of the

(*a*) Wats. c. 39.
(*b*) 1 Rolle's Rep. 57; 1 Sid. 281; Gibs. 206.
(*c*) *Starky* v. *Churchwardens of Watlington*, 2 Salk. 547.
(*d*) Wood. Civ. L. 142.
(*e*) Wats. c. 39.
(*f*) The most comprehensive work on this subject is the History and Law of Church Seats or Pews, by Mr. Alfred Heales, Proctor, London, 1872; see also two very learned dissertations in the Law Magazine, vols. i. and ii.

incumbent, and so in all respects at his disposal. Many wills of incumbents are to be seen, whereby they did of old bequeath the seats in the church to their successors or others as they thought fit. Athon and Lindwood are however silent on this subject. The common law books mention but two or three cases before this time, and those relating to the chancels, and seats of persons of great quality (*g*).

No payment for pews.

It is clearly the law on this subject, that a parishioner has a right to a seat without paying for it (*h*).

Church Building Acts.

The Church Building Acts, however, have authorized in certain circumstances payments for pews in churches built under their provisions (*i*); such payments, however, may be extinguished after the lapse of a certain period; and also,

Recent statute.

by a recent act (1872), the ecclesiastical commissioners, who now administer the provisions of the Church Building Acts, may accept a church site under a grant in which it is declared that pews or seats shall not be let "for payment of money" (*k*).

Of common right to be repaired by the parishioners.

And generally, the seats in churches are to be built and repaired as the church is to be, at the general charge of the parishioners, unless any particular person be chargeable to do the same by prescription (*l*).

Use of the seats in the parishioners.

And although the freehold of the body of the church be in the incumbent thereof, and the seats therein be fixed to the freehold; yet because that the church is dedicated to the service of God, and is for the use of the inhabitants, and the seats are erected for their more convenient attending upon divine service, the use of them is common to all the people that pay to the repair thereof. And for this reason, if any seat, though affixed to the church, be taken away by a stranger, the churchwardens, and not the parson, may have their action against the wrong-doer (*m*).

There can be no property in pews; they are erected for the use of the parishioners. The ordinary may grant a pew to a particular person while he resides in the parish, or there may be a prescription, by which a faculty is pre-

(*g*) Johns. 175, 176; Ken. Par. Ant. 596.

(*h*) Lord Stowell, 1 Consist. 317. "It being contrary to law " (observes the learned Dr. Harris " in an opinion 1788) that pews " should be disposed of for mo- " ney, or otherwise than gratui- " tously by the churchwardens or " by the ordinary." Mr. Toker's MSS. p. 344. Further extract from this opinion: "As all " churches ought by law to be " open during celebration of di- " vine service, it is clear that no " person whatever (who is not " excommunicated) ought to be " excluded whilst he behaves de- " cently."

(*i*) *Vide infra*, Part IX., Chap. V.

(*k*) 35 & 36 Vict. c. 49.

(*l*) Degge, part 1, c. 12.

(*m*) Wats. c. 39.

sumed; but as to personal property in a pew, the law knows of no such thing (*n*). Every man who settles as a householder, has a right to call on the parish for a convenient seat (*o*). All the pews in a parish church are, by general law and of common right, for the use in common of all the parishioners, who are to be so provided with seats as may most conveniently and orderly accommodate all (*p*). It was holden in *Blake* v. *Usborne* (*q*), that a person who had permission from the churchwardens to sit in a pew temporarily, and in order, by keeping possession for a future tenant, to carry into effect the conditions of sale of a house with which the pew had for above a century been holden under an unexpired faculty, has no possession on which he can bring a suit for perturbation against a mere intruder, such permission being illegal, as confirming the sale of the pew.

Non-parishioners, as a general rule, have no such rights.

Non-parishioners, whether extra-parochial or residing in another parish, have no such rights; and directly an occupier of a pew ceases to be a parishioner, his right to the pew, however founded and valid during his continuance in the parish, at once ceases and determines (*r*).

Ordinary to dispose of the same.

But the authority of appointing what persons shall sit in each seat is in the ordinary; who is to take care to order all things appertaining to divine service, so that the service of God may be best celebrated, that there be no contention in the church, and that all things be done decently and in order; for he, having the cure of souls, is presumed by the law to be a person that will have a prudent regard to the qualities of men in this case, and to give precedence to such as ought to have it (*s*).

In *Re Cathedral of St. Colomb's*, Derry (*t*), it was decided by Dr. Todd, Vicar Gen. of Derry, that—

(1) In a parish church which is also a cathedral, seats are to be allotted to the parishioners by the churchwardens, subject to the control of the ordinary, as in any other parish church.

(2) In a cathedral, which is not a parish church, or so far as it is not a parish church, seats apparently can only be allotted by the bishop.

(*n*) 3 Phill. 16.

(*o*) Lord Stowell, 1 Consist. 194.

(*p*) See *Blake* v. *Usborne*, 3 Hagg. 733; *Fuller* v. *Lane*, 2 Addams, 425; *Walter* v. *Sumner*, 1 Consist. 317; *Pettman* v. *Bridger*, 1 Phill. 323; *Hawkins* v. *Compiegne*, 3 Phill. 11; *Hawkins* v. *Coleman*, 3 Phill. 16.

(*q*) 3 Hagg. 733.

(*r*) 2 Addams, 425; *Byerley* v. *Windus*, 3 B. & C. 19; 7 D. & R. 564.

(*s*) Wats. c. 39.

(*t*) 8 L. T., N. S. 861.

Ordinary to dispose of the same.

With respect to this latter position, it must be observed that this is the decision of an Irish court respecting an Irish cathedral. The statutes of each cathedral must be consulted, as well as usage, as to the authority of the bishop, or dean, or dean and chapter.

In *Corren* v. *Pym*, it was resolved that if any man has a house in a town or parish, and he and those whose estate he has in the house, have had time out of mind a certain pew or seat in the church, maintained by him and them, the ordinary cannot remove him, (for prescription makes certainty, the mother of quietness,) and if he do, a prohibition lies against him. But where there is no prescription, there the ordinary, that has the cure and charge of souls, may for the avoiding of contention in the church or chapel, and the more quiet and better service of God, and placing of men according to their qualities and degrees, take order for the placing of the parishioners in the church or chapel public, which is dedicate and consecrate to the service of God (*u*).

For the disposal of the seats in the nave of the church appertains of common right to the bishop of the diocese; so that he may place and displace whomsoever he pleases (*x*).

Parishioners are not at liberty to choose what seats they like; the distribution of seats among them rests in the discretion of the ordinary, which he generally exercises by the churchwardens, who are his officers as well as those of the parish (*y*). To exclude the ordinary from his jurisdiction, it is necessary not merely that a possession should be shown for many years, but that the pew should have been built and repaired time out of mind (*z*).

Churchwardens' power to dispose of the same.

But by custom the churchwardens may have the ordering of the seats, as in London; which, by the like custom, may be in other places (*a*).

For a custom time out of mind of disposing of seats by the churchwardens and major part of the parish, or by twelve or any particular number of the parishioners, is a good custom: and if the ordinary interpose, a prohibition will be granted (*b*).

But the churchwardens must show some particular reason why they are to order the seats exclusive of the ordinary; for a general allegation, that the parishioners have used to repair and build all the seats in the church, and by reason thereof the churchwardens have used to order and dispose

(*u*) 3 Inst. 202.
(*x*) 2 Rolle's Abr. 288.
(*y*) 1 Phill. 316, 323; 1 Hagg. 394.
(*z*) *Stocks* v. *Booth*, 1 T. R. 428; 1 Consist. 332.
(*a*) Wats. c. 39.
(*b*) Gibs. 198; 1 Salk. 167.

of the seats, is not sufficient to take away the ordinary's power in disposing and ordering the seats; because this is no more than the parishioners are bound to do of common right, to wit, building and repairing the seats, for which they have the easement and convenience of sitting in them (*c*).

Their general authority must be exercised justly and discreetly (*d*) by the churchwardens, or they may be corrected by the ordinary (*e*). In churches where the seats are fixed they should place the parishioners with some regard to their rank and station (*f*), and families should be seated together (*g*); but in no case are the higher classes to be accommodated beyond their real wants, to the exclusion of their poorer neighbours (*h*).

If through the increase of inhabitants more seats be necessary, the churchwardens cannot erect them of their own head. It cannot be done without the licence of the ordinary. If there be a dispute whether more seats are necessary, or where they shall be placed, the ordinary is sole judge in that case.

Appropriation of a pew must be by faculty or prescription.

A person claiming a pew must show either a faculty or prescription, which will suppose a faculty (*i*). If a pew is rightly appurtenant, the occupancy of it must pass with the house, and the individuals cannot, by contract between themselves, defeat the general right of the parish (*j*): even if there is a prescriptive right, it could not be exercised by transferring it to persons not inhabitants of the house or the parish (*k*). Where the prescription is interrupted, a jury is not bound to presume a faculty from long undisturbed possession (*l*).

Reparation necessary to make a title.

If a person prescribe that he and his ancestors, and all they whose estate he has in a certain messuage, have used to sit in a certain seat in the nave of the church for time out of mind, in consideration that they have used time out of mind to repair the said seat; if the ordinary remove him from this seat, a prohibition lies; for the ordinary has not any power to dispose thereof, for this is a good prescription, and by intendment there may be a good consideration for the commencement of this prescription,

(*c*) Wats. c. 39.

(*d*) *Reynolds* v. *Monckton*, 2 Moody & Rob. 384. Same law laid down in an action on the case.

(*e*) *Wyllie* v. *Mott and French*, 1 Hagg. 33.

(*f*) 1 Phill. 323.

(*g*) 2 Add. 434.

(*h*) 2 Add. 426.

(*i*) Ld. Stowell, 1 Consist. 322; *Fuller* v. *Lane*, 2 Add. 247; 1 Hagg. 39.

(*j*) Ld. Stowell, 2 Consist. 319.

(*k*) Ibid.

(*l*) 3 M. & Ry. 389.

although the place where the seat is be the freehold of the parson (*p*).

But if a person prescribe to have a seat in the nave of the church generally, without the said consideration of repairing the seat, the ordinary may displace him (*q*).

Seat not to go to a man and his heirs.

A seat may not be granted by the ordinary to a person and his heirs absolutely; for the seat does not belong to the person, but to the inhabitant; otherwise, if he and his heirs go away, and dwell in another parish, they shall yet retain the seat, which is unreasonable (*r*).

Seat may be prescribed for, as belonging to a house.

A seat in the nave or body of a church may be prescribed for as belonging to a house. And per Lord Kenyon, a pew may be annexed to a house by a faculty, as well as by prescription, which supposes a faculty; and in that case may be transferred with the messuage. And his lordship said, he had seen a faculty for exchanging seats in a church, which were annexed to houses (*s*). This doctrine was heretofore doubted, and sometimes denied and overruled, with regard to the general right of the ordinary, and the jurisdiction of the spiritual authority; but it seems now to be the doctrine received. Only the reparation of it by the person pleading such prescription, and praying a prohibition thereupon, must of necessity be alleged here; because the ordinary in the body of the church *primâ facie* has the right; and nothing but such private reparation can divest him of that right; which right stands good and entire (notwithstanding possession and use time out of mind) if the parish have but repaired.

When reparation need not be pleaded.

But it has been holden, that in two cases reparation need not be particularly pleaded; first, in case of prescription for an aisle, because (say they) by the common law the particular persons are supposed to repair, and so need not show it; and the foundation of the right may be for other causes than repairing, as for being founder, or having been contributory to its building; but this is not out of question (*t*). The second case (which has often been declared for law) is, where an action upon the case is brought against one who disturbs another in his seat; which disturber being a stranger, and having not any right *primâ facie*, the possession of the other is a sufficient ground of action, and it needs not be alleged that he repairs (*u*).

Thus in *Kenrick* v. *Taylor*, in 25 Geo. 2, on a special action upon the case, against the defendant for disturbing

(*p*) 2 Rolle's Abr. 288.
(*q*) Ibid.
(*r*) Gibs. 197.
(*s*) 1 T. R. 431.
(*t*) *Vide supra*, Sect. 4.
(*u*) Gibs. 197, 198.

the plaintiff in his pew, which he claims by prescription as appurtenant to his messuage in the parish; the declaration sets forth that the plaintiff and all those whose estate he hath in the said messuage have time out of mind repaired the pew. A verdict was given for the plaintiff, subject to the opinion of the court, upon a case which stated that at the trial there was no evidence given that the plaintiff, or any of the owners of the messuage, had ever repaired or been obliged to repair the pew, or that the pew had ever wanted repairing. The question was, whether the plaintiff can maintain this action without proving repairs done to the pew. It was argued for the plaintiff, that as this was an action by one in possession against a mere stranger and wrongdoer, there was no necessity to prove any repairs; and that there was a great difference between an action against a stranger and a contest with the ordinary in prohibition; for at common law the ordinary has the disposal of all the seats in the church; and although they be built and repaired at the charge of the whole parish, yet that will not oust him of his jurisdiction, and therefore a special title must be showed against him by building or repairing the seat; but possession alone is sufficient against a mere stranger. And of this opinion was the court; who said, that this being a possessory action against a stranger and a mere wrongdoer, the plaintiff was not obliged to prove any repairs done by himself or others whose estate he has; for it is a rule in law, that one in possession need not to show any title or consideration for such possession against a wrongdoer. But it is otherwise where one claims a pew or an aisle against the ordinary, who undoubtedly has *primâ facie* the disposal of all the seats in the church; and against him a title or consideration must be shown in the declaration and proved (*x*).

Evidence of possession.

Possession must, however, be understood according to the subject-matter, and in this case must be supported by a title derived either from prescription or a faculty (*y*). But possession for thirty-six years was holden to be presumptive evidence of a prescriptive right, in a case where the church had been rebuilt about forty years before (*z*). Yet in a later case, it appearing that the seat itself was built thirty-five years ago, for the accommodation of the plaintiff, and to put an end to a dispute between two

(*x*) 1 Wils. 326; 1 Lev. 71; 3 Lev. 73.

(*y*) *Stocks* v. *Booth*, 1 T. R. 428.

(*z*) *Rogers* v. *Brooks*, 1 T. R. 431.

families, this proof was holden to rebut the presumption which would otherwise arise from so long a possession (*a*).

What is evidence of repairs.

"The strongest evidence of that kind is the building and repairing time out of mind: for mere repairing thirty or forty years will not exclude the ordinary. The possession must be ancient, and going beyond memory; and though on this subject I do not mean the high legal memory, it must be longer than appears in the circumstances of this case" (*b*). That a house has been built only eighty years is not sufficient to establish a prescriptive right, because it might be presumed that the evidence of the grant of a faculty was not extinct in that time (*c*). A prescriptive right must be clearly proved; the facts must not be left equivocal, and they must be such as are not inconsistent with the general right. In the first place, *use* and *occupation* of the pew must be shown to have gone from time immemorial, as appurtenant to a certain *messuage*, not to *lands*. Secondly, it must be shown that if any acts have been done by the inhabitants of such a messuage, they maintained and upheld the right. At all events, if any repairs have been required within memory, it must be proved that they have been made at the expense of the party setting up the prescriptive right. The *onus* and *beneficium* are supposed to go together; mere occupancy does not prove the right (*d*).

On an application for a faculty to repair and repew a church, a parishioner appeared to the decree and prayed a faculty might *not* be granted *without a proviso* that a pew, claimed to be holden by him by prescription, should not be removed or altered. The prescription was denied. Ruled, that a *primâ facie* title by prescription was established, and that the faculty should be issued *with the proviso* prayed. It was said in this case that evidence of *repair* to a pew claimed by prescription is *not* absolutely necessary, as no repair may have been made within the period of any one living (*e*).

It has however been generally holden (*f*) that reparation from time to time is necessary to be pleaded and proved in order to make out a prescriptive right to a pew (*g*). Lining and putting new cushions into pews are

(*a*) *Griffith* v. *Matthews*, 5 T. R. 296.

(*b*) Ld. Stowell, 1 Consist. 322.

(*c*) Ibid.

(*d*) *Pettman* v. *Bridger*, 1 Phill. 325. See also *Stocks* v. *Booth*, 1 T. R. 431; *Mainwaring* v. *Giles*, 5 B. & Ald. 356.

(*e*) *Knapp* v. *The Parishioners of Willesden*, 2 Roberts. 358.

(*f*) See also *Pepper* v. *Barnard*, 7 Jur. 1123 (1843).

(*g*) 3 Add. 6.

not repairs, but mere ornament; these are not usually done by the parish (*h*).

A seat cannot be claimed by prescription, as appendant to *land*, but to a *house* (*i*). For such a seat belongs to the house in respect of the inhabitants thereof; and yet it has been holden that a seat in an aisle may be prescribed for by an inhabitant of another parish (*i*); for the inhabitant may have built the aisle, and may be bound to repair it. But the court doubted if such prescription would be good for a seat in the nave of the church (*k*). In the Court of Exchequer it was holden, that a pew in the aisle of a church may be prescribed for as appurtenant to a house out of the parish (*l*).

Seats cannot be claimed as belonging to the land.

As a seat in the church, so priority in a seat may be prescribed for. Thus it was declared in the case of *Carleton* v. *Hutton*, in 2 Cha. 1. Carleton claimed the upper place in a seat. Hutton disturbed him. The Archbishop of York sent an inhibition to Carleton, till the matter should be determined before him. But prescription was surmised, and thereupon prohibition obtained: because as well the priority in the seat, as the seat itself, may be claimed by prescription (*m*).

Priority in a seat may be prescribed for.

The right to sit in a pew may be apportioned; and therefore where by a faculty, reciting "that A. had applied to have a pew appropriated to him in the parish church in respect of his dwelling-house," a pew was granted to him and his family for ever and the owners and occupiers of the said dwelling-house, and the dwelling-house was afterwards divided into two, it was holden that the occupier of one of the two (constituting a very small part of the original messuage) had some right to the pew, and in virtue thereof might maintain an action against a wrongdoer (*n*). Priority in a seat in the body or aisle of the church may be appropriated, and belong to a house by faculty or by prescription, which presupposes a faculty (*o*).

Apportionment of seat.

With the experience of the mischief that has resulted from a too lavish grant of these faculties in former times, it is the duty (says Sir J. Nicholl) of the ordinary to prevent its recurrence, by proceeding in this whole matter with prudence and circumspection. Faculties which might with propriety have been granted a century or two ago, the

Faculties for pews—considerations which should guide the ordinary in issuing them.

(*h*) 3 Phill. 331.

(*i*) Gibs. 198; Siderf. 361; 2 Keb. 342. *Vide supra*, Sect. 4.

(*k*) Siderf. 361.

(*l*) *Davis* v. *Witts*, Forr. Rep. 14; 3 Add. 6.

(*m*) Noy, 78; Latch. 116.

(*n*) *Harris* v. *Drewe*, 2 B. & Ad. 164.

(*o*) Roll. Abr. 288; Gibs. 221; 1 Hagg. 39; *Lonsley* v. *Hayward*, 1 Y. & J. 583.

Faculties for pews—considerations which should guide the ordinary in issuing them.

present state of population may render most improper. True it may be that at the particular time the faculty is applied for, its issue may not be generally inconvenient—the parishioners at large may be sufficiently accommodated, notwithstanding its issue; but in this even, the most favourable case, there are obvious reasons for inducing the ordinary to entertain such applications with a good deal of reserve (*p*). The court should inquire, 1, whether such a grant be prejudicial to the parish; 2, whether to the persons opposing the grant; 3, whether the applicant for the grant is qualified for it by station and property in the parish (*q*). The following is an extract from an opinion of Dr. Swabey, given in 1808:—"I am of opinion that the *vicar* and *churchwardens, who were severally entitled to be cited specially*, may express their dissent against any appropriation, and it would be deserving of weight in a *grant* which is *discretionary*, and not *of right*. I should also strongly doubt the propriety of the granting of a faculty for the appropriation of a pew to an individual for the use of his or her servants, though it may be proper that they should not be disturbed in their possession without just cause, which I think may in a great measure depend upon the sufficiency of seats for persons of high pretensions generally."

Superior court reluctant to interfere with the inferior court in the matter of faculties.

The same doctrine was laid down in *Wooleombe* v. *Ouldridge*, where the Court of Arches confirmed the decree of the inferior court, observing that faculties generally are matters so much within the discretion of the local judge, that there must be a considerable degree of general inconvenience to induce a reversal of his decree.

Form of the grant of a faculty.

The best form of a grant of this description is "to a man and his family so long as they continue inhabitants of a certain house in the parish;" though modern usage sometimes omits "of a certain house" (*r*). All intimations should run "to show cause why a faculty should not be granted to appropriate," &c. (*s*).

How far revocable.

Butt v. *Jones* seems to have established that a faculty obtained by surprise and undue connivance may be revoked (*t*). When a faculty limited to a certain period expires, the right of the parishioners revives to the pews which were the subject of the faculty (*u*). Generally speaking, the faculty,

(*p*) *Fuller* v. *Lane*, 2 Add. 428.

(*q*) *Partington* v. *Rector of Barnes*, 2 Lee, 345.

(*r*) *Fuller* v. *Lane*, 2 Add. 426; 1 Phill. 237.

(*s*) 2 Sir G. Lee's Rep. 354.

(*t*) 2 Hagg. 417.

(*u*) 3 Hagg. 733.

if once issued, is good, even against the ordinary himself (*x*).

Ordinary's disposition of seats in the chancel.

Dr. Gibson asserts, that the seats in the chancel are under the disposition of the ordinary, in like manner as those in the body of the church. Which needs only to be mentioned (he says) because there can be no real ground for exempting it from the power of the ordinary; since the freehold of the church is as much in the parson as the freehold of the chancel; but this hinders not the authority of the ordinary in the church, and therefore not in the chancel. And in one of our records, he says, in Archbishop Grindal's time, we find a special licence issued, for the erecting seats in the chancel of a church, together with the rules and directions to be observed therein (*y*). After the parson and his family be seated, if there be room for any other seats, the bishop can grant faculties for the building and disposing of them in the chancel as well as the body of the church (*z*).

A general grant of part of the chancel of a church by a lay impropriator to A., his heirs and assigns, is not valid, because it would take the chancel entirely out of the jurisdiction of the ordinary. The chancel was unalienable by the rector, without consent of the ordinary, before the dissolution of the monasteries; and the general saving in 31 Hen. 8, c. 13, s. 4, leaves the right as it existed before (*a*).

Impropriator's seat in the chancel.

The parson or rector impropriate is entitled to the chief seat in the chancel. This was resolved by the Court of King's Bench, in 7 Jac. 1, in the case of *Hall* v. *Ellis*, that so it is of common right, in regard to his repairing the chancel; but it was declared at the same time, that by prescription another parishioner may have it (*b*).

In *Spry* v. *Flood*, Dr. Lushington said, "I apprehend the rector would be entitled, according to the common law of the land, to the chief seat in the chancel, whether he be endowed rector, or spiritual rector only, unless some other person be in a condition to prescribe it for himself from time immemorial; and that the ecclesiastical court, in the exercise of its ordinary authority, would allot to him such a right, and protect him against the disturbance of it" (*c*).

Vicar's seat in the chancel.

In some places, where the parson repairs the chancel, the vicar by prescription claims a right of a seat for his

(*x*) 2 Add. 431.
(*y*) Gibs. 200.
(*z*) Prideaux, 128. In *Clifford* v. *Wicks*, 1 B. & Ald. 506, Bayley, J., repeats this rule.
(*a*) Per Holroyd, J., in *Clifford* v. *Wicks*, 1 B. & Ald. 498.
(*b*) Noy, 153; Johns. 264.
(*c*) 2 Curt. 359.

Vicar's seat in the chancel.

family, and of giving leave to bury there, and a fee upon the burial of any corpse (*d*).

As to the right of a seat in the chancel, it was originally inherent in every vicar. For before the Reformation, the hours of the breviary were to be sung or said in the chancel (not in the body of the church) by the express words of a constitution of Archbishop Winchelsea; and this was to be done, not only on Sundays and festivals, but on other days, by another constitution of the said archbishop; and these hours were to be sung or rehearsed, not by the vicar alone, but with the consort and assistance of all the clergymen belonging to the church, which were the ecclesiastical family of the vicar. So that it is evident, that all vicars had a right of sitting there before the Reformation, and by consequence must retain this right still, unless it appear that they have quitted it; and if they have not for forty years past used the right, this breeds a prescription against them in the ecclesiastical courts. In many chancels are to be seen the ancient seats or stalls used by the vicar and his brethren in performing these religious offices, like those which remain in the old choirs of cathedral and collegiate churches; and from hence it is, that *cancellus* and *chorus* (the chancel and the choir) are words of the same signification. This being the place where the body of the clergy of every church did sing, or at least rehearsed their breviary; and if any common parishioner may prescribe to a pew in the chancel, much more may the vicar (*e*).

As these seats were placed at the lower end of the choir or chancel, for the daily use of the vicar, so at the upper end stood the high altar of every church, where, as the vicar, or his representative, was obliged to celebrate mass every Sunday and holiday of obligation, so he might do it every day, if there was occasion, or if he pleased; so that it is clear, the use of the chancel was entirely in the vicar, whoever repaired it; and therefore no wonder if the pavement were not to be broken up without his leave; and that thereupon he should acquire a right of receiving what fees were due on such occasions. And the Reformation left the rights of parson and vicar as it found them (*f*).

Difference between chancels and aisles.

"It is therefore," Mr. Johnson says, "a very groundless notion with impropriators, that they have the same right in the great chancel that a nobleman hath in a lesser. These lesser chancels are supposed by lawyers to have

(*d*) Johns. 242, 243; *Vide supra*, Part III. Chap. X. Sect. 7.

(*e*) Johns. 243.

(*f*) Johns. 244.

been erected for the sole use of these noble persons; whereas it is clear the great chancels were originally for the use of clergy and people; but especially for the celebration of the eucharist, and other public offices of religion, there to be performed by the curate and his assistants. That the parsons repair these great chancels doth not at all prove their sole right to them, for they were bound originally to repair the church as well as chancel; and of common right the repairs of the church are still in the parson; it is custom only eases them of this burden. The ordinary hath no power to order morning or evening prayer to be said in noblemen's chancels, but he can order them to be said in the great chancel" (*g*).

Incumbent has no power as to seats.

The incumbent has no authority in the seating and arranging the parishioners beyond that of an individual member of the vestry, and which his station and influence naturally give him; it is not the vicar but the vestry which appropriates the seats; the general superintendence and authority in allotting them rests with the ordinary (*h*).

Seats pulled down.

If any seats annexed to the church be pulled down, the property of the materials is in the parson, and he may make use of them if they were placed in the church by any one of his own head, without legal authority; but for the seats erected by the parishioners by good authority, it seems that the property of the materials upon removal is in the parishioners (*i*).

If any persons on their own heads shall presume to build any seat in the church, without licence of the ordinary, or consent of the minister and churchwardens, or in any inconvenient place, or too high, it may be pulled down by order from the bishop or his archdeacon, or by the churchwardens by the consent of the parson: for the freehold of the church, and all things annexed to it, are in the parson; and therefore if any presume to cut or pull down any seat annexed to the church, the parson may have an action of trespass against the misdoer (though he formerly set it up), if he do it without the parson's consent, or order from the ordinary; but if the seat be set loose, he that built it may remove it at his pleasure (*k*).

In *Gibson* v. *Wright*, in an action of trespass brought by Gibson, for breaking and cutting in pieces his pew, and taking it away; the defendants pleaded, that they

(*g*) Johns. 244, 245. *Vide supra*, Sect. 4.

(*h*) *Tattersall* v. *Knight*, 1 Phill. 233.

(*i*) Degge, part 1, c. 12; Prideaux, 125.

(*k*) Degge, part 1, c. 12.

Seats pulled down.

were churchwardens, and that the plaintiff had built it in the church without licence. And by the court, the trespass is confessed; for though they may remove the seat, they cannot cut the timber and materials into pieces (*l*).

But it has been said, that this case is not law; because the freehold of the church being in the incumbent, when the person has fixed a seat to it, it is then become parcel of his freehold, and consequently the right is in him; so that the breaking the timber could not be prejudicial to the other, because he had no legal right to the materials, after they were fixed to the freehold (*m*).

And Dr. Watson says, although he will not question the law of this case, yet thus much is to be said against it, that the freehold being in another person, the annexing of the seat thereto seems to make the seat to be a part of the freehold, and so to be in him in whom the freehold is, and the use of it in them that have the use of the church; and if so, then the breaking the timber could be no wrong to him that had no legal right in it after it was fastened to the freehold, and became (as other seats) of common use, and at the disposal of the ordinary (*n*).

And further, he says, that if a man with the assent of the ordinary sets up a seat in the nave of the church for himself, and another pulls down or defaces it, trespass *vi et armis* in such case does not lie against him, because the freehold is in the parson, and so the only remedy is in the ecclesiastical court (*o*).

Per Buller, J.: Trespass will not lie for entering into a pew, because the plaintiff has not the exclusive possession; the possession of the church being in the parson (*p*); and the plaintiff having only the liberty to use the seat (*q*). But an action on the case lies for a disturbance of the right (*r*).

Power of the ecclesiastical court to punish those who illegally erect or pull down or alter pews, &c.

All persons (says Sir J. Nicholl) ought to understand that the sacred edifice of the church is under the protection of the ecclesiastical laws as they are administered in these courts; that the possession of the church is in the minister and the churchwardens; that no person has a right to enter it when it is not open for divine service, except under their permission and with their authority; that pews already erected cannot be pulled down without the consent of the

(*l*) Noy, 108.
(*m*) Nels. 493; Ayl. Par. 486.
(*n*) Wats. c. 39.
(*o*) Ibid.
(*p*) *Stocks* v. *Booth*, 1 T. R. 430.
(*q*) *Dawtrie* v. *Dee*, 2 Roll. Rep. 139; Palm. 46.
(*r*) Noy, 78; 1 Siderf. 88; Sir T. Jones, 3; 3 Keb. 745; 1 T. Rep. 428.

minister and churchwardens, unless after cause shown by a faculty or licence from the ordinary. The learned judge, in this case, condemned a lessee of an impropriator of great tithes in the costs of the proceeding, admonished him to pull down the seats he had erected, to reinstate the chancel as it was, and to certify by the first day of next term that he had complied with the sentence (*s*).

Trifling alterations, however, may be made in a pew without a faculty from the ordinary, unless some private right is infringed thereby (*t*). It is to be observed that acts of parliament for building churches, or a particular church in a specific mode, do not oust the jurisdiction of the ecclesiastical court, but merely prescribe the rules which such jurisdiction shall observe in the particular instance.

Possessory right to a pew

There remains yet to be considered that sort of right to a pew which is termed "possessory" (*u*). This, by the common law of the church, is holden sufficient to maintain a suit against a mere disturber: the fact of possession implies either the virtual or actual authority of those having power to place; the disturber must show that he has been placed there by this authority. But a possessory right is not good against the churchwardens and ordinary; they may displace and make new arrangements, but they ought not, without cause, to displace persons in possession; if they do, the ordinary would reinstate them. The possession, therefore, will have weight: the ordinary would give a person in possession *cæteris paribus* the preference over a mere stranger (*x*). A possessory title is sufficient ground for resisting a faculty (*y*); but this right is only co-extensive in duration with actual possession, and if this be abandoned, the right wholly ceases (*z*). And in *Spry* v. *Flood* (*a*), the judge said—"Whether under any circumstances the rector, or any one else, can properly be displaced from a pew except by the churchwardens, and

(*s*) *Jarratt* v. *Steele*, 3 Phill. Rep. 167.

(*t*) *Parham* v. *Templar*, 3 Phill. 527.

(*u*) "19th Febry. 1749, and Dec. 8. *Arches. Brittle* v. *Umfreville*. Pew in Hornsey Church. Brittle a parishioner and Umfreville and his wife *only lodgers*, placed by churchwardens. After publication would not allow Brittle to prove a title. Holden, that *lodgers* may *be* placed by a churchwarden, and not to be displaced by a parishioner." (*Vide* this and Dr. Arnold's opinion; Mr. Toker's MSS. p. 459.)

(*x*) *Pettman* v. *Bridger*, 1 Phill. 324.

(*y*) *Wilkinson* v. *Moss*, 2 Lee, 259.

(*z*) *Woolcombe* v. *Ouldridge*, 3 Add. 7.

(*a*) 2 Curt. 359.

how far the churchwardens could interfere of their own authority with a possessory right, are questions upon which I do not mean to enter. It was the opinion of Lord Stowell that they could not do so without reference to the ordinary. Perhaps later cases and the necessity of the times may have extended that power, and it may be competent for them to act without any authority of the ordinary previously conferred."

Rights to seats, where triable.

By the general law there can be no permanent property in pews (*b*), but it has been said, that in all cases of prescriptions for seats, the ordinary has nothing to do, but the matter is solely determinable at the common law (*c*); and that therefore, if a suit be commenced in the spiritual court for a seat, upon the account of prescription, a prohibition will lie for the party sued, because, whether the prescription be good or not, is not in the spiritual court to judge (*d*). And it has been also said that the plaintiff, if it go against him, may have a prohibition as to the costs, because the suit is *coram non judice* as to the principal; but there seem to be good reasons against that. For the spiritual court may in several cases proceed upon libels grounded on prescription, where the prescription is not denied (so that such suits are not absolutely *coram non judice*); and the reason why a prohibition shall be granted where the prescription or custom is denied, seems to be this: that the notion of customs and prescriptions is different by the ecclesiastical law from what it is at the common law, as to the time in which such custom or prescription may be created; for the ecclesiastical law allows of different times in creating customs or prescriptions, and generally of less time than is allowed of by the common law, which owns no time in such case, but that whereof there is no memory of man to the contrary. Therefore the common law will not suffer the spiritual courts to try prescriptions, whereby they might affect and charge persons' inheritances by adjudging them to be good, which by the common law are no prescriptions (*e*).

The title to a seat is triable at the common law, by action upon the case; and it is agreed that the plaintiff need not to show any reparation in his declaration, but he ought to prove reparation in evidence (*f*). And this is

(*b*) Degge, part 1, c. 12.

(*c*) *Hawkins* v. *Compeigne*, 3 Phill. 11.

(*d*) Wats. c. 39; *Witcher* v. *Cheslam*, 1 Wils. 17.

(*e*) Wats. c. 39.

(*f*) Per Hale, C. B., in *Stephens case*, ibid.

a probable reason for the prescription, for, per Bridgman, C.J.—Although prescriptions resemble the river Nile, in this respect, that no one can trace their origin, so that no direct reason can be given for them, for they were before the memory of man; yet some probable reason, sufficient to make the prescription reasonable, ought to be given (*g*).

Nevertheless, for a disturbance in the seat, a man may sue in the spiritual court, and the defendant, if he will, may admit the prescription to be tried there, as a defendant does a modus or a pension by prescription (*h*).

When such rights are triable in the ecclesiastical courts.

The ecclesiastical court will admonish a wrongdoer not to disturb a person in possession of a pew, although he has no well-founded title to it (*i*). Trespass will not lie by an individual for entering a pew because he has not exclusive possession (*k*), but an action on the case lies for disturbance of his right (*l*). Such an action was brought in *Morgan* v. *Curtis* (*m*), and in *Rogers* v. *Brooks* (*n*). The temporal courts in both these cases held a shorter period of possession sufficient to raise a presumption of a faculty, than Lord Stowell in *Walker* v. *Gunner* (*o*). But the usual method of procedure is by a suit in the ecclesiastical courts for perturbation of seat; this is a civil suit: as also is another remedy afforded by the ecclesiastical court, that of citing the churchwardens to show cause why they have not seated certain persons suitably to their condition; this was the mode adopted in *Walker* v. *Gunner*, in which case Lord Stowell said, "I think the process has issued very properly in this case, and this is a convenient mode of proceeding." There appears to be another difference in the doctrine of the temporal and ecclesiastical courts upon this subject; namely, in the former, repairs need not be pleaded in an action against a stranger for disturbing a person in his prescriptive possession (*p*), which seem to be usually required in such a suit before the ordinary.

The law as to seats, under the special provisions of the

(*g*) 1 Siderf. 203.

(*h*) 2 Salk. 551; 2 Ld. Raym. 755; *Clifford* v. *Wicks*, 1 B. & Ald. 498. This case, as has been said, decided that a grant of part of the chancel by the rector to a man and his heirs was void. See remarks on the rector's power over the chancel, by Lds. Ellenborough and Tenterden.

(*i*) *Cross* v. *Salter*, 3 T. R. 639.

(*k*) *Stocks* v. *Booth*, 1 T. R. 430.

(*l*) Noy, 78; 1 Sid. 88.

(*m*) 3 Man. & Ry. 389.

(*n*) 1 T. R. 431.

(*o*) 1 Consist. 322.

(*p*) Lofft, 423; 1 Wils. 326.

Church Building Acts, is anomalous and complicated, and is treated of hereafter in the Chapter on the Building of Churches (*q*).

SECT. 8.—*Church-way.*

Subject to ecclesiastical court.

The right to a church-way may be claimed and maintained by libel in the spiritual courts. This is supposed in the several reports upon this head, by the mention of particular circumstances, without which prohibitions would not have laid (*r*).

When not a highway.

A church-way may commonly be claimed as a private way; and upon suggestion that it is a highway, a prohibition will be granted; so if the suggestion prove true, the right is triable at common law (*s*).

A way to a parish church, or to the common fields of a town, or to a village, which terminates there, may be called a private way, because it belongs not to all the king's subjects, but to the particular inhabitants of such parish, house or village, each of which, as it seems, may have an action for nuisance therein; whereas nuisances in highways are punishable by indictment, and are not actionable unless they cause a special damage to some particular person (*t*). Yet an indictment for stopping *communem viam pedestrem ad ecclesiam de Whitby* was holden good, for it was taken to be a foot-way common to all, and not merely to the parishioners, and that the church was only the *terminus ad quem* (*u*). If a way leading to a church be a private way, he who ought to repair may be compelled to repair by the ecclesiastical court, and no prohibition will lie; but otherwise, if it be a highway, though it lead to a church. If it be a highway, that is, common to all his majesty's subjects, the charge of repairing it, of common right, lies on the occupiers of lands within the parish, but may be cast on certain persons by reason of inclosure, tenure, or prescription, and, in some cases, is to be regulated by the surveyors (*x*).

Prescription for a church-way may be pleaded by any

(*q*) Part IX., Chap. V.

(*r*) Ayl. Par. 438; Gibs. 293.

(*s*) Gibs. 293; 2 Rolle's Abr. 287; Ayl. Par. 438.

(*t*) 3 Bac. Ab. 54.

(*u*) 1 Ventr. 208, cited in 2 Raym. 1175.

(*x*) See 3 Bac. Ab. 58, 59.

inhabitant in the spiritual court. This was done in 16 Jac. 1; but upon suggestion that it had been enjoyed by permission only, and not as of right, a prohibition was granted: as it was also in a case which Rolle mentions in the same year, when the churchwardens of Bithorne and Bowe sued for a church-way as appertaining to all the parishioners by prescription (*y*).

Which case mentioned by Rolle is thus: if the churchwardens of a church sue for a way to a church that they claim to belong to all the parishioners by prescription, a prohibition shall be granted, for this is temporal (*z*).

Alteration of it requires a faculty.

In *Walter* v. *Mountague* (*a*), a case in the Arches Court, it is said: "Individuals may by prescription have a right of way, and parishioners for attendance on divine worship, vestries, &c. Neither the rector nor the churchwardens can make a new path without a faculty from this court. With regard to the jurisdiction, the churchyard being consecrated ground, this court has cognizance of the matter; it would not sanction alterations, however convenient, unless the consent of the rector had been previously given, or at least asked. If this is an ancient footpath, it is competent to any individual to proceed at law, and this court may be stopped by a prohibition." In this case the court condemned the churchwardens in 40*l*. costs, *nomine expensarum*, monishing them to be more careful in future, and not considering it a good defence that the new footpath they had made through the churchyard was *bonâ fide* for the good of the parishioners.

Power given by Church Building Acts.

By 59 Geo. 3, c. 134, s. 39, "It shall be lawful for the said commissioners (*b*), if they should think fit, to alter, repair, pull down and rebuild, or order or direct to be altered, repaired, pulled down and rebuilt, the walls or fences of any existing churchyard or burial ground of any parish or chapelry, and to fence off, with walls or otherwise, any additional or new burial ground, to be set out or provided by virtue of this act; and also to stop up and discontinue, or alter or vary, or order to be stopped up and discontinued, or altered or varied, any entrance or gate leading into any churchyard or burial ground, and the paths, footways and passages into, through or over the same, as to them may appear useless and unnecessary, or as they shall think fit to alter or vary; provided that the same be done

(*y*) Gibs. 293.
(*z*) 2 Rolle's Abr. 287.
(*a*) 1 Curteis, 261.
(*b*) That is, the Church Building, and now the Ecclesiastical, Commissioners.

"with the consent of any two justices of the peace of the county, city, town or place, where any such entrance, gate, path or passage shall be stopped up or altered; and on notice being given in the manner and form prescribed by an act 55 Geo. 3, c. 68."

No appeal.

Schedule A of that statute gives a form of notice of an order for stopping up an useless road, and the form states that such order will be enrolled at sessions, unless, upon an *appeal against the same to be then made*, it be otherwise determined. It has been holden that 59 Geo. 3, c. 134, though incorporating the foregoing statute, did not give an appeal against the order of the commissioners; *for an appeal cannot be given by implication*, otherwise it would not have been taken away by the repeal of 55 Geo. 3, c. 68, by 5 & 6 Will. 4, c. 50, s. 11 (*b*).

Under this act it has been ruled, that the notice required must be given before the making of the order by the commissioners (*c*).

Sect. 9.—*Church Rates.*

Old law.

According to the old law, rates for reparation of the church were to be made by the churchwardens, together with the parishioners, duly assembled, after due notice, in the vestry or the church.

"*Unusquisque parochianus tenetur ad reparationem ecclesiæ juxta portionem terræ quam possidet intra parochiam, et secundum numerum animalium quæ tenet et nutrit ibidem,*" said Lindwood (*d*). That was according to lands and stock; but the rate was a personal, not a real charge, laid upon persons in respect of their lands. It is unnecessary to state the various stages in the history of the subject, by which in our day this doctrine was practically undermined. The Braintree church rate case decided that a majority of the parishioners might refuse a rate: the question whether the recusants were punishable in the Ecclesiastical Court being left open (*e*). In the

(*b*) *Reg.* v. *Stock*, 8 Ad. & El. 405.

(*c*) *Reg.* v. *Arkwright*, 18 L. J. (N. S.) Q. B. 26.

(*d*) De Eccles. Ref. C. licet Paroch. verb. refic. Eccles.; and Athon in Othob. C. Archidiac. verbo ad hoc tenentur.

(*e*) *Burder* v. *Veley*, 12 Ad. & El. 233; 4 Jur. 383; 10 L. J. (N. S.) Ex. 532.

year 1868 the 31 & 32 Vict. c. 109, was passed, which rendered a compulsory church rate illegal, but provided in rather an obscure manner for a voluntary church rate, clothed with some of the characteristics of the old law.

Compulsory Church Rate Abolition Act, 1868.

This statute has been found generally inapplicable, and churches are now for the most part supported by voluntary contributions.

The statute, however, is as follows: —

Sect. 1. "No suit shall be instituted or proceeding taken in any ecclesiastical or other court, or before any justice or magistrate, to enforce or compel the payment of any church rate made in any parish or place in England or Wales."

Compulsory church rates abolished.

Sect. 2. "Where in pursuance of any general or local act any rate may be made and levied which is applicable partly to ecclesiastical purposes and partly to other purposes, such rate shall be made, levied, and applied for such last-mentioned purposes only, and so far as it is applicable to such purposes shall be deemed to be a separate rate, and not a church rate, and shall not be affected by this act.

Saving of rates called church rates, but applicable to secular purposes.

"Where in pursuance of any act of parliament a mixed fund, arising partly from rates affected by this act and partly from other sources, is directed to be applied to purposes some of which are ecclesiastical purposes, the portion of such fund which is derived from such other sources shall be henceforth primarily applicable to such of the said purposes as are ecclesiastical."

Sect. 3. "In any parish where a sum of money is at the time of the passing of this act due on the security of church rates, or of rates in the nature of church rates, to be made or levied in such parish under the provisions of any act of parliament, or where any money in the name of church rate is ordered to be raised under any such provisions, such rates may still be made and levied, and the payment thereof enforced by process of law, pursuant to such provisions, for the purpose of paying off the money so due, or paying the money so ordered to be raised, and the costs incidental thereto, but not otherwise, until the same shall have been liquidated: Provided, that the accounts of the churchwardens of such parish in reference to the receipt and expenditure of the monies levied under such acts shall be audited annually by the auditor of the poor law union within whose district such parish shall be situate, unless another mode of audit is provided by act of parliament."

Provision where money is due on security of such rates.

Sect. 4 saves rates already made.

Not to affect enactments in local acts, &c. where rates are made for purposes herein named.

Sect. 5. "This act shall not affect any enactment in any private or local act of parliament under the authority of which church rates may be made or levied in lieu of, or in consideration of the extinguishment or of the appropriation to any other purpose of, any tithes, customary payments, or other property or charge upon property, which tithes, payments, property, or charge, previously to the passing of such act, had been appropriated by law to ecclesiastical purposes as defined by this act, or in consideration of the abolition of tithes in any place, or upon any contract made, or for good or valuable consideration given, and every such enactment shall continue in force in the same manner as if this act had not passed."

Act not to affect vestries, &c.

Sect. 6. "This act shall not affect vestries, or the making, assessing, receiving, or otherwise dealing with any church rate, save in so far as relates to the recovery thereof; but, subject to the provisions hereinbefore contained, whensoever any ecclesiastical district having within its limits a consecrated church in use for the purposes of divine worship shall have been legally constituted out of any parish or parishes, and whether such district shall or shall not be a separate and distinct parish, the inhabitants of such district shall not be entitled to vote for or in reference to a church rate or the expenditure thereof at any vestry meeting of the parish or parishes out of which the said district is formed, nor shall they be assessed to any rate made in relation to the parish church of the said parish or parishes, but such inhabitants may assemble in vestry, and, subject to the provisions of this act, may make and assess a rate in relation to the church of their own district in like manner as if such church were the church of an ancient parish: Provided that nothing in this act contained shall affect any right of burial to which the inhabitants of the district may be entitled in the churchyard of the mother church."

Trustees and others under incapacity may subscribe to voluntary rate.

Sect. 7. "It shall be lawful for all bodies corporate, trustees, guardians, and committees who or whose *cestuis que trust* are in the occupation of any lands, houses, or tenements, to pay, if they think fit, any church rate made in respect of such property, although the payment of the same may not be enforceable after the passing of this act, and the same shall be allowed to them in any accounts to be rendered by them respectively."

Regulations as to persons refusing to pay church rates.

Sect. 8. "No person who makes default in paying the amount of a church rate for which he is rated shall be entitled to inquire into, or object to, or vote in respect of the expenditure of the monies arising from such church

rate; and if the occupier of any premises shall make default for one month after demand in payment of any church rate for which he is rated, the owner shall be entitled to pay the same, and shall thereupon be entitled, until the next succeeding church rate is made, to stand for all purposes relating to church rates (including the attending at vestries and voting thereat) in the place in which such occupier would have stood."

Sect. 9 refers to church trustees (*a*).

Definition of "ecclesiastical purposes," "church rate," and "parish."

By sect. 10, "'Ecclesiastical purposes" shall mean the building, rebuilding, enlargement, and repair of any church or chapel, and any purpose to which by common or ecclesiastical law a church rate is applicable, or any of such purposes:

"'Church rate' shall mean any rate for ecclesiastical purposes as hereinbefore defined:

"'Parish' shall mean any parish, ecclesiastical district, chapelry, or place within the limits of which any person has the exclusive cure of souls."

Loans under 5 Geo. 4, c. 36.

Sect. 1 of 5 Geo. 4, c. 36, enacts, that churchwardens and overseers of a parish may, with the consent of the vestry, of the bishop of the diocese, and of the incumbent, apply to the commissioners empowered to make advances on public works for a loan for "rebuilding, repairing, enlarging, or otherwise extending the accommodation of any church or chapel of such parish," and the commissioners, on being satisfied that the required consent has been given, may advance the loan; which is to be applied "for the purposes mentioned in such application," and rates are to be made for the repayment of the loan.

Rippin and Wilson v. Bastin.

A loan was made under this act for the purpose of repairing the church of H. All the formalities required by the act were duly complied with before the loan was granted. A portion of the money was expended in repairing the chancel, and the rest in repairing the other portions of the church. Subsequently a rate was made in due form to repay the loan.

In a suit against a rate-payer for refusal to pay the rate, the defendant alleged in his answer, that it was the duty of the rector alone to repair the chancel: that the preliminary resolution of the vestry contemplated the application of a portion of the loan to the repair of the chancel; that a portion of the loan was expended in repairing the chancel; that the consent of the bishop, and the advance by the commissioners, were given and made

(*a*) *Vide infra*, Part VI., Chap. VI.

respectively on the representation that the loan was wanted for purposes that did not include the repair of the chancel; and that, therefore, the rate was void:—It was ruled by the present judge of the Arches, that the word "church," in the above section, included the chancel, and that, therefore, a portion of the loan might properly be expended in repairing the chancel.

It was ruled further, that even if the word "church" did not include the chancel, yet, as all the required formalities had been observed before the loan was granted, an improper expenditure of the loan could not affect the commissioners' right to repayment; and that the rate, being duly made in form, was valid (*b*).

Smallbones v. *Edney and Lunn.*

In *Smallbones* v. *Edney and Lunn* (*c*), the Privy Council decided, that the impropriator of the great tithes was liable to contribute to rates raised for the repayment of loans raised under the foregoing statute.

(*b*) *Rippin and Wilson* v. *Bastin*, L. R., 2 Adm. & Eccl. 386 (1869).

(*c*) 7 Moo., N. S. 286; L. R., 3 P. C. 444; see *Asterley* v. *Adams*, L. R., 3 Adm. & Eccl. 361.

CHAPTER III.

CHAPELS.

SECT. 1.—*Different kinds of.*
2.—*Their Endowment and Dependence.*
3.—*Repairs of.*
4.—*Who may nominate to.*
5.—*Modern Law as to Chapels to Public Institutions.*
6.—*Chapels under Burial Acts.*

SECT. 1.—*Different kinds of.*

Private chapels.

PRIVATE chapels are such as noblemen and other religious and worthy persons have at their own private charge built in or near their own houses for them and their families to perform religious duties in. These private chapels and their ornaments are maintained at those persons' charge to whom they belong, and chaplains provided for them by themselves with honourable pensions; and these anciently were all consecrated by the bishop of the diocese, and ought to be so still (*a*).

Building and endowing a church originally entitled the patron to the patronage, but an impropriator of a parish has no right to nominate a preacher to every chapel within the parish; it would be a hardship should he be bound so to do, neither ought it to be at his election. A man may build a private chapel for himself and family, or for himself and his neighbours, but that will not give the parson a right to nominate his preacher (*b*).

Constitution of Stratford.

"We do decree," says Stratford, "that whosoever against the prohibition of the canons shall celebrate mass in oratories, chapels, houses, or other places, not consecrated, without having obtained the licence of the diocesan, shall be suspended from the celebration of divine service for the space of a month. And all licences granted by

(*a*) Degge, pt. 1, c. 12.

(*b*) *Herbert* v. *Dean and Chapter of Westminster*, 1 P. W. 774. *Vide supra*, p. 345. See *Duke of Portland* v. *Bingham*, decided by Lord Stowell, 1 Consist. 162, treated of *supra*, pp. 273—280.

Private chapels.

the bishops for celebrating mass in places not consecrated other than to noblemen or other great men of the realm, living at a considerable distance from the church, or notoriously weak or infirm, shall be void. Nevertheless, the heads, governors, and canons of cathedral churches, and others of the clergy, may celebrate mass in their oratories of ancient erection, as hath been accustomed. Moreover, the priests who shall celebrate mass in oratories or chapels built by the kings or queens of England, or their children, shall not incur such pain" (*c*).

In Oratories.]—An oratory differs from a church; for in a church there is appointed a certain endowment for the minister and others; but an oratory is that which is not built for saying mass, nor endowed, but ordained for prayer (*d*).

Or other Places.]—As suppose, in a tent, or in the open air (*e*).

Licence of the diocesan requisite for the performance of divine service in a chapel.

Without having obtained the Licence of the Diocesan.]—Such oratory any one may build without the consent of the bishop; but without the consent of the bishop divine service may not be performed there. And this licence he shall not grant, for divine service there to be performed upon the greater festivals (*f*).

Abundance of such licences both before and since the Reformation remain in our ecclesiastical records, not only for prayers and sermons, but in some instances for sacraments also. But the law is (as Lindwood has it in his gloss on the said canon), that such licence be granted sparingly. And these restrictions were laid on private oratories, out of a just regard to places of public worship, that while the laws of the church provided for great infirmities or great distance, such indulgence might not be abused to an unnecessary neglect of public or parochial communion (*g*).

And in the said oratories a bell might not be put up without the bishop's authority (*h*).

At a considerable Distance.]—As suppose, a mile or more; and in such case and not otherwise (says Lindwood) the bishop ought to permit service to be performed there (*i*).

By 2 & 3 Edw. 6, c. 1, s. 1, and 1 Eliz. c. 2, s. 4, open prayer in and throughout those acts is explained

(*c*) Stratford, Lind. 233.
(*d*) Lind. 233.
(*e*) Ibid.
(*f*) Ibid.
(*g*) Gibs. 212.
(*h*) Lind. 233.
(*i*) Ibid.

thereby to be that prayer which is for others to come unto or hear, either in common churches, or private chapels, or oratories.

By Can. 71 of 1603, "No minister shall preach or administer the holy communion in any private house, except it be in times of necessity, when any being either so impotent as they cannot go to church, or very dangerously sick, are desirous to be partakers of the holy sacrament, upon pain of suspension for the first offence, and excommunication for the second: provided that houses are here reputed for private houses, wherein are no chapels dedicated and allowed by the ecclesiastical laws of this realm: and provided also, under the pain before expressed, that no chaplains do preach or administer the communion in any other places but in the chapels of the said houses; and that also they do the same very seldom upon Sundays and holidays; so that both the lords and masters of the said houses, and their families, shall at other times resort to their own parish churches, and there receive the holy communion at the least once every year" (*k*).

Free chapels.

The distinction of free chapels is grounded on their freedom or exemption from all ordinary jurisdiction (*l*).

Sir Simon Degge says, it is agreed on all hands, that the king may erect a free chapel, and exempt it from the jurisdiction of the ordinary, or may license a subject so to do (*m*). By 26 Hen. 8, c. 3, s. 1, and 1 Eliz. c. 4, s. 1, free chapels are charged with first fruits; but this the late Mr. Serjeant Hill conjectures must mean only such as were in the hands of subjects. No other chapels are expressly named in the statutes: parsonages and vicarages are expressly noticed; it seems that parochial chapels are included in those words; and chapels of ease were not supposed to have any revenue (*n*).

And Dr. Godolphin says, the king may license a subject to found a chapel, and by his charter exempt it from the visitation of the ordinary (*o*).

But Dr. Gibson observes, nevertheless, that no instances are produced in confirmation hereof; it is true, he says, that many free chapels have been in the hands of subjects; but it does not therefore follow, that those were not originally of royal foundation (*p*).

By a constitution of Archbishop Stratford, as before mentioned, *ministers who officiate in oratories or chapels*

(*k*) *Vide supra*, Part IV., Chap. III., Sect. 7, pp. 1180—1185.

(*l*) Gibs. 210.

(*m*) Degge. p. 1, c. 12.

(*n*) Serjt. Hill's MS. notes.

(*o*) God. 145.

(*p*) Gibs. 211.

Free chapels.

erected by the kings or queens of England or their children, shall not need to have the licence of the ordinary.

Or their Children.]—Which word children extends not further than to grandchildren; after these they are called posterity (*q*).

All free chapels, together with the chantries, were given to the king in the 1st year of King Edward the Sixth; except some few that are excepted in the acts of parliament by which they were given; or such as are founded by the king or his licence since the dissolution (*r*).

And the king himself visits his free chapels and hospitals, and not the ordinary; which office of visitation is executed for the king by the lord high chancellor (*s*).

Free chapels may continue such in point of exemption from ordinary visitation, though the head or members do receive institution from the ordinary (*t*).

In short, the sum of all is this: Free chapels (says the learned and accurate Bishop Tanner) were places of religious worship, exempt from all ordinary jurisdiction, save only that the incumbents were generally instituted by the bishop, and inducted by the archdeacon of the place. Most of these chapels were built upon the manors and ancient demesnes of the crown, whilst in the king's hands, for the use of himself and retinue when he came to reside there. And when the crown parted with those estates, the chapels went along with them, and retained their first freedom: but some lords having had free chapels in manors that do not appear to have been ancient demesnes of the crown, such are thought to have been built and privileged by grants from the crown (*u*).

Chapels of ease under a mother church.

Of chapels subject to a mother church, some are merely chapels of ease, others chapels of ease and parochial (*x*). But *quære* if they can be both at the same time.

A chapel merely of ease is that which was not allowed a font at its institution, and which is used only for the ease of the parishioners in prayers and preaching (sacraments and burials being received and performed at the mother church), and commonly where the curate is removable at the pleasure of the parochial minister; according to what Lindwood says, where the minister of the mother church has the cure of them both, yet he exercises the cure there by a vicar not perpetual, but temporary,

(*q*) Lind. 234.
(*r*) Degge, p. 1, c. 12.
(*s*) God. 145.
(*t*) Gibs. 211.
(*u*) Tanner's Notit. Monast. Pref. 28.
(*x*) Gibs. 209.

and removable at pleasure; though in this case, Lindwood observes elsewhere, that there may be in other respects the rights of a parochial chapel by custom. But where a chapel is instituted, though with parochial rights, there is usually (if not always) a reservation of repairing to the mother church, on a certain day or days, in order to preserve the subordination (*y*).

Parochial chapels.

A parochial chapel is that which has the parochial rights of christening and burying; and this differs in nothing from a church, but in the want of a rectory and endowment (*z*).

For the privileges of administering the sacraments (especially that of baptism) and the office of burial, are the proper rites and jurisdiction that make it no longer a depending chapel of ease, but a separate parochial chapel. For the liberties of baptism and sepulture are the true distinct parochial rites. And if any new oratory has acquired and enjoyed this immunity, then it differs not from a parish church, but (says Mr. Selden) may be styled *capella parochialis*. And till the year 1300, in all trials of the rights of particular churches, if it could be proved that any chapel had a custom for free baptism and burial, such place was adjudged to be a parochial church (*a*). Hence at the first erection of these chapels, while they were designed to continue in subjection to the mother church, express care was taken at the ordination of them, that there should be no allowance of font or bells, or anything that might be to the prejudice of the old church (*b*). And when any subordinate chapel did assume the liberty of burial, it was always judged an usurpation upon the rights of the mother church, to which the dead bodies of all inhabitants ought to be duly brought, and there alone interred. And if any doubt arose whether a village were within the bounds of such a parish, no argument could more directly prove the affirmative than evidence given that the inhabitants of that village did bury their dead in the churchyard of the said parish (*c*).

Sir G. Lee, in *Line* v. *Harris* (*d*), says, "its having sacraments and burials does not make it cease to be such," *i. e.* a chapel of ease; and "a chapel of ease is built for the ease of the parishioners that dwell too far from the church, and served by a curate provided at the charge of

(*y*) Gibs. 209.
(*z*) Degge, p. 1, c. 12.
(*a*) 2 Inst. 363.
(*b*) *Nulla ecclesia est in prejudicium alterius construenda.* X. 5, 32, 1.
(*c*) Ken. Par. Ant. 590, 591.
(*d*) 1 Lee's Rep. 146.

the rector" (*e*). A perpetual curacy or chapel has all sorts of parochial rights, as a clerk, wardens, &c., the right of performing divine service, baptism, sepulture, &c., and the curate has small tithes and surplice fees; but chapels of ease are merely *ad libitum*, and have no parochial rights; therefore, on the union of the two parishes, one is frequently deemed the parish church, and the other as a parochial chapel, but not as a chapel of ease (*f*).

Evidence of chapelry being parochial.

The performance of baptisms, marriages, and burials in a chapel existing from time immemorial might possibly be presumptive evidence of consecration, and of a composition; *aliter*, as to a chapel the origin of which is ascertained (*g*).

It has been decided that where parishioners dwelling within a chapelry contribute to the repairs of the parish church, it is strong but not conclusive evidence that the chapel is a chapel of ease to the inhabitants of the parish, and not a separate and distinct chapelry (*h*).

Upon a trial, where the question was, whether the chapelry of St. H. was a legal parochial chapelry—it was holden, that the statement of a witness, that he had heard from a former incumbent of H. that the people of four townships and another parish came to the chapelry, was admissible in evidence, inasmuch as the rights of the chapel in question were sufficiently of a public nature to make reputation admissible.

So, a case stated by a deceased incumbent of St. H. for the opinion of a proctor, with his opinion thereon, was holden admissible, on the same principle as the statement of a deceased occupier, which qualifies his estate, is admissible.

It was holden, also, that the answer of the incumbent of St. H., and other clergymen, to questions sent by the bishop of C., the diocesan, for the information of the governors of Queen Anne's bounty, at the time an augmentation was made, was admissible, as being in the nature of an inquisition on a public matter (*i*).

Provisions in Church Building Acts.

The Church Building Acts (*k*) contain, with respect to the *general law* as to chapels of ease, provisions that those which have reputed townships or districts attached to them may, as being properly endowed, with consent of bishop, patron, and incumbent of parish, be made independent of

(*e*) 1 Lee's Rep. 146.
(*f*) *Attorney-General* v. *Brereton*, 2 Ves. 425, 427.
(*g*) 2 Hagg. 50.
(*h*) *Dent* v. *Rob*, 1 Y. & Col. 1.
(*i*) *Carr* v. *Mostyn*, 5 Ex. 69 (1850).
(*k*) As to chapels built under authority of these acts, *vide infra*, Part IX., Chaps. V., VI.

the parish church, and their township or district may be made a parish (*l*).

It is said by Rolle, that if the question be in the Court Christian, whether a church be a parish church or only a chapel of ease, a prohibition lies (*m*).

Church or chapel, how to be tried.

And Dr. Watson says, if the defendant in a *quare impedit* shall plead that the same is a chapel and no church, this matter shall be tried by the country, and not by the bishop (*n*).

But Dr. Gibson says, that a chapel or no chapel ought to be tried by the spiritual judge, for a chapel is spiritual as well as a church; and when two spiritual things are to be tried, no prohibition shall be granted; in like manner, as it goes not, when a modus is pleaded in a dispute between two spiritual persons, to wit, the rector and vicar, about tithes (*o*).

But he says, if a question is depending as to the *limits* thereof, whether a chapel of ease or a parish church, or whether a chapel of ease or a parochial chapel, the same shall be tried, as to the limits, in the temporal court (*p*).

Criteria of church and chapel.

If a person be patron of a chapel that has parochial right, and presents thereto by the name of a church, and the presentees have been received thereto, as to a church; it is no longer a chapel but a church; and if a disturbance happen upon any avoidance thereof, the patron may have his *quare impedit* as to a church (*q*).

But on the contrary, a presentation to a church by the name of a chapel will not make it cease to be a church; for the case was, that in the time of Henry III. there were two rectories, A. and B., and the patron of A. purchased the rectory of B. After which, constantly, presentations were to the church of A. with the chapel of B. And it was resolved, that although the patron of A. ever after the said purchase, had presented only unto the said church of A. with the chapel of B., yet B. notwithstanding remained in right a church, and the freehold of it in suspense (*r*).

These cases are governed by the maxim, *nomina sunt mutabilia, res autem immobiles* (*s*).

Government thereof.

Chapels of ease have the like officers for the most part as churches have, distinguished only in name (*t*).

And are in like manner visitable by the ordinary (*u*).

(*l*) 1 & 2 Will. 4, c. 38, s. 23; 1 & 2 Vict. c. 107, s. 7.
(*m*) 2 Rolle's Abr. 291.
(*n*) Wats. c. 23.
(*o*) Gibs. 210.
(*p*) Ibid. 213.
(*q*) Wats. c. 23; 2 Inst. 363.
(*r*) Wats. c. 23; Sav. 17, 18.
(*s*) 6 Co. 66.
(*t*) Degge, pt. 1, c. 12.
(*u*) Ibid.

SECT. 2.—*Their Endowment and Dependence.*

Their endowment and dependence.

When by long usage and custom parochial bounds became fixed and settled, many of the parishes were still so large that some of the remoter hamlets found it very inconvenient to be at so great a distance from the church; and therefore for the relief and ease of such inhabitants, this new method was practised of building private oratories or chapels in any such remote hamlet, in which a capellane was sometimes endowed by the lord of the manor or some other benefactor, but generally maintained by a stipend from the parish priest, to whom all the rights and dues were entirely preserved (*t*).

Consents requisite for their erection.

But in order to authorize the erecting of a chapel of ease, the joint consent of the diocesan, the patron, and the incumbent (if the church was full) were (and as it seems still are) all required (*u*).

By a constitution of Othobon, when a private person desires to have a chapel of his own, and the bishop for just cause has granted the same, the said bishop has always provided that this be done without prejudice to the right of any other; "agreeably whereunto we do injoin, that the chaplains ministering in such chapels, which have been granted saving the right of the mother church, shall render to the rector of the said church all oblations and other things, which, if the said chaplains did not receive them, ought to accrue to the said mother church: and if any shall neglect or refuse so to do, he shall incur the pain of suspension until he shall conform" (*x*).

But this is to be understood, unless a special privilege or ancient custom allows the contrary; or unless by composition with the rector of the mother church, he retains yearly the fruits arising within the chapelry, paying for the same something in certain to the said rector (*y*).

For a chapel may prescribe for tithes against the mother church. Thus in *Sayer* v. *Bland* (*z*), when the parson libelled for tithes against an inhabitant of a hamlet where was a chapel of ease, and it was showed on the other side, that time out of mind the said hamlet had found a clerk to do divine service in the said chapel, with part of their tithes, and (what was an usual composition upon the erection of a chapel) paid a certain sum of money to the parson and his predecessors for all tithes; the prescription was holden to be good, and a prohibition was granted (*a*).

(*t*) Ken. Par. Ant. 587.
(*u*) Ibid. 585, 586.
(*x*) Athon. 112.
(*y*) Ibid.
(*z*) 4 Leon. 24.
(*a*) Gibs. 209.

And at the consecration of a chapel, there was often some fixed endowment given to it, for its more light and easy dependence on the mother church: in some places being endowed with lands or tithes, and in some places by voluntary contributions (*b*).

It was ruled by Dr. Phillimore, chancellor of the diocese of Oxford, in 1849, that the Consistorial Court had power to grant a faculty for the removal of a consecrated chapel to another site authorized by the ordinary (*c*).

Dependence of chapels on the mother church.

Yet, nevertheless, at the first there were very many signs of the dependence of chapels on the mother church; of which the prime and most effectual was the payment of tithes and offerings, and all profits whatsoever, to the incumbent of the mother church. And therefore when such chapels were first allowed, a particular reserve was always made, that such a new foundation should be no prejudice to the parish priest and church. The constitutions of Egbert, archbishop of York, in the year 750, take care that churches of ancient institution should not be deprived of tithes or any other rights, by giving or allotting any part to new oratories. The same was also provided in council under King Ethelred, by the advice of his two archbishops, Alpheg and Wulstan. Which constitution is also found in an elder council of Mentz; and in the imperial capitularies. And by the laws of King Edgar, made about the year 970, it was ordained, that every man should pay his tithes to the *ealdan mynstre*, to the elder or mother church. Only if a thain or lord should have within his own see a church, with a burial place, (that is, a parochial chapel,) he might give a third part of his tithes to it; but if it had no privilege of burial, (that is, if it were a bare appendant chapel,) then the law was, to maintain the priest out of his nine parts, that is, purely at his own charge, without laying any part of the burden on the priest of the parish church (*d*).

Another mark of dependence on the mother church was this: The inhabitants of the village, which was thus accommodated with a chapel, were upon some festivals to repair to the mother church, as an expression of duty and obedience to it. This practice was enjoined by the 31st canon of the Council of Agatha, and recommended by a decree of Gratian, and obtained as a custom in this kingdom. Yea, when chapels were first allowed to our colleges in Oxford, it was generally provided, that such liberty

(*b*) Degge, pt. 1, c. 12.

(*c*) *Clayton* v. *Dean*, 7 Notes of Cases, 46.

(*d*) Ken. Par. Ant. 594.

Dependence of chapels on mother church.

should be no prejudice to the parish church; and that the scholars of every such house should frequent the said parochial church in the greater solemnities of the year. Which custom still prevails at Lincoln college, where the rector and fellows on Michaelmas-day go in their respective habits to the church of St. Michael, and on the day of All Saints to the church of All Hallows (*e*).

Nor did the inhabitants of any village so privileged with a chapel barely visit the mother church, and join in the divine service: but as a farther sign of subjection, they made their oblations, and paid some accustomed dues at those solemn seasons. This was sometimes done upon every one of the three greater festivals of Christmas, Easter, and Whitsunday. Sometimes those offerings were made only on the day of the dedication of the mother church. At other times and places, these solemn oblations were made only at Whitsuntide, and this chiefly in cathedral and conventual churches, where, among all parish churches that were appropriated to them, or of their patronage, the priests and people came in solemn procession within the week of Pentecost, and brought their usual offerings. Whereupon we may fairly presume, that this old custom gave birth and name to the *pentecostals* or Whitsun-contributions that were allotted to the bishops, and are still paid in some few dioceses (*f*).

It was a farther honour done to mother churches, that all the hamlets and distant villages of a large parish, made one of their annual processions to the parochial church, with flags and streamers, and other ensigns of joy and triumph. This custom might possibly after the Conquest be introduced by the Normans; for among the ecclesiastical constitutions made in Normandy in the year 1080, it is decreed, that once in a year about Pentecost, the priests and capellanes should come with their people in a full procession to the mother church, and for every house should offer on the altar a wax taper to enlighten the church, or something of like value (*g*).

Submission of the curate of a chapel.

Moreover, the capellane or curate of a chapel was to be bound by an oath of due reverence and obedience to the rector or vicar of the mother church (*h*).

(*e*) Ken. Par. Ant. 595.

(*f*) Ibid. 596, 597. *Vide supra*, pp. 1597, 1598.

(*g*) Ken. Par. Ant. 598.

(*h*) *Vide supra*, p. 316.

SECT. 3.—*Repairs of.*

Payments of rates for chapels as well as for churches cannot now be enforced by law (*i*). The old law was as follows:—

Repairs to a chapel no discharge from repairs to the parish church.

The inhabitants of a precinct where there is a chapel, though it is a parochial chapel, and though they do repair that chapel, are nevertheless of common right contributory to the repairs of the mother church. If they have seats at the mother church, to go thither when they please, or receive sacraments or sacramentals, or marry, christen or bury at it, there can be no pretence for a discharge. Nor can anything support that plea, but that they have time out of mind been discharged (which also is doubted whether it be of itself a full discharge): or that in consideration thereof, they have paid so much to the repair of the church, or the wall of the churchyard, or the keeping of a bell, or the like compositions (which are clearly a discharge) (*j*).

Dr. Godolphin says, it is contrary to common right, that they who have a chapel of ease in a village, should be discharged of repairing the mother church; for it may be that the church, being built with stone, may not need any reparation within the memory of man; and yet that does not discharge them, without some special cause of discharge showed (*k*).

If the chapel be three miles distant from the mother church, and the inhabitants, who have used to come to the chapel, have used always to repair the chapel, and there marry and bury, and have never within sixty years been charged to repair the mother church; yet this is not any cause to have a prohibition: but they ought to show in the Spiritual Court their exemption, if they have any, upon the endowment (*l*).

But if the inhabitants of a chapelry prescribe to be discharged time out of mind of the reparation of the mother church, and they are sued for the reparation of the mother church, a prohibition lies upon this surmise (*m*).

In *Ball* v. *Cross*, in 1 Will. 3, the inhabitants of a chapelry within a parish were prosecuted in the Ecclesiastical Court, for not paying towards the repairs of the parish church; and the case was, those of the chapelry never had contributed, but always buried at the mother church, till about Henry the Eighth's time the bishop was prevailed on

(*i*) *Vide supra*, p. 1817.

(*j*) Gibs. 197; *vide supra*, p. 1789.

(*k*) God. 153.

(*l*) 2 Rolle's Abr. 290.

(*m*) Ibid.

Repairs no discharge from repairs of mother church.

to consecrate them a burial place, in consideration of which they agreed to pay towards the repair of the mother church. All which appeared upon the libel. And it was holden by Holt, Chief Justice, that those of a chapelry may prescribe to be exempt from repairing the mother church, as where it buries and christens within itself, and has never contributed to the mother church; for in that case it shall be intended coeval, and not a latter erection in ease of those of the chapelry: but here it appears, that the chapel could be only an erection in ease and favour of them of the chapelry; for they of the chapelry buried at the mother church till Henry the Eighth's time, and then undertook to contribute to the repairs of the mother church (*n*). And although, at the first sight, this may seem somewhat hard, yet it has this good foundation of reason; that all chapels, and all discharges from attending divine service at the mother church, were originally matters of grace and favour; and the ease and convenience of particular inhabitants ought not to be purchased with inconvenience and damage to the mother church; in whose right it was specially provided on those occasions, that nothing should be done in prejudice thereof (*o*).

How to be repaired.

The repairs of a chapel are to be made by rates on the landowners within the chapelry, in the same manner as the repairs of a church, and such rates are to be enforced by ecclesiastical authority (*p*).

And there shall be the like appeals to the ordinary for unequal assessments. But all this must be intended of ancient chapels, and where this course has been used; for if there be land given for the repair of them, or any land or estate charged by prescription to the repairs of them, then the custom must be observed (*q*).

The inhabitants of a chapelry may, however, prescribe to be exempt from the repairing the mother church, if it can be intended that the chapel was a *coeval* and not a subsequent erection; but nothing short of a prescription seems to be sufficient, unless indeed they can show an exemption from the endowment (*r*).

(*n*) 1 Salk. 164, 165.
(*o*) Gibs. 209.
(*p*) Ibid.
(*q*) Degge, p. 1, c. 12.
(*r*) 1 Salk. 164; 2 Rolle's Abr. 290; Gibs. 209.

SECT. 4.—*Who may nominate to.*

How to be supplied, and who may erect, and who may nominate to them.

The cure of chapels of ease, in many places, is to be performed by those that have the cure of souls in the parish (*s*).

And in such case the incumbent of the mother church being bound to find a chaplain there, may himself serve in the chapel as well as his curate or chaplain (*t*).

By agreement (of the bishop, patron, and incumbent) the inhabitants may have a right to elect and nominate a capellane. Otherwise, the ancient custom was, that he was either arbitrarily appointed by the vicar; or by him nominated to the rector and convent, whose approbation did admit him; or was nominated by the inhabitants (as founders and patrons) to the vicar, and by him presented to the ordinary; for custom herein was different: sometimes a capellane was to be presented by the patron of the church to the vicar, and by him to the archdeacon, who was then obliged to admit him; at other times the lord of the manor did present a fit person to the appropriators, who, without delay, were to give admission to the person so presented (*u*). The law on this subject has been already stated (*x*).

Lord Tenterden remarks, "In *Dixon* v. *Kershaw* (*y*), Lord Northington says that a mere arbitrary agreement made even with the consent of the parson, the patron, and the ordinary, without a compensation to the mother church, will not be sufficient; perhaps this expression requires some qualification; and where nothing is taken from the income of the incumbent, the consent of the parson, patron, and ordinary, without a compensation, may be sufficient" (*z*).

"Chapels," says Sir J. Nicholl, in *Moysey* v. *Hillcoat* (*a*), "possess no parochial rights unless acquired by composition with the patron, incumbent, and ordinary." And in *Bliss* v. *Woods* (*b*), the same learned judge adds, "without a provision for the indemnity or compensation of the future incumbent, perhaps in all cases, certainly if his pecuniary rights and interests are to be in any manner affected."

It has been already (*c*) said, that there is no general

(*s*) Degge, p. 1, c. 12.
(*t*) Wats. c. 32; Hob. 67.
(*u*) Ken. Par. Ant. 589.
(*x*) *Vide supra*, Part II., Chap. X., Sects. 2, 3, pp. 305—313.
(*y*) Amb. 528.
(*z*) *Farnworth* v. *The Bishop of Chester*, 4 B. & C. 568; 7 Dowl. & Ry. 72.
(*a*) 2 Hagg. 49.
(*b*) 3 Hagg. 511.
(*c*) *Vide supra*, p. 1181, for the canon on this subject.

principle of ecclesiastical law more firmly established than this: that it is not competent to any clergyman to officiate in any church or chapel within the limits of a parish without the consent of the incumbent.

Proprietary chapels.

Sir John Nicholl says (*d*), the incumbent of a parish has a right to perform divine service in any *consecrated* building within the parish; and again, "By law no persons can procure divine service to be administered without the consent of the incumbent and the licence of the bishop (to which, in some instances, must be added the consent of the patron), and the person officiating without such consent is liable to ecclesiastical censures" (*e*). In these two last cases the nature of unconsecrated proprietary chapels was discussed. They are anomalies unknown to the ecclesiastical constitution of this kingdom, and can possess no parochial rights. The two principal decisions upon this subject are *Moysey* v. *Hillcoat* (*f*) and *Hodgson* v. *Dillon* (*g*), already referred to. The substance of the former case was as follows: a chapel being built shortly before 1735 by private subscription, and the subscribers agreeing out of the pew-rents to pay the rector of the parish a yearly stipend for performing divine service, a licence was obtained from the bishop to the rector and his successors, who from time to time performed therein parochial duties; but there being no proof of consecration, nor of any composition between the patron, incumbent, and ordinary, such chapel was holden merely proprietary, and the minister, nominated by the rector of the parish, *cannot perform parochial duties therein*, nor distribute the alms collected at the Lord's Supper (*h*). The case of *Hodgson* v. *Dillon* decided that *the bishop has the power of revoking absolutely and discretionally licences to officiate in unconsecrated chapels.*

It should seem that it is at any time competent to the proprietors of an unconsecrated chapel to convert it to secular purposes (*i*).

It was decided in the case of *Bosanquet* v. *Heath* (*k*), that the proprietor of a licensed chapel retains his right of property in the chapel, and may refuse to admit any person during the celebration of divine service, even the churchwarden of the parish in which the chapel is situate.

(*d*) *Moysey* v. *Hillcoat*, 2 Hagg. 48.
(*e*) *Carr* v. *Marsh*, 2 Phill. 198.
(*f*) 2 Hagg. 30.
(*g*) 2 Curt. 388 (1840).
(*h*) 2 Hagg. 30.
(*i*) 2 Hagg. 50.
(*k*) 9 W. R. 35.

Sect. 5.—*Modern Law as to Chapels to Public Institutions.*

By 31 & 32 Vict. c. 118, s. 31, it is enacted that, "The chapel of every school to which this act applies (*l*) shall be deemed to be a chapel dedicated and allowed by the ecclesiastical law of this realm, for the performance of public worship and the administration of the sacraments according to the liturgy of the Church of England, and to be free from the jurisdiction or control of the incumbent of the parish in which such chapel is situate."

Chapels to public schools.

By 32 & 33 Vict. c. 86, s. 53, "The chapel of an endowed school subject to this act (*m*), which either has been before or after the commencement of this act consecrated according to law, or is authorized for the time being by the bishop of the diocese in which the chapel is situate, by writing under his hand, to be used as a chapel for such school, shall be deemed to be allowed by law for the performance of public worship and the administration of the sacraments according to the liturgy of the Church of England, and shall be free from the jurisdiction and control of the incumbent of the parish in which such chapel is situate."

Chapels to endowed schools.

In 1871, 34 & 35 Vict. c. 66 was passed; it was entitled "An Act to amend and define the Law relating to Private Chapels and to Chapels belonging to Colleges, Schools, Hospitals, Asylums, and other Public Institutions" (*n*).

It provided as follows:—

Sect. 1. "The bishop of the diocese within which any chapel belonging to any college, school, hospital, asylum, or public or charitable institution is situated, whether consecrated or unconsecrated, may license a clergyman of the Church of England to serve such chapel and administer therein the sacrament of the Lord's Supper, and perform such other offices and services of the Church of England as shall be specified in such licence, provided that the bishop shall not include in any such licence the solemnization of marriage, and may, if he think fit, revoke the same at any time."

Bishop may license clergyman of Church of England to certain private chapels; and revoke such licence.

Sect. 2. "The minister officiating in such chapel shall, with respect to the performance of the offices and services of the church specified in such licence, be subject to no control or interference on the part of the incumbent of the

Status of minister, and saving of rights of incumbent.

(*l*) *Vide infra*, Part VIII., Chap. V.

(*m*) *Vide infra, ibid.*

(*n*) This title is now misleading, as the *act* refers only "to chapels belonging to colleges," &c. The *bill* had a wider scope.

parish or district in which such chapel is situate; but nothing herein contained shall prejudice or affect the right of such incumbent to the entire cure of souls throughout such parish or district elsewhere than within such institution and the chapel thereof."

Offertory.

Sect. 3. "The offertory and alms collected at any chapel subject to the provisions of this act shall be disposed of as the minister thereof shall determine, subject to the direction of the ordinary."

By sect. 4, the act may be cited as "The Private Chapels Act, 1871."

Sect. 6.—*Chapels under Burial Acts.*

Conveyance of chapel of closed burial ground.

Where a burial ground in the metropolis is closed under 15 & 16 Vict. c. 85, and it is locally situate in a parish other than that to which it belongs, and has a chapel annexed to it, the incumbent and churchwardens of the parish to which it belongs, with consent of the vestry and bishop, may, by sect. 51, convey the chapel to nominees of the incumbent and churchwardens of the parish within which it is situate, with consent of the vestry and bishop thereof, upon such trusts for the last-mentioned parish and subject to such provisions as to the bishop may seem proper (*o*).

(*o*) *Vide supra*, p. 847.

CHAPTER IV.

CHURCHWARDENS.

SECT. 1.—*Their Office.*
2.—*Who are exempted from being.*
3.—*Choice of.*
4.—*Refusing to act.*
5.—*Refusing to admit.*
6.—*Official Acts of.*
7.—*Accounts of.*
8.—*Actions by.*
9.—*Proceedings against.*
10.—*Perambulation of Parishes.*

SECT. 1.—*The Office of Churchwarden* (*a*).

IN the ancient episcopal *synods*, the bishops were wont to summon divers creditable persons out of every parish, to give information of and to *attest* the disorders of clergy and people. These were called *testes synodales*, and were in aftertimes a kind of impannelled jury, consisting of two, three, or more persons in every parish, who were upon oath to present all heretics and other irregular persons (*b*). *Origin.*

And these in process of time became standing officers in several places, especially in great cities, and from hence were called *synods men*, and by corruption *sidesmen*; they are also sometimes called *questmen*, from the nature of their office, in making *inquiry* concerning offences.

And these sidesmen or questmen, by canon 90 of 1603, are to be chosen yearly in Easter week, by the minister and parishioners (if they can agree); otherwise to be appointed by the ordinary of the diocese.

But for the most part this whole office is now devolved upon the churchwardens, together with that other office which their name more properly imports, of taking care

(*a*) Questmen, sidesmen, or assistants, are also considered in this chapter; *et vide supra*, Part IV., Chap. IX., on Visitations. As to churchwardens under the Church Building Acts, *vide post*, Part IX., Chap. VI.

(*b*) Ken. Par. Ant. 649.

of the church and of the goods thereof, which they had of very ancient time.

Nature of churchwarden's office.

Churchwardens are parochial officers for several purposes, and are to inspect the morals and behaviour of the parishioners, as well as to take care of the goods and repairs of the church (*c*). "I conceive" (says Lord Stowell) "that their duties were originally confined to the care of the ecclesiastical property of the parish, over which they exercise a discretionary power for certain purposes. In all other respects it is an *office of observation and complaint, but not of control*, with respect to divine worship: so it is laid down in Ayliffe in one of the best dissertations on the duties of churchwardens, and in the canons of 1591. In these it is observed that the churchwardens are appointed to provide the furniture of the church, the bread and wine of the holy sacrament, the surplice and the books necessary for the performance of divine worship, and such as are directed by law; *but it is the minister* who has the use. If, indeed, he errs in this respect, it is just matter of complaint, which the churchwardens are bound to attend to, but the law would not oblige them to complain if they had a power themselves to redress the abuse. In the service, the churchwardens have nothing to do but to collect the alms at the offertory; and they may refuse the admission of strange preachers into the pulpit; for this purpose they are authorized by the canon (*d*), but *how?* When letters of orders are produced, their authority ceases. Again, if the minister introduces any irregularity into the service, they have no authority to interfere, but they may complain to the ordinary of his conduct. I do not say there may not be cases where they may not be bound to interpose. In such cases they may repress, and ought to repress, all indecent interruptions of the service by others, and are the most proper persons to repress them, and desert their duty if they do not. And if a case should be imagined in which even a preacher himself was guilty of an act grossly offensive either from natural infirmity or from disorderly habits, I will not say that the churchwardens, and even private persons, might not interpose to preserve the decorum of public worship. But that is a case of instant and overbearing necessity, that supersedes all ordinary rules. In cases which fall short of such a singular pressure, and can await the remedy of a proper legal complaint, that is the only proper mode to

(*c*) *Governors of St. Thomas's Hospital* v. *Treherne and Cove*, 1 Lee, 129.

(*d*) 1603, can. 50.

"be pursued by a churchwarden, if private and decent application to the minister himself shall have failed in preventing what he deems the repetition of an irregularity at all, and is nothing more than a misrepresentation of his own" (*e*). *They have only the custody of the church under the minister;* if he refuses access to the church on fitting occasions, complaint must be made to higher authorities (*f*). Churchwardens are the guardians or keepers of the church, and representatives of the body of the parish (*g*). They have the care of a benefice during a vacancy; and the death or avoidance of the spiritual person, who was the incumbent of any parish or place in which any separated parish or district shall be consecrated, shall be notified by the bishop under his hand and seal to the spiritual person then serving the church or chapel, and the churchwardens of the parish or place, and is to be preserved with the registers of births, &c. (*h*).

How far they have the custody of the church.

A parish clerk, having been dismissed from his office by the rector, though irregularly, and another appointed, the former entered the church before divine service had commenced, and took possession of the clerk's seat:—It was decided, that the churchwardens were justified in removing him from the clerk's desk, and also out of the church, if they had reasonable grounds for believing that he would offer interruption during the celebration of divine service (*i*).

Have power to prevent interruption of divine service.

The churchwarden has, as such, no authority in a private proprietary chapel, even though clergymen be licensed by the ordinary to officiate therein (*k*).

No power in private chapel.

Churchwardens are a corporation for the purpose of the custody of the ornaments of the church.

How far a corporation as to ornaments of the church.

A monition to carry into execution a judgment of the Judicial Committee, approved by her Majesty in council, was issued against P. and E., the church or chapel-wardens of St. B., to remove certain ornaments, and do other acts in the chapel of St. B., as therein directed. At the time the monition was served on P. and E. they had ceased to be chapel-wardens. Upon motion by the original promovent, B., a new monition was directed to be issued, addressed to and monishing the church or

(*e*) *Hutchins* v. *Denziloe*, 1 Cons. 173.

(*f*) *Lee* v. *Matthews*, 3 Hagg. 173.

(*g*) 1 Bla. Com. 394.

(*h*) By 58 Geo. 3, c. 45, s. 20.

(*i*) *Burton* v. *Henson and Kesbey*, 10 Mee. & W. 105 (1842).

(*k*) *Bosanquet* v. *Heath*, 9 W. R 35.

chapel-wardens, for the time being, of St. B., by their official designation only, to do the acts directed by the former monition (*m*).

SECT. 2.—*Who are exempted from being Churchwardens.*

Overseers.

The same person may hold the offices of churchwarden and overseer (*n*).

Peers.

All *peers* of the realm, by reason of their dignity, are exempted from the office of churchwarden (*o*).

Clergymen.

So are all *clergymen*, by reason of their order (*p*).

Members of parliament.

In like manner all *parliament men*, by reason of their privilege (*q*).

Attorneys.

If an *attorney* of the King's Bench be made a churchwarden of the parish, he shall have a writ of privilege out of the King's Bench, showing his privilege to be discharged thereof by reason of his attendance in the said court. In 14 Car. 1, Felix Wilson, being an attorney of the King's Bench, was made churchwarden of Hanwell, and he refused, and was sued in the spiritual court to take upon him the office, and a prohibition was granted. So in like manner, in 15 Car. 1, Mr. Barber being chosen churchwarden of Aldermanbury in London, such writ was granted (*r*).

Clerks of Queen's Bench.

In 21 Jac. 1, Stampe, clerk of the King's Bench, was chosen churchwarden of Kingston, and had a writ of privilege to the spiritual court, requiring them not to compel him to take the oath; which writ being disobeyed, he had a prohibition (*s*).

Apothecaries.

By 6 & 7 Will. & Mary, c. 4, ss. 1, 2, every person that shall use and exercise the art of an *apothecary* within the city of London and seven miles thereof, being free of the company of apothecaries, and who shall be duly examined of his skill in the said mystery, and shall be approved for the same, shall, for so long as he shall use and exercise the said art, and no longer, be freed and exempted from all parish offices; and if he shall be chosen and elected into any such office, or be disquieted or disturbed by reason thereof, he shall, on producing a testimonial under the common seal of the said corporation, of such his examination, approbation, and freedom, to the person by whom he shall be so elected or appointed, or by or before whom he

(*m*) *Liddell* v. *Beal*, 14 Moo. P. C. 1 (1860).
(*n*) 29 & 30 Vict. c. 113, s. 12.
(*o*) Gibs. 215.
(*p*) Ibid.
(*q*) Ibid.
(*r*) 2 Roll. Abr. 272.
(*s*) 1 Roll. Abr. 368.

shall be summoned, returned, or required to serve or hold any such office, be absolutely discharged from the same, and such nomination, election, return, and appointment shall be void and of none effect. And all persons that shall use and exercise the said art of an apothecary within any other part of the realm, and have been brought up and served in the said art as apprentices for seven years according to the statute of the 5 Eliz. c. 4, shall be freed and exempted from all such offices within the several places where they live, so long as they shall use and exercise the said art, and no longer; and if any person so qualified shall be elected or chosen into any such office, such nomination, election, return, and appointment shall be void, unless he shall voluntarily consent and agree to hold the same.

Medical practitioners.

By 21 & 22 Vict. c. 90 (the Medical Act), s. 35, every person registered under the act shall be exempt, if he so desire, from serving any corporate, parochial, or ward office.

Registrars of births, &c.

By 1 Vict. c. 22, s. 18, registrars of births and deaths or of marriages are exempt from every parochial and corporate office.

Dissenters.

By 1 Will. & Mary, c. 18, ss. 5, 8, commonly called the Act of Toleration, if any person *dissenting from the Church of England* shall be chosen or otherwise appointed to bear the office of churchwarden, or any other parochial office, and such person shall scruple to take upon him such office in regard of the oaths or any other matter or thing required by the law to be taken or done in respect of such office; he shall and may execute the same by a sufficient deputy by him to be provided, that shall comply with the laws in that behalf: provided, that the said deputy be allowed and approved by such persons and in such manner as such officer should by law have been allowed and approved. And every teacher or preacher in holy orders, or pretended holy orders, that is, a minister, preacher or teacher of a congregation, and duly qualified by the said act, shall be exempted from being chosen or appointed to bear the office of churchwarden, or any other parochial office (*t*).

Every Roman Catholic minister shall be exempted from the office of churchwarden, on taking the oath, and conforming to the regulations prescribed by 31 Geo. 3. c. 32, s. 8.

Militiamen.

No serjeant, drummer, or corporal of the militia, nor any private man, from the time of his enrolment until

(*t*) Extended by 52 Geo. 3, c. 155, s. 9.

his discharge, shall be liable to serve as a peace or parish officer, by 42 Geo. 3, c. 90, s. 174. No excise, or custom officer, by 7 & 8 Geo. 4, c. 53, s. 11, and 8 & 9 Vict. c. 85, s. 12. No alien born, or alien naturalized (*u*). "If the parish," says Lord Stowell, "had returned a papist, *Jew*, or a child of ten years of age, or a person convicted of felony, I conceive the ordinary would be bound to reject" (*x*). In *Adey* v. *Theobald* (*y*), the court refused to compel a Quaker to undertake the office. Deafness is no ground of exemption (*z*). When a person first elected churchwarden had, on the payment of a fine, been excused, a person elected in his place, at the same vestry meeting, is bound to serve, unless some exemption is shown (*a*).

Excisemen.

Other cases.

Non-residents.

No person *living out of the parish*, although he occupies lands within the parish, may be chosen churchwarden; because he cannot take notice of absences from church, nor disorders in it, for the due presenting of them (*b*).

But a person may be a parishioner without inhabiting a house, for he may occupy a farm (*c*). A partner in trade, lodging in another parish, is bound to serve in the parish wherein is his house of trade; and even a non-resident partner in a house of trade has been holden liable to serve the office of churchwarden (*d*).

SECT. 3.—*Choice of Churchwardens.*

Time.

By Can. 90 of 1603, churchwardens, questmen, sidesmen, and assistants shall be chosen in Easter week.

By whom.

And by Can. 89, "All churchwardens or questmen, in every parish, shall be chosen by the joint consent of the minister and the parishioners, if it may be; but if they cannot agree upon such a choice, then the minister shall choose one, and the parishioners another: and without such a joint or several choice, none shall take upon them to be churchwardens" (*e*).

(*u*) *Anthony* v. *Seger*, 1 Cons. 10.

(*x*) Ibid.

(*y*) 1 Curteis, 447; Court of Archdeaconry of London, Dr. Phillimore.

(*z*) *Cooper* v. *Allnutt*, 3 Phill. 165, Lord Stowell. In this case counsel moved the court to compel Allnutt to take upon himself the office of churchwarden, and the court directed him to take the oath before the proper ordinary.

(*a*) *Birnie* v. *Weller and Elliott*, 3 Hagg. 474.

(*b*) Gibs. 215.

(*c*) *Brook* v. *Owen*, 3 Phill. 517, in note.

(*d*) *Stephenson* v. *Langton*, 1 Consist. 379. See also *Rex* v. *Poynder*, 1 B. & C. 178; and *Att.-Gen.* v. *Foster*, 10 Ves. 333.

(*e*) As to the meaning of the term "parishioners," the cases of

The books of common law interpret this with a limitation; namely, if a custom has not been for the parishioners to choose both. In which case when two have been chosen by the parish, on pretence of custom, and one by the incumbent on the foot of this canon, and the ecclesiastical judge has refused to admit the swearing more than one of those who have been chosen by the parish, upon surmise of such custom, mandamuses have been frequently granted by the temporal courts to swear the person so elected by the parish: and also prohibitions have gone, in cases where the spiritual court has attempted to try or overrule the custom, or otherwise to do anything to the prejudice of that title. Upon which occasion it has been said, that churchwardens are lay incorporations and temporal officers; and that of common right every parish ought to choose their own churchwardens, which right is not to be overthrown but by proof of a contrary custom; and that although one is sworn, a writ may go to swear another in the same place, to the end both parties may be made capable to try the right (*f*).

For, by Coke, Chief Justice: "A convocation hath power to make constitutions for ecclesiastical things or persons, but they ought to be according to the law and custom of the realm: and they cannot make churchwardens that were eligible to be donative, without act of parliament. And the canon is to be intended, where the parson had nomination of a churchwarden before the making of the canon" (*g*).

How to be determined.

When two sets of churchwardens are sworn in, the right is to be settled in an action. A *quo warranto* will not be granted, as the office does not concern the rights or prerogatives of the crown (*h*). The right is now, however, most usually and conveniently tried by *mandamus* (*i*). The mode of election is first by show of hands, and then by polling (*j*).

It has been said that "the Ecclesiastical Court has no authority to determine the question of the validity of an election, and that the extent of discretion which it should exercise in swearing in or declining to swear in persons

Att.-Gen. v. *Parker*, 3 Atk. 577; 1 Ves. sen. 43; and *Faulkner* v. *Glyn*, 4 B. & C. 457; 6 D. & R. 524, should be consulted.

(*f*) Gibs. 215; Cro. Car. 551; 1 Keb. 517; 3 Burr. 1420; Noy, 31—139; 2 Roll. 234; Degge, p. 1, c. 12.

(*g*) Godol. 162.

(*h*) 2 Str. 1196; 4 T. R. 381; *Re Barlow*, 30 L. J., Q. B. 270 (1861).

(*i*) See *Re Barlow*, 30 L. J., Q. B. 270.

(*j*) *Anthony* v. *Seger*, 1 Consist. 10. *Vide infra*, Part VI., Chap. V.

How to be determined.

"alleged to be chosen churchwardens is difficult to be defined, and that it can be tried only by an action at law" (*k*). See however *Anthony* v. *Seger* (*l*), where the validity of the election was tried, and Chitty's Burn's Justice (*m*), where it is said, and supported by authorities, that the spiritual court may become the means of trying the validity of the election by a return of "not elected," or "not duly elected;" and the right may be tried by an action for a false return.

"The proper and regular mode is for the churchwardens to return two persons to succeed them: but this is not exclusive of other methods, and though customary, is not indispensably necessary, provided the court has satisfactory information of the election in any other way" (*n*).

In London.

To a question whether a churchwarden, in London, who had served one year as under-churchwarden, could be compelled to take the office of upper-churchwarden, the late Dr. Harris gave the following opinion:

Dr. Harris's opinion.

Churchwarden not to serve twice.

"The intent of the 89th canon seems to have been to hinder the continuance of any person in the office of churchwarden for more than a year, unless under particular circumstances; and if a majority in vestry should choose the same person a second time, without good reason, and a precedent for so doing, I have no doubt but that the officer so elected would be warranted for refusing to serve, and would be excused and dismissed if prosecuted in an ecclesiastical court before the ordinary.

"But the proviso in the above-mentioned canon (except perhaps they be chosen again in like manner) must, I think, be understood to authorize a second election in special cases, and on a justifiable account; and in the present instance, as the second election of Mr. Conach for a second year is according to the constant custom of the parish of St. Ethelburg (London), I apprehend that he would be obliged to take the oath, if cited for that purpose into the ecclesiastical court by the present churchwarden, who in strictness of law does not go out of office till the new elected one has been sworn.

"27th April, 1767. GEORGE HARRIS."

Decision of the Common Pleas to the same effect.

In accordance with this opinion was a decision of the Common Pleas in 1846.

From the year 1648 (the earliest period of which any records could be found), the parish of St. S. W., in the city of London, had been governed by a select vestry,

(*k*) Rep. of Eccles. Commis. 45 (1832).

(*l*) 1 Consist. 11.

(*m*) Vol. i. p. 688.

(*n*) *Anthony* v. *Seger*, 1 Consist. 10, Lord Stowell.

composed of the rector and churchwardens, and those inhabitants who had served the office of churchwarden, or paid a fine for not serving. Down to the year 1734 (except in two or three instances, and between 1667 and 1672, when the affairs of the parish were deranged by the Great Fire of London), the course had been for the select vestry annually to choose, from among the parishioners at large, one person to act as junior churchwarden, who at the end of the year succeeded to the office of senior churchwarden. From 1734 to 1775, no records of the parish could be found. And from 1775 to 1824, the same course had been pursued except only in four instances. The number of persons composing the vestry on these occasions varied, sometimes as many as sixteen being present, sometimes only three.

Upon a special case, leaving it to the court to draw such inferences from the facts as a jury would be warranted in drawing, it was decided that a repeated re-election of the same person to the office of senior churchwarden, without any necessity for so doing, was in violation of the custom, and, consequently, void (*o*).

Other cases.

In 7 Car. 1, a prohibition was granted against the churchwarden chosen by the parson of St. Magnus nigh London Bridge, by force of the canon; upon a surmise, that the parish has a custom to choose both churchwardens (*p*).

And, by Holt, Chief Justice: In London, generally, both the churchwardens are appointed by the parish (*q*).

In *Warner's case*, in 17 Jac. 1, Warner, one of the churchwardens of All-Hallows, in London, prayed a prohibition; for that whereas, by the custom of the said parish, the parishioners used every year to elect one of the parish, who had borne the office of scavenger, sidesman, or constable, to be churchwarden; and that every year one who had been so elected churchwarden, was to continue a year longer, and to be the upper-churchwarden, and another was to be chosen to him, who is called the under-churchwarden, that such a choice being made in that parish of the said Warner to be churchwarden, the parson notwithstanding that election nominated one Carter to be churchwarden, and procured him to be sworn in the Ecclesiastical Court, and denied the said Warner to be churchwarden according to the election of the parishioners; and this by colour of the late canon, that the parson should have the

(*o*) *Gibbs* v. *Flight*, 3 Mann. G. & S. 581 (1846).

(*p*) 2 Rolle's Abr. 287.

(*q*) Ld. Raym. 138.

In London.

election of one of the churchwardens; and this being against the custom, a prohibition was prayed, and a precedent shown in the common bench, in Easter term of 5 Jac. 1, for the parishioners of Walbrook, in London, where such a prohibition was granted; for it being a special custom, the canons cannot alter it, especially in London, where the parson and churchwardens are a corporation to purchase and demise their lands; and if every parson might have election of one churchwarden, without the assent of the parishioners, they might be much prejudiced thereby (*r*).

But although the greatest part of the parishes in London choose both the churchwardens by custom; yet in all the new erected parishes the canon takes place (unless the act of parliament, in virtue of which any church was erected, shall have specially provided that the parishioners shall choose both); inasmuch as no *custom* can be pleaded in such new parishes (*s*).

Customs out of London.

In *Catton* v. *Berwick*, in 5 Geo. 1, a judgment of the Court of Delegates; the custom was, for the parson to appoint one, and the two old churchwardens the other: but it went no further. In this case the two churchwardens could not agree, so the one presents Berwick, and the parishioners at large choose Catton. It was insisted for Berwick, that his case was like that of coparceners, where if they disagree, the ordinary may admit the presentee of which he will, except the eldest alone presents. On the other side it was said, that the cases widely differed; for in the case of a presentation the ordinary has a power to refuse, but he has not so in the case of churchwardens, for they are a corporation at common law, and more temporal than spiritual officers. And a case was cited to have been adjudged in the King's Bench, where, to a mandamus to swear in a churchwarden, the ordinary returned that he was a very unfit person; but a peremptory mandamus was granted, because the ordinary was not a judge in that case. And the court held, that by this disagreement the custom was laid out of the case; and then they must resort to the canon: under which, Catton being duly elected, they decreed for him, with sixty pounds costs (*t*).

(*r*) Cro. Jac. 532; Cro. Car. 515, 552.

(*s*) Gibs. 215.

(*t*) 1 Str. 145. In the printed Catalogues of Processes in the High Court of Delegates, No. 808, is the following notice of this case, which was appealed to that court from York. "In 1718, *Catton* v. *Berwick*: 'In 1ma inst negotium circa jus electionis, admissionis, et jurationis guardiani pro Capellâ de Burrowbridge pro ann. 1715.'"

The parish of Prestwich, in the county of Lancaster, formerly consisted of six several townships or hamlets, viz., Prestwich, Unsworth, Great and Little Heaton, Tonge-cum-Alkrington, Outwood, and Whitefield, each of which had its own churchwarden, and collected its own church rates, which afterwards formed a common fund for the parish. In 1848 Whitefield was, by order in council, created a separate rectory, and thenceforth ceased to form part of the parish of Prestwich, or to furnish a churchwarden, or to contribute any rates thereto.

The evidence of the custom as to the appointment of churchwardens was as follows:—In the township of Prestwich, the outgoing churchwarden, either orally or in writing, presented to the rector the names of two persons (one of whom might be himself), of whom the rector chose one to be churchwarden for the ensuing year; in each of the other hamlets or townships the selection of the persons submitted to the rector's choice was made at a meeting of the rate-payers of the hamlet or township. As to Prestwich, this course was not always strictly adhered to; the churchwarden for the time being was sometimes, when circumstances rendered it convenient, requested by the rector to continue in office for another year.

Upon a special case, in which it was agreed that the court should draw inferences of fact: It was holden, that the custom was valid and sufficiently proved, notwithstanding the occasional deviations; and that the severance of the hamlet of Whitefield from the rest of the parish of Prestwich, did not affect the validity of the ancient custom.

Declarations of a deceased rector were received as evidence of the custom.

In 1863, the rate-payers of the township of Prestwich claimed to be entitled to appoint a churchwarden, or to nominate two persons to be submitted to the rector for his choice; and at a meeting holden for that purpose the defendant was appointed churchwarden, and proceeded to collect a church-rate in the township of Prestwich. In an action by the five churchwardens appointed according to the above custom, to recover from him the money so levied:—It was decided, that the action was maintainable, although it appeared that some of the plaintiffs had omitted to make the declaration prescribed by 5 & 6 Will. 4, c. 62, s. 9—the court having power under the 19th section of the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), to give judgment for such of the plaintiffs as might be proved to be entitled.

Customs out of London.

And it seems that a churchwarden of the former year (who had made the required declaration) might, if necessary, have been substituted for the disqualified plaintiff (*u*).

In some places, the lord of the manor prescribes for the appointment of churchwardens: and this shall not be tried in the ecclesiastical court, although it be a prescription of what appertains to a spiritual thing (*v*).

Where no churchwardens are appointed.

In *Stutter* v. *Freston* (*x*), in 3 Geo. 1, a prohibition was granted to the spiritual court, where it was libelled against the defendant, for not appearing to take upon him the office of churchwarden, though thereunto *appointed by the ordinary*. And it was holden, that although the parishioners and parson neglect for ever so long to choose churchwardens, yet the ordinary has no jurisdiction; for churchwardens were a corporation at common law, and they are different from questmen, who were the creatures of the Reformation, and came in by the canon law. The canons say, that churchwardens shall be chosen by the parson and parishioners, and if they disagree, then one by the parson and the other by the parishioners; and otherwise they shall not be. By the court: The proper way is, to take a mandamus out of the King's Bench.

Mode of conducting elections.

A *quo warranto* does not lie (*y*). If there be a custom to conclude a poll for the election of churchwardens at a certain time, that being a reasonable time, the voters must tender their votes within it (*z*). The mode of conducting elections is considered in the next chapter.

Churchwarden ceasing to reside in parish.

It seems that a churchwarden who, during the continuance of his office, ceases to reside in the parish, does not *ipso facto* cease to be churchwarden, although it is a good ground for appointing another in his place (*a*).

Holding office, *primâ facie* proof of being churchwarden.

Proof that a party holds the office of churchwarden is *primâ facie* evidence of his having been lawfully appointed, even where the question turns on his title to the possession of land in his capacity of such churchwarden (*b*).

(*u*) *Bremner* v. *Hull*, L. R., 1 C. P. 748 (1866).

(*v*) Godol. 153.

(*x*) Str. 52.

(*y*) *Re Barlow*, 30 L. J., Q. B. 270 (1861).

(*z*) *Rex* v. *The Commissary of the Bishop of Winchester*, 7 East's Rep. 573.

(*a*) *Gamvill* v. *Utting*, 9 Jur. 1081 (1845).

(*b*) Ibid.

SECT. 4.—*Churchwardens refusing to act.*

Refusing to take oath.

Any person elected to be churchwarden, and refusing to take the oath according to law, may be excommunicated for such refusal; and no prohibition will lie (*c*).

Donative.

In *Castle* v. *Richardson* (*d*), in 3 Geo. 1, there was a libel in the ecclesiastical court, for not taking upon him the office of chapel-warden. The defendant pleads, that it is a donative; and thereupon moved for a prohibition. And upon debate, the same was denied; the whole court being of opinion, that though there was a difference as to the incumbent, yet as to the parish officers there was none; for they are the officers of the parish, and not of the patron of the donative.

Constitution of Boniface.

The constitution of Boniface is, "We do decree, that laymen, when inquiry shall be made by the prelates and judges ecclesiastical for correcting the sins and excesses of such as are within their jurisdiction, shall be compelled (if need be), by sentence of excommunication, to take an oath to speak the truth" (*e*).

Old law.

That ordinaries were empowered by the laws of the church, to require an oath of the *testes synodales*, appears, not only from this constitution, but also from the body of the canon law. And the same practice of administering an oath appears in the ecclesiastical records of our own church; where it is often entered, that the presenters were charged upon their consciences, to discover whatever they knew to want amendment in things and persons; and in process of time, articles of inquiry were delivered to them, upon which to ground their presentments (*f*).

Contentions as to form of oath.

But as contests grew between the two jurisdictions, ecclesiastical and temporal, this was charged upon the ordinaries and other ecclesiastical judges as an incroachment, that they inserted divers things in their articles of visitation, which were not of spiritual cognizance; and that by requiring an oath from the churchwardens to present according to those articles, they did in consequence require them to take an oath, which by law they could not and ought not to perform. Upon this foundation, prohibitions were applied for and obtained, for removing those matters from the spiritual to the temporal courts. Until at length, the contests of this kind multiplying, and caus-

(*c*) Gibs. 216.

(*d*) Str. 715. See the instances cited where the ordinary has compelled churchwardens to take upon them the office. *Cooper* v. *Allnutt*, 3 Phill. 165; *Anthony* v. *Seger*, 1 Consist. 10; *Adey* v. *Theobald*, 1 Curteis, 447.

(*e*) Boniface, Lind. 109.

(*f*) Gibs. 960.

ing great and frequent troubles, both to the spiritual and temporal courts; an oath of a more general form was agreed on by the civilians and common lawyers, by which the churchwardens bound themselves, instead of presenting such things as were contained in the book of articles, to present such things as to their knowledge were presentable by the laws ecclesiastical of this realm (*g*).

Which oath of the churchwardens was this:

Churchwarden's oath or declaration.

"*You shall swear, truly and faithfully to execute the office of a churchwarden within your parish, and according to the best of your skill and knowledge present such things and persons, as to your knowledge are presentable by the laws ecclesiastical of this realm: So help you God, and the contents of this book*" (*h*).

Sidesman's oath or declaration.

And the sidesman's oath, agreed upon in like manner by the civilians and common lawyers, was as follows:

"*You shall swear, that you will be assistant to the churchwardens, in the execution of their office, so far as by law you are bound: So help you God*" (*i*).

Oath confirmed.

The old oath of the churchwardens being thus modelled, was allowed and confirmed two several times in the Court of King's Bench; once in the 25th, and again in the 29th of King Charles II.: before both which judgments, it had been expressly declared in the same court, that though some things might be inserted in the articles of visitation, which were not properly of ecclesiastical cognizance; yet if the oath was conceived and tendered in those general terms, the churchwardens could not legally refuse it: inasmuch as the articles were offered only by way of direction and charge; and by the tenor of the oath, the ecclesiastical laws, and not the articles, were now become the legal rule and measure of their duty (*k*).

Declaration substituted.

And now by 5 & 6 Will. 4, c. 62, s. 9, a declaration is substituted for the oath, and no sidesman shall be compelled to take any oath on quitting office.

SECT. 5—*Refusing to admit Churchwardens.*

If the party elected offer himself and the ecclesiastical judge refuse to tender the oath to him; a mandamus from the temporal court will be granted (*l*).

Rex v. *Martin Rice.*

In *Rex* v. *Martin Rice* (*m*), in 8 & 9 Will. 3, a mandamus was directed to the Archdeacon of St. Asaph, to swear

(*g*) Gibs. 960.
(*h*) Gibs. 216.
(*i*) Ibid.
(*k*) Gibs. 961; 3 Keb. 206; Ventr. 127.
(*l*) Gibs. 216.
(*m*) 1 Lord Raym. 138.

and admit a person duly elected by the parish, according to the custom, to be churchwarden. To which it was returned, that he was a person unfit, being a poor dairyman, and the like. And the question was, whether the archdeacon can refuse to swear and admit the churchwarden so elected, for any cause whatsoever. And it was resolved, that he has no such power: for the churchwarden is an officer of the parish; and his misbehaviour will prejudice them, and not the archdeacon; for he has not only the custody, but also the property, of the goods belonging to the church, and may maintain actions for them; and for that reason it is an office merely temporal, and the archdeacon is only a ministerial officer. And therefore a peremptory mandamus was granted.

Which same case, as it seems, is reported by Salkeld under the name of *Morgan* v. *Archdeacon of Cardigan* (*n*), as follows: Mandamus to the archdeacon, to swear a churchwarden, being duly elected. The archdeacon made this return, that he was a poor dairyman, and a servant, and unable and unfit to execute the office. And thereupon a peremptory mandamus was awarded: for the churchwarden is a temporal officer; he has the property and custody of the parish goods; and as it is at the peril of the parishioners, so they may choose and trust whom they think fit; and the archdeacon has no power to elect, or control their election.

Rex v. *Simpson.*

In *Rex* v. *Simpson* (*o*), in 11 Geo. 1, a mandamus to the Archdeacon of Colchester, to swear Rodney Fane into the office of churchwarden; he returns, that before the coming of the writ, he received an inhibition from the Bishop of London, with a signification that he had taken upon himself to act in the premises. But by the court: The return is ill. It does not appear, that the town of Colchester is within the diocese of the bishop who inhibits; besides, the archdeacon is but a ministerial officer, and is obliged to do the act, whether it be of any validity or not. And a peremptory mandamus was granted.

Rex v. *White.*

In *Rex* v. *White* (*p*), in the same year, to a mandamus directed to the archdeacon to swear a churchwarden, he returned, that he was not elected. Upon opening which Mr. Justice Fortescue said, that it was settled, and had been often ruled, that the archdeacon could not judge of the election; and therefore this return was ill, whereupon a peremptory mandamus was granted. But note (says Lord Raymond) it was certainly wrong; for the return was

(*n*) 1 Salk. 166.
(*o*) 1 Str. 610.
(*p*) 2 Lord Raym. 1379.

a good return, and has often been made to such mandamus, and actions brought upon the return and tried.

Rex v. Harwood.

In *Rex* v. *Harwood* (*q*), in the same year, to a mandamus directed to the defendant, Dr. Harwood, as commissary of the dean and chapter of St. Paul's, commanding him to swear William Folbigg, one of the churchwardens of the parish of St. Giles, Cripplegate, London; the defendant returned, that he was not elected. And it was insisted on the behalf of Folbigg, that the return was ill; that the archdeacon, who was only to obey the writ, could not judge of the election: and therefore upon such a return to such a writ, a peremptory mandamus was granted last Michaelmas term, in the case of *Rex* v. *White*. That the archdeacon could not judge of the *qualities* of a person chosen by the parish, was cited *Rex* v. *Martin Rice*. But Raymond, Chief Justice, and Reynolds, Justice, held the return to be good. But upon the importunity of the counsel for Folbigg, and pressing the authority of that case of *Rex* v. *White*, and no counsel for the defendant appearing, a rule was made for a peremptory mandamus unless cause showed. And at another day, the counsel for the defendant coming to show cause against the rule, it was discharged. But the court not being unanimous, it was ordered to come on again in the paper. But Lord Raymond (who reports this case) says, he never heard that it was stirred again. But there can be no doubt (he says) but such return is good.

Reg. v. Twitty.

And the proper distinction, as to this point, seems to be taken in the case of *Reg.* v. *Twitty*, in 1 Anne (*r*). Mandamus to swear a churchwarden, suggesting that he was *duly elected*. The return was, that he was *not duly elected*. It was objected, that this was not a good return. But by Holt, Chief Justice: Where the writ is, to swear one *duly elected*, there a return that he was *not duly elected*, is a good return, for it is an answer to the writ; but where it is to swear one *chosen* churchwarden, there a return that he is not *duly* chosen is naught, because it is out of the writ and evasive.

Hubbard v. Penrice.

In *Hubbard* v. *Sir Henry Penrice* (*s*), in 19 Geo. 2, to a mandamus to swear the plaintiff churchwarden of Heston in Middlesex, the defendant returned, that he was not duly elected. And in the course of the trial, the question was, where the common right of choosing churchwardens rests. The plaintiff insisted, it was in the parishioners at large

(*q*) 2 Lord Raym. 1405.
(*r*) 2 Salk. 433.
(*s*) Str. 1246.

as to both the churchwardens, and would therefore have left it upon the defendant, to show a custom or right in the parson to name one. The defendant, on the contrary, insisted, that of common right it was in the parson and parishioners, and therefore it lay upon the plaintiff to prove a custom in the parishioners to choose both. And of this opinion was Lee, Chief Justice, and that though there are some dictums to the contrary, yet they had never been regarded. The plaintiff therefore went on to prove a custom to choose both by the parishioners, but failed in it; it appearing, that though the parson had generally left it to the parishioners, yet he had sometimes interfered. Lee, Chief Justice, likewise held, that a curate stood in the place of the parson, for the purpose of nominating one churchwarden.

Curate's authority.

In *Rex* v. *Harris* (*t*), in 3 Geo. 3, a mandamus was directed to Dr. Harris, commissary of the consistorial and episcopal court of the Bishop of Winchester for the parts of Surrey, to admit and swear Henry Griffith and Thomas Garner, churchwardens of the parish of St. Olave, Southwark. And a like mandamus was also directed to him to admit and swear another set of churchwardens into the same office. Dr. Harris returns, that a cause was depending before him, in which it was disputed, which of the two sets of churchwardens had been duly elected; and till that is determined, he cannot admit either one set or the other. By Lord Mansfield and the court: The return is bad; the commissary cannot try the right. He ought to obey both writs, and it is of no prejudice to either party. It was proposed by the court, and consented to by the parties, to try the right on a feigned issue; and the execution of the peremptory mandamus to be suspended till after the trial, and then the peremptory mandamus to go to swear in those that shall prevail upon the trial.

Rex v. *Harris*.

But hear Lord Stowell (*u*). "It has been said there would be ground for a mandamus, but inaccurately; *for offices the most ministerial leave a discretion not to join in an illegal act*; and if a parish had returned a Papist, or a Jew, or a child of ten years of age, or a person convicted of felony, I conceive the ordinary would be bound to reject; and though it is the duty of the ordinary not to take slight exceptions, *he is bound, I conceive, to take care that an election, in his opinion void in itself, should have no legal*

Lord Stowell's opinion.

(*t*) 3 Bur. 1420; 1 W. Black. 430.

(*u*) *Anthony* v. *Seger*. 1 Consist. 10.

effect, and this is a duty which he owes to the parish and the general law of the country."

Rex v. Williams.

The following case of *Rex* v. *Williams*, in 1828 (*x*), contains one of the latest decisions as to the proper return to a mandamus.

To a mandamus to admit A. B. into the office of churchwarden, reciting that he had been duly elected, a return that A. B. was not duly elected, is good.

"Mandamus to the defendant as official and commissary of the parish of Hornchurch and liberty of Havering-atte-Bower in the county of Essex, to swear and admit into the office of churchwarden James Meakins. The mandamus recited, that he had been duly nominated, elected, and chosen into the place and office of churchwarden of the said parish. The defendant having returned, that Meakins was not duly elected into the place and office of churchwarden: the case now came on for argument in the crown paper.

"Brodrick.—The return is insufficient. The commissary had no right to exercise any judgment on the subject. He was a ministerial officer, and was bound to swear in the churchwarden, *Rex* v. *Martin Rice* (*y*), *Rex* v. *Simpson* (*z*). In *Rex* v. *White* (*a*), to a mandamus to swear in a churchwarden, a return that he was not elected, was held bad, on the ground that the archdeacon could not judge of the election. *Rex* v. *Harris* (*b*) is an authority to the same effect. These authorities show that a return denying the election is bad. Here the return is that Meakins was not *duly* elected. The commissary, therefore, exercised his judgment, not only as to the fact of the election, but as to the validity of it. *Hereford's case* and *Cripp's case* (*c*) show that such a return is bad.

"Erle, *contra*, was stopped by the court.

"Bayley, J.—At the end of the report of *Rex* v. *White* (*d*), Lord Raymond adds a note, 'It was certainly wrong; for the return was a good return, and has been often made to such mandamuses, and actions brought upon the return and tried:' and he refers to *Rex* v. *Harwood* (*e*). There the mandamus was directed to the defendant, a commissary, commanding him to swear in a churchwarden, and he returned *non fuit electus;* and it was insisted that the return was ill, that the archdeacon, who was only to obey the writ, could not judge of the election or of the qualities of a person chosen by the parish. But Raymond, C. J., and Reynolds, J., took the return to be good. But, being

(*x*) 8 B. & C. 681—687; 3 Man. & Ry. 403.
(*y*) 1 Lord Raym. 138.
(*z*) Str. 610.
(*a*) 2 Lord Raym. 1379.
(*b*) 3 Burr. 1420.
(*c*) 1 Sid. 209.
(*d*) 2 Lord Raym. 1379.
(*e*) Ibid. 1405.

"pressed with the authority of *Rex* v. *White*, and no counsel for the defendant appearing, a rule nisi was made for a peremptory mandamus. Cause was afterwards shown; but the court not being unanimous, it was ordered to come on again in the paper. Lord Raymond says, 'I never heard it stirred again. There can be no doubt that it was a good return.' In *Rex* v. *Ward* (*f*), it was said in argument to have been decided in *Rex* v. *Harwood*, that *non fuit electus* was a good return. In *Reg.* v. *Twitty* (*g*), there was a mandamus to swear a churchwarden, suggesting *that he was duly elected.* The return was, that he was not duly elected. It was objected, that it was not a good return. Holt, C. J., says, 'Where the writ is to swear one duly elected, there a return that he was not duly elected is a good return, for it is an answer to the writ; but where it is to swear one *chosen* churchwarden, there a return that he is not *duly chosen* is naught, because it is out of the writ, and evasive.' These authorities show that the return in the present case is good.

"Littledale, J.—The commissary has a right to say by the return, that he is not bound to do the thing which he is required to do by the mandamus. Here he does say so, by showing that the party was not duly elected.

"Parke, J.—The commissary may deny any material allegation in the writ. He cannot exercise any judicial authority, but he may inquire whether the party has been duly elected, otherwise he would be bound to admit any person who presents himself for admission, even if he knew the fact to be that such person was never elected. The party who obtains the mandamus states the foundation of his right in the writ. The commissary may deny it. In this case he has done it, by showing that the party who seeks to be admitted was not duly elected. The return, therefore, is sufficient, and the judgment must be for the defendant. Judgment for the defendant" (*h*).

Where improper election.

Where there is a *primâ facie* case of an improper election, the Court of Queen's Bench will award a mandamus to elect a churchwarden (*i*); but apparently not now without a previous rule to show cause (*k*).

(*f*) Strang. 894.

(*g*) 2 Salk. 433.

(*h*) "A return is good if it pursues the suggestion of the writ. *Rex* v. *Penrice*, Strange, 1235; *Rex* v. *Hill*, 1 Shower, 253."

(*i*) *Rex* v. *Rector of Birmingham*, 7 Adol. & Ell. 254.

(*k*) *Reg.* v. *Stephens* (T. T. 1870), cited in Prideaux's Churchwardens' Guide (ed. 1871), prefatory advertisement.

SECT. 6.—*Official Acts of Churchwardens.*

Churchwardens a corporation.

The churchwardens are so far incorporated by law, as to sue for the goods of the church, and to bring an action of trespass for them: and also to purchase goods for the use of the parish: but they are not a corporation in such sort as to purchase lands, or to take by grant; except in London, where they are a corporation for those purposes also (*l*). But by 9 Geo. 1, c. 7, the churchwardens, with consent of the major part of the parishioners or inhabitants in vestry, may purchase houses to lodge and employ the poor in. A lease of parish land granted by the churchwardens alone is invalid (*m*).

And therefore, if any one give land to the parish, for the use of the church, it must not be to the churchwardens and their successors, but it should be to feoffees in trust to the use intended; which must from time to time be renewed, as the trustees die away (*n*).

And although the churchwardens may have their action for the goods of the parish, yet they cannot dispose of them without the consent of the parish; and a gift of such goods by them, without the consent of the sidesmen or vestry, is void (*o*).

And Prideaux thinks the ordinary's licence is necessary (*p*). In *Jackson* v. *Adams* (*q*), it was holden that the property of the bellropes of a parish church was in the churchwardens.

Contracts by churchwardens.

It has been laid down as a general rule that an agreement by parish officers in the course of their official duties, which is beneficial to the parish, is binding on it and succeeding churchwardens (*r*). A churchwarden has no authority to pledge the credit of his co-churchwarden for the repairs of the church. If he orders such repairs, without the knowledge of the other churchwarden, he will be liable individually (*s*).

Crown lands.

By 1 & 2 Will. 4, c. 59, they may, with consent of the treasury, inclose crown lands not exceeding fifty acres. They cannot make a lease of lands given to feoffees for parishioners (*t*).

(*l*) Gibs. 215; Bac. Abr. Churchwardens (B.); Cro. Ja. 532.

(*m*) *Phillips* v. *Pearce*, 5 B. & C. 433; 8 D. & Ry. 43.

(*n*) Gibs. 215; Mar. 2, 67.

(*o*) Wats. c. 39; 1 Roll. Abr. 393.

(*p*) See Direct. 178.

(*q*) 2 Bing. N. S. 402.

(*r*) 2 P. Wms. 266; 1 Powell on Contr. 114.

(*s*) *Northwaite* v. *Bennett*, 2 C. & M. 316.

(*t*) 12 Hen. 7, 29 a; 13 Hen. 7, 29 a.

Leases by churchwardens.

By 59 Geo. 3, c. 12, s. 17, "all buildings, lands and hereditaments, which shall be purchased, hired, or taken on lease by the churchwardens and overseers of the poor of any parish, by the authority and for any of the purposes of this act, shall be conveyed, &c. to the churchwardens and overseers of the poor of every such parish respectively and their successors, in trust for the parish; and such churchwardens, &c. shall and may, and they are hereby empowered to accept, take and hold, in the nature of a body corporate, for and on behalf of the parish, all such buildings, &c., *and also all other buildings, &c. belonging to such parish*" (*u*).

Churchwardens alone, or overseers alone, have no power as a body corporate under that act to make leases, &c. of such lands (*v*). Where a lease had been granted by churchwardens before the act, the acceptance of rent by the parish officers, after the passing of the act, was holden not to set up the lease, because that was void, but to create a tenancy from year to year (*x*). A covenant in a lease of lands by the churchwardens and overseers of a township, that the lessee might take manure, &c. from the poorhouse, to be used on the land, the lessee covenanting to provide straw, to be used in the poorhouse, has been holden not to bind succeeding overseers (*y*). It seems that churchwardens and overseers, having no corporate seal, cannot appoint an attorney (*z*).

Cannot appoint attorney.

One churchwarden cannot release.

The release of one churchwarden is in no case a bar to the action of the other; for what they have is to the use of the parish.

In *Starkey* v. *Berton* (*a*), in 7 Jac. 1, the case was, two churchwardens sue in the spiritual court, for a levy towards the reparation of their church, and had a sentence to recover, and costs assessed; the one releases, and the other sues for the costs, and there this release was pleaded, and disallowed. Whereupon he prays a prohibition; and all this matter was disclosed in the prohibition; and the

(*u*) See as to the last words, *Doe* d. *Jackson* v. *Hiley*, 5 M. & Ry. 706; *Doe* d. *Higgs* v. *Terry*, 5 N. & M. 556; *Doe* v. *Cockell*, 6 ibid. 179; *Ex parte Annesley*, 2 You. & C. 350; *Alderman* v. *Neate*, 4 Mee. & W. 704; *Allason* v. *Stark*, 1 Per. & D. 183.

(*v*) *Woodcock* v. *Gibson*, 6 D. & R. 524; *Phillips* v. *Pearce*, 8 ibid. 43; and see Co. Litt. 3 a.

(*x*) *Doe* d. *Higgs* v. *Terry*, 5 N. & M. 556.

(*y*) *Snowden* v. *Emsley*, 3 Stark. 28.

(*z*) *Ex parte Annesley*, 2 You. & C. 350; *Doe* d. *Higgs* v. *Terry*, 4 Ad. & Ell. 274; *Doe* d. *Hobbs* v. *Cockell*, ibid. 478; *Rex* v. *Churchwardens of St. Michael, Pembroke*, 1 Nev. & Per. 69; *Rex* v. *St. Saviour's, Southwark*, ibid. 496; *Rex* v. *Brighton Churchwardens*, ibid. 774; *Wrench* v. *Lord*, 4 Scott, 381, for the power of churchwardens as a corporate body.

(*a*) Cro. Jac. 234.

One church-warden cannot release.

defendant thereupon demurred in law. And now it was moved, that this release by the one, being in the personalty, should discharge the entire. But it was resolved by all the court to the contrary: for churchwardens have nothing but to the use of their parish, and therefore the corporation consists in the churchwardens; and the one solely cannot release nor give away the goods of the church; and the costs are in the same nature, which the one without the other cannot discharge. And of that opinion was all the Court of King's Bench. Wherefore it was adjudged for the defendant.

Upon the like foundation, where an obligation is made to them and their successors, and they die, their executors shall have action, and not their successors (*b*).

Taking possession of lands.

Where lands are vested in churchwardens and overseers of a parish as a *quasi* corporation, under 59 Geo. 3, c. 12, s. 17, and the interests of the parish require possession of land to be taken, or similar acts done, any one of the churchwardens or overseers may do it without the concurrence of the rest (*c*).

Presentments.

The persons who are to make presentments are now chiefly the churchwardens; which is not according to the rule of the ancient canon law, nor according to the practice of the Church of England before the Reformation; churchwardens being, by their original office, only to take care of the goods, repairs, and ornaments of the church; for which purposes, and no other, they have been reputed a body corporate for many hundred years; but the business of presenting was devolved upon them by canons and constitutions of a more modern date (*d*).

The ancient method was, not only for the clergy, but the body of the people within such a district, to appear at synods, or (as we now call them) general visitations; (for what we now call visitations were really the annual synods, the laws of the church by *visitations* always meaning visitations parochial;) and the way was, to select a certain number, at the discretion of the ordinary, to give information upon oath concerning the manners of the people within the district; which persons, the rule of the canon law upon this head supposes to have been selected, while the synod was sitting: but afterwards, when the body of the people began to be excused from attendance, it was directed in the citation, that four, six, or eight, according to the proportion of the district, should appear together with the clergy, to represent the rest, and to be the *testes*

(*b*) Vin. tit. Churchwardens (D).

(*c*) *Ganvill* v. *Utting*, 9 Jur. 1031 (1845).

(*d*) Gibs. on Visitat. 59.

synodales, as the canon law elsewhere styles them. But all this while, we find nothing of churchwardens presenting, till a little before the Reformation; when we find the churchwardens began to present, either by themselves, or with two, three, or more, credible parishioners joined with them: and this (as was before observed) seems evidently to be the origin of that office which our canons call the office of sidesmen or assistants (*e*).

A nuisance in the churchyard is of ecclesiastical conusance.

As the churchwardens may present, so also they may libel, in the spiritual courts. In 2 W. & M., Newton, one of the churchwardens of St. Botolph's, London, libelled against Quiltes for stopping the church door and windows by sheds, &c., built, as he supposed, upon part of the churchyard. Upon which a prohibition was prayed, and the suggestion was, that they were not built upon any part of the churchyard, but upon a lay fee. But the court agreed, that no prohibition should be granted to any suit in the spiritual court, for any nuisance or other matter done in the churchyard, upon a suggestion that the churchyard is a lay fee; for a nuisance there is properly of ecclesiastical conusance (*f*).

They may present as often as they please, but shall not be obliged to do so more than twice, except at the bishop's visitation (*g*). The minister may present when the churchwardens neglect, but such presentments ought to be upon oath (*h*).

How long they shall continue in office.

By Can. 89 of 1603, the churchwardens or questmen shall not continue any longer than one year in that office; except perhaps they be chosen again in like manner.

For although, in some places, there is but one new churchwarden yearly elected (he who was junior churchwarden before being continued of course); yet in that case the books of common law, as well as the canon, suppose a new election to be made of both (*i*).

But by Can. 118, the office of all churchwardens and sidesmen shall be reputed to continue until the new churchwardens that shall succeed them be sworn.

And it has been holden, that a churchwarden remains in office, and is liable for the non-performance of the duties thereof, until his successor has made and subscribed the declaration required by 5 & 6 Will. 4, c. 62, s. 9 (*k*).

(*e*) Gibs. on Visitat. 59, 60, 61. *Vide supra*, Part IV., Chap. IX., Sect. 3.

(*f*) Carth. 151. *Sed vide supra*, p. 1784.

(*g*) Can. 116, 117 of 1603.

(*h*) Can. 113; *Grove* v. *Elliott*, 2 Vent. 42.

(*i*) Gibs. 215; Cro. Jac. 532; Nov, 31. *Vide supra*, pp. 1844, 1845.

(*k*) *Bray* v. *Somer*, 8 Jur., N.S. 716 (1861).

How long they shall continue in office.

And although a parish prescribe to choose two churchwardens, and that the person so chosen shall continue in that office for two years: yet there is considerable authority for saying that the parish may, notwithstanding the prescription, remove such churchwardens at their pleasure, and choose new ones: for, as it is said, the parish might suffer great loss, if the churchwardens should continue so long in their office contrary to their will; for in that time they might waste all the parish goods belonging to the church (*l*).

SECT. 7.—*Accounts of Churchwardens.*

By Canon.

By Can. 89 of 1603, "All churchwardens at the end of their year, or within a month after at the most, shall, before the minister and the parishioners, give up a just account of such money as they have received, and also what particularly they have bestowed in reparations and otherwise for the use of the church. And last of all, going out of their office, they shall truly deliver up to the parishioners whatsoever money or other things of right belonging to the church or parish, which remaineth in their hands; that it may be delivered over by them to the next churchwardens, by bill indented."

A just Account.]—If the custom of the parish is, for a certain number of persons to have the government thereof, and the account is given up to them; the custom is good in law, and the account given to them is a good account (*m*).

By Bill indented.]—Lindwood, speaking of the inventory of the goods of the church, to be delivered in writing to the archdeacon, says, "It were good that these writings should be indented, so that one part might remain with the archdeacon, and the other with the parishioners:" from whence this branch of the present canon seems to have been taken (*n*).

In *Styrrop* v. *Stoakes* (*o*), in 3 Will. & M., it was holden, that if money be disbursed by churchwardens for repairing the church, or any thing else merely ecclesiastical, the spiritual courts shall allow their accounts: but if there be any thing else that is an agreement between the parishioners, the succeeding churchwardens may have an action of account at law, and the spiritual court in such case has not jurisdiction.

(*l*) Wats. c. 39; 13 Co. 70.
(*m*) Gibs. 216.
(*n*) Ibid.; Lind. 50.
(*o*) 12 Mod.

If a churchwarden in any case is maliciously sued in the spiritual court for not making up his account, and is excommunicated, when in fact it has been duly made; he may have a prohibition: and also an action upon the case will lie (*p*).

Account, when settled, final.

In *Snowden* v. *Herring* (*q*), in 4 Geo. 2, it was said, that where churchwardens have passed their accounts at a vestry, the spiritual court shall not afterwards proceed against them to account upon oath.

In *Wainwright* v. *Bagshaw* (*r*), in 7 Geo. 2, the churchwardens were cited into the Court of Lichfield to account: they pleaded, that they had accounted at the vestry, according to law; which was rejected; and a prohibition was granted. For the ordinary is not to take the account; he can only give a judgment that they do account; and to what purpose should they be sent back to those, who have taken their account already?

In *Adams* v. *Rush* (*s*), in 13 Geo. 2, the court said: "The spiritual court has no jurisdiction to settle the churchwardens' accounts." And a prohibition was granted, after sentence, allowing the accounts, and an appeal to the Arches.

Power of the spiritual court as to their accounts.

The spiritual court may compel the churchwardens to deliver in their account, but cannot decide on the propriety of the charges. Therefore if they take any step after the accounts are delivered in, it is an excess of jurisdiction for which a prohibition will be granted, even after sentence (*t*).

And if the churchwardens have laid out the parish money imprudently and improvidently, yet if it be truly and honestly laid out, they must be reimbursed again; and the parishioners can have no remedy herein, unless some fraud or deceit be proved against them; because the parish have made them their trustees. But if they be going on in an expensive way, the parishioners may complain to the ordinary, in order to give a check to them, or to procure (Dr. Gibson says) a removal of them from their office (*u*).

There is no general right in parishioners to inspect the churchwardens' books. Therefore the Court of Queen's Bench has refused an application for a mandamus to church-

Inspection of churchwardens books.

(*p*) Gibs. 216; Bunb. 247.
(*q*) Bunb. 289.
(*r*) 2 Stra. 974.
(*s*) Ibid. 1133.
(*t*) *Leman* v. *Goulty*, 3 T. R. 3.
(*u*) Gibs. 196; see, on the subject of inspection, also *Rex* v. *Clear*, 4 B. & C. 899; 7 D. & Ry. 393; *Rex* v. *Clapham*, 1 Wils. 505; *Rex* v. *Bletshow*, 1 Bott. 300; *Astle* v. *Thomas*, 2 B. & C. 271; 3 D. & R. 492; *Addison* v. *Round*, 4 Adol. & Ell. 799; 6 Nev. & M. 422.

wardens to allow an inspection, where the affidavit, without showing any special ground, stated that the request for inspection had been made to the churchwardens *bonâ fide*, and for the purpose of enabling the applicant and other ratepayers to take part in the proceedings of the vestry (*x*).

SECT. 8.—*Actions by Churchwardens.*

Cannot bring actions after their office is expired.

In *Dent* v. *Prudence* and *Bond* (*y*), in 3 Geo. 2, before the Court of Delegates, it was adjudged that the churchwardens, Prudence and Bond, could not cite the defendant Dent into the spiritual court, for nonpayment of his church rate, after their year was expired; for they can only sue in their politic capacity, and cannot institute any suit after that capacity is gone. It was agreed, that if the suit had been begun within their year, they might have proceeded in it after their year was out, this being of necessity to prevent people from delays in order to wear out the year; but in regard this suit was not commenced till the year was out, and no precedents were shown to warrant this suit, the defendant Dent was dismissed. But if the action be commenced within the year, they may proceed in it after the year (*z*).

But their successors must do it.

If the churchwardens for the time being neglect to bring an action for any of the goods of the church taken away, their successors may bring trespass for them in respect of their office; but then the new churchwardens must say to the damage *of the parishioners* and not *of themselves*, though the old churchwardens, in whose time the goods were taken away, might say either (*a*).

And if any of the goods of the church are detained, or not delivered by the predecessor, the successor has an action against him also (*b*).

Churchwardens *de facto*.

It is said that churchwardens *de facto*, although the validity of their election be doubtful, may bring an action against former churchwardens for money received to the use of the parish (*c*). But churchwardens are not answerable for indiscretion, but for deceit only, if they lay out more money than is needful (*d*). An indictment lies against them for extortion and corruption in their office (*e*).

(*x*) *Reg.* v. *The Churchwardens of Daventry*, 5 Jur., N. S. 940 (1859).

(*y*) 2 Stra. 852; 1 Bac. Abr. 376.

(*z*) 2 P. W. 126; 2 Stra. 852.

(*a*) Wats. c. 39; Cro. Eliz. 145, 179.

(*b*) Gibs. 216.

(*c*) 2 H. Bla. 559.

(*d*) 1 Wood's Inst. 6, 1, c. 7.

(*e*) *Rex* v. *Eyres*, 1 Sid. 307.

Yet they may be relieved in equity.

In *Nicholson* v. *Masters* (*f*), in 13 Anne, on a bill in chancery against ninety parishioners, by the executrix of one of the churchwardens of Woodford, to be reimbursed money laid out by the testator as churchwarden, for rebuilding the steeple of the church, it was objected that this matter was proper for the ecclesiastical court, and not for this court. But by Harcourt, Chancellor, the plaintiff is proper for relief in this court, and there are many precedents of the like nature. And it was decreed, that the parishioners should reimburse the plaintiff the money laid out by her testator, with costs of this suit; and that the money should be raised by a parish rate.

In the case of *Radnor Parish* in Wales, in 1718 (*g*), the churchwardens, as being a corporation for the goods of the parish, commenced a suit with the consent and by order of the parish, concerning a charity for the poor; in which suit they miscarried. And then they brought a bill against the subsequent churchwardens, to be repaid the costs by them expended, and had a decree for it. It was proved that from time to time the parish was made acquainted with what they did; and though there was no vestry by prescription, yet a vestry book, kept for the parish acts, was allowed as evidence of their consent. The Master of the Rolls said, they are the trustees of the parish, and the parishioners ought to contribute, and not lay the burthen upon these poor people the churchwardens. And the annual successive churchwardens need not to be made parties, as they are renewed.

But it is said the spiritual court had no power to order a rate to reimburse the preceding churchwardens; and a prohibition was granted after sentence, in *Dawson* v. *Wilkinson*, in 10 & 11 Geo. 2 (*h*), because upon the face of the order it appeared the ecclesiastical court had no jurisdiction: and by the whole Court of King's Bench unanimously, there cannot be a rate made to reimburse the churchwardens, because they are not obliged to lay any money out of their own pockets.

In *French* v. *Dear* (*i*), on a bill by a former churchwarden against the parish officers, trustees of an estate for the poor of the parish, and forty inhabitants, to be reimbursed money laid out on account of the trust under an

(*f*) Vin. tit. Churchwardens (C). See also *Marriott* v. *Tarpley*, 2 Jur. 464; and *Rex* v. *Churchwardens of St. Michael, Pembroke*, 5 Ad. & Ell. 603.

(*g*) Vin. Abr. tit. Churchwardens (C).

(*h*) Cases temp. Hardw. 381.

(*i*) 5 Ves. 547; 5 Madd. 4; 2 Vern. 262.

order of vestry, his accounts being passed, and an order made for payment, the lord chancellor expressed a strong opinion against such a bill, but it was dismissed on the ground of informality.

One cannot sue.

It has been finally settled that one churchwarden alone cannot sue in the ecclesiastical court (*k*).

Cannot sue for chose in action.

It is said that churchwardens and overseers cannot sue at law for a legacy or a thing never in their possession (*l*). And if they sue under 59 Geo. 3, c. 12, they must describe themselves as churchwardens in the action (*m*).

SECT. 9.—*Proceedings against Churchwardens* (*n*).

Their protection by law in due execution of office.

If an action be brought against any churchwardens or persons called sworn men, executing the office of churchwarden, for any thing done by virtue of their office, they may plead the general issue, and give the special matter in evidence; and if a verdict is given for them, or the plaintiff shall be nonsuit, or discontinue, they shall have double costs (*o*).

In *Kercherel* v. *Smith* (*p*), in 8 Car. 1, an action upon the case was brought against the defendants, because that they being churchwardens, presented the plaintiff falsely and maliciously, upon a pretended fame of incontinency. Upon not guilty it was found for the defendants, and moved that they might have double costs, because they were troubled and vexed for matter which did concern their office. But it was resolved it was not within the statute; for it is merely ecclesiastical; and the statute was never intended but where they shall be vexed concerning temporal matters which they do by virtue of their office, and not for presentments concerning matters of fame.

What must be shown to justify criminal proceedings against a churchwarden.

In *Millar* and *Symes* v. *Palmer* and *Kilby* (*q*) churchwardens were criminally proceeded against for not repairing the church. Sir H. Jenner's judgment lays down the principles which govern this subject. It was laid down as law in this and a subsequent case that the repairs must be

(*k*) *Fry and Greata* v. *Treasure*, 2 Moo. P. C., N. S. 539 (1865).

(*l*) Comyn's Dig. tit. Eglise.

(*m*) *Ward* v. *Clarke*, 8 Jur. 364.

(*n*) Churchwardens have duties in connexion with the poor without respect to the church, which are not here mentioned.

(*o*) 7 Jac. 1, c. 5; 21 Jac. 1, c. 12.

(*p*) Cro. Car. 285.

(*q*) 1 Curteis, 553.

absolutely necessary to warrant such a suit; but since the Compulsory Church Rate Abolition Act, 31 & 32 Vict. c. 109, and the principle set forth in *Veley* v. *Pertwee* (*r*), such a suit could not be maintained.

Removal of churchwardens.

If churchwardens misbehave themselves, it seems the parishioners may remove them (*s*). As soon as a churchwarden ceases to inhabit a parish, his place must be supplied (*t*). Churchwardens," says Blackstone, "may not waste the church goods, but may be removed by the parish" (*u*): and Sir John Nicholl, in *Dawe* v. *Williams* (*x*), says, "The power of parishioners to remove their churchwardens in case of their wasting the goods of the parish (or, it may be presumed, in case of their *other* misbehaviour), is pretty broadly laid down in many books of authority."

The following form, taken from the Appendix of Gibson's Codex, seems to confirm this doctrine (*y*):—

"*Suspensio Guardianorum Ecclesiæ pro permittendo Prædicator' non licentiat' ad prædicandum.*"

Bishop recites that her Majesty's commissioners have suspended the churchwardens for suffering an unlicensed minister to preach.

"John, by the Providence of God Bishop of London, to all and singular parsons, vicars and curates whatsoever, within the diocese and jurisdiction of London, and especially to the parson or curate of the parish of St. Clement Danes without Temple Bar, London, sendeth greeting in our Lord God everlasting. Whereas we the said John, and the right worshipful our well beloved in Christ Mr. Valentine Dale, doctor of laws, one of the masters of the request, Sir Owen Hopton, knight, and Mr. Edward Stanhope, doctor of law, our chancellor, our colleagues, her majestie's high commissioners for causes ecclesiastical, rightly and justly proceeding, *have suspended* John Ceely and Christopher Fisher, *churchwardens* of the parish church of St. Clement Danes without Temple Bar aforesaid, because that they, contrary to an intimation directed from my Lord's Grace of Canterbury, and also the aforesaid Lord Bishop of London, and others her majestie's high commissioners for causes ecclesiastical, did permit and suffer a preacher unlicensed to preach in the said parish church of St. Clement Danes, in contempt of us and our jurisdiction ecclesiastical, and have decreed the same to be published with the cause thereof on Sunday next in the time of divine service, in the said church of St. Clement Danes,

(*r*) 5 L. R., Q. B. 573.

(*s*) 13 Co. 70; Com. Dig. tit. Eglise; *Fry and Greata* v. *Treasure*, 2 Moo. P. C., N. S. 539; *Ganville* v. *Utting*, 9 Jur. 1081.

(*t*) 1 Consist. 383.

(*u*) 1 Com. 394.

(*x*) 2 Add. 133, 134.

(*y*) Gibs. Cod. p. 1479. App. s. v.

And requires the minister to publish it on the next Sunday or holyday.

by ordinary authority: These are therefore to will and require you jointly and severally, upon the next Sunday or Festival day after the receipt of these presents, in the parish church of St. Clement Danes aforesaid, at such time as divine service shall be there celebrated and as there be most assembly there congregated, to publish and declare openly that the said John Ceely and Christopher Fisher so were and are suspended from the exercise of their function or office of churchwarden for the causes aforesaid. In witness we have set the seal of our said chancellor which we use in this behalf, the third day, in the year of our Lord God, after the computation of the Church of England, one thousand five hundred and eighty-eight, and in the twelfth year of our translation.—William Blackwell"(*z*).

Hughes' opinion.

Hughes says, "Although they have so large authority in the parish and church under the ordinary, yet are they not esteemed ecclesiastical persons, but are for the most part lay men, and may be removed from their offices or places by the ordinary upon just cause of complaint made unto him, or else by the parishioners themselves; and therefore if a parish do prescribe to have the election of their churchwardens, and that the churchwardens elected by them have used time out of mind to continue churchwardens for two years together with the assent of the parishioners, yet may the parishioners themselves within the two years remove such churchwardens and appoint others in their places; otherwise they might within the two years waste all the church goods, for which the parishioners could have no remedy against them"(*a*). And the learned Prideaux says, "if their improvidence and negligence be such as to waste the church goods in their custody or otherwise much damnify the parish, they may on proof hereof *by the authority of the ordinary* at any time be removed and others chosen in their stead"(*b*).

Prideaux' opinion.

Liability of churchwardens as to fees of visitation.

The liability of churchwardens to pay the fee of the registrar to an archdeacon is not personal, but is contingent upon their possessing funds out of which the fees may be legally paid. Therefore, where churchwardens had no funds in their hands for the repairs of the church, or for any other expense incident to their office, except by volun-

(*z*) In the edition of Gibson's Codex (Oxford, 1761), it is printed "one thousand six hundred and eighty-eight," but this is clearly a misprint for *five* hundred.

(*a*) The Parson's Law, p. 115.

(*b*) Prideaux, Directions to Churchwardens, p. 30; citing 8 Ed. 4, 6; Finch, l. 2, c. 17; 13 Coke, 70 f. See also Lamb's Office of Churchwardens, s. 3.

tary subscriptions, and were without the means of obtaining funds:—It was holden that they were not liable to pay the fee of the registrar due upon a visitation of the archdeacon (*c*)

But with respect to payment of parochial rates and assessments by churchwardens, the law seems to be different.

Liability as to parochial assessments.

Under 9 Geo. 4, c. lxiv. (local), sect. 33, for more effectually lighting, paving, &c. certain parts of Westminster, by which act the commissioners are empowered to make rates and assessments in respect of any cathedral, church, chapel, &c., according to the number of square yards of pavement or ground belonging to such cathedral or church, &c., and to determine the same, "and the rates and assess-" ments to be levied or assessed upon or in respect of any " other church, or any chapel, place of worship, hospital, " school, or other public building, wall, or void space of " ground, shall be paid *by the churchwardens*, chapel-" wardens, trustees, or owners, or proprietors thereof " respectively," the churchwardens are *personally* liable to the commissioners for the rates, and the want of parochial funds does not exempt them from that liability (*d*).

And this case was followed in a question raised on the construction of a similar act, in the case of a new church under 6 & 7 Vict. c. 37 (*e*).

SECT. 10.—*Perambulation of Parishes.*

Before leaving the subject of churchwardens, it is proper to mention the custom and law relating to what is called the perambulation of parishes.

Boundaries of parishes.

The settling the bounds of parishes depends upon ancient and immemorial custom. For they have not been limited by any act of parliament, nor set forth by special commissioners; but have been established, as the circumstances of times and places and persons did happen to make them, greater or lesser (*f*).

In some places, parishes seem to interfere, when some place in the middle of another parish belongs to one that is distant; but that has generally happened by an unity of possession, when the lord of a manor was at the charge to erect a new church, and to make a distinct parish of his

(*c*) *Veley* v. *Pertwee*, 5 L. R., Q. B. 573 (1870). *Vide supra*, p. 1355.

(*d*) *Hopkinson* v. *Puncher*, 3 Ex. 95 (1848).

(*e*) *Mills* v. *Ryder*, 10 Ex. 67.

(*f*) 1 Still. 243.

own demesnes, some of which lay in the compass of another parish (*g*).

But now care is taken (or ought to be) by annual perambulations to preserve those bounds of parishes, which have been long settled by custom (*h*).

Perambulation of the boundaries.

By a constitution of Archbishop Winchelsey, the parishioners shall find at their own charge *banners for the rogations* (*i*).

And upon the account of perambulations being performed in rogation week, the rogation days were anciently called *gange-days;* from the Saxon *gan* or *gangen*, to go.

In *Goodday* v. *Michell* (*k*), in 37 & 38 Eliz, trespass for breaking his close, and for breaking down two gates, and three perches of hedge. The defendant justifies; for that the said close was in the parish of Rudham, and that all the parishioners there for time immemorial had used to go over the said close upon their perambulation in rogation week; and because the plaintiff stopped the two gates and obstructed three perches of hedge in the said way, the defendant, being one of the parishioners, broke them down. And by the court: It is not to be doubted but that parishioners may well justify the going over any man's land in the perambulation, according to their usage, and abate all nuisances in their way.

In the perambulation of a parish, no refreshment can be claimed by the parishioners, as due of right from any house or lands in virtue of custom. The making good such a right on that foot, has been twice attempted in the spiritual courts; but in both cases prohibitions were granted, and the custom declared to be against law and reason (*l*).

These perambulations (though of great use in order to preserve the bounds of parishes) were accompanied with abuses; nevertheless *perambulations* were retained in the injunctions of Queen Elizabeth; wherein it was required, that for the retaining of the perambulation of the circuits of parishes, the people should once in the year, at the time accustomed, with the curate and the substantial men of the parish, walk about the parishes, as they were accustomed, and at their return to the church make their common prayers. And the curate, in their said common perambulations, was at certain convenient places to admonish the people to give thanks to God (in the beholding of his benefits), and for the increase and abundance of his fruits

(*g*) 1 Still. 244.
(*h*) Ibid.
(*i*) Lind. 252.
(*k*) Cro. Eliz. 441.
(*l*) Gibs. 213; *Willy* v. *Harbert*, 3 Keb. 609.

upon the face of the earth; with the saying of the 103rd Psalm. At which time also the said minister was required to inculcate these or such like sentences, *Cursed be he which translateth the bounds and dolles of his neighbour;* or such other order of prayers as should be lawfully appointed (*m*).

Lord Denman, in his judgment in *Taylor* v. *Devey* (*n*), said that the right to enter private houses, and to remove all obstructions to such entrance, for the purpose of perambulating parochial boundaries, had been long confirmed by high judicial sanction.

But a custom for the parishioners on perambulation of the parish boundaries to go through a house which is not on the boundary line, is bad (*o*).

Boundaries of parishes, where to be tried.

The bounds of parishes, though coming in question in a spiritual matter, shall be tried in the temporal court. This is a maxim, in which all the books of common law are unanimous; although our provincial constitutions do mention the bounds of parishes, amongst the matters which merely belong to the ecclesiastical court, and cannot belong to any other (*p*). The bounds of a parish may be tried in an action at law; but a bill will not lie for an issue or commission to ascertain boundaries between two parishes: except perhaps the parishioners have a common right, as where all the tenants of a manor claim a right of common by custom, in which case the right of all is tried by trying the right of one; or where all parties concerned are before the court (*q*); or where a commission was prayed, in the Court of Exchequer, to ascertain the bounds of a parish, upon a presumption that all the lands within it would be titheable to the parson, but denied; and where it is said, that the first-mentioned decision was upon a bill brought by the parish of St. Luke, to avoid confusion in making the rates, a number of houses having been built on waste land, and it being doubtful to which parish the different parts of the waste belonged.

In 14 Car. 1, when a prohibition was prayed to the spiritual court, for proceeding to determine a case of tithes, the right to which depended on the lands lying in this or that *vill;* it was denied by the whole court of King's Bench, who declared, that the bounds of vills are

(*m*) Gibs. 213.
(*n*) 7 Ad. & Ell. 412; 2 Nev. & Per. 472.
(*o*) Ibid.
(*p*) Gibs. 212.
(*q*) *St. Luke, Old Street,* v. *St. Leonard, Shoreditch, Atkyns* v. *Hatton,* 1 Anstr. 395; 1 Bro. C. C. 40.

Boundaries, where to be tried.

triable in the ecclesiastical court (*r*). But this was between two spiritual persons, the rector and vicar (*s*).

And in *Ives* v. *Wright*, in 15 Car. 1 (*t*), it was said if the bounds of a village in a parish (*u*) come in question in the ecclesiastical court, in a suit between the parson impropriate and the vicar of the same parish, as if the vicar claim all the tithes within the village of D. within the parish, and the parson all the tithes in the residue of the parish, and the question between them is, whether certain lands, whereof the vicar claims the tithe, be within the village of D. or not; yet inasmuch as it is between spiritual persons, viz. between the parson and vicar, although the parson be a layman, and the parsonage appropriate a lay fee, yet it shall be tried in the ecclesiastical court. And in this case the prohibition was denied.

(*r*) Gibs. 213.

(*s*) 2 Rolle's Abr. 312.

(*t*) Ibid.

(*u*) See Siderfin, 89, *Buller* v. *Yateman*, 1 Keble, 369, for a distinction between the bounds of vills and of parishes. See also *Speer* v. *Crawter*, 2 Meriv. 410; *Atkins* v. *Hatton*, 2 Anstr. 386; *Wake* v. *Conyers*, 1 Eden, 331; *Miller* v. *Warmington*, 1 Jac. & Walk. 484; *Carberry* v. *Mansell*, Vern. & Scriv. R. 112; *Woolaston* v. *Wright*, 3 Anst. 801, as to commissioners for ascertaining boundaries.

CHAPTER V.

VESTRIES.

SECT. 1.—*What and where to be holden.*
2.—*Acts regulating.*
3.—*Mode of Procedure.*
4.—*Officers of.*
5.—*Select Vestries.*

SECT. 1.—*What and where to be holden.*

A VESTRY, properly speaking, is the assembly of the whole parish met together in some convenient place, for the dispatch of the affairs and business of the parish; and this meeting being commonly holden in the vestry adjoining to, or belonging to the church, it thence takes the name of vestry, as the place itself does, from the priest's vestments, which were usually deposited and kept there (*a*).

Definition of.

A town hall has been holden not be an improper place to take the poll, by reason of its being private property; where no person had been prevented from voting on that account (*b*).

Place of.

The ecclesiastical court has jurisdiction *ratione loci* over the proceedings of a vestry meeting holden in a parish church (*c*).

Ecclesiastical jurisdiction.

In 1850 the 13 & 14 Vict. c. 57, was passed, which was entitled "An Act to prevent the holding of Vestry or other Meetings in Churches, and for regulating the Appointment of Vestry Clerks." The act recited, "Whereas the holding of vestry or other parochial meetings in the parish church or chapel, or in the vestry room attached to such church or chapel, is productive of scandal to religion and other great inconveniences;" and for remedy thereof enacted as follows: "It shall be lawful for the commissioners for administering the laws for relief of the poor

13 & 14 Vict. c. 57.

Poor law commissioners upon applica-

(*a*) Par. L. c. 17.

(*b*) *Baker and Downing* v. *Wood*, 1 Curteis, 527, and cases there cited.

(*c*) *Wilson* v. *M'Math*, 3 B. & A. 241; see *post*, s. 29 of 1 & 2 Will. 4, c. 60, for the place of meeting for parishioners adopting that act.

tion of churchwardens, &c. of any parish where population exceeds 2,000, may make an order to put this act in force.

in England, at any time or times after the passing of this act, upon application in writing of the churchwardens, or, where there are no churchwardens, of the overseers of any parish in England the population whereof exceeds two thousand persons according to the then last preceding census, such application being made pursuant to a resolution of the vestry of such parish, to make an order under their seal of office that this act or any part thereof shall be applied to and be put in force within such parish; and a copy of such order shall be published in such newspaper or Gazette, or both, as the said commissioners may direct, and shall be deposited with the churchwardens or overseers (where there are no churchwardens) of any such parish."

On expiration of twelve months from the publishing of any such order certain meetings prohibited from being held in churches and chapels.

Sect. 2. "From and after the expiration of twelve calendar months from the making and publishing of any such order no meeting of the inhabitants of the parish for the purpose of holding a vestry, or for any other purpose than that of divine worship, or some ecclesiastical or charitable object, or some other purpose approved by the bishop of the diocese, shall be holden in any parish church or chapel, or other consecrated church or chapel, nor in the chancel thereof, nor, except in case of urgency, and with the previous approval of the said commissioners, in the vestry room attached to such church or chapel, in any parish or place named in such order, any public or private act of parliament to the contrary notwithstanding."

Power to provide other places of meeting.

Sect. 3. "Where any vestry or other meeting, by virtue of any statute, law, or custom, has heretofore been holden in the church or chapel of any parish or place named in any such order as aforesaid, or in the vestry room of such church or chapel, any such vestry or other meeting shall from and after the making and publishing of such order be holden in such other room or place within the parish or place as shall be provided for the holding thereof in pursuance of the provisions of this act, and all acts done in such other room or place as aforesaid shall be as good, valid, and effectual in the law, to all intents and purposes whatsoever, as if such vestry meeting had been held in the vestry room of such church or chapel or in the body of such church or chapel as aforesaid."

Purchase of lands.

Sects. 4 and 5 relate to the purchase of lands for vestry rooms, and to the hiring of rooms, &c., and to the mode of borrowing money for such purposes.

SECT. 2.—*Acts regulating Vestries.*

The statutes by which parish vestries are regulated are 58 Geo. 3, c. 69, and 59 Geo. 3, c. 85 (*d*).

58 Geo. 3, c. 69.

The first of these acts is generally called Mr. Sturges Bourne's Act, from the name of its author; it enacts as follows:—

Three days' notice to be given of vestries; by publication in church, and affixing on church door.

Sect. 1. "No vestry or meeting of the inhabitants in vestry of or for any parish shall be holden until public notice shall have been given of such vestry, and of the place and hour of holding the same, and the special purpose thereof, three days at the least before the day to be appointed for holding such vestry, by the publication of such notice in the parish church or chapel on some Sunday during or immediately after divine service (*e*), and by affixing the same, fairly written or printed, on the principal door of such church or chapel."

Chairman of vestries appointed;

Sect. 2. "And for the more orderly conduct of vestries, be it further enacted, that in case the rector or vicar or perpetual curate shall not be present, the persons so assembled in pursuance of such notice shall forthwith nominate and appoint by plurality of votes to be ascertained as hereinafter is directed, one of the inhabitants of such parish to be the chairman of and preside in every such vestry; and in all cases of equality of vòtes upon any question arising therein, the chairman shall (in addition to such vote or votes as he may by virtue of this act be entitled to give in right of his assessment) have the casting vote; and minutes of the proceedings and resolutions of every vestry shall be fairly and distinctly entered in a book (to be provided for that purpose by the churchwardens and overseers of the poor), and shall be signed by the chairman, and by such other of the inhabitants present as shall think proper to sign the same."

to have casting vote.

Minutes to be entered and signed.

Manner of voting in vestries.

Sect. 3. "In all such vestries every inhabitant present, who shall, by the last rate which shall have been made for the relief of the poor, have been assessed and charged upon or in respect of any annual rent, profit or value not amounting to fifty pounds, shall have and be entitled to give one vote and no more; and every inhabitant there present, who shall in such last rate have been assessed or

(*d*) There is also 59 Geo. 3, c. 12, which empowers parishes to establish vestries of a certain description for the management of the poor; and for this purpose their authority supersedes that of the ordinary parish officers; but they are themselves subject to the poor law commissioners. See 4 & 5 Will. 4, c. 76, ss. 21, 54.

(*e*) But for the present law as to publication in church, see 1 Vict. c. 45, *supra*, p. 1031.

charged upon or in respect of any annual rent or rents, profit or value, amounting to fifty pounds or upwards (whether in one or in more than one sum or charge), shall have and be entitled to give one vote for every twenty-five pounds of annual rent, profit and value upon or in respect of which he shall have been assessed or charged in such last rate, so nevertheless that no inhabitant shall be entitled to give more than six votes; and in cases where two or more of the inhabitants present shall be jointly rated, each of them shall be entitled to vote according to the proportion and amount which shall be borne by him of the joint charge; and where one only of the persons jointly rated shall attend, he shall be entitled to vote according to and in respect of the whole of the joint charge."

Inhabitants coming into a parish since the last rate may vote.

Sect. 4. "When any person shall have become an inhabitant of any parish, or become liable to be rated therein, since the making of the last rate for the relief of the poor thereof, he shall be entitled to vote for and in respect of the lands, tenements, and property for which he shall have become liable to be rated, and shall consent to be rated, in like manner as if he should have been actually rated for the same."

Inhabitants refusing payment of poor's rate excluded from vestries.

*Sic.

Sect. 5. "No person who shall have refused or neglected to pay any rate for the relief of the poor, which shall be due from and shall have been demanded of him, and* shall be entitled to vote or to be present in any vestry of the parish for which such rate shall have been made, until he shall have paid the same" (*f*).

Parish books and papers preserved.

Sect. 6. "As well the books hereby directed to be provided and kept for the entry of the proceedings of vestries, as all former vestry books, and all rates and assessments, accounts and vouchers of the churchwardens, overseers of the poor, and surveyors of the highways, and other parish officers, and all certificates, orders of courts and of justices, and other parish books, documents, writings and public papers of every parish, except the registry of marriages, baptisms and burials, shall be kept by such person and persons, and deposited in such place and manner, as the inhabitants in vestry assembled shall direct; and if any person in whose hands or custody any such book, rate, assessment, account, voucher, certificate, order, document, writing, or paper shall be, shall wilfully or negligently destroy, obliterate or injure the same, or suffer the same to

Retaining or injuring parish books, &c.

(*f*) Not however, by 16 & 17 Vict. c. 65, rates which have been made or become due within three calendar months of the vestry meeting.

be destroyed, obliterated or injured, or shall, after reasonable notice and demand, refuse or neglect to deliver the same to such person or persons, or to deposit the same in such place, as shall by the order of any such vestry be directed, every person so offending, and being lawfully convicted thereof on his own confession, or on the oath of one or more credible witness or witnesses, by and before two of his majesty's justices of the peace, upon complaint thereof to them made, shall for every such offence forfeit and pay such sum, not exceeding fifty pounds, nor less than forty shillings, as shall by such justices be adjudged and determined; and the same shall be recovered and levied by warrant of such justices in such manner and by such ways and means as poor's rates in arrear are by law to be recovered and levied, and shall be paid to the overseers of the poor of the parish against which the offence shall be committed, or to some of them, and be applied for and towards the relief of the poor thereof: Provided nevertheless, that every person who shall unlawfully retain in his custody, or shall refuse to deliver to any person or persons authorized to receive the same, or who shall obliterate, destroy or injure, or suffer to be obliterated, destroyed or injured, any book, rate, assessment, account, voucher, certificate, order, document, writing or paper belonging to any parish, or to the churchwardens, overseers of the poor, or surveyors of the highways thereof, may in every such case be proceeded against in any of his majesty's courts, civilly or criminally, in like manner as if this act had not been made."

Penalty.

And subject to other proceedings.

Sect. 7. "All provisions, authorities and directions in this act contained in relation to parishes, shall extend, and be construed to extend, to all townships, vills and places having separate overseers of the poor and maintaining their poor separately, and that all the directions and regulations herein contained in regard to vestries shall extend and be applied to all meetings which may by law be holden of the inhabitants of any parish, township, vill or place, for any of the purposes in this act expressed; and that the notices by this act required to be given of every vestry may, in places in which there is or shall be no parish church or chapel, or where there shall not be divine service in such church or chapel, be given and published in such manner as notices of the like nature shall have been there usually given and published, or as shall be most effectual for communicating the same to the inhabitants of every such parish, township, vill, or place respectively."

Provisions in relations to parishes extended to townships, &c.

Manner of giving notices of vestries and meetings in special cases.

Time for holding vestries specially directed not altered.

Proviso for special vestries;

Sect. 8. "Nothing in this act contained shall extend or be construed to extend to alter the time of holding any vestry, parish or town meeting which is by the authority of any act required to be holden on any certain day, or within any certain time in such act prescribed and directed; nor shall anything in this act contained extend to take away, lessen, prejudice or affect the powers of any vestry or meeting holden in any parish, township or place by virtue of any special act or acts, of any ancient and special usage or custom, or to change or affect the right or manner of voting in any vestry or meeting so holden" (*g*).

and for London and Southwark.

Sects. 9 and 10. Nothing in this act contained shall extend to any parish within the city of London, or the borough of Southwark.

59 Geo. 3, c. 85.

And by 59 Geo. 3, c. 85, intituled "An Act to amend and correct an Act of the last Session of Parliament for the Regulation of Parish Vestries in England," and reciting the previous act, it was enacted as follows:—

Persons rated to the poor, though not parishioners, may vote in vestry according to the value of the premises rated.

Sect. 1. "Any person who shall be assessed and rated for the relief of the poor in respect of any annual rent, profit or value arising from any lands, tenements or hereditaments situate in any parish, in which any vestry shall be holden under the said recited act, although such person shall not reside in or be an inhabitant of such parish, shall and may lawfully be present at such vestry, and such person shall have and be entitled to give such and so many vote or votes at such vestry, in respect of the amount of such rent, profit or value, as by the said act any inhabitant of such parish present at such vestry might or ought to have and be entitled to give in respect of such amount, and to all intents and purposes, as if such person were an inhabitant of such parish, any thing in the said recited act to the contrary in anywise notwithstanding."

Clerk or agent of corporation, &c. may vote in vestry according to the value of the premises rated.

Sect. 2. "In all cases where any corporation or body politic or corporate or company shall be charged to the rate for the relief of the poor of such parish, either in the name of such corporation or of any officer of the said corporation, it shall and may be lawful for the clerk, secretary, steward or other agent duly authorized for that purpose of such corporation or body politic or corporate or company, to be present at any vestry to be holden in the said parish under the said recited act; and such clerk, secretary, steward or agent shall be entitled to give such

(*g*) See *Campbell* v. *Maund*, 1 Nev. & Per. 558, in which it was holden that the local parochial act of Paddington (5 Geo. 4, c. cxxvi.) did not exempt it from this act.

and so many vote or votes at such vestry, in respect of the amount of the rent, profit or value of such lands, tenements or hereditaments, as by the said act any inhabitant assessed to such rate present at such vestry might or ought to have and be entitled to in respect of such amount; any thing in the said recited act to the contrary in anywise notwithstanding."

[58 Geo. 3, c. 69, s. 5.] Non-payment of rates to disqualify from being present or voting in vestry.

Sect. 3. " 'And whereas by the said act it was intended to be enacted that no person should be present at or vote at any vestry who should have refused to pay any assessment that had become due and had been demanded of such person, but the word "and" was by mistake so inserted in the said act, as to make the same in that respect ambiguous:' now, to rectify such mistake, be it further enacted, that no person who shall have refused or neglected to pay any rate for the relief of the poor which shall be due from and shall have been demanded of him, shall be entitled to vote or to be present in any vestry of the parish for which such rate shall have been made, until he shall have paid the same (*h*); nor shall any such clerk, secretary, steward or agent be entitled to be present or to vote, nor shall be present or vote, at any vestry in such parish, unless all rates for the relief of the poor which shall have been assessed and charged upon or in respect of the annual rent, profit or value, in right of which any such clerk, secretary, steward or agent shall claim to be present and vote, which shall be due, and which shall have been demanded at any time before the meeting of such vestry, shall have been paid and satisfied."

Cases to which sect. 3 of 58 Geo. 3, c. 69, is not applicable.

With respect to the application of the 3rd section of 58 Geo. 3, c. 69, to a parish where the poor rates had, according to ancient custom, been always assessed without regard to the annual value of property in the parish, but according to the supposed ability of the party assessed, it was holden, that persons so rated were not entitled to the benefit conferred by this section as to the plurality of votes, although assessed in respect of property exceeding the annual value of 50*l*. (*i*).

Who have votes.

Outdwellers, occupying land in the parish, have a vote in the vestry as well as the inhabitants (*k*).

Who shall preside.

Anciently, at the common law, every parishioner who paid to the church rates, or scot and lot, and no other

(*h*) But see 16 & 17 Vict. c. 65, *supra*, p. 1874, note.

(*i*) *Nightingale* v. *Marshall*, 3 D. & R. 549; 2 B. & C. 313; *et vide Att.-Gen.* v. *Wilkinson*, 7 Moore, 187; 3 B. & B. 266; *Rex* v. *Clerkenwell*, 3 Nev. & M. 411; 1 Ad. & Ell. 317.

(*k*) Johns. 19.

Who shall preside.

person, had a right to come to these meetings; but this must not be understood of the minister, who has a special duty incumbent on him in this matter, and must be responsible to the bishop for his care herein; and therefore in every parish meeting, he presides for the regulating and directing this affair: and this equally holds whether he be rector or vicar (*m*).

The right of the minister to preside at a meeting of his parishioners seems to have been unquestioned law since the learned decision of Sir J. Nicholl in *Wilson* v. *Macmath* (*n*); but the minister is not an essential part of the vestry (*o*).

Hindering persons from meeting.

In *Phillybrown* v. *Ryland* (*p*), in 11 Geo. 1, the plaintiff brought a special action upon the case for excluding him from the vestry room, and upon demurrer the court made no difficulty but that such an action was maintainable; however, in this case, they gave judgment for the defendant, it not being averred that the parish had any property in this room, or right to meet there; so that for aught appears, it might be the defendant's own house, and then he might let in whom he pleased, and refuse the rest.

Majority conclusive.

And when they are met, the major part present will bind the whole parish (*q*).

How votes are to be taken.

"There is no doubt of the law" (says Lord Denman), "that the rate payers in the vestry are to elect, and that if a poll be demanded, it should be kept open for all qualified persons" (*r*). It should be here remarked, that where *a statute* directs an election by poll, the poll may be taken from the holding up of the electors' hands. But if the tellers appointed to take the numbers differ, and a poll is demanded and refused, the court will grant a mandamus to enter an adjournment of the election meeting, and to proceed to complete the election (*s*). A person not present at the show of hands may vote at a poll subsequently taken (*t*): nor is it any impeachment of the validity of the

(*m*) Par. L. c. 17.

(*n*) 3 Phill. 67; 3 B. & Ald. 244, note (*b*); *Baker and Downing* v. *Wood*, 1 Curteis, 522; see also the recent case of *R.* v. *D'Oyly*, 4 P. & D. 58.

(*o*) *Mawley* v. *Barbet*, 2 Esp. 687, Kenyon.

(*p*) 1 Str. 624; 2 L. Raym. 1388; Vin. Abr. Vestry (A 3); see also *Dobson* v. *Fussey*, 5 M. & P. 112; 7 Bing. 305.

(*q*) Wats. c. 39; Vin. Abr. Vestry (A 1); *Clutton* v. *Cherry*, 2 Phill. 380.

(*r*) *Reg.* v. *St. Mary, Lambeth*, 3 Nev. & P. 416; *Veley* v. *Burder*, 12 A. & E. 265.

(*s*) *Rex* v. *Vestrymen and Vestry Clerks of the Parish of St. Luke's, Middlesex*, 2 Nev. & M. 464.

(*t*) *Campbell* v. *Maund*, 5 Ad. & El. 865; 1 N. & P. 558.

proceedings at an election that the chairman ordered a poll without first taking a show of hands; of course under 58 Geo. 3, c. 69, a show of hands would be no criterion of the number of votes (*u*). But where a vestry had by show of hands passed a resolution directing an illegal application of some charitable funds, and a poll had been demanded of the persons presiding at the vestry and not granted, the court refused a rule for a mandamus to compel such persons to grant a poll, observing that it ought not to grant a mandamus for the purpose of putting it to the vote whether a breach of trust should be committed (*x*).

SECT. 3.—*Mode of Procedure.*

Stoughton v. Reynolds.

In *Stoughton* v. *Reynolds* (*y*), in 9 Geo. 2, it was adjudged, that the right of adjourning the vestry is not in the minister or any other person as chairman, nor in the churchwardens, but in the whole assembly, where all are upon an equal footing, and the same must be decided (as other matters there) by a majority of votes.

Baker and Downing v. Wood.

The whole law upon this subject is exhausted in the judgment of Sir Herbert Jenner in the Court of Arches, during the course of which the doctrine laid down in *Stoughton* v. *Reynolds* was fully discussed, in the case of *Baker and Downing* v. *Wood* (*z*). The notice was as follows: "Notice is hereby given, that a meeting of the inhabitants in vestry of, and for this parish, will be holden in the vestry of St. Thomas's Church, at 11 o'clock in the forenoon of Thursday, the 25th of September instant, for the purpose of expunging an irregular and improper entry made in the vestry order book at a meeting held on the 7th day of August last, and for the purpose of granting the churchwardens a levy of tenpence in the pound. If a poll be demanded, the meeting will be immediately adjourned to the town hall, and the poll will commence forthwith, and be kept open till 4 o'clock in the afternoon of the said 25th of September; and the polling will be continued at the town hall aforesaid from the hours of 10 in the forenoon of Friday, the 26th of September, to the hour of 4 in the afternoon of the same day; and again at

(*u*) *Reg.* v. *Rector of Birmingham*, 7 Ad. & Ell. 254; *Reg.* v. *St. Mary, Lambeth*, 8 Ad. & Ell. 356.

(*x*) *Rex* v. *Churchwardens of St. Saviour's, Southwark*, 1 Ad. & Ell. 381; 3 Nev. & M. 879.

(*y*) 2 Str. 1045.

(*z*) 1 Curteis, 507.

Baker and Downing v. Wood.

the same place from the hour of 10 in the forenoon till the hour of 12 at noon, on Saturday, the 27th day of September, when the poll will finally close." The judge said:—

"The validity of the rate is not questioned on the usual grounds of objection to church rates,—it is not alleged that the rate required was not necessary; nor that there is any excess in the amount of the rate, although the sum to be collected was considerable, being upwards of nine hundred pounds: it is not stated that there is any inequality of assessment, nor that the purposes for which the rate was made were those to which a church rate cannot properly be applied, and no objection is taken as to a want of due specification of the purpose for which the meeting was called: indeed, it was contended in the argument that the notice was too specific, that the churchwardens had no right to fix tenpence in the pound as the amount of the rate; that all they had to do was to call a meeting, and to leave the parishioners to determine the amount of the rate. But this is an objection which cannot be insisted on, for it was nothing more than an intimation of the churchwardens of the amount of rate which would be required, leaving it to the vestry to determine whether the amount should be reduced to sevenpence or any smaller sum. So with regard to the objection as to that part of the notice for expunging the entry irregularly and improperly made in the vestry book; if the impression on their minds was that the proceeding was irregular and improper, it might be necessary that notice should be given in the church; and considering the circumstances of the case,—the room being filled, and there being individuals in the churchyard who could not get access to the room to express their sentiments by a show of hands,—my opinion is that they justified the chairman in the course he took on that occasion.

"Having stated that the objections to the validity of this rate are not the usual objections in questions of this description, that no objection has been made on the grounds I have stated, the court may assume that the rate was proper in itself, in its amount, in the manner in which it was proposed, and as to the persons from whom it was to be collected. Under these circumstances, undoubtedly the rate comes before the court under circumstances peculiarly favourable to it, and it would be the wish of the court, not less than its duty, to support it, unless the party opposing it can show such grounds of opposition as should render it impossible for the court to do so: and it is ad-

" mitted that the party opposing the rate stands on his strict right of law, and that he is not entitled to any favourable consideration.

" What then are the grounds on which the rate is impugned? The grounds which I collect from the argument which has been addressed to the court are these: first, that the chairman adjourned the poll without any legal authority; secondly, that the place to which it was adjourned was private property, to which the parishioners and inhabitants of the town of Dudley had no legal right of access, and was, therefore, an improper place; and, thirdly, that the time fixed for the duration of the poll was insufficient with reference to the number of persons entitled to vote; and on all or some of these grounds, it is contended that the rate is invalid.

" Before the case was ripe for determination before the court, other objections had been urged, both in plea and in argument, in this court. It was stated as a ground of objection to the rate, that only those persons were entitled to vote who were present in the vestry room when the show of hands was called for; that the voting should not be according to the value of the property, but according to numbers; these and other minor objections, the whole of which were abandoned subsequently (being disposed of during the progress of the cause, by the decision in *Maund* against *Campbell* (*a*), referred to in the argument), it is not necessary for the court particularly to notice.

" The first objection, then, is to the adjournment of the poll, which, it is admitted, took place without the opinion of the vestry having been taken upon it; and the case of *Stoughton* v. *Reynolds* (*b*), reported in Fortescue and Strange's Reports, and in cases temp. Lord Hardwicke, has been relied on, as showing directly that the power of adjourning a vestry meeting is not in the chairman of the meeting, but in the whole body of the vestry; and it appears from what was said by Lord Hardwicke and the other judges, that the Court of King's Bench was of opinion under the circumstances of the case, that the chairman had no such right as he had assumed on that occasion. But in order to see the full effect of that decision, the circumstances of that case must be considered; and it will appear, that they are as far removed from the circumstances of the present case as can be well conceived.

(*a*) *Campbell* v. *Maund*, 1 Nev. & Per. 564.

(*b*) Fortescue, 168; 2 Strange, 1045; Cases temp. Hard. 274.

Baker and Downing v. Wood.

"I will refer to the case as reported by Fortescue, because it has been stated that Lord Hardwicke's opinion was more strongly expressed in that Report than in Strange, and in the Report of Cases in the time of Lord Hardwicke.

"The declaration set forth that the plaintiff, being an inhabitant of the parish of All Souls, Northampton, was chosen churchwarden, and offered himself to Dr. Reynolds, chancellor of the diocese, to be admitted to the office, and the chancellor refused to admit him. Mr. Stoughton thereupon moved for a *mandamus* to the chancellor to admit him to the office, and the chancellor returned to the *mandamus*, that he considered the plaintiff was not chosen churchwarden, but another person. The action was brought for a false return, and a special verdict was found to this effect: That in the parish of All Souls, the vicar has immemorially had the nomination of one of the churchwardens; that the time appointed for choosing churchwardens was a day in Easter week, 1734, when the vicar nominated Mr. Lowlk, and the parishioners the plaintiff; that in the Easter week following, in the year 1735, the vicar chose the same person, and upon a dispute arising, whether the parishioners could choose the plaintiff Stoughton a second time, the vicar adjourned the assembly till the next morning, but that part of the parish who were for the plaintiff staid behind and elected him; and the other party assembling next day, elected another person, and the question was, whether the vicar, who presided, was at liberty, *ex mero motu*, to adjourn the election of churchwardens without any previous notice or the consent of the meeting, and, after the persons present at the meeting had elected a churchwarden, to proceed without notice to elect another churchwarden the next morning.

"Most undoubtedly, in such circumstances, there is no authority for the power assumed and exercised by the chairman in that case; it was calculated to put an end to the privilege possessed by the parishioners, of electing a person for churchwarden, and to put a stop to all discussion at a meeting called for the purpose of election.

"In deciding the question in that case, Lord Hardwicke delivered an opinion very strongly; that, even supposing the vicar had a power of presiding (that point has been settled since) (*c*), it did not follow that he had a power of adjourning the meeting, and that the adjournment was void. And the other judges, Mr. Justice Page and Mr. Justice

(*c*) *Wilson* v. *M'Math*, 3 Phill. 67; 3 B. & Ald. 244, note (*b*).

"Lee, delivered the same opinion as Lord Hardwicke. Mr. Justice Lee said: 'The parson has a right of sitting from his freehold in the church; but I do not think that can any ways give him a greater right or authority than any of the other members of the assembly; and it is a rule in law, that the major part in all elections have the right of determining for themselves.' So that the decision in that case comes to this, that the chairman or vicar has no right, under the circumstances which have been stated, *ex mero motu*, to adjourn a vestry meeting whilst the business of the vestry meeting is in progress.

"*Rex* v. *The Commissary of the Bishop of Winchester* (*d*) is an authority for showing (for that is the effect of the case) that where there is no regular presiding officer, the regulation of the meeting devolves on the whole body, and that in the absence of the vicar, the churchwarden is not entitled to preside. To the extent to which this case goes, it supports the authority of the case of *Stoughton* and *Reynolds*; that the chairman, as such, has not the power to adjourn the vestry at any time and under any circumstances he may think proper. Another effect of this case the court will refer to by and by; but one effect of the case is to show, that where there is no regular presiding officer, the adjournment devolves on the meeting, and not on the chairman.

"Considering the nature of these decisions, and the circumstances of the cases, the question is whether they are applicable to the present, and whether there are not many material distinctions between these cases and that which the court has under its consideration.

"Without relying on my own judgment in this particular, it does seem to me that the question has already been decided by the Court of King's Bench, in a case which has been cited in the argument as the *Manchester case* (*e*), which seems to me to run on all fours with the present case.

"In the case now before the court, the notice for calling the vestry in the parish of Dudley, on the 25th of September, was (I believe it has been stated in the argument) copied from the notice in that case, and considering the decision in that case as a precedent for their direction, the churchwardens and vicar of Dudley governed themselves according to that case, and followed its provisions as exactly as the nature of the circumstances would permit;

(*d*) 7 East, 573.

(*e*) *Rex* v. *The Archdeacon of Chester*, 1 Adol. & Ell. 342; 3 Nev. & M. 413.

Baker and Downing v. *Wood.*

"and, in all the subsequent proceedings, conformed with what had been there decided: and the only distinction I find between that case and the present is, that the former was for the election of a churchwarden, whereas the present was for the making of a church rate. But this does not make any real difference between the two cases; the principle which it is proper to follow in respect to making a church rate will be found to be the same as those which apply to the election of churchwardens; and all the conditions in respect to the conduct of the poll, and the course of the proceedings in an election of a churchwarden, are equally applicable to a poll in the question of a church rate.

"What then were the circumstances of that case? A rule had been obtained, calling on the Archdeacon of Chester to show cause why a *mandamus* should not issue, calling upon him to swear in certain persons as churchwardens of Manchester, on the grounds that they were duly elected; that the meeting at which their election took place was illegally adjourned, and that a poll subsequently taken was not duly taken.

"No case can be more clear and direct in its application to the present case than this."

The learned judge, after referring at some length to the case, concluded—

"I cannot, therefore, on this first point see any distinction between the two cases, and having this, as I consider it, direct authority and precedent on this point, I am of opinion that the adjournment from the vestry room to the town hall, for the purpose of the poll, was a legal adjournment."

The question of the requisite time for duration of the poll was also much discussed in the course of his judgment. As 785 persons were the greatest number proved to have voted on any occasion, the judge, regretting that a longer period had not been allowed, held that eleven hours was a sufficient time if due diligence had been used for taking the poll, observing:—

"These two points being disposed of, the only question is, whether the time allowed for the poll was sufficient; and I confess this is the only part of the case on which I have felt any real difficulty. It is not very easy to determine what time should be allowed so as to give every person entitled to vote an opportunity of recording his vote; and all that can be said is, that where no custom exists, a reasonable time should be given, and which I

"consider is the result of the *Winchester case* (*f*), which I have adverted to already. But it can hardly be said that it was decided that the time allowed in that case was only a reasonable time for polling one hundred and eighty voters. One hundred and eighty persons only were entitled to vote, and it cannot be contended that the result of that case is, that the whole of the time was necessary for them to record their votes. The question was not as to the time solely, and it was decided that that was a question of custom. Mr. Justice Le Blanc says:—'If there had been no custom, there would have been a difficulty in the case; but if there be a custom to conclude the poll at a certain time, that being a reasonable time, the voters must tender their votes within it: and this is fit to be tried.' And Lord Ellenborough, after stating that the custom was a sufficient foundation for the court to go upon, observes, that if there were no custom, there must be some limit, if the limit were assigned by a competent authority, and were in itself reasonable: 'Now putting out of question the resolution of the vestry on the first day to determine the election at four o'clock on the evening of the second day, it still appears that for two hundred years past there has been no instance of an election of churchwarden continuing beyond four o'clock on the second day: I see nothing unreasonable in that limit.' There then the time of the determination of the poll was previously fixed at four o'clock of the second day, and it appeared that in no instance had the election continued beyond that period for two hundred years past, and this was held to be a reasonable time, not with reference, I apprehend, to the number of voters, one hundred and eighty; but altogether, with reference to the custom, and a *mandamus* was directed to issue in that case. I cannot, therefore, consider that this case determines anything more than that where a custom prevails, the custom shall rule; but where there is no custom, that a reasonable time should be allowed for persons to give their votes."

General power of the president of the vestry.

The law laid down in this case is confirmed and extended by the decision of the Queen's Bench in *Reg.* v. *D'Oyly* (*g*). It is there said that the president of the vestry has authority to regulate the whole of the proceedings; to decide on what they shall be, so as to insure the voters of the parish a reasonable time to vote; to adjourn the poll, if he thinks fit, and to do all necessary acts on his

(*f*) *Rex* v. *The Commissary of the Bishop of Winchester*, 7 East, 573.

(*g*) 4 Perry & Davison, 58.

own responsibility, being amenable for the propriety of his conduct to a court of justice.

But it has been ruled that the chairman of a vestry meeting holden for the purpose of taking a poll for the election of a churchwarden, has no power to *close* the poll on account of disturbance (*h*).

Election. Votes refused.

Where, upon the election of a churchwarden, the chairman of the vestry meeting had rejected votes which were alleged to be admissible, but it did not appear that the rejection had caused any difference in the result, a court of common law has refused to grant a mandamus ordering a fresh election, though the persons, whose votes had been rejected, were parties to the application (*i*).

Show of hands. Poll.

In a case as to the election of churchwarden, decided in the court of the Archdeacon of Middlesex: after a show of hands a poll was demanded, which by mutual agreement was commenced immediately. The chairman agreed with *one* of the candidates that the poll should close at seven o'clock, which was accordingly done, and thereby some qualified electors were prevented from recording their votes, and the election was holden to be void (*j*).

Ballot.

In the same court it was decided that to take the vote by ballot on a poll was illegal (*k*). But this does not apply to vestries under 1 & 2 Will. 4, c. 60 (*l*).

Poll in writing.

In another case, at a vestry two candidates were nominated for the office of parishioners' churchwarden. The chairman refused to take a show of hands, but proceeded to take a poll in writing of all the members of the vestry present, writing down the number of votes to which each was entitled, and then declared one of the candidates elected. On motion a mandamus was refused, it being holden that, though the chairman's action was irregular, no one was shown to have been excluded from voting by it (*m*).

Sect. 4.—*Officers of Vestry.*

Entry of acts made.

To prevent disputes, it may be convenient, that every vestry act be entered in the parish book of accounts; and that every man's hand consenting to it be set thereto (*n*).

(*h*) *Reg.* v. *Graham*, 9 W. R. 738.

(*i*) *Ex parte Mawby*, 3 El. & Bl. 718 (1854).

(*j*) *Westerton* v. *Davidson*, 1 Spinks, 385 (1854).

(*k*) *Story* v. *Cobb*, 6 N. of C. App. xxxiii.

(*l*) *Vide infra*, p. 1895.

(*m*) *Reg.* v. *Incumbent of Goole*, 4 L. T., N. S. 322.

(*n*) Par. L. 54.

Beadle.

The beadle (in the saxon *bydel*, from *beodan*, to bid) is chosen by the vestry; and his business is to attend the vestry, to give notice to the parishioners when and where it is to meet, and to execute its orders as their messenger or servant (*o*).

Vestry clerk.

The vestry clerk is chosen by the vestry; and he acts as register or secretary thereto, but has no vote: and his business is, to attend at all parish meetings, and to draw up and copy all orders and other acts of the vestry, and to give out copies thereof when necessary: and therefore he has the custody of all books and papers relating thereto (*p*).

But his office is not such for which *mandamus* will lie, though perhaps the vestry clerk may have that writ to compel those who have the custody of the parish books to deliver them to him (*q*).

13 & 14 Vict. c. 57.

The status of vestry clerks in certain parishes is the subject of the concluding provisions (*r*) of 13 & 14 Vict. c. 57, which enact as follows:—

Churchwardens, &c. within one month after publication of order to convene a meeting for electing a vestry clerk.

Sect. 6. "And whereas in parishes whereof the population exceeds two thousand persons as aforesaid (*s*) various duties are by law imposed upon and required to be performed by the officers of parishes, and much business is transacted at vestry meetings, and the parish officers and vestries require the assistance of a vestry clerk in respect of such duties and business; and it is expedient that provision should be made for regulating the appointment and for the payment of such vestry clerks: be it therefore enacted, that the churchwardens or other persons to whom it belongs to convene meetings of the vestry in any such parish shall, within the space of one calendar month from and after the making and publishing of any order of the commissioners so applied for, if such order extend to the appointment of vestry clerk as aforesaid, and also, in case of any subsequent vacancy in the office of vestry clerk, within one calendar month next after such vacancy, convene a meeting of the vestry of any parish named in such order, for the special purpose of electing a vestry clerk, to perform such of the duties hereinafter mentioned as shall be applicable to such parish, in addition to those which are or may be imposed upon vestry clerks by any act or acts of parliament; and public notice of such vestry, and the place of holding the same, and the special purpose thereof, shall be given, in the usual manner in which notice of the

(*o*) Par. L. c. 17.

(*p*) Ibid. c. 18.

(*q*) *Rex* v. *Churchwardens of Croydon*, 5 T. R. 713.

(*r*) *Vide supra*, p. 1871.

(*s*) *Vide* Sect. 1, *supra*, p. 1872.

meetings of the vestry is now given, at least seven days before the day to be appointed for holding such vestry; and at such meeting the vestry shall proceed to elect some fit and competent person to be vestry clerk, and the person so elected shall not be removable from office except by a resolution passed at a vestry to be called for that special purpose in the manner hereinbefore mentioned, and with the consent of the said commissioners for administering the laws for the relief of the poor in England, or by an order under the seal of the said commissioners."

Vestry clerk elected at such meeting not to be removable except by resolution of vestry and consent of poor law board, &c.

Duties of vestry clerk.

Sect. 7. "It shall be the duty of such vestry clerk, unless otherwise directed by the poor law commissioners,

To give notice of and attend the meetings of vestry and committees appointed thereat:

To summon and attend meetings of the churchwardens and overseers, when required, and to enter the minutes thereof respectively:

To keep the account of all charity monies which the churchwardens or overseers are authorized or are accustomed to distribute:

To keep the vestry books, and the parish deeds and documents, and the rate books and accounts which are closed, and to give copies of and extracts from the same to any person entitled thereto, such person paying for the same at the rate of four-pence for every seventy-two words or figures, and to permit any person or persons rated to the relief of the poor of the said parish, at all reasonable times, to inspect the same or any of them, on pain of dismissal for neglecting to give such copies or permit such inspection:

To make out, when required by the vestry, the church rate, and procure the same to be signed and completed, and to retain the custody thereof, and where there is no collector of poor rates or assistant overseer, to make out the poor rate, and procure the same to be allowed, and to make all the subsequent entries in the rate books, and to give the notices thereof required by law:

To prepare and issue the necessary process for recovering of arrears of such rates respectively before the justices, and procure the summons to be served, and to attend the justices thereon, and advise the churchwardens and overseers as to the recovery of such arrears:

To keep and make out the accounts of the churchwardens, and to present such accounts to the vestry

or other legal authority, to be passed, and to examine the church rate collectors' accounts and returns of arrears:

To assist the overseers in making out their accounts (whenever required by them), and, subject to the rules and regulations of the commissioners for administering the laws for the relief of the poor, to examine from time to time the accounts of the assistant overseers or collectors of poor rates, and their returns of arrears:

To attend the audit of accounts of the overseers, and conduct all correspondence arising therefrom:

To assist the churchwardens or overseers in preparing and making out all other parochial assessments and accounts, and in examining the accounts of the collectors of such assessments:

To ascertain and make out the list of persons liable to serve on juries, and to cause them to be printed and duly published, and returned to the justices:

To give the notices for claims to vote for members of parliament, and to make out lists of voters, and get the same printed and published, and duly returned, according to law, and to attend the court for revising them, and to prepare, make out, and publish the burgess lists and the lists of constables:

To make all returns required of the churchwardens or of the overseers by law or proper authority:

To advise the churchwardens and overseers in all the duties of their office; and also to perform such other duties and services of a like nature as the said commissioners for administering the laws for the relief of the poor in England, from time to time, at the request of the churchwardens or overseers of any such parish, or otherwise, shall prescribe and direct to be performed by such vestry clerk."

Salary of vestry clerk to be fixed by poor law commissioners.

Sect. 8. "The amount of salary or other remuneration to be paid to the vestry clerk, as well as the days and times on which and the persons by whom the same shall be payable, shall be fixed by the said commissioners, and altered from time to time as there shall be occasion; and such salary or remuneration shall be chargeable upon and paid out of the moneys to be raised for the relief of the poor of any such parish; and, where the said commissioners shall deem requisite, such vestry clerk shall give such security and to such persons as the said commissioners shall by their order under seal direct: Provided always, that where, under the provisions of any local act or acts of

parliament, any person or persons shall be paid for the performance of any of the duties of vestry clerk, or for assisting in the performance of any of the duties of churchwardens or overseers of the poor, nothing herein contained respecting the duties of the vestry clerk shall apply to or be deemed to apply to the performance of such duties while the same are so performed, or while payment shall be made for the performance of them as aforesaid."

Churchwardens and overseers not to be discharged from performance of duty.

Sect. 9. "Nothing herein contained shall exempt or discharge, or be construed to exempt or discharge, any churchwarden or overseer of the poor from the performance of any duty required of him by law, nor oblige him to avail himself of the assistance of any vestry clerk to be appointed as aforesaid in the performance of his duties, unless he shall think fit so to do."

Interpretation of terms.

By sect. 10, the following words and expressions shall have their several meanings as follows: "parish" shall mean every place having separate overseers of the poor and maintaining its own poor, and also every parish or place having a separate ecclesiastical jurisdiction, and in which a vestry shall have been heretofore constituted and held for parochial as well as ecclesiastical purposes, either separately or jointly with any other parish; "churchwarden" shall mean also chapelwardens or other persons discharging the duties of churchwardens in any parish or place as last aforesaid; "vestry" shall mean the inhabitants of the parish lawfully assembled in vestry, or for any of the purposes for which vestries are holden, except in those parishes in which there is a select vestry elected under 59 Geo. 3, c. 12, and 1 & 2 Will. 4, c. 60, or elected under the provisions of any local act of parliament for the government of any parish by vestries, or under or by virtue of any prescriptive custom or otherwise, in which parishes it shall mean select vestry; and "lands" shall mean lands tenements, and hereditaments, of whatsoever nature or tenure.

Sect. 5.—*Select Vestries.*

Origin of.

Select vestries seem to have grown from the practice of choosing a certain number of persons yearly, to manage the concerns of the parish for that year; which by degrees came to be a fixed method, and the parishioners lost not only their right to concur in the public management as oft as they would attend, but also (in most places, if not in all) the right of electing the managers. And such a custom, of the government of parishes by a select number,

has been adjudged a good custom, in that the churchwardens accounting to them was adjudged a good account (*t*).

In some parishes, these select vestries having been thought oppressive and injurious, great struggles have been made to set aside and demolish them (*u*).

And no wonder that it has been so, in such parishes where by custom they have obtained the power to choose one another; for it is not to be supposed, but that if they are guilty of evil practices, they will choose such persons as they think will connive at or concur with them therein.

Batt v. *Watkinson.*

In *Batt* v. *Watkinson* (*x*), in 3 Will. 3, in a prohibition prayed to the spiritual court at York, the suggestion set forth, that the parish of Masham in Yorkshire was an ancient parish, and that time out of mind there were twenty-four of the chief parishioners, who all along had been called the four and twenty; and that during time immemorial, as often as any one of the said four and twenty parishioners happened to die, the rest surviving of the four and twenty did choose, and during all the same time used to choose, one other fit and able parishioner of the same parish, to be one of the four and twenty in the room of him so deceased; and that within the said parish there is, and during time immemorial there always hath been a custom, that the said four and twenty for the time being have been used and accustomed, as often as there was occasion, to make rates, and to assess reasonable sums of money upon the parishioners and inhabitants in the said parish for the time being for the repairs of the church; and that the churchwardens of the said parish, during all the time aforesaid, have used to receive all duties and dues for burials in the body or aisles of the said church; and if any of the inhabitants refused to pay the said rates or dues for burials as aforesaid, then the churchwardens, by warrant from the twenty-four for the time being, were used to distrain the goods and chattels of the said parishioners in the said parish; and that the said twenty-four, with the consent of the vicar or curate, have used to repair the body and aisles of the said church; and that the churchwardens for the time being, during all the time aforesaid, have always used to give up their accounts to the said four and twenty, who allowed or disallowed the said accounts as they saw expedient; and that on the allowance of such account, the churchwardens have always been discharged from giving any other account in any other place; that the plaintiffs were churchwardens for the year 1680;

(*t*) Gibs. 219. (*u*) Par. L. c. 17. (*x*) Lutw. 1227.

Batt v. *Watkinson.*

and after this year was ended, they gave in their accounts to the four and twenty; and that though all pleas concerning prescriptions and customs ought to be determined by the common law, yet the defendant hath drawn and cited them into the spiritual court to give in and pass their said accounts there; and although the said plaintiffs have pleaded all the matters aforesaid in the said spiritual court, yet the said defendant hath refused to admit or to receive the said plea. Upon great debate of this case at several times, the court was of opinion, that the custom was good and reasonable, and a prohibition was granted.

So that prescription and constant immemorial usage seems to be the basis and only support of this select vestry. And pursuant hereunto, upon the same foundation, and for the same reasons, was the select vestry of the parish of St. Mary-at-Hill in London confirmed and established in the King's Bench. And since that time, the select vestries of St. Saviour's and St. Olave's in Southwark, for want of proof of such prescription and immemorial usage, have been set aside and demolished (*y*).

Cases on the constitution of select vestries.

If in pleading it is stated "that from time immemorial there had been a select vestry composed of a certain number of select persons," it is incumbent on the party making that averment to prove that the vestry had consisted of a definite number, and so it seems it would be if it had been stated that the vestry was composed of a certain number of select persons (*z*). A select vestry cannot be constituted by a faculty from the bishop (*a*). Nor when it exists by ancient custom for the management of parochial affairs can it elect another select vestry for the management of the poor within 59 Geo. 3, c. 12 (*b*). But a custom in a parish has been holden not to be destoyed, because in 1662 it had accepted a faculty corroborative of its power, though the faculty was not binding in law and the vestry had power at any time to depart from its instructions. A custom that there shall be a select vestry of an indefinite number of persons continued by election of new members made by itself, and not by the parishioners, is valid in law (*c*); but it would appear that it must be part of such custom that there should always be a reasonable number, and that the reasonableness of that number must be decided with reference to long-established

(*y*) Par. L. c. 17.

(*z*) *Berry* v. *Banner*, Peake, 212, per Lord Kenyon; this seems to have been, to a certain extent, overruled by *Golding* v. *Fenn*, cited *post*.

(*a*) Ibid.

(*b*) *Rex* v. *Goodman*, 4 B. & Ad. 507.

(*c*) *Golding* v. *Fenn*, 7 B. & C. 765; 1 M. & R. 647.

usage and to the population of the parish, and such custom must have existed from time immemorial in a parish (*d*). It has been holden, that a select vestry appointed pursuant to sect. 30 of 59 Geo. 3, c. 134, had no power to impose a rate for the repair of the district church (*e*). Where an ancient select vestry existed in a parish having and exercising certain powers in the management and care of the poor, but not all the powers required by the statute of 59 Geo. 3 to be exercised by select vestries, the court granted a mandamus calling upon the parish officers to convene a meeting, pursuant to the act, for the purpose of establishing a new select vestry to perform those functions under the act, which the former vestry could not discharge, but not otherwise to interfere with it (*f*). To a mandamus calling on churchwardens and overseers to summon a meeting for the purpose of establishing a select vestry for the concerns of the poor, pursuant to 59 Geo. 3, c. 12, a return was made, stating that there was by custom an ancient vestry in the parish, which had from time to time immemorial consulted and deliberated on parochial matters, and acted as a select vestry for the concerns of the poor, and that they had immemorially been accustomed to perform the duties imposed on select vestries by the statute; it was holden that the return was bad, since the statute imposes some duties, as the management of money raised by poor rates, and making orders for the government of overseers, which could not have existed before 43 Eliz. c. 2 (*g*). By a local act, the inhabitants of the parish of C., paying church and poor rates, were empowered to elect guardians of the poor. In the vestry act of 58 Geo. 3, c. 69, is a proviso that that act shall not affect the right or manner of voting in any vestry holden by ancient usage or by a special act; it was holden that this proviso did not except the parish of C. from the operation of the above-mentioned act, and that to bring a vestry within the exception it must have a peculiar constitution (*h*). The magistrates are bound under 59 Geo. 3, c. 12, to appoint all persons nominated and elected by the parishioners to be members of the select vestry, and have no discretion to reject any person so nominated and so elected (*i*).

(*d*) *Golding* v. *Fenn*, 7 B. & C. 765; 1 M. & R. 647.

(*e*) *Cockburn* v. *Harvey*, 2 B. & Ad. 797.

(*f*) *Rex* v. *St. Martin in the Fields' Churchwardens*, 3 B. & Ad. 907.

(*g*) *Rex* v. *St. Bartholomew the Great*, 2 B. & Ad. 506.

(*h*) *Rex* v. *Clerkenwell*, 3 Nev. & M. 411; 1 Ad. & El. 317.

(*i*) *Rex* v. *Kent Justices*, 4 Nev. & M. 299; *S. C.*, in the names *Rex* v. *Adam*, 2 Ad. & Ell. 409.

An inhabitant may be a member of a select vestry, although he be a magistrate acting within the parish; and an overseer may be a select vestryman, although he be also a member of the select vestry by virtue of his office (*k*).

Proceeding in select vestries.

To constitute a valid assembly of a select vestry appointed under 59 Geo. 3, c. 12, a majority of the whole number should be present (*l*). Where an act of parliament for regulating the concerns of the poor in a particular point requires that certain notice shall be given of a vestry for the election of a treasurer, and that a treasurer shall be elected at a vestry holden in pursuance of such notice, it has been holden that to support an allegation in an indictment that "A. was duly elected treasurer of the said parish," an entry in the vestry-book, stating that A. was elected treasurer at a vestry duly holden in pursuance of notice, is sufficient evidence (*m*). Where a local statute confers a power of investigating accounts upon auditors to be annually elected, and to be summoned by the vestry clerk at certain stated intervals to audit the accounts, the court will not grant a *mandamus* to compel the latter, when new auditors have been elected for the succeeding year, to call a meeting of the old auditors to audit the accounts of the past year (*n*). Where by an ancient custom a select vestry was to consist of the rector, churchwarden, and those who had served the office of upper churchwarden, and other parishioners to be elected by the vestrymen, and the practice had been in modern times to elect as vestrymen only those parishioners who had been fined for not serving the office of upper churchwardens, it was holden that they were good vestrymen (*o*); and where thirteen persons or more in a select vestry were empowered by statute to do certain acts, it was holden that the presence of the rector at a vestry for the election, if thirteen trustees were present, was not necessary (*p*).

Under special acts.

In the act 10 Anne, c. 20, s. 20, for building fifty new churches, the commissioners shall appoint a convenient number of sufficient inhabitants to be vestrymen; and from time to time, upon the death, removal, or other voidance of any such vestryman, the rest or majority of them may choose another.

(*k*) *Rex* v. *Kent Justices*, 4 Nev. & M. 299; *S. C.*, in the names *Rex* v. *Adam*, 2 Ad. & Ell. 409.

(*l*) *Brockett* v. *Blizard*, 4 M. & R. 641.

(*m*) *Rex* v. *Martin*, 2 Campb. 100, Macdonald.

(*n*) *In re St. Giles' and St. George's*, 1 Dowl. P. C. 540.

(*o*) *Rex* v. *Brain*, 3 B. & Ad. 614.

(*p*) Ibid.

In the several private acts for building particular churches, sometimes the minister, churchwardens, overseers of the poor, and others who have served, or paid fines for being excused from serving those offices; sometimes the minister, churchwardens, overseers of the poor, and all who pay to the poor rate; sometimes only all who pay such a sum to the poor rate; sometimes all who rent houses of so much a year;—are appointed to be vestrymen within such parishes, and no other persons.

Liability of vestrymen.

Vestrymen who have signed a resolution ordering the parish surveyor to take steps for defending an indictment for not repairing a road, were holden not to be responsible for the payment of the attorney employed by the surveyor (*q*). Where several parishioners joined at a vestry meeting in signing an order authorizing two churchwardens to put a new roof on the parish tower, and both concurred in giving orders for that purpose, and one of them (the plaintiff) paid the artificers, and a rate for reimbursing them having been quashed, the plaintiff sued the defendant, being the other churchwarden, for a moiety of the money so paid; it was holden that the defendant could not insist on those parishioners who had signed the vestry order being joined with him as co-defendants in the action (*r*). In a case where several parishioners in the vestry signed a resolution in the vestry minute-book, stating that they approve of an action brought by the surveyor of the highways against A., and that they do thereby guarantee to him all legal expenses that are or may be incurred by him in prosecuting that suit; it was holden that this binds them personally, and will render each person signing it incompetent to be a witness on the trial of that action (*s*).

1 & 2 Will. 4, c. 60.

Vestries may be constituted by Sir J. Hobhouse's Act, the distinguishing feature of which, it will be seen on reference to it, is a provision for the auditing and keeping of parochial accounts by a select body of vestrymen elected from the ratepayers. It will be observed also that it is applicable only to parishes forming part of a city or town, or containing more than 800 ratepayers, and that it in no way affects the ecclesiastical jurisdiction. It no longer applies to the metropolis (*t*).

(*q*) *Spratt* v. *Powell*, 3 Bing. 478; 11 Moore, 398; *Lanchester* v. *Frewer*, 9 Moore, 688; 2 Bing. 361.

(*r*) *Lanchester* v. *Tricker*, 8 Moore, 20; 1 Bing. 201.

(*s*) *Heudebourck* v. *Langton*, 3 C. & P. 566, per Lord Tenterden. A rule for a new trial was refused; 10 B. & C. 546.

(*t*) 1 & 2 Will. 4, c. 60, "An Act for the better Regulation of

Vestries in metropolis.

Vestries in the metropolis are now to be constituted under the Metropolis Local Management Acts.

The first of these, 18 & 19 Vict. c. 120, repeals, by sect. 1, 1 & 2 Will. 4, c. 60, so far as it relates to the metropolis, and proceeds to provide for the formation of vestries in the metropolitan parishes.

No such vestries are, by sect. 29, to be holden in any church or chapel.

By sect. 90, all duties, powers and authorities as to the concerns of any parish (*except such duties and powers as relate, inter alia, to the affairs of the church*) are to be vested in the vestries formed under this act.

Church rates where made in open vestry before passing of the act 18 & 19 Vict. c. 120, to be so made.

By the second act, 19 & 20 Vict. c. 112, s. 1, "Where at the time of the passing of the said act the power of making church rates, or rates of the nature of church rates, in any parish was vested in any open vestry, or in any meeting in the nature of an open vestry meeting, or in any meeting of the parishioners, inhabitants or ratepayers generally, or of such of the parishioners, inhabitants or ratepayers as were rated at or above any specified amount or value (whether such vestry or meeting were holden for the parish at large or for any liberty or district therein), such power shall not be deemed to have become vested in the vestry constituted in such parish under the said act, but shall be exercised as if the said act had not been passed: Provided always, that this act shall not affect any such rate made before the passing thereof by any such vestry as last aforesaid."

Nothing in this act, or in 18 & 19 Vict. c. 120, to affect ecclesiastical districts.

Sect. 2. "Nothing in the said act or this act shall affect, or be deemed to have affected, any power of electing or appointing churchwardens or making church rates, or other power, which at the time of the passing of the said act was vested in any such open vestry or meeting as aforesaid, or any elected or other vestry, where such vestry or meeting acts exclusively for any district (by whatever denomination distinguished) created for ecclesiastical purposes only."

Other powers of vestries and like meetings declared to have been transferred to vestries under act 18 & 19 Vict. c. 120.

Sect. 3. "Save as hereinbefore otherwise provided, all the duties, powers and privileges (including such as relate to the affairs of the church) . . . which might have been performed or exercised by any open or elected or other vestry, or any such meeting as aforesaid in any parish, under any local act or otherwise, at the time of the passing of the said act of the last session, shall be deemed to have

Vestries, and for the Appointment of Auditors of Accounts, in certain Parishes of England and Wales. (Oct. 20, 1831.)

become transferred to and vested in the vestry constituted by such last-mentioned act; . . . Provided that all duties and powers relating to the affairs of the church . . . which at the time of the passing of the said act were vested in or might be exercised by any guardians, governors, trustees or commissioners, or any body other than any open or elected or other vestry, or any such meeting as hereinbefore mentioned, shall continue vested in and be exercised by such guardians, governors, trustees or commissioners, or other body as aforesaid."

The case of *Carter* v. *Cropley* (*u*), deciding that the right to elect their incumbent when previously vested in the inhabitants and parishioners paying rates, is not by these acts transferred to the statutory vestries, has been already mentioned (*x*).

(*u*) 8 De G., M. & G. 680; 2 Jur., N. S. 1200; 3 Jur., N. S. 171.
(*x*) *Vide supra*, p. 364.

CHAPTER VI.

CHURCH TRUSTEES.

Origin of.

CHURCH trustees have their origin in the Compulsory Church Rate Abolition Act 1868 (31 & 32 Vict. c. 109).

Power to appoint church trustees.

By the 9th section of this act it is provided as follows:

"A body of trustees may be appointed in any parish for the purpose of accepting, by bequest, donation, contract, or otherwise, and of holding any contributions which may be given to them for ecclesiastical purposes in the parish.

"The trustees shall consist of the incumbent and of two householders or owners or occupiers of land in the parish, to be chosen in the first instance, and also from time to time on any vacancy in the office by death, incapacity, or resignation, one by the patron, and the other by the bishop of the diocese in which the parish is situate.

The trustees shall be a body corporate, by the name of the church trustees of the parish to which they belong, having a perpetual succession and a common seal, with power to sue and be sued in their corporate name.

The trustees may from time to time, as circumstances may require, pay over to the churchwardens, to be applied by them either to the general ecclesiastical purposes of the parish, or to any specific ecclesiastical purposes of the parish, any funds in their hands, and the funds so paid over may be applied to such purposes and shall not be applied to any other purpose: Provided always, that no power shall be thereby conferred on the churchwardens to take order with regard to the ecclesiastical purposes of the parish further or otherwise than they are now by law entitled to do: provided also, that due regard shall be had to the direction of the donors of funds contributed for any special ecclesiastical purposes: and, subject as aforesaid,

The trustees may invest in government or real securities any funds in their hands, and accumulate the income thereof, or otherwise deal with such funds as they think expedient, subject to the provisions of this act.

The incumbent shall be the chairman of the trustees.

" The trustees shall, once at the least in every year, lay before the vestry an account of their receipts and expenditure during the preceding year, and of the mode in which such receipts have been derived and expenditure incurred, together with a statement of the amount (if any) of funds remaining in their hands at the date of such account."

It does not appear whether any instance of the application of this section has yet occurred.

As to application of section.

CHAPTER VII.

MINOR OFFICERS.

SECT. 1.—*Parish Clerks.*
2.—*Sextons.*
3.—*Organists.*

SECT. 1.—*Parish Clerks* (*a*).

Clerk in holy orders.

THE *status* of parish clerks in holy orders has been already considered (*b*).

Constitution of Boniface.

"We do decree that the offices for holy water be conferred upon poor clerks" (*c*).

For the understanding of which constitution, it is to be observed, that parish clerks were heretofore real clerks, of whom every minister had at least one, to assist under him in the celebration of divine offices: and for his better maintenance, the profits of the office of *aquæbajalus* (who was an assistant to the minister in carrying the holy water) were annexed unto the office of the parish clerk by this constitution: so as, in after times, *aquæbajalus* was only another name for the clerk officiating under the chief minister.

His qualification.

By Can. 91 of 1603, "And the said clerk shall be twenty years of age at the least; known to the parson, vicar, or minister to be of honest conversation, and sufficient for his reading, writing, and also for his competent skill in singing (if it may be)."

How to be appointed.

All incumbents once had the right of nomination of the parish clerks, by the common law and custom of the realm (*d*).

And by the aforesaid constitution of Archbishop Boniface, "Because differences do sometimes arise between rectors and vicars and their parishioners, about the conferring of such offices, we do decree, that the same rectors and vicars, whom it more particularly concerneth to know

(*a*) Called originally "*æditui*," Ayl. Parerg. 409.

(*b*) *Vide supra*, pp. 588—590.

(*c*) Boniface, Lind. 142.

(*d*) Gibs. 214.

who are fit for such offices, shall endeavour to place such clerks in the aforesaid offices, who, according to their judgment, are skilled and able to serve them agreeably in the divine administration, and who will be obedient to their commands."

And by Can. 91, "No parish clerk upon any vacation shall be chosen within the city of London or elsewhere, but by the parson or vicar; or where there is no parson or vicar, by the minister of that place for the time being; which choice shall be signified by the said minister, vicar or parson, to the parishioners the next Sunday following, in the time of divine service."

Since the making of which canon, the right of putting in the parish clerk has often been contested between incumbents and parishioners, and prohibitions prayed, and always obtained, to the spiritual court for maintaining the authority of the canon in favour of the incumbent against the plea of custom in behalf of the parishioners (*e*).

Thus, in *Cundict* v. *Plomer* (*f*), in 8 Jac. 1, the parishioners of the parish of St. Alphage in Canterbury prescribed to have the election of their parish clerk, and by the canon the election of the clerk is given to the vicar. It was adjudged in this case, that the prescription should be preferred before the canon, and a prohibition was awarded accordingly.

In *Jermyn's Case* (*g*), in 21 Jac. 1, Jermyn, rector of the parish of St. Katherine's in Coleman Street, and Hammond, as clerk there, sued in the spiritual court to have the said clerk established there, being placed there by the parson according to the late canon, where the parishioners disturbed him, upon a pretence of a custom to place the clerk there by the election of their vestry. And upon this surmise of a custom, the churchwardens and parishioners prayed a prohibition; and after divers motions a prohibition was granted; for they held that it was a good custom, and that the canon cannot take it away.

In united parishes.

Before the union of parishes in London, effected by 22 Car. 2, c. 11, there was a custom in the parish of St. M. P. for the parishioners to join with the rector in the election of a parish clerk. By that act the parish of St. M. C. was united to that of St. M. P., the church of the latter parish still remaining; and it was holden that the right of election after the union continued in the inhabitants jointly with the rector; and that an appointment by the rector

(*e*) Gibs. 214.
(*f*) Hughes, 275; 13 Coke, 70.
(*g*) Cro. Jac. 670.

alone, without the concurrence of the majority of such parishioners, was void; and consequently that a person so appointed could not maintain trespass against the churchwardens, &c., for forcibly expelling him from the reading-desk of the parish church. It was not decided whether the election should be made by the rector and the inhabitants of both parishes in joint vestry assembled, or by the rector with the inhabitants of St. M. P. alone, and whether the presence of the rector at the time of the election was necessary for the validity of the appointment (*h*).

Authority of curate, where incumbent is suspended.

Where D., the vicar of F., was suspended, for misconduct, by the bishop of the diocese, from performing the duties and receiving the profits of the vicarage, for the space of two years, and, further, until he should exhibit a certificate of good behaviour, and K. was licensed by the bishop to act as curate of F., and officiated; and after the expiration of the two years, and before the exhibition of a certificate, the parish clerk of F. died, and K. appointed plaintiff to be parish clerk during the suspension of D.; and D., during the continuance of the suspension, appointed defendant as parish clerk, who received fees in that character; plaintiff having, during the continuance of the suspension, sued the defendant, in respect of these fees, for money had and received: It was ruled—(1) that K. had the right of appointing the parish clerk; (2) that the appointment of plaintiff was good; but (3) that a general appointment by K. would be more advisable than one limited to the time of D.'s suspension (*i*).

How to be admitted.

Parish clerks, after having been duly chosen and appointed, are usually licensed by the ordinary (*k*); but this, though not unusual, does not seem to be absolutely necessary (*l*).

And when they are licensed, they are sworn to obey the minister (*m*).

And if a parish clerk has been used time out of mind to be chosen by the vestry, and after admitted and sworn before the archdeacon, and he refuse to swear such parish clerk so elected, but admits another chosen by the parson, a writ may be awarded to him commanding him to swear him (*n*).

(*h*) *Hartley* v. *Cook*, 9 Bing. 728; 3 M. & Scott, 230; 5 C. & P. 441.

(*i*) *Pinder* v. *Barr*, 4 Ell. & Bl. 105 (1854).

(*k*) Johns. 204.

(*l*) *Peak* v. *Bourne*, Str. 942, *infra*, p. 1905.

(*m*) Johns. 205.

(*n*) 2 Roll. Abr. 234; Viner, Mandamus (H. 3); 3 Bac. Abr. 531.

And in the case of *Rex* v. *Henchman* (*o*), official of the consistory court of the Bishop of London, a mandamus was granted to admit one Robert Trott to the office of parish clerk of Clerkenwell, being elected by the parish, it being shown that the official had usually admitted to that office.

His salary.

By the aforesaid constitution of Archbishop Boniface, "If the parishioners shall maliciously withhold the accustomed alms from the *aquæbajulus*, they shall be earnestly admonished to render the same; and if need be, shall be compelled by ecclesiastical censure."

Alms.]—By which word we may understand that such clerks cannot claim anything by way of a certain allowance or endowment by reason of their office of *aquæbajulus*: but their sustentation ought to be collected and levied according to the manner and custom of the country (*p*).

Accustomed Alms.]—For this custom ought to be considered according to the manner anciently observed; which also, inasmuch as it concerns the increase of divine worship, ought not to be changed at pleasure: but hereunto the parishioners may be compelled by the bishop (*q*).

And a custom of this kind is good and laudable, that every master of a family (for instance) on every Lord's day, give to the clerk bearing the holy water somewhat according to the exigency of his condition; and that on Christmas day he have of every house one loaf of bread, and a certain number of eggs at Easter, and in the autumn certain sheaves. Also that may be called a laudable custom, where such clerk every quarter of the year receives something in certain in money for his sustenance, which ought to be collected and levied in the whole parish. For such laudable custom is to be observed, and to this the parishioners ought to be compelled; for having paid the same for so long a time, it shall be presumed that at first they voluntarily bound themselves thereunto (*r*).

Admonished.]—Not only by the ministers, but also and more especially by the ordinary of the place (*s*).

By Can. 91, "The said clerks shall have and receive their ancient wages, without fraud or diminution, either at the hands of the churchwardens, at such times as hath been accustomed, or by their own collection, according to the most ancient custom of every parish."

Ancient Wages.]—In case such customary allowance is

(*o*) 3 Bac. Abr. 531.
(*p*) Lindw. 143.
(*q*) Ibid.
(*r*) Ibid.
(*s*) Ibid.

Where to be sued for.

denied, the foregoing constitution, and the practice thereupon, direct where it is to be sued for, viz. before the ordinary in his ecclesiastical court. That constitution (as we see) calls those wages *accustomed alms:* and in the register there is a consultation provided in a case of the same nature, for what the writ calls *largitio charitativa* (as being originally a free gift), which by parity of reason may be fairly extended to the present case (*t*).

But by the common law, if a parish clerk claim by custom to have a certain quantity of bread at Christmas of every inhabitant of the parish, or the like, and sue for this in the spiritual court, a prohibition lies (*u*).

In *Parker* v. *Clarke* (*x*), in 3 Anne, the clerk of a parish libelled against the churchwardens, for so much money due to him by custom every year, and to be levied by them on the respective inhabitants in the said parish; and after sentence in the spiritual court, the defendants suggested for a prohibition, that there was no such custom as the plaintiff had set forth in his libel. It was objected against granting the prohibition, that it was now too late, because it was after sentence, especially since the custom was not denied; for if it had, and that court had proceeded, then and not before, it had been proper to move for a prohibition. But by Holt, Chief Justice: It is never too late to move the King's Bench for a prohibition, where the spiritual court had no original jurisdiction, as they had not in this case, because a clerk of a parish is neither a spiritual person, nor is this duty in demand spiritual, for it is founded on a custom, and by consequence triable at law; and therefore the clerk may have an action on the case against the churchwardens for neglecting to make a rate, and to levy it, or if it had been levied and not paid by them to the plaintiff.

In *Pitts* v. *Evans* (*y*), in 12 Geo. 2, a prohibition was granted to a suit in the spiritual court by the clerk of St. Magnus for 1*s*. 4*d*., assessed on the defendant's house at a vestry in 1672, to be paid to the parish clerk. For, by the court, he is a temporal officer, or if not, yet he could not sue there for such a rate: for if it is due by custom, he may maintain an *assumpsit*, if not a *quantum meruit*, or a bill in equity.

How to be removed from his office.

The parish clerk ought to be deprived by him that placed him in his office: and if he is unjustly deprived,

(*t*) Gibs. 214.
(*u*) 2 Rolle's Abr. 286.
(*x*) 6 Mod. 252; 3 Salk. 87.
(*y*) Strange, 1108; *S.C.* 13 Vin. Ab. 155.

a mandamus will lie to the churchwardens to restore him; for the law looks upon him as an officer for life, and one that has a freehold in his place, and not as a servant, and therefore will not suffer the ecclesiastical court to deprive him, but only to correct him for any misdemeanor by ecclesiastical censures (*z*).

In *Townshend* v. *Thorpe* (*a*), in 13 Geo. 1, the plaintiff declared in prohibition, that he was indicted for an assault with intent to commit sodomy, notwithstanding which he was proceeded against in the spiritual court for the same offence, and for drunkenness. The defendant pleaded, that the plaintiff was a parish clerk, and that the suit there was not only to punish him for the incontinency, but also to deprive him of his office. Demurrer thereupon. And as it was going to be argued, the court proposed to stay till the indictment was tried; and it having been tried, and the defendant convicted and pilloried, the court, without ordering the declaration to be amended, granted a consultation as to the proceeding to deprive, and confirmed the prohibition as to any other punishment. They said, he was an ecclesiastical officer as to everything but his election.

In *Peak* v. *Bourne* (*b*), in 6 Geo. 2, the plaintiff declared in prohibition, that he was sued in the spiritual court for executing the office of deputy parish clerk, without the licence of the ordinary. On demurrer, three points were made: 1. Whether a parish clerk be a temporal or a spiritual office. 2. Whether he can make a deputy. 3. Whether the licence of the ordinary is requisite. It was argued three several times upon all the points. But the court in giving judgment founded themselves only upon the last; as to which they held, that a licence was not necessary, and therefore gave judgment for the plaintiff in prohibition. They said the canon did not require it, and indeed it would be a transferring the right of appointment to all intents and purposes to the ordinary. As to the two other points, the court strongly inclined that he was a temporal officer as to the right of his office, and that he might make a deputy. And as to the first, when the court were pressed with their own authority in *Townshend* v. *Thorpe*, they said it was a hasty opinion, into which they were transported by the enormity of the case (*c*).

(*z*) 3 Rolle's Abr. 234; Gibs. 214; God. 192; 2 Brownl. 38.

(*a*) Str. 776; 2 Raym. 1507.

(*b*) Str. 942. This case is also reported in 2 Lee, 587.

(*c*) Lord Tenterden, speaking of *Townshend* v. *Thorpe* (*Free* v. *Burgoyne*, 5 Barn. & Cress. 405; 8 D. & R. 587), said, "Objection has since been made to that case,

How to be removed from his office.

In *Tarrant* v. *Haxby* (*d*), in 30 & 31 Geo. 2, a motion was made for a prohibition to the consistory court of York, to stay their proceedings against Tarrant, the present parish clerk of St. Osith in York; which proceedings were there instituted at the instance of Haxby, the deprived parish clerk, for the restoration of the said Haxby. It was urged that the office is temporal, and therefore that the spiritual court has no jurisdiction concerning his deprivation. This Haxby, they said, was deprived by the parson and the whole parish, for drunkenness during divine service and other misdemeanors: Whereupon the parson appointed Tarrant in his room. Against whom Haxby libelled in the consistory court, where there was a monition, and they were proceeding to restore Haxby. And all this was suggested. Upon which a rule was granted to show cause. And now cause was to have been shown. But the counsel, being satisfied that it was too strong against them, gave it up. And the rule for the prohibition was made absolute.

Mandamus to restore.

In *Rex* v. *Erasmus Warren* (*e*), in 16 Geo. 3, in the last term cause was shown against a mandamus to restore William Readshaw to the office of parish clerk of Hampstead. It was stated, that the clerk was appointed by the minister; that he had since become bankrupt, and had not obtained his certificate; that he had been guilty of many omissions in his office; was actually in prison at the time of his amoval; and had appointed a deputy who was totally unfit for the office. Against which it was insisted, that the office of parish clerk is a temporal office during life; that the parson cannot remove him; and that he has a right to appoint a deputy. Lord Mansfield then said, there was an application of this sort in a cause of *Rex* v. *Proctor*, in 15 Geo. 3, where the parson removed a parish clerk appointed by the former incumbent. There the right of amotion was in question, and all agreed it must be somewhere, but that case was not decided. Lord Mansfield asked, what remedy is there in Westminster Hall to remove him? He certainly has his office only during his good behaviour. But though the minister may have a power of removing him on a good and sufficient cause, he can never be the sole judge and remove him at pleasure, without being subject to the control of this court.

on the ground that the ecclesiastical court had no authority to suspend or deprive, perhaps that objection is well founded." But see Sir G. Lee's remarks in *Barton* v. *Ashton*, 1 Lee, 353, *infra*, p. 1908.

(*d*) Burr. 367.

(*e*) Cowper, 370.

By Mr. Justice Aston: As long as the clerk behaves himself well, he has a good right and title to continue in his office. Therefore if the clergyman has any just cause for removing him, he should state it to the court. Accordingly, the court enlarged the rule to this term, that affidavits might be made on both sides, of the cause and manner of amotion. And now on this day, upon reading the affidavits, Lord Mansfield said, it was settled in the case of *Rex* v. *Ashton*, in 28 Geo. 2, *that a parish clerk is a temporal officer, and that the minister must show ground for turning him out.* Now in this case, there is no sufficient reason assigned in the affidavits that have been read, upon which the court can exercise their judgment, nor is there any instance produced of any misbehaviour of consequence; therefore the rule for a mandamus to restore him must be made absolute.

Duty to hear before removal.

In a more recent case, in which a mandamus had issued to a vicar to restore T. H. to the office of parish clerk. Return, that T. H. had on several specified occasions misconducted himself by designedly irreverent and ridiculous behaviour in his performance of his duty; by appearing in church drunk, so as to be incapable of performing it; and by indecently disturbing the congregation during the administration of the sacrament. The return stated that the alleged acts were done in the view and presence of the defendant, and after repeated reproof, whereupon the defendant removed him from his office of clerk. Plea, stating that T. H. had not been summoned to answer for his conduct before his removal. It was ruled, that the return was bad for not showing such summons (*f*).

Mode of appointment.

A pauper was appointed a parish clerk in the following manner: The rector sent for the pauper on a Sunday, and requested him to perform duty on that day, and on coming out of the desk, the rector said to the pauper, "I appoint you my regular clerk and sexton, and to follow me in funerals and marriages" (*g*). It was holden that this was a proper appointment of the pauper as parish clerk (*h*). It seems to be doubtful whether the canon renders it necessary that the appointment of a parish clerk should be signified to the parishioners. A right to demand a poll is by law incidental to the election of a parish officer by show of hands (*i*).

(*f*) *Reg.* v. *Smith*, 5 Ad. & Ell., N. S. 614 (1844).

(*g*) *Rex* v. *St. Ann's, Soho*, 3 Burr. 1877.

(*h*) *Rex* v. *Bobbing* (*Inhab.*), 1 N. & P. 166.

(*i*) *Campbell* v. *Maund*, 1 N. & P. 558.

Where mandamus does not lie.

But a mandamus does not lie to restore one to the office of deputy parish clerk (*k*). It has been holden, as we have seen, that it lies to a minister to restore a parish clerk removed by him *without just cause*. And the court will not judge of the justice of the cause of the removal upon the *ex parte* statement of the minister; he must state it in his return to the mandamus, and give to the clerk an opportunity of answering it (*l*). But Sir G. Lee said, that where a parish clerk was appointed by the parishioners by custom, he had been holden to be a temporal officer; but where he was nominated by the parson he was a spiritual officer, and that all proceedings to deprive a clerk in the ecclesiastical court must be plenary and by articles (*m*).

Serving the office of parish clerk for a year gains a settlement, although he be chosen by the parson and not by the parishioners, and have no licence from the ordinary, and although he be a certificate man (*n*).

As to vote of parish clerk.

A parish clerk, receiving more than 40*s*. a year from the parochial burial fees, is not entitled to vote for the county, either as holding a freehold office, or as having an interest in freehold land in virtue of his receipt of such fees (*o*).

Office cannot be assigned.

It has been holden that the office of parish clerk cannot be assigned, and that the assignor was therefore still the parish clerk, and could sue for the fees (*p*).

7 & 8 Vict. c. 59.

In 1844, the 7 & 8 Vict. c. 59 was passed, entitled "An Act for better regulating the Office of Lecturers and Parish Clerks." The following sections relate to the removal of parish clerks:—

Power to suspend or remove church clerks not in holy orders who may be guilty of neglect or misbehaviour.

Sect. 5. "If at any time it shall appear, upon complaint or otherwise, to any archdeacon or other ordinary that any person not in holy orders, holding or exercising the office of church clerk, chapel clerk, or parish clerk in any district, parish, or place within and subject to his jurisdiction, has been guilty of any wilful neglect of or misbehaviour in his said office, or that by reason of any misconduct he is an unfit and improper person to hold or exercise the same, it shall be lawful for such archdeacon or other ordi-

(*k*) *Anon.*, Lofft, 434.

(*l*) *Rex* v. *Davies*, 9 D. & R. 234; and see Lord Kenyon's remarks, *Rex* v. *Gaskin*, 8 T. R. 209.

(*m*) *Barton* v. *Ashton*, 1 Lee, 353. See the collection of cases of older date in the note. A copy of such articles is in Phillimore's Burn, vol. 3, "Practice."

(*n*) *Inter the parishes of Gatton and Milwich*, 2 Salk. 536; *Peak* v. *Bourne*, 2 Str. 942; 2 Sess. Cas. 182.

(*o*) *Bushell* v. *Eastes*, 8 Jur., N. S. 655 (1861).

(*p*) *Nichols* v. *Davis*, L. R., 4 C. P. 80 (1868).

nary forthwith to summon such church clerk, chapel clerk, or parish clerk to appear before him, and also by writing under his hand, or by such process as is commonly used in any of the courts ecclesiastical for procuring the attendance of witnesses, to call before him all such persons as may be competent to give evidence or information respecting any of the matters imputed to or charged against such church clerk, chapel clerk, or parish clerk as aforesaid; and such archdeacon or other ordinary shall and may, if he see fit, examine upon oath, to be by him administered in that behalf, any of the persons so appearing or attending before him respecting any of the matters aforesaid, and shall and may thereupon summarily hear and determine the truth of the matters so imputed to or charged against such church clerk, chapel clerk, or parish clerk as aforesaid; and if upon such investigation it shall appear to the satisfaction of such archdeacon or other ordinary that the matters so imputed to or charged against such church clerk, chapel clerk, or parish clerk are true, it shall be lawful for the said archdeacon or other ordinary forthwith to suspend or remove such church clerk, chapel clerk, or parish clerk from his said office, and by certificate under his hand and seal directed to the rector or other officiating minister of the parish, district, or place wherein such church clerk, chapel clerk, or parish clerk held or exercised his said office, to declare the said office vacant, and a copy of such certificate shall thereupon, by such rector or other officiating minister, be affixed to the principal door of the church or chapel in which the said church clerk, chapel clerk, or parish clerk usually exercised his said office; and the person or persons who upon the vacancy of such office are entitled to elect or appoint a person to fill the same, shall and may forthwith proceed to elect or appoint some other person to fill the same in the place of the said church clerk, chapel clerk, or parish clerk so removed as aforesaid: Provided always, that the exercise of such office by a sufficient deputy who shall duly and faithfully perform the duties thereof, and in all respects well and properly demean himself, shall not be deemed a wilful neglect of his office on the part of such church clerk, chapel clerk, or parish clerk, so as to render him liable, for such cause alone, to be suspended or removed therefrom."

Power to remove person ceasing to be

Sect. 6. "In case any person, having ceased to be employed in any of the offices or duties in this act mentioned or referred to, or having been duly suspended or removed

employed as mentioned in this act from premises holden by him in right of his employment.

from any such office or employment as aforesaid, shall at any time refuse or neglect to give up the possession of any house, building, land, or premises, or any part or parcel thereof, by him held or occupied by virtue or in respect of any such office or employment as aforesaid, it shall be lawful for the bishop of the diocese, upon complaint thereof to him made, to summon such person forthwith personally to appear before him, and to show cause for such refusal or neglect; and upon the failure of the person so summoned as aforesaid to obey such summons, or, upon his appearance, to show to the said bishop such cause as may be deemed by the said bishop sufficient for such refusal or neglect, the said bishop shall thereupon grant a certificate of the facts aforesaid, under his hand and seal, to the person or persons entitled to the possession of such house, building, land, or premises as aforesaid, who may thereupon go before any neighbouring justice of the peace; and such justice, upon production of such certificate, and proof of such wrongful retention of possession as aforesaid, shall and he is hereby required to issue his warrant under his hand and seal, directed to the constables or other peace officers of the district, parish, or place within which such house, building, land, or premises is or are situate, or to the constables or other peace officers of any neighbouring district, parish, or place, requiring them forthwith to expel and remove from the said house, building, land or premises, and from every part and parcel thereof, the person so wrongfully retaining possession thereof, and to deliver the peaceable possession thereof to the person or persons so entitled to the same as aforesaid; and such constables or other peace officers shall and they are hereby required promptly and effectually, to obey and execute such warrant, according to the exigency thereof, and thereupon it shall be lawful for them also to levy, upon the goods and chattels of the person so by them expelled and removed as aforesaid, the necessary costs and expenses of executing such warrant, the amount whereof, in case the same shall be disputed, shall be forthwith settled and determined by the said justice of the peace by whom the said warrant was so issued as aforesaid, or by any other justice of the peace residing in or near to the said district, parish, or place, whose decision thereupon shall be final, and who is hereby authorized to make such order in that behalf as to him shall seem reasonable."

In cemeteries.

By 10 & 11 Vict. c. 65, s. 34, cemetery companies, with consent of the chaplains of the cemeteries, may ap-

point clerks, and allow them such stipends as they think proper, and may remove them at their pleasure (*q*).

As to the rights of parish clerks in certain cases to officiate in cemeteries and claim fees for their services, see chapter on Burial (*r*).

Parish clerks belonging to churches built under the Church Building Acts are treated of hereafter in the chapter on the Building of Churches (*s*).

SECT. 2.—*Sextons.*

Nature of office.

The *sexton*, *segsten*, *segerstane*, *sacristan*, (*sacrista*, the keeper of the holy things belonging to the divine worship,) seems to be the same with the *ostiarius* in the Roman Church, and is appointed by the minister or others, and receives his salary according to the custom of each parish.

Mandamus for.

It has been adjudged that a mandamus lies to restore a sexton; though as to this the court at first doubted, because he was rather a servant of the parish than an officer, or one that had a freehold in his place; but upon a certificate shown from the minister and divers of the parish that the custom was to choose a sexton, and that he held it for his life, and that he had 2*d.* a year of every house within the parish, they granted a mandamus directed to the churchwardens to restore him (*t*).

Women may be sextons.

In *Olive* v. *Ingram* (*u*), in 12 Geo. 1, in assumpsit for money had and received to the plaintiff's use, a case was made at nisi prius for the opinion of the court, that there being a vacancy in the office of sexton of the parish of St. Botolph without Aldersgate, in the city of London, the plaintiff and Sarah Bly were candidates; and Sarah Bly had 169 indisputable votes, and 40 which were given by women who were housekeepers and paid to the church and poor; that the plaintiff had 174 indisputable votes, and 22 other votes given by such women as aforesaid: that Sarah Bly was declared duly elected; upon which the plaintiff brought a mandamus, and was sworn in, and the defendant had received 5*s.* belonging to the office. In this case two points were raised: 1st, whether a woman was capable of being chosen sexton; and 2nd, whether women could vote in the election. As to the first, the court seemed to have no difficulty about it, there having been many cases where offices of greater consequence have

(*q*) *Vide supra*, p. 846.
(*r*) *Supra*, p. 872.
(*s*) *Vide infra*, Part IX., Chap. V.
(*t*) 3 Bac. Abr. 530
(*u*) Str. 1114.

Women may be sextons.

been held by women, and there being many women sextons at that time in London. In the second year of Queen Anne a woman was appointed governor of Chelmsford workhouse; Lady Broughton was keeper of the Gatehouse; Lady Packington was the returning officer for members at Ailesbury. As to the second point, it was shown that women cannot vote for members of parliament or coroners, and yet they have freehold, and contribute to all public charges; and though they vote in the monied companies, yet that is by virtue of the acts which give the right to all persons possessed of so much stock; that military tenures never descended to them. But the court notwithstanding held, that this being an office that did not concern the public, or the care and inspection of the morals of the parishioners, there was no reason to exclude women who paid rates from the privilege of voting; they observed, here was no usage of excluding them stated, which perhaps might have altered the case; and that as this case was stated, the plaintiff did not appear to have been duly elected, and therefore there ought to be judgment against him (*u*).

Mandamus refused for office.

In *Rex* v. *Churchwardens of Thame* (*x*), in 5 Geo. 1, an application was made to the Court of King's Bench for a mandamus to restore John Williams to the office of sexton. A return was made that he held it *at pleasure.* The court refused the mandamus without a certificate that he was chosen *for life.*

Quo warranto.

It has been said, that the common law considers sextons to have a freehold in their office, and has never decided that a writ of *quo warranto* would not lie in the case of a sexton (*y*).

When office full and right to elect doubtful.

In 1836 a mandamus was applied for on affidavits making a *primâ facie* case of right in the inhabitants to elect a sexton for the parish of Stoke Damerel in Devonshire. Affidavits were filed in answer, stating facts to show that the right was in the rector, who had filled up the appointment. The office being full, a question arose as to whether the proper remedy was not by "*quo warranto,*" instead of "*mandamus.*" Mr. Justice Patteson (agreeing with Lord Chief Justice Denman, Williams and Coleridge, Justices,

(*u*) Anne, Countess of Pembroke, Dorset, and Montgomery, sat on the Bench with the judges at the assizes at Appleby as hereditary sheriff of Westmoreland.

(*x*) Str. 115.

(*y*) See 2 Roll. Abr. 234; *Ile's case*, 1 Ventr. 153; *Rex* v. *Churchwardens of St. James's, Taunton*, 1 Cowp. 413; 5 Ad. & Ell. 584; *Stokes* v. *Lewis*, 1 T. R. 20; case of sexton chosen by two parishes.

said (*z*), "I am of the same opinion. I cannot at present find any reported case in which a mandamus has been granted to elect, where the office was already filled by a void election; but I am sure, from my recollection, that the practice is so, if the court is satisfied of the election being void (*a*). In *Rex* v. *The Corporation of Bedford* (*b*), where the corporation had elected a mayor who would not attend to be sworn in, because he had not qualified, the court ultimately granted a mandamus to proceed to a new election; that, however, was after much doubt, and the office was expressly avoided by stat. 13 Car. 2, stat. 2, c. 1, s. 12. But I am confident that, if the question cannot be tried by a *quo warranto*, the course is to grant a mandamus for a new election, where the court is satisfied that the first election is void. Where there is any other mode of trying the right, a mandamus ought not to go. Here, *primâ facie*, the appointment is right, being made by the rector, who, by the general law, is the proper person to make it. Strong evidence would be necessary to disprove his authority. There is, on the other hand, a custom alleged for the parishioners to elect; and some evidence, not conclusive, but amounting to a *primâ facie* case, has been given to show that the last election was by them. The office, however, is now full by the rector's appointment. If there were no other remedy, I should say that a mandamus ought to go; but there is such a remedy, by refusing the fees, or bringing an action for money had and received if they are taken. It cannot be supposed that the sexton will go on for five or six years refusing his fees, to prevent a trial of the right; at least the probability of it is not one which we can enter into. The rule must therefore be discharged."

Appointment of. General law.

The appointment to the office of sexton, *primâ facie*, is not vested in the inhabitants of the parish at large. Where the duties of that office consist in the care of the sacred vestments and vessels, in the care of the church, by keeping it clean, in ringing the bells, and in opening and closing the doors for divine service, the presumption is, that the churchwardens have the right of appointment; and where the duties are confined to the churchyard, in digging graves, &c., the presumption is, that the appoint-

Presumption of law.

(*z*) *Rex* v. *The Minister and Churchwardens of Stoke Damerel*, 5 Ad. & Ell. 589; 1 Nev. & Per. 453.

(*a*) It seems to have been so understood in *Rex* v. *Churchwardens of St. Pancras*, 1 A. & E. 80; and see there the judgments of Parke, J., p. 100, and of Patteson, J., p. 102.

(*b*) 1 East, 79.

ment is in the incumbent; and where the office embraces both the above-mentioned duties, the presumption is, that his appointment is vested in the churchwardens and incumbent jointly (*c*).

SECT. 3.—*Organists.*

His duties.

The organist has become of late years an important officer in parish churches, though formerly his duties were chiefly confined to cathedrals and the churches of large towns.

Something has been said about organists and organs in the Chapter on Liturgy and Ritual (*d*).

Subject to control of minister.

It has also been said that the minister has the right of directing the service, *e. g.*, when the organ shall and shall not play, and when children shall and shall not chant, though the organist is paid and the children are managed by the churchwardens (*e*).

No mandamus to elect.

The Court of Queen's Bench has refused to issue a mandamus to the vicar, churchwardens and inhabitants of a parish to elect an organist, even though the office of organist has always existed in the parish church beyond the time of living memory (*f*).

(*c*) *Causfield* v. *Blenkinsop*, 4 Ex. 234 (1849).

(*d*) Part III., Chap. XI., Sect. 4, pp. 927—929.

(*e*) *Hutchins* v. *Denziloe*, 3 Phillim. 90.

(*f*) *Reg.* v. *Vicar, &c. of St. Stephen's, Coleman Street*, 9 Jur. 255 (1845).

PART VII.

COUNCILS OF THE CHURCH.

CHAPTER I.

GENERAL COUNCILS.

THE earliest council of the church (*a*) is that recorded in the Acts of the Apostles (A.D. 46), in which was decided the question relating to the obligation of Mosaic ordinances upon the Gentile converts. The principles that the spiritual governors of the church should meet and settle questions in dispute unprovided for by Holy Writ, and

(*a*) ΣΥΝΟΔΙΚΌΝ, sive Pandectæ Canonum SS. Ap. et Conciliorum ab Eccles. Græcâ receptorum, &c., Gul. Beverege, Oxon. 1672, 2 vols. fol.—the most complete and learned work on the subject; Mahan, Church History of First Seven Centuries (American); Walter, s. 58, 65 a, 74—84, 84 a, 103—110, 157; Müller, Lex. I. "Concilien;" Canones Apost. et Concil. veterum selecti, Bruns (Berlin, 1839); Hefele, Concilien Gesch.; Durand de Maillane, Dict. du Droit Can. t. 1, titre "Concile;" Hooker, Eccl. Pol. bk. viii., "To call and dissolve all solemn assemblies about the public affairs of the church;" Ayliffe's Introd. xxxvi.; Grotius (de Bello, Pro. s. 51) observes, "Synodici canones qui recti sunt, collectiones sunt ex generalibus legis divinæ pronuntiatis, ad ea quæ occurrunt aptatæ: hi quoque monstrant quod divina lex præcipit, aut id quod Deus suadet hortantur, et hoc veræ Ecclesiæ est officium ea quæ sibi a Deo tradita sunt tradere, et eo quo tradita sunt modo, &c." As to English and British councils, see especially Concilia Magnæ Britanniæ et Hiberniæ, ed. Wilkins, A.D. 1737; Johnson's Canons, ed. Baron; Eccles. vol. of "Ancient Laws and Institutes," Record Commission's, 1840; Eccles. Institutes, ed. Thorpe; Councils and Ecclesiastical Documents relating to Great Britain and Ireland," edited "after Spelman and Williams" by Haddan and Stubbs. —first and third volumes are published. This promises to be by far the most erudite and valu-

that such a meeting (*b*), duly convened and unanimous in its decision, may reasonably expect the guidance of the Holy Spirit (*c*), appear to be plain inferences from this great event.

This apostolical precedent was followed by the church during the times of her persecution, and still more when that persecution ceased and she became recognized by the state.

Moreover, the Councils or Synods (*d*) of the church form so material a part of the Canon Law, that some mention of them seems proper in a work of this description.

Different kinds of councils.

The canonists define a Council to be an assembly of prelates and doctors to settle matters concerning religion and the discipline of the church. The clearest arrangement of them seems on the whole to be as follows: I. General Councils, called also Œcumenic and Plenary, composed of prelates and doctors assembled from all parts of the earth, and representing the Universal Church: "*universalia concilia sunt quæ sancti patres ex universo orbe, in unum convenientes, juxta fidem evangelicam et apostolicam condiderunt*" (*e*). As St. Augustin says, "*plenaria concilia ex orbe universo.*" Our 21st Article says, "General Councils may not be gathered together

able work on the subject of British councils yet published. It purports to include "everything "partaking of a law or canon; "every record of the existence "of a Synod, even if its acts are lost." (Pref. xviii.)

It contains the following record:

A.D. 1125. *Urban of Landaff summoned to a Council at London.*

Welsh Bishop summoned to a synod of the English Church, to be held by the Papal Legate, with consent of the Archbishop of Canterbury.

LIB. LANDAV.—*Summonitio Willelmi Cantuariensis Archiepiscopi.*—Willelmus Cantuariensis Archiepiscopus Urbano Landauensis Episcopo salutem. Litteris istis tibi notum facere volumus, quod Johannes, Ecclesiæ Romanæ Presbyter Cardinalis atque Legatus, legis ordinatione nostraque conniuentia concilium celebrare disposuit Lundoniæ in Nativitate bæatæ semper Virginis Mariæ [Sept. 8]. Propterea precipimus, ut in prefato termino in eodem loco nobis occurras cum archidiaconibus et abbatibus et prioribus tuæ dyocesios, ad definiendum super negotiis ecclesiasticis, et ad informandum seu corrigendum quæ informanda vel docenda seu corrigenda docuerit sententia connocationis nostræ. (Ib. p. 317.)

(*b*) Πρᾶξ. τῶν Ἀποστ., κ. xv. 25, 26:—"ἔδοξεν ἡμῖν γενομένοις ὁμοθυμαδὸν. . . ."

(*c*) Ibid. 28, 29:—"ἔδοξε γὰρ τῷ ἁγίῳ Πνεύματι καὶ ἡμῖν. . . ."

(*d*) *Synodus* autem ex Græco interpretatur comitatus vel cœtus. *Concilii* vero nomen tractum est ex more Romano. Dist. xv. 7.

(*e*) C. 1, dist. 15, vers. inter eat.

without the commandment and will of princes. And when they be gathered together, (forasmuch as they be an assembly of men, whereof all be not governed with the Spirit and Word of God), they may err, and sometimes have erred, even in things pertaining unto God. Wherefore things ordained by them as necessary to salvation have neither strength nor authority, unless it may be declared that they be taken out of the Holy Scripture." II. National Councils are an assembly composed of the clergy of one entire nation; such were the councils of Toledo in Spain, of Carthage in Africa, and of Orleans in France. It is said that the first national council in England was holden at Herudford, now Hertford, in the year 673. The last was holden by Cardinal Pole in the year 1555 (*f*). III. Provincial Councils, composed of the metropolitan and the bishops of the province (*g*). It should be observed, however, that there are some councils which seem to be more than national, and less than general; such were the various councils convoked by the pope to heal the schisms which from time to time disturbed the peace of the western church (*h*). On the other hand, ecclesiastical history affords several instances of councils apparently more than provincial, without being national. Such were the councils, in which the prelates of one or more patriarchates met together by deputy. IV. Diocesan or Episcopal Councils, (called by the Gallican Church "Synods" (*i*),) in which the bishop and his clergy assembled together to confer upon matters relating to the diocese (*k*). These were frequently holden in England, and did not fall into desuetude till the Act of Submission, 25 Hen. 8, c. 19. Of late years some attempts have been made to revive them.

Some canonists have added a fifth Council, viz. a Council of Regulars or Religious, which is more correctly denominated, as in our country, a Chapter. "*Dic quod illud rectiùs et frequenter consueverit appellari capitulum*" is the remark of Lancelot (*l*).

General Councils.

There are some really Œcumenic or General Councils, which form a part of the Canon Law.

(*f*) Johnson's Coll. of Eccles. Laws, &c. 139.

(*g*) *Vide infra*, the English Provincial Councils and the Chapter on Convocation.

(*h*) *E. g.* that of Felix III. against Xenicus, of Celestin against Nestorius, Martin and Agathon against the Monothelites, Stephen IV. against the Iconoclasts, &c., &c.

(*i*) The work of Benedict XIV. (De Synodâ Diocesanâ, Venetiis, 1787, 2 vols.) is the great work on this subject.

(*k*) Johnson's Collect. of Eccles. Law, 140.

(*l*) C. in singulis stat. Monach. Glos. in instit.

Seven or Eight General Councils (m).

General Councils.

It is remarkable that the eight General Councils on which the Eastern Church relies were convened by the authority of the Emperors of the East and West (n).

The eight General Councils of the Eastern Church are—

1. Nice, 1 325

Convened under Constantine the Great; condemned the heresy of Arius, who denied the true Divinity of our Lord.

2. Constantinople, 1 . . . 381

Convened under Theodosius the Elder; condemned the heresy of Macedonius, who denied the Divinity of the Holy Ghost, and that of Apollinarius, who denied that our Lord had a rational human soul.

3. Ephesus 431

Convened under Theodosius the Younger; condemned the heresy of Nestorius, Patriarch of Constantinople. His heresy related to the Divinity of our Lord, and to denying that the Blessed Virgin was Θεοτόκος, asserting her to be Χριστοτόκος only—that was, in his meaning, ἀνθρωποτόκος.

4. Chalcedon 451

Convened under the Emperor Marcianus; condemned the heresy of Eutyches, who taught the opposite error to that of Nestorius relating to the incarnation and natures of our Lord.

As to these four councils the Emperor Justinian decreed as follows:—

Decree of Justinian.

"Sancimus igitur vicem legum obtinere sanctas ecclesiasticas regulas, quæ a sanctis quatuor conciliis expositæ sunt aut firmatæ, hoc est in Nicæna trecentorum decem et octo, et in Constantinopolitana sanctorum centum quinquaginta Patrum, et in Ephesina prima, in quâ Nestorius est damnatus, et in Chalcedoniâ in quâ Eutyches cum Nestorio anathematizatus est. Prædictarum etiam quatuor Synodo-

(m) There seems to be no practical difference as to dogma between those who reckon seven and those who reckon eight. M. Michaud, one of the leaders of the old Catholics, speaks of the dogmatic decrees of the seven first councils as binding upon him; Jour. des Débats, 2 Oct. 1872. Beverege reckons eight; Proleg. v.

(n) Bishop Beverege (Proleg. ii.) however remarks, "Etiamsi Imperatores multa de ecclesiasticis personis et rebus in Constitutionibus suis ediderint, nihil tamen de novo constituerunt, sed ea tantum quæ ab Ecclesiasticis synodis prius constituta fuerant, ipsi suâ etiam auctoritate confirmarunt." He cites Justinian's expression in Novel. 83, "Secundum sacras et divinas regulas quas etiam nostræ sequi non dedignantur leges." Hooker (bk. viii.) cites St. Jerome as saying, "Dic quis Imperator hanc synodum jussit convocari?"

rum dogmata sicut sanctas Scripturas accipimus et regulas sicut leges observamus" (*o*).

That early portion of the canon law called the *Decretum*, in its first part and in *Distinctio* XV. says, "Inter cætera autem Concilia quatuor esse scimus venerabiles Synodos, quæ totam principaliter fidem complectuntur, quasi quatuor Evangelia, vel totidem Paradisi·flumina." It proceeds to enumerate the four first councils, the emperors under which they were convened, and the heresies which they condemned. "Hæ sunt quatuor Synodi principales, fidei doctrinam plenissimè prædicantes. Sed et si quæ sunt alia Concilia, quæ sancti Patres Spiritu Dei pleni sanxerunt, post istorum quatuor authoritatem, omni manent stabilita vigore, quorum gesta in hoc opere condita continentur."

Decretam.

According to our English statute, 1 Eliz. c. 1, s. 17 (*p*), heresy is to be determined "by the authority of the Canonical Scriptures, or by the *first four General Councils*, or any of them, or by any other general council wherein the same was declared heresie by the express and plain words of the said Canonical Scriptures, or such as hereafter shall be ordered, judged or determined to be heresie, by the high court of parliament in this realm, with the assent of the clergy in their convocation, anything in this act contained to the contrary notwithstanding."

1 Eliz. c. 1.

The effect of these four Great Councils is thus summed up by the learned Mahan (*q*):—"That Jesus Christ is "*true* God had been witnessed at Nicæa; that he is *perfect* "man had been defined at Constantinople; that he is "*indivisibly* One Person had been settled at Ephesus; "finally, the six hundred and thirty at Chalcedon declared "that 'he is one and the same Christ, the Son, the Lord, "'the Only-begotten in two Natures without confusion, "'change, division or separation.'"

5. Constantinople, 2 . . . 553

Convened under Justinian, having for its object to support and amplify the decrees of the Council of Ephesus; but it promulgated no canons.

The first and second councils of Constantinople have obtained from canonists the name of general councils, although not composed of prelates assembled from all countries, because having been holden by orthodox Catholic bishops of the Eastern, they were afterwards ratified by the pope and bishops of the Western, church. The Gallican as well as the Anglican church has combated the doctrine that the ratification of the pope was necessary for

(*o*) Novell. 131, tit. 14.
(*p*) *Vide supra*, p. 1092.
(*q*) Note. p. 538.

Second four General Councils.

the validity of canons enacted by general councils. It seems that the former church (although the Councils of Constance and Basle seem to speak another language) considers such ratification as proper and becoming, inasmuch as the consent of all churches is represented by that of Rome (*q*), the mother of all. This doctrine is repudiated by the Church of England, and also by the Eastern church.

6. Constantinople, 3 . . . 680

Under Constantine Pogonatus; it condemned the heresy which asserted that our Lord had only ἓν θέλημα καὶ μίαν ἐνεργείαν, after his incarnation—a development of the heresy condemned by the Council of Chalcedon. This council excommunicated and anathematized by name certain holders of the heresy condemned. Amongst others the Pope Honorius (*r*).

The next council, the Quini-sextan, is not numbered in the regular order. It was holden at Constantinople A. D. 680, and was the fourth there holden. It is usually called Quini-sextan, as supplying what was wanting in the fifth and sixth councils, and it is referred to by this name in the acts of the next council.

It was holden ἐν τῷ Τρούλλῳ, in Trullo, a particular room, so called from its domed shape, in the imperial palace.

A.D. 630, Theodore, Archbishop of Canterbury, presided over an English council at Hadfield ("qui Saxonico vocabulo *Hæthfelth* nominatur"), at which the orthodoxy of the English church respecting the Monothelite heresy, with especial regard to the Council of Constantinople holden in the same year, was asserted. At this council, also, the first five general councils and canons of the Lateran council of 649, A.D. (*s*), were received.

7. Nice, 2 787

Convened under Constantine and Irene; it related to the use of images in the church. It passed twenty-two canons upon this and other subjects. In the first canon it contained the decrees of the six universal councils.

8. Constantinople, 4 . . . 869

Two synods appear to have been convened at Constantinople under Basilius Macedo, when Photius was

(*q*) "Parce qu'elle représente l'uniformité et l'acceptation de toutes les Eglises dans celle de Rome, la mère de toutes les autres." Dict. de Droit Canon. vol. i. p. 612.

(*r*) The condemnation of Honorius for the Monothelite heresy was repeated "annually for a thousand years by every priest and prelate who made faithful use of his breviary." Mahan, App. 562, 563.

(*s*) Councils, &c., Haddan & Stubbs, vol. 3, p. 141.

patriarch of Constantinople. He composed what is called the "Nomocanonon," which contained the decrees of these two synods, and the Eastern church appears on this account to consider them as part of her canon law (*t*).

The general councils, properly so called, end here. It will be remembered that Savonarola, Luther and Cranmer appealed to a general council, if and whenever a really free one could be convened; but long before the period of the Reformation, in 1427, Archbishop Chichele appealed against Pope Martin V. to a future general council (*u*).

In the canon law are also to be found these seven councils in the West (*x*).

9. Lateran, 1	1123	13. Lyons, 1	1245
10. Lateran, 2	1139	14. Lyons, 2	1274
11. Lateran, 3	1179	15. Vienne	1311
12. Lateran, 4	1215		

The extent to which the canon law has prevailed in this country has been considered (*y*); but it may be as well to remark here, that the fourth council of Lateran has been often referred to by the temporal courts as being engrafted into the ecclesiastical laws of this realm (*z*). The foregoing councils constitute a part of the *corpus juris canonici;* but it should be observed that the councils of Carthage, although not general councils, have furnished canons for the Decretum of Gratian; and the council of Elvira (*a*), holden in Spain, A.D. 304, is said to have furnished the first canons for the discipline of the church.

The seven councils, of later date, also called "general" by the Roman church, are those "*quorum nulla in corpore juris mentio fit.*"

16. Pisa	1409	19. Florence	1439
17. Constance	1414	20. Lateran, 5	1512
18. Basle	1431	21. Trent	1545

(*t*) Beverege, Proleg. v., ix.

(*u*) Burnet, Records, iv. 382. See note 7, p. 190; Curteis, Bampton Lectures.

(*x*) There are five councils which, though strictly speaking national, have, from the importance and wisdom of their regulations, been generally received in the Greek and Latin churches. 1. Ancyra (Metropolis of Galatia), A.D. 314. 2. Neocesarea (Metropolis of Pontus), A.D. 315. 3. Gangra (Metropolis of Paphlagonia). 4. Antioch (Metropolis of Syria), A.D. 341. 5. Laodicea (Metropolis of Phrygia), about A.D. 364.

(*y*) *Vide supra*, pp. 16—19, 1076, 1437, 1438.

(*z*) *Croft* v. *Middleton*, 2 Atk. 650; Str. 1056.

(*a*) The place exists no longer. It was about two or three leagues from Grenada. The old name was Eliberis, or Illiberis. The severity of these canons was such that they were thought by some to be a compilation from various councils.

Council of Trent.

The council of Trent, holden under Paul III., Julius III. and Pius V., and so celebrated in history, was never acknowledged by France as a general council (*b*). That kingdom admitted the catholicity of its doctrines, but denied the validity of its regulations respecting the discipline of the church (*c*). In England it has never been recognized in either respect. "Their new creed of Pius IV. containeth," says Barrow (speaking of the creed, which contained in twelve articles a summary of the Trent council), "these novelties and heterodoxies. 1. Seven sacraments; 2. Trent doctrines of justification and original sin; 3. Propitiatory sacrifice of the mass; 4. Transubstantiation; 5. Communicating under one kind; 6. Purgatory; 7. Invocation of saints; 8. Veneration of reliques; 9. Worship of images; 10. The Roman church to be the mother and mistress of all churches; 11. Swearing obedience to the pope; 12. Receiving the decrees of all synods and of Trent" (*d*).

Its Heterodoxies.

22. The Vatican council of 1870.

Vatican council of 1870.

The doctrine of papal infallibility promulgated by this Roman council is, perhaps, the strict logical conclusion from Ultramontane tenets, as it certainly is at variance with all sound catholic teaching and principle. Moreover, this council appears to have been wanting in some of the essential elements which all canonists require for the validity of a general council.

Lambeth synod.

The assemblage in 1867 of prelates from different parts of the globe under the presidency of the Metropolitan of Canterbury has been already noticed (*e*).

(*b*) Henry III. told the pope that as to matters of faith the decrees of the council were unnecessary for France, which was already orthodox; and as to matters of discipline, since the council could not, for various reasons, be considered general, he would cause certain of its decrees to become law by royal ordinances. This was done by the ordinances of Blois and Melun, and various edicts. See title "Trente," vol. iv. Dict. de Droit Canonique.

(*c*) See Barrow's Treatise on the Pope's Supremacy, *in fine*.

(*d*) A good edition of the canons and decrees of this council was published in 1837 at Leipsic, by Koehler and Tauchnitz. It contains an accurate and copious index.

(*e*) *Vide supra*, p. 3.

CHAPTER II.

CONVOCATION.

SECT. 1.—*History and Law before Henry VIII.*
2.—*From the Time of Henry VIII. to that of Queen Victoria.*
3.—*Forms of Procedure generally and in Upper House.*
4.—*Forms of Procedure in Lower House.*
5.—*General Powers and Privileges.*

SECT. 1.—*History and Law before Henry VIII.*

Convocation, what.

THOUGH the word *convocation* (*a*) be in itself of a general signification, and may indifferently be applied to any assembly which is summoned or called together after an orderly manner; yet custom has determined its sense to an ecclesiastical use, and made it, if not only, yet principally, to be restrained to the assemblies of the clergy (*b*).

Before the Conquest.

That the *bishop* of every diocese had here as in all other Christian countries power to convene the clergy of his diocese, and in a common synod or council with them to transact such affairs as specially related to the order and government of the churches under his jurisdiction, is not

(*a*) Tractatus de Politiâ Eccles. Anglicanæ (Mocket), cap. 11; De Angl. Eccles. Synodis Nationalibus et Provincialibus, 1616, published 1705, with the two Tracts of Zouch—see Preface to this collection, and Heylin's Life of Laud, p. 70; The Authority of Christian Princes, &c., Archbishop Wake; Ecclesiastical Synods and Parliamentary Convocations in the Church of England, White Kennett, D.D.; Complete History of Convocations, or Synodus Anglicana, Gibson; England's Sacred Synods, Joyce, 1853; History of English Synods and Convocations, Hody; Synodalia, Cardwell; History of the Convocation of the Church of England, Lathbury; The Law relating to Convocations of the Clergy, 1848, Pearce; Convocations of Canterbury and York, Trevor; Synodalia, A Journal of Convocation, Warren, 1853, contains some valuable historical papers. Since 1853 have been published Journals of Convocation, succeeded by the present Chronicles of Convocation, which begin February 10, 1858.

(*b*) As to Convocation of Ireland, see Journal of Conv. for 1856, p. 138; Synodical Action of the Scotch Church, Synodalia, 248; Journal of Convocation, 1854, p. 155.

Diocesan synods.

to be questioned. These assemblies of the clergy were as old almost as the first settlement of Christianity amongst us, and, amidst all our revolutions, continued to be holden till the time of King Henry the Eighth.

What the bishop of every diocese did within his own district, the *archbishop* of each province, after the kingdom was divided into provinces, did within his proper province. They called together first the bishops, afterwards the other prelates, of their provinces; and by degrees added to these such of their inferior clergy as they thought needful.

Provincial councils.

In these two assemblies of the clergy (the *diocesan synods* and *provincial councils*) only the spiritual affairs of the church were wont for a long time to be transacted.

Synods of the church common to England and other countries.

So that in this respect, therefore, there was no difference between the bishops and clergy of our own and of all other Christian churches. Our metropolitans and their suffragans acted by the same rules here, as they did in all other countries. They held these assemblies by the same power, convened the same persons, and did the same things in them.

Parliament.

But, as will be seen, the bishops first, and then some of the other prelates (as abbots and priors) were very early brought into the great councils of the realm, or *parliament;* and there consulted and acted together with the laity.

Thus were the greater clergy first brought into our state councils, and made a constant or established part of them.

Epochs in the history of Convocation.

The Convocation of the English Church became in its progress a very remarkable instance of the independence and autonomy which has always distinguished that church (*b*), as the liberties of the Gallican Church once

(*b*) The constitution of Archbishop Boniface says, "Item statuimus quod Episcopi in suis *Synodis* et aliis *Convocationibus* et singuli Archidiaconi in suis Capitulis, et Capellani Ecclesiarum Parochialium in suis Ecclesiis," &c.; Gloss. *Synodis.* "Hæ dicuntur conventus sive congregationes senum et Presbyterorum, et debent fieri per Episcopos annuatim, et ad eas tenentur venire omnes illi qui sub illo Episcopo habent curam animarum—*aliis Convocationibus*, quas ex variis causis facere potest Episcopus, viz. propter subsidium Charitativum exhibendum, propter visitationem exercendam; item propter prædicationem verbi Dei, et in aliis quæ variis de causis possunt occurrere. *Capitulis*—nota benè proprietatem terminorum, nam Episcopis tribuit Synodos, Archidiaconis verò Capitula," &c.; Lynd. l. i. t. 14, p. 68; and l. v. t. 13, p. 298, Gloss. on *Synodalibus*, i. e. Constitutionibus quæ fiunt in Synodis Episcoporum, unde et Constitutio Synodalis ligat subditos statuentes, ita quod non licet con-

distinguished it from the general subservience of the other branches of the Western Church to Rome.

The most remarkable epochs of the actual and legal history of Convocation are as follows:—

1. The original ecclesiastical synod, formed upon the usual model.

2. The summoning of the lower clergy to attend the prelates in this synod.

3. The *præmunientes* clause of Edward the First, summoning proctors of the clergy to parliament.

4. The division of the *clerus* into two houses or chambers.

5. The Act of Submission and legislation of Henry the Eighth. By it, *inter alia*, Convocation was forbidden to meet without the summons of the crown.

6. The arrangement between Lord Chancellor Clarendon and Archbishop Sheldon as to the subsidies of the clergy.

7. The accession of William and Mary, and their legislation with respect to the church.

8. The recourse of the government in 1717 to immediate prorogation, in order to prevent the Lower House of Convocation from censuring the sermons of Hoadley, Bishop of Bangor, and the refusal of this and subsequent governments during the reign of the Georges and William the Fourth to allow Convocation to discuss any subject whatever.

9. This clumsy and unworthy resource having been found to foster the evil which it was intended to prevent, like all attempts in this free country to stifle debate and discussion, whether in the civil or ecclesiastical part of the constitution, has been partially, and it may be hoped will be totally, abandoned during the reign of her present majesty (*c*).

These are the principal divisions of the subject which the ecclesiastical historian, and to some extent the ecclesiastical lawyer, must bear in mind while considering the subject of Convocation.

The Fire of London in 1666 consumed the "Schedules of Continuation," and probably other records of Convocation.

travenire determinatis in Synodo Episcopali; multò fortius hoc erit dicendum quoad decisa et determinata in Synodo Provinciali, &c.

(*c*) See a very able paper entitled "The Humble Representation of the Clergy of the Lower House of Convocation," presented to the Upper House, November, 1853, setting forth the necessity of synodical action to the life of the church.

Atterbury's attempts.

At the beginning of the 18th century political questions mingled largely with the discussion of questions properly belonging to Convocation. Atterbury endeavoured to establish the entire independence of the Lower House, which numbered many adherents of the house of Stuart, upon the analogy of the House of Commons. It is not to be regretted that the eloquence and ingenuity of this accomplished man proved unequal to the fulfilment of this task. For the analogy was certainly false, and had it prevailed, the consequences must have been destructive of the synodical character of Convocation and of the discipline of the church.

His chief opponents were Wake, Kennett and Hody; the errors of the two former being, I incline to think, a depreciation of the synodical character of Convocation, when the crown ordered the archbishops to summon it, and too stringent a construction of the Act of Submission; but, speaking generally, their opinion of the law of Convocation was sound. The work, however, of Bishop Gibson on the subject of Convocation is *facile princeps*, and is for the most part adopted (*d*) in this work.

Subsidies voted in convocation.

In the provincial (*e*) synods summoned by the archbishops of their own authority, the clergy taxed themselves, and gave subsidies to the crown, a practice which—though the legislation of Henry VIII. required the authority of parliament to confirm the grant of the subsidy—continued till the reign of Charles the Second; and therefore the synodical assembly dealt with questions of secular finance as well as with those of a purely spiritual character. Edward the First (1283) endeavoured to raise these subsidies by calling the clergy to parliament; the attempt failed. In 1294, he made another attempt to summon a *national* synod by writs directed to each bishop. "Thus" (Mr. Joyce observes) "was a national synod summoned, not "provincially by the metropolitans, but by accumulated "diocesan authority." The attempt seems to have been unsuccessful; it was at all events not repeated. Edward II. (1314) issued an order to the metropolitans to summon provincial synods in the presence of royal commissioners, for the purpose of voting subsidies, but the experiment excited much dissatisfaction. I pass by for the moment the further attempt in 1295. In the first year of Edward III.,

(*d*) I have generally adopted the language as well as the opinion of Gibson, though with occasional alterations.

(*e*) England's Sacred Synods, Joyce, ch. ix., a work containing much information.

as Mr. Joyce says, "an arrangement between the royal "and archiepiscopal authority of summoning provincial "synods was agreed upon, which prevails down to this day." The prerogative of the crown was so exerted as to be consistent, as will be seen, with canonical obedience. It is necessary to return for an instant to the reign of Edward I. in 1295. That monarch seems to have devised a scheme for bringing the clergy, not to a provincial synod, but to parliament. He directed a writ to each bishop to attend in his place in parliament, *premonishing* him by a clause, known as the *præmunientes* clause, to bring with him to parliament the prior of his cathedral, the archdeacons, a proctor for the chapter of the cathedral, and two proctors for the diocesan clergy. This writ is issued at the present day, but never obeyed. It has been the cause of much historical error as to the origin and duties of convocation, partly because it naturally happened that the proctors for the clergy in parliament were also chosen to represent the clergy in synod or convocation. These parliamentary proctors "are (Lord Coke says (*f*)) "*procuratores cleri*, and many times have appeared in "parliament as spiritual assistants to consider, consult, "and consent, *ut supra* (*g*), but never had voices there, "because they were no lords of parliament."

Kennett's account.

The double aspect, so to speak, of convocation is fairly represented by Kennett, who says, "The truth is, as our convocations were intended for the king's temporal assistance, and the civil rights of the clergy, they were properly summoned with or near the parliament, and so far made a part of it. And as they are still summoned with every parliament, it is upon the old supposal, that they have some concern there, to aid the king, and maintain their own civil rights. But as our convocations were proper ecclesiastical councils, to debate and define the matters of faith and spiritual discipline, they bore no relation to a parliament, but were rather inconsistent with it, because the archbishop was not inclined (and, if he were so, was sometimes expressly prohibited) to call his suffragans and clergy to a synod, when the king had occasion for their attendance in parliament. *So still, our ecclesiastical synods to be summoned by the king's writ to the archbishop are not confined to parliament time; they may be then held, but they may too at other seasons, if the exigence of affairs shall so require*" (*h*).

(*f*) 4 Inst. 5.

(*g*) Referring to the office of judges in the House of Peers.

(*h*) Kennett, Eccles. Synods, 88; see too 273.

Hody's account.

The learned Hody says, "Upon comparing all things together, I take it, *præmunientes*, to have been continued in the writs after it became a constant custom for the clergy to meet in a separate body by virtue of the archbishop's mandate, that thereby our kings might assert their right of calling the clergy (if they please) to parliament: which the clergy opposed as an invasion and inroad upon their liberties" (*h*).

In truth, however, the exact date and origin of the Lower House of Convocation is a question now of no practical moment. I agree with a recent (*i*) writer, who says: "It is enough that our two convocations are legally and constitutionally both the provincial synods of the church and the representative chambers of the clergy. As such they have been summoned to meet at least ever since the Reformation; and when King William attempted to supersede them after the Revolution, he was arrested by the addresses of both houses of parliament requiring him to issue his writs for a convocation of the clergy 'according to the ancient practice and usage of this kingdom in time of parliament'" (*k*).

SECT. 2.—*From the Time of Henry VIII. to that of Queen Victoria.*

The Act of Submission of the 25 Hen. 8.

The archbishops continued to summon provincial synods according to the exigencies of the church until the Act of Submission, 25 Hen. 8, c. 19, was made; by which it is enacted as follows: "Where the king's humble and obedient subjects the clergy of this realm of England, have not only acknowledged, according to the truth, that the convocation of the same clergy is, always hath been, and ought to be assembled only by the king's writ; but also submitting themselves to the king's majesty, have promised *in verbo sacerdotii* that they will never from henceforth presume to attempt, alledge, claim, or put in ure, enact, promulge, or execute any new canons, constitutions, ordinances, provincial or other, or by whatsoever name they shall be called, in the convocation, unless the king's most royal assent and licence may to them be had, to make, promulge, and execute the same, and that his majesty do give his most royal assent and authority in that behalf. . . . . . It is therefore enacted, according to the said

(*h*) Hody, Hist. of Conv. 431.
(*i*) Synodalia, 439.
(*k*) Card. Conf. 460.

submission, that they nor any of them shall presume to attempt, alledge, claim, or put in ure, any constitutions or ordinances provincial, by whatsoever name or names they may be called, in their convocations in time coming (which always shall be assembled by authority of the king's writ); unless the same clergy may have the king's most royal assent and licence, to make, promulge, and execute such canons, constitutions, and ordinances, provincial or synodal: upon pain of every one of the said clergy doing contrary to this act, and being thereof convict, to suffer imprisonment, and make fine at the king's will."

Accordingly, in 8 Jac. 1, it was resolved upon this statute by the two chief justices and divers other justices, at a committee before the lords in parliament: 1. That a convocation cannot assemble without the assent of the king; 2. That after their assembly they cannot confer to constitute any canons without licence of the king; 3. When they upon conference conclude any canons, yet they cannot execute any of their canons without the royal assent; 4. That they cannot execute any after the royal assent, but with these four limitations, (1) that they be not against the prerogative of the king, nor (2) against the common law, nor (3) against any statute law, nor (4) against any custom of the realm. All which appears by the said statute. And this (Coke says) was but an affirmance of what was before the said statute; for it was holden before, that if a canon be against the law of the land the bishop ought to obey the commandment of the king, according to the law of the land (*l*).

Convocation, how summoned in Philip and Mary's reign. Cardinal Pole.

Cardinal Pole held a convocation in the year 1557, the latter end of Queen Mary's reign; and the title of it was Convocatio sive Sacra Synodus convocata auctoritate brevis Regis Phillippi et Mariæ, &c. "Now it is not to be imagined," Gibson observes, "that either the queen or the cardinal (so remarkably tender of the privileges and immunities of their church) would have given way to a convocation upon that foot, had it been the opinion of those times that the authority of the royal writ destroyed that authoritative summons which the archbishops before the Reformation had always exercised. They knew the kings of England had often directed their writs to the archbishop before the Act of Submission was thought of, and were as constantly obeyed; and the writ being an immediate direction to the archbishop, and not to any

(*l*) 12 Co. 72.

"particular member of convocation, they were so far from considering that a summons upon the authority of such writ destroyed his grace's authoritative summons, that we see they use the term even while the act was repealed, and they were by consequence under no obligation to use it."

Lingard, in speaking of Henry the Eighth's reign, observes: "The ecclesiastical constitutions which had so "long formed part of the law of the land now depended "on his breath, and were executed only by his sufferance. "The convocation, indeed, continued to be summoned, "but its legislative authority was no more. Its principal "business was to grant money: yet even these grants now "owed their force not to the consent of the grantors, but "to the approbation of the other two houses and the "assent of the crown." He adds, in a note, "Journals "156, 218, 277. The first instance which I find was in "1540" (*m*).

Subsidy by convocation. Collier.

Collier observes that, "The clergy had always the privilege of taxing their own body. Neither from Magna Charta until the thirty-seventh of Henry VIII. is there any parliamentary confirmation of subsidies given by the clergy. For what reason this custom was afterwards altered is not easy to account for. It is possible it might be for the benefit of the crown, and for the better securing the payment of the money granted; for since the Reformation, the jurisdiction of the church was much sunk, and her censures less regarded. Now the convocation could proceed no further than spiritual penalties. They had no authority over the secular magistrate, neither could they command the justices of the peace to levy their subsidies by distress: and therefore that the crown might not be disappointed of the money granted by the convocation, their subsidies from the thirty-seventh of Henry VIII. downwards were generally confirmed by act of parliament. But that the clergy's granting the king a benevolence without such confirmation, exceeded their

(*m*) Lingard, Hist. of Engl. vol. vi., ch. v., p. 478. The Journals of the Lords begin 1 Hen. 8, 1509; the Journals of the Commons begin 1 Edw. 6, Nov. 8, 1547; the Rolls of Parliament from 6 Edw. 1 to 19 Hen. 7, A.D. 1278—1503. See title in Index, "*Convocation*," with references. See Journals of the House of Lords, vol. 1, 156, A. 1540, 32 Hen. 8, item lecta est Billa Subsidii Cleri; ibid. 218, A. 1542, the Act for the Subsidy of the Temporalty, *item*, the Subsidy of the Clergy; ibid. 277, 37 Hen. 8, *item* 1[a] *vice* lecta est Billa Subsidii concessa a Clero Domino Regi A. 1545.

"power, is more than is proved. Had the convocation pretended to tax the laity, the objection had been good.

"But to contest their authority for raising money upon their own body, is to cross upon custom and known privilege: neither could the clergy without doors reckon this a grievance, for they had already given their consent for this purpose in their procuratorial letters; for in this instrument, signed and sealed by the electors for convocation, they engage themselves to allow and abide by the proceedings of their clerks and proctors. Besides, there was a precedent in Queen Elizabeth's reign in defence of this practice. For in the year 1585, the convocation granted a subsidy or benevolence, and levied the money by synodical authority, without any confirmation from the parliament; neither was this at all complained of" (*n*).

As to conference between House of Lords and Convocation.

In the second year of James the First, the House of Lords (*o*) received a message from the Convocation House for a conference on ecclesiastical matters; the House of Lords declared itself willing to have conference with some select number of the bishops, but so as they might confer with them as lords of parliament, and not in such condition and quality as they are of convocation.

Member of Lower House of Convocation ineligible to House of Commons.

It appears that in 1553, the House of Commons resolved, that any person having a voice in the Convocation House cannot be a member of this house.

In the 18 Jac. 1, there was a motion that the House of Lords should not sit on Wednesdays and Fridays, as the bishops met in convocation on those days.

As to adjournment of House of Lords over convocation meetings.

In 16 Car. 1, there was a motion for the adjournment of the lords in consequence of the meeting of the Convocation House; it was refused, and the high court of parliament declared not to be subordinate to any other court. The House of Lords, however, had a report made to them relative to the days when the Convocation House usually sat.

Messages from Lower House of Convocation to House of Commons.

In 1702, the Lower House of Convocation sent a message of thanks to the House of Commons for the regard shown to their privileges; and the House of Commons resolved, that it will upon all occasions assert the just rights and privileges of the Lower House of Convocation.

In 1703, the Lower House of Convocation sent a message of thanks to the House of Commons for the attention

(*n*) Collier's Ecclesiastical History of Great Britain, vol. viii., pp. 192, 193.

(*o*) For this and the following references to Parliament, see Index to Journals of the Lords, titles "Convocation" and "Adjournment of this House."

given by the house to the interests of the clergy in respect of her majesty's bounty.

In 1710, the Lower House sent a message of thanks to the House of Commons for the regard shown by that house to the established church, in promoting the scheme for building new churches in London and Westminster; and the House of Commons resolved, that it will pay all regard to the said House of Convocation in matters ecclesiastical (*p*).

Convocations in 1661—1663.

In 1661, the convocation prepared the Act of Uniformity, under the direction of Sheldon, Archbishop of Canterbury, and Morley, Bishop of Worcester (*q*). In 1663 convocation gave four subsidies to the crown, and this was the last time the clergy imposed a tax upon themselves, the agreement already referred to being effected soon afterwards (*r*). Speaker Onslow makes the following note to a passage in Burnet, containing the history of this transaction (*s*). "It was first settled by a verbal agreement between Archbishop Sheldon and the Lord Chancellor Clarendon, and tacitly given in to by the clergy in general, as a great ease to them in taxations. The first public act of any kind relating to it, was an act of parliament in 1665, by which the clergy were, in common with the laity, charged with the tax given in that act, and were discharged from payment of the subsidies they had granted before in convocation; but in this act of parliament in 1665, there is an express saving of the right of the clergy to tax themselves in convocation, if they think fit; but that has never been done since nor attempted, as I know of, and the clergy have been constantly from that time charged, with the laity, in all public aids to the crown, by the House of Commons. In consequence of this (but from what period I cannot say), without the intervention of any particular law for it, except what I shall mention presently, the clergy (who are not lords of parliament) have assumed, and without any objection enjoyed, the privilege of voting in the election of members of the House of Commons, in virtue of their ecclesiastical freeholds."

Speaker Onslow's remarks on their cessation.

"This having constantly been practised from the time it first began, there are two acts of parliament which suppose it now a right. These acts are, the 10th of Anne,

(*p*) For all these references, see Gen. Index of the H. of C. 1547—1714, title "Convocation."

(*q*) See 8vo. edit. of Burnet's History of his own Times, i. 302—316.

(*r*) Ibid. i. 340, 341.

(*s*) Ibid. iv. 508.

c. 23 (*t*), and 18th of Geo. 2, c. 18; and here it is best the whole of this matter should remain, without further question or consequence of any kind. As it now stands, both the church and the state have a benefit from it. Gibson, Bishop of London, said to me that this was the greatest alteration in the constitution ever made without an express law."

Effect of abandonment of taxing in convocation.

The effect of this abandonment of the power of taxing the clergy has operated in the peculiar religious circumstances of this country unfavourably to the meeting of convocation. Collier, the church historian, foresaw this effect. "Being," he observed, "in no condition to give "subsidies and presents to the crown, 'tis well if their con-"vocation meetings are not sometimes discontinued, if "they do not sink in their insignificancy, lie by for want "of a royal licence, and grow less regarded when their "grievances are offered" (*u*).

It may well be questioned whether this discontinuance has not worked mischief to the state as well as the church. Probably if convocation had been allowed to sit to make the reforms, both in its own constitution and generally in the administration of spiritual matters, which time had rendered necessary, the apathy and erastianism which at one time ate into the very life of our church, the spiritual neglect of our large cities at home in England, and of our colonies abroad, and the fruit of these things, the schism created by the followers of Wesley, would not have occurred, and the state would have escaped the evil of those religious divisions which have largely influenced, hampered and perplexed the legislation of her parliaments and the policy of her statesmen.

Convocation under Charles II., James II. and William III.

The long parliament of Charles the Second was dissolved in 1678. Convocation was summoned with the new parliament in 1680. It was dissolved in 1681. It met again in 1685, but during this troubled and eventful reign was not allowed to act, for James the Second feared the censure with which it would have visited his policy. In 1689, the lords besought William "to issue forth writs as soon as conveniently may be for calling a convocation of the clergy to be advised with in ecclesiastical matters." On November 21 (*x*), 1689, convocation met, and immediately showed a strong disinclination to permit what was then being attempted, the alteration of the liturgy.

(*t*) Chap. 31 in The Statutes Revised.

(*u*) Eccl. Hist. ii. 393; Lathbury, History of Conv. 309.

(*x*) Lathbury, Conv. 321.

A royal commission empowered the convocation to treat of alterations, and form canons and constitutions relative to rites and ceremonies and the ecclesiastical courts (*y*); but on the 24th of January next, the king dissolved (*z*) convocation, without allowing them to proceed to business.

Tillotson (*a*), on the deprivation of Sancroft, became Archbishop of Canterbury. During his primacy convocation did no business. He died in 1694, and was succeeded by Tenison. In 1697 appeared Atterbury's once celebrated "Letter to a Convocation Man" (*b*); and in 1700, after ten years of enforced silence, convocation met again (*c*), for the transaction of business. Then (*d*) Atterbury reprinted his work, correcting various errors in it. A question arose as to the censures of Poland's book (*e*), and Bishop Burnet's work on the Articles.

The Lower House was at this time guilty of various irregularities.

The controversies carried on by Wake, Hody, Gibson, Atterbury, have been already mentioned (*f*).

Convocation under Queen Anne.

In 1701, convocation was again assembled, and the disputes between the Upper and Lower House disfigure this period. After King William's death, and during Queen's Anne's reign, convocation sat frequently, with licence to transact business. It censured Whiston's book (*g*), eight judges against four thinking that convocation had jurisdiction in cases of heresy. The queen's government allowed convocation to proceed. It extracted and censured as heretical various passages in this work. This judgment was sent to her majesty, but, whether intentionally or not, was never confirmed by her.

In 1713, convocation had royal letters of business, and considered various subjects,—penance, excommunication, forms for the visitation of prisoners, Dr. Clarke's book on the Scripture Doctrine of the Trinity, &c.

Under George I.

At the beginning of George the First's reign, 1715, convocation had letters of business, and considered, among other things, a form of consecrating churches and communion plate. In 1716-7, Hoadley published a work and preached a sermon which gave rise to the once celebrated Bangorian controversy. The action of the Lower

(*y*) Lathbury, Conv. 329.
(*z*) Ibid. 332.
(*a*) Birch's Life of Tillotson, pp. cxxxi, cxxxiv, cxxxviii.
(*b*) Lathbury, Conv. 343.
(*c*) Ibid. 346.
(*d*) Ibid. 359.
(*e*) Christianity not Mysterious.
(*f*) *Vide supra*, p. 1926.
(*g*) An Historical Preface to Primitive Christianity Revived.

House of Convocation affronted the government, who determined and effected their determination to punish the church by the suppression of convocation.

In 1717, convocation was prorogued, and till the reign of her present majesty was never allowed to transact business—though in 1741-2 it was allowed to meet for a short time, and began to take some matters into consideration.

Prorogation of convocation.

It has been temperately and truly said by the last historian of convocation, "It is evident that no argument can fairly be derived from Hoadley's case against the revival of convocation: for the controversy, like all the rest from the year 1689, arose out of the circumstances of the country. Yet the opponents of convocation constantly refer to the contests which took place, without caring to ascertain their cause, and then draw their inferences against synodical action. In all these matters the views of the Lower House were generally received by the great body of the clergy: and the reason is obvious, namely, that being less dependent on the crown than the bishops, it was supposed to speak with more certainty the sentiments of the church" (*h*).

"Shall the presbyterian kirk of Scotland have its "general assembly, and the church of England be denied "its convocation?" said Dr. Johnson, with characteristic indignation (*i*), in 1763.

This manifest injustice continued till our days (*k*). A feeling which had existed for some time that parliament, in a great measure composed of members wholly unconnected with and even necessarily hostile to the church of England, could not, to say the least, properly claim the sole legislation on matters relating to her doctrine and discipline, conspired with a general sense of wrong done to the church to procure, about 1840, a relaxation of the practice of immediately proroguing convocation after it

Re-assembling of convocation.

(*h*) Lathbury, Conv. 463, 464.

(*i*) See his biographer's account (Boswell's Johnson), vol. i. 364.

(*k*) "We know," writes Mr. Burke, "that the convocation of "the clergy had formerly been "called, and sat with nearly as "much regularity to business as "parliament itself. It is now "called for form only. It sits "for the purpose of making some "polite ecclesiastical compli- "ments to the king; and when "that grace is said, retires, and "is heard no more. It is, how- "ever, a part of the constitution, "and may be called out into act "and energy whenever there is "occasion, and whenever those "who conjure up that spirit will "choose to abide the conse- "quence."—Letter to the Sheriffs of Bristol.

Re-assembling of convocation.

had made (what Mr. Burke calls) "some polite ecclesiastical compliments to the king."

Since this period, convocation has discussed a great variety of subjects affecting the interests of the church, and has issued valuable reports made by committees sitting during the prorogations.

It is true that convocation has not as yet been allowed to legislate by itself, except on the alteration of the subscription canons (*i*), and the canon about sponsors in baptism (*k*); and even upon this last subject the legislation, owing to the course taken by the province of York, has been imperfect: but it has sanctioned the new Lectionary, subsequently adopted by parliament, and advised (as will be seen hereafter) the crown as to the adoption of a part of the last Report of the Ritual Commissioners.

Reform of convocation.

In 1867, a committee of convocation made an elaborate report of a proposed reform of convocation.

Letters of business in 1872.

In 1872, the crown gave to the two convocations (1) General, and (2) Special Letters of Business. By the latter these convocations were empowered to consider the recommendations in a Report of the Ritual Commissioners.

The convocations expressed their approval of some of the recommendations, and drew up a scheme of shortened services. This scheme was afterwards sanctioned by the statute 35 & 36 Vict. c. 35, which will be found in the Addenda to this work.

The preamble of this statute recites in part as follows:—

"And whereas her majesty was pleased to authorize the convocations of Canterbury and York to consider the said Report of the said commissioners and to report to her majesty thereon, and the said convocations have accordingly made their first reports to her majesty."

Letters of business were given to the convocations for considering the Prayer Book framed in 1662 (*l*), and sanctioned by the Act of Uniformity, 14 Car. 2, c. 4; and the reference to the convocations, and their approval of the Prayer Book then to be sanctioned, is recited in the preamble to that act.

(*i*) *Vide supra*, pp. 467—470, 1109.

(*k*) *Vide supra*, p. 641.

(*l*) *Vide supra*, p. 952.

SECT. 3.—*Forms of Procedure generally and in Upper House.*

Opening Convocation.

With respect to the form of opening Convocation (*l*) and the proceedings, especially of the Upper House, the authority of Gibson may be relied upon.

On the day (he observes) prefixed in the archbishop's mandate for the Convocation's meeting, all the members cited thereby are obliged to be ready at St. Paul's for the coming of his grace. Thus it is, and ever has been, according to Archbishop Parker's account of the established form of opening a convocation:

Sciendum est, quod omnes qui authoritate reverendissimi citantur ad comparendum coram eo in domo capitulari ecclesiæ cathedralis D. Pauli London. —— die —— tenentur præfixo tempore interesse atque in eadem ecclesia cathedrali præstolari adventum dicti reverendissimi.

His grace (*m*), waited on at his landing by all the advocates and proctors of his court, is by them and his own retinue conducted to the church of St. Paul's; at the door whereof the bishops and clergy meet and receive him, and all walk in procession to the choir. Prayers and sermon ended, he with the bishops and clergy go into the chapter-house, where the Lord Bishop of London, dean of the province, exhibits a certificate that the mandate has been duly executed:

Reverendissimo ac cæteris suis coepiscopis in suis sedibus ordine consedentibus, ac reliquo clero circumstante, reverendus dominus episcopus London. mandatum sibi a dicto reverendissimo ad convocationem hujusmodi summonend. directum, una cum debito certificatorio super executione ejusdem introducere, ac debita cum reverentia eidem reverendissimo patri præsentare et tradere tenetur.

This certificate under the episcopal seal, and directed to the archbishop, first acknowledging the receipt of his grace's mandate, recites it; and then signifies, how by virtue and authority thereof, the bishops of his province, and by them the deans, &c., have been regularly summoned: that he owns himself duly cited by the authority of the same mandate: that he has intimated to them his

(*l*) Syn. Ang. 19, c. 2; Synod. (Warren), 11.

(*m*) The presence of the civilians, advocates in Doctors' Commons, was, according to Bishop Andrews' MS. note in his prayer-book (now, I think, in the British Museum), analogous to the presence of the judges in the House of Lords. They were there to advise, not to vote. This attendance of civilians has ceased since the abolition of the college of advocates.

Opening convocation.

grace's resolution not to hold any excused but upon good reasons to be then and there alleged: that he has also enjoined every bishop to bring with him a certificate of the execution of the foresaid mandate in his own diocese: and then, adding how he has executed it, particularly in the diocese of London, he subjoins a catalogue of the members therein. In like manner every bishop makes his return immediately to the archbishop in a formal instrument under his episcopal seal, certifying the summons of his dean, archdeacons and clergy, in virtue of his grace's letters mandatory transmitted by the Lord Bishop of London, and adding their several names and surnames.

By the archbishop's order the Bishop of London's certificate is publicly read, and one or more officers of his court appointed by him to receive in his name the certificates of the other bishops, and all the letters of proxy.

Then a written schedule is put into his grace's hand, by which he pronounces all members cited, and not appearing, contumacious; reserving the punishment of their contumacy to another time.

Reservando pœnam eorum contumaciæ in aliquem diem competentem pro beneplacito ipsius reverendissimi (*n*).

As to colonial bishops.

In 1853, Convocation had to consider the difficult and delicate question whether the bishops who had colonial sees, were not by their patents—then supposed to have a much greater force than has since been ascribed to them—entitled to be summoned to Convocation, that is, to the Upper House. After a learned report (Feb. 16, 1853) from the vicar general (*o*), the Upper House decided against their claim.

Suffragan bishops, appointed about eighteen years after this report, being also archdeacons, have taken their seats in the Lower House.

The special prayer said by Convocation is as follows:—

"*Oratio pro præsente Convocatione, sive Synodo.*

Special prayer for Convocation.

"Domine Deus, Pater Luminum, & Fons omnis Sapientiæ; Nos ad scabellum pedum tuorum provoluti, humiles tui & indigni famuli, Te rogamus, ut qui in Nomine tuo, sub auspiciis Clementissimæ Reginæ Victoriæ, hic convenimus, Gratiâ tuâ cælitus adjuti, ea omnia investigare, meditari, tractare, & discernere valeamus, quæ honorem tuum & gloriam promoveant, & in Ecclesia cedant profectum. Concede igitur ut Spiritus tuus, qui Concilio olim Apostolico, huic nostro etiam nunc insideat, ducatque

(*n*) Gibson's Synodus Anglicana, 19, 20.

(*o*) Synodalia (Warren), 307.

nos in omnem veritatem, quæ est secundum Pietatem: Ut qui, ad amussim sanctæ Reformationis nostræ, errores, corruptelas, & superstitiones olim hic grassantes, Tyrannidemque Papalem, meritò & seriò repudiavimus, Fidem Apostolicam & verè Catholicam firmitèr & constantèr teneamus omnes, Tibique ritè puro cultu intrepidi serviamus, per Jesum Christum Dominum & Servatorem nostrum. Amen" (*p*).

Prorogation *Consensus fratrum.*

The question whether the archbishop can of his own authority prorogue Convocation, or whether it must be, according to many precedents, *cum consensu fratrum*, with the consent of his brother prelates, has been much discussed.

It appears to me that this *consensus* is necessary; but probably, by the use of ordinary care and courtesy, the necessity for a formal decision on this matter will not again arise (*q*).

Blackstone says, Book I. ch. 7, that "with us the con-" vocation is the miniature of a parliament, wherein the " archbishop presides with regal state: the Upper House " of bishops represents the House of Lords, and the Lower " House, composed of representatives of the dioceses at " large, and of each particular chapter therein, resembles " the House of Commons, with its knights of the shire " and burgesses." But this is a very loose and inaccurate statement.

Archbishops Tenison and Marsh as to *consensus fratrum.*

The manuscript correspondence between Marsh, Archbishop of Dublin, and Tenison, Archbishop of Canterbury, is adverse to the absolute power of the archbishop.

Marsh, Archbishop of Dublin, wrote to the Archbishop of Canterbury in 1703, when the Irish Convocation was revived, for information; and he asks, "Whether, if any " one bishop (or two, or a major part of the bishops pre-" sent) should offer any matter in yᵉ Upper House of " Convocation to be debated, or put to the vote, yᵉ matter " may be debated or put to the vote, although the president " doth not or will not propose it. Whether the president " be bound to propose all such matters so offered as afore-" said? or whether he hath a discretional power therein?

(*p*) Forma Precum in utrâque Domo Convocationis (1847), p. 13.

(*q*) Elaborate opinions were given by Sir F. Thesiger and the author of this work to this effect, and of Sir W. Page Wood to the contrary, in 1853. See a reference to them, Synodalia (Warren), 409—416, and opinions themselves printed in a pamphlet published in 1853 by Rivingtons, entitled "Convocation—Reasons, &c." See preface to ed. 1854 of Gibson's Syn. Angl. p. xli. some opinions collected; and Atterbury's Rights, &c., pp. 13—15.

Archbishops Tenison and Marsh as to *consensus fratrum.*

"Both which questions may be comprehended in this "one, viz. What power ye president in convocation hath "in proposing matters to be debated on, and in voting "whether he hath only one single voice or two? or a "negative?"

Marsh proceeds, "I have one other request to your "grace, which is, y^t^ y^u^ will please to order me a copy of "ye writ for proroguing a convocation, because we find "no form of such a writ here."

Appended to this MS., which is in the handwriting of Marsh, is the reply of Tenison, unaddressed. It appears to be the draft of the letter which was sent to Ireland. It is in Tenison's own hand, and is as follows:—

"The way to prove the right in ye president to propose "or not propose matters to ye consideration of ye House "must be by repeated instances of his refusal to propose "what has been offered by the members; and such re-"fusals are not to be met with. Without doubt every-"thing which the bishops debate is regularly proposed to "them by the president, who easily discovers the inclina-"tions of the majority, or may put it to the vote, whether "this or that shall be proposed, in case the bishops seem to "differ in their opinions. In this and all other votes pre-"vious to the final determination of business, the president "has the casting vote upon an equality; but to suppose it "wholly in his breast what shall be proposed or not pro-"posed, debated or not debated, would be too great a "power, greater than the king himself has in parliament.

"After any business in convocation is completed, I "think the consent of the president to be absolutely ne-"cessary; and ye president is perfectly safe in proposing "what ye majority desires, when he is sure it cannot finally "be passed into an act, nor be published as such, in case "he dislike it" (*r*).

(*r*) Lathbury, Conv. 466; he cites from Gibson, MSS. vol. i., Nos. 97, 98; and Lathbury adds, in a postscript to this letter, Marsh alludes to the great storm which had caused so much mischief in England, remarking that in Ireland it was only an ordinary high wind. In the same volume is another letter from Marsh to Tenison in the same year, in which he alludes to the Irish convocation. He hopes the queen will not refuse her writ during the parliament, "thereby to re-"store the right of the church "before our parliament be dis-"solved. For we fear, if we do "not recover this old right in "her majestie's reign, our church "may never be able to obtain it; "and if the present opportunity "of this parliament be let slip, it "being uncertain when we shall "have another we may be de-"barred that way also." Ibid. No. 99.

Convocation dissolved by dea sovereign.

There is no doubt that Convocation is now dissolved by the death of the sovereign.

The Convocation of Philip and Mary's reign is said in extracts out of the Upper House books to be *soluta per mortem reginæ Mariæ;* as we find afterwards (anno 1624) that the Convocation was dissolved by the death of King James the First.

Law before and since the Reformation.

" On the contrary (Gibson observes), before the Reformation, anno 1412, we find that Archbishop Arundel summoned a convocation in obedience to the king's writ; and yet it was continued for some time after the death of Henry the Fourth. Again, anno 1460, Archbishop Bouchier issued his summons in a like obedience to the royal writ; but the same convocation, not expiring with the death of Henry the Sixth, continued in the reign of Edward the Fourth.

" The difference in this matter, before and since the Reformation, naturally arises from the foregoing construction of the Submission Act. Before that was made the archbishop had a right to hold convocations independent of the prince, and was by consequence under no obligation to discontinue them upon the death or demise of the prince; he was bound to obey the royal writ as oft as it was sent him, by exerting the summoning authority according to the tenor thereof; but he was not absolutely confined to wait for and receive such writ, in order to summon or hold; nor was a convocation, holden by the archbishop independent of the king, an illegal assembly by the laws then in being.

" But by the Statute of Submission, interpreted in its most genuine meaning, an absolute restraint is laid upon the archbishop from holding his convocation, unless authorized so to do by the royal writ. By this means, any such meeting of the bishops and clergy, holden by the archbishop without such writ, is become an illegal assembly. Now the force of the writ, directed to the archbishop to take off the restraint laid upon him by the statute, must cease and expire with the prince, in whose name and under whose seal it was issued: and when that happens, the archbishop is by law reduced to the same inability to hold a convocation, as he was under before the reception of such writ" (*s*).

Therefore, in 1701, when some of the clergy contended that the Convocation was not dissolved by the death of

(*s*) Synod. Angl. 334, 335.

King William, the contrary was determined by the government, acting upon proper legal advice (*t*).

Convocation may sit after the dissolution of parliament.

On the other hand, the dissolution of parliament does not necessarily entail the dissolution of convocation. It was determined by high authority in the reign of Charles the First, "That the Convocation called by the king's "writ is to continue till it be dissolved by the king's "writ, notwithstanding the dissolution of the parlia-"ment" (*u*).

SECT. 4.—*Forms of Procedure in Lower House.*

Election of proctors.

Stipendiary curates, deacons and the laity are ineligible as members by the present constitution of convocation; and only parsons, vicars and perpetual curates are capable of giving their votes in choosing proctors for the diocesan clergy (*x*).

If any member of the convocation, who is a proctor, dies, the archbishop issues his mandate to the bishop of that diocese to elect another, and this by virtue of the power inherent in him to summon his suffragan bishops; who being to obey him in all things lawful and honest, and the clergy their bishop, in the like manner, they by that command make an election to supply the place of one of their proctors (*y*).

In the province of Canterbury there are only two proctors returned for each diocese; in those dioceses where there are several archdeaconries, two are nominated by the clergy of each archdeaconry; and out of these, two are chosen to serve as proctors for the whole diocese. But in the province of York two proctors are sent to convocation for every archdeaconry; otherwise the number would be so small as scarce to deserve the name of a provincial synod. By this means it comes to pass that the parochial clergy have as great an interest in convocation there, as the cathedral clergy. Whereas in the province of Canterbury, the Lower House of Convocation consists of twenty-two deans (taking in Westminster and Windsor), twenty-four proctors of the chapters, fifty-three archdeacons, in the whole ninety-nine of the cathedral clergy; and there are but at the same time forty-four proctors for the parochial clergy (*z*).

(*t*) Lathbury, Conv. 373.
(*u*) Collier, Eccl. Hist. viii. 177.
(*x*) Johns. 150.
(*y*) Gilb. Exch. 58, 59.
(*z*) Johns. 150; Wake, 34.

Controverted elections.

According to Gibson (*a*), there is no doubt as to the right of the metropolitan, at the head of his suffragan bishops, to receive petitions touching controverted elections, or to proceed to an examination and final decision of them in the Upper House, or to enjoin members of the Lower House to examine and determine such elections; the only question has been as to concurrent power on the part of the Lower House, for which there appears to be some colour, though not strong, of precedent; and it is to be observed, that the prolocutor has exercised the power of examining witnesses upon oath.

Election of prolocutor.

While (Gibson (*b*) observes) the archbishops, bishops and clergy were used to debate in a body, the clergy, upon any emergency that required separate consultation, were directed to retire for that end. The result of their debates was to be reported above; and that made it necessary to fix upon some one of the members to represent the opinions or resolutions of the rest: the whole body being all the while present, and he only distinguished by speaking in their name. From thence he had the style of *prolocutor* and *organum cleri:* and from his relating to the president and bishops the effect of their debates, that of *referendarius.*

In the year 1415, Nov. 18, a convocation was holden at St. Paul's under Archbishop Chicheley, and one Henry Ware mentioned as prolocutor. This is said to be the first time that the name of prolocutor occurs in the registry (*c*).

In the year 1425 the great canonist, Lyndwood, was formally elected prolocutor.

The prolocutor has sometimes been recommended by the archbishop; and the Lower House has always had the antecedent order or leave of his grace before proceeding to election, and this both in the beginning and during the sitting of convocation upon a vacancy occurring. The prolocutor is presented to the archbishop and bishops for confirmation. The precedents are in favour of the necessity of leave being obtained from the Upper House before the prolocutor can appoint a deputy. All messages from the Lower to the Upper House are regularly carried up by the prolocutor.

(*a*) Syn. Ang. 304; Synodalia (Warren), 27.

(*b*) Syn. Angl. 47, Ch. iv.; Synod. (Warren), 16, Forma eligendi et præsentandi Prolocutorem.

(*c*) Hody, Hist. of Conv., 3rd Part, p. 256.

Form of electing prolocutor in 1864.

Session LXII.(d)—Tuesday, April 19, 1864.
Upper House.

The house met at twelve o'clock. His Grace the Archbishop presided. Prayers were read.

Election of Prolocutor.

The Dean of Westminster and a large number of the members of the Lower House being in attendance,

The president, addressing them, said—"Officio Prolocutoris vacante per resignationem viri admodum Reverendi Decani Bristoliensis, monemus vos, Fratres e clero inferiore, ut vosmet recipientes in cameram Hierosolymatanam ecclesiæ collegiatæ Divi Petri Westmonasteriensis Decanatam contiguam, eligatis e numero vestro virum aliquem, pietate, doctrinâ, gravitate morum ac prudentiâ conspicuum, electum vero hoc loco nobis presentatis, ut legitimè approbatus, ad Prolocutoris seu Referendarii vestri munus admittatur."

The members of the Lower House then retired to the Jerusalem Chamber to elect the prolocutor.

On their return to the Upper House, Canon Wordsworth, who was chosen by the Lower House, presented the newly-elected prolocutor to the archbishop and the bishops—[His speech is given at length in the original Latin in the Chronicle of Convocation, vol. ii. p. 1445].

The president replied in the following terms:—"Approbamus, Fratres e clero inferiore, virum Venerabilem Edvardum Bickersteth, Sanctæ Theologiæ Professorem, ritè et legitimè e vobis electum in officium Prolocutoris vestri vacans per resignationem viri admodum Reverendi Decani Bristoliensis: et illum, auctoritate nostrâ, ad Prolocutoris sive Referendarii vestri munus admittimus."

The prolocutor replied—[His Latin speech is also given in the Chronicle of Convocation].

The prolocutor and the other members of the Lower House then retired.

Business in Lower House.

From the earlist account (*e*) of proceedings in convocation, it appears to have been usual for the clergy to lay before the archbishop, or the president and bishops, the grievances under which they laboured, and to pray redress. These were styled *gravamina* or *articuli cleri,* and related chiefly to matters of jurisdiction and their civil property, viz., the encroachments of lay officers, exactions,

(*d*) Chronicle of Convocation, vol. 2, 1445—1447.

(*e*) Syn. Angl. 117, c. xii.

and irregularities of ecclesiastical courts, frequently called *injuriæ*.

Sometimes the redress of them was made a condition of the subsidy granted—sometimes their petitions were addressed to the crown, sometimes to the archbishops and bishops, sometimes to the king singly, sometimes to the king in council, sometimes to the king in parliament. When the matters to be reformed related to the *common good* of the church, they were addressed and presented in the names of bishops and clergy and synodically settled; these are called in the registers *reformanda in convocatione*. When the matter was *special*, the clergy presented their grievances to the Upper House for their approbation and the conveyance of them to the crown or parliament; yet the form ran in their own name only—these are properly *gravamina* and *articuli cleri*.

The Upper House has often directed the time and form at which such presentments shall be proposed and offered.

The *reformanda*, whether *in convocatione*, *in parliamento*, or *per regem*, inasmuch as they concerned the general weal of the whole church, were frequently moved and proposed by the archbishop at the opening of the convocation among the causes of his summons. The bishops and clergy were to proceed jointly to a reformation of abuses specified in a schedule.

"While" (I am, as before, citing Gibson) "the archbishop and bishops are supposed to be consulting in the upper house, whether any regulations in the church, or in their particular diocese, be necessary at any time; the clergy in the lower house, who are supposed to be eyewitnesses of many things that do not ordinarily reach the notice of their diocesan, have a right, either jointly or separately, to lay before their lordships an account of any disorderly persons or practices they know: and this either *vivâ voce*, by the prolocutor, or in schedules put into the prolocutor's hands, in order to be severally laid before the archbishop and bishops, and to be compared and jointly considered with those of the same kind exhibited by their lordships. These *reformanda*, in many cases, could require no more than the strict exercise of the ordinary jurisdiction in every diocese, and were therefore answered by a solemn recommendation of them to the care of the bishops respectively. But if the abuses called for a new law, and the reformation of them required the assistance of the prince or the parliament, these schedules were reduced into articles, and upon them, as containing the general sense and request of the synod, such solicitations

were set afoot as were judged necessary to bring about the reformation desired.

"The applications upon the *reformanda in parliamento* were usually left to the care of the archbishop, bishops, and the parliamentary prelates" (*e*).

Proxies.

In convocation, those who are absent are allowed to vote by proxy; and the bishops, when they could have holden lesser dignities in commendam, constituted any person that is member of the lower house to vote there as their proxy, for such deanries or archdeaconries as they held (*f*) by commendam (*g*).

What a synodical act is.

After any matter in convocation (*h*) has been duly considered, read and agreed to by the bishops and clergy severally, the prolocutor and the inferior clergy are sent for to the upper house, and there it is passed into a synodical act.

The several sorts of business in convocation, however differently passed in some respects, agree in this, that the inferior clergy are sent for to the upper house, and there the whole convocation, the metropolitan, bishops and presbyters, in a body, give their final consent.

The method of passing canons and constitutions before the statute 25 Hen. 8, c. 19, was the same that has ever been practised in synodical meetings, viz., by the authority of the synod, and with the sanction of the metropolitan; and these two give them their full force and effect. But now they are framed in order to be laid before the crown, as agreed on by the archbishop, bishop and clergy; and none to be "of any force, effect or validity in law, but only such and so many of them as he, by his letters patent under the great seal of England, shall allow, approve, and confirm." This is the language of the royal licence, the necessity whereof, in order to make, promulge and execute canons, &c., is an abridgement of the ecclesiastical power in these respects, and therefore the ancient sanction, which always signified a final authority, could not be continued in any matters which were not to be promulged or executed without the allowance, approbation and confirmation of the king by his letters patent under the great seal of England.

But all synodical acts to which the royal licence is not necessary receive their final authority from the sanction of the metropolitan; *i. e.* they still pass, in the ancient

(*e*) Gibs. 123.

(*f*) For "Standing Orders," see Synodalia, 123.

(*g*) Johns. 142.

(*h*) Syn. Angl. c. xvi. 133, 137, 138.

canonical way, whatever (I continue to cite Gibson) some late writers, too much bent upon the diminution of ecclesiastical power, may suggest to the contrary.

And even in canons and all other matters passing by subscription the metropolitan's ancient authority remains thus far entire, that without his concurrence the agreement of all the rest is not the act of convocation, nor can be presented as such to the prince for his royal confirmation.

Continuatio et prorogatio.

When the business of the day (*i*) is over, the archbishop consults with his suffragans about a convenient day to which they may, to use the proper phrase, *continue* for the further prosecution of the business before them. A *schedule of continuation* is delivered by the registrar to his Grace, who personally or by deputy publicly reads and signs it. This reading and signing is formally attested by a public notary—whereby the lower house is legally assured that it is his Grace's act, and are apprized of what they are to do in consequence thereof.

The use of *schedules* is of earlier date than the division of the two houses, and therefore than the Reformation; but there appears to be no record of a separate schedule of continuation while the two houses debated together.

Probably such schedules came into use when it began to be less usual for the lower clergy to stay with the bishops in the upper house throughout the debates, and so to be present at the *continuation.*

While the custom was to enter this continuation at large in the register, the convocation was either continued in a body as it still is in the province of York, or notice was given to the lower clergy by the prolocutor or some authorized person.

In course of time, as business increased and the separation of the two houses became more decided, the notary ceased to transcribe the *continuation* at length, but merely referred to the original schedule deposited in the same office with the acts of both houses. The continuation was of the whole convocation, not of the upper house. This it was the duty of the prolocutor to convey (*intimare*) to the lower house. This power of continuation belonged to the archbishop *cum consensu fratrum* when the two houses were united, and was preserved to him when they separated (*k*). The usual language was "*de et cum consensu fratrum suorum* continuavit et prorogavit *hujusmodi convocationem sive sacram synodum provincialem.*"

(*i*) Syn. Angl. App. 276. (*k*) *Vide supra*, pp. 1939, 1940.

Prorogatio.

But the prorogation is, strictly speaking, distinct from the continuation (k). As the archbishop, upon receiving the royal writ for calling a convocation, is bound by law to exert his summoning authority, so he is bound to prorogue and dissolve in the proper canonical form when the pleasure of the crown is signified to this effect. This is a deference which, Gibson says, has ever been paid to Christian princes.

The royal order is executed by a formal declaration out of a schedule, mentioning the royal writ, but running solely in the archbishop's name, and pronounced by him in the presence of the bishops and clergy.

Right of petition.

"The clergy (l) in convocation" (Gibson observes) "have a right not only to the redress of their own particular grievances, or to interpose for the reformation of any disorders they may observe in the church, but also to offer to the archbishop and bishops all such measures as may in their opinion tend to the honour and interest of religion."

Atterbury says (m), "Subjects themselves may petition and make known whatever grievances or requests they have to offer without encroachments on any of their superiors. And that the liberty of such addresses and representations is still left to the convocation, to the lower house only or to both jointly, I have fully showed. The Statute of Submission, even under the most rigorous interpretation of it, being scarce pretended to abridge their privileges in this respect." This position seems to be right in itself, and upon the whole not at variance with the precedents. The records show petitions:—

1. For making new canons;
2. For the revival of old canons;
3. For the abolition or suspension of particular laws;
4. For the appointment of new and the enforcement of old festivals;
5. For the intercession of the archbishop with the crown to restrain lay officers from oppressing the church, or to enforce ecclesiastical laws;
6. For the more strict execution of ecclesiastical discipline;

and for various other matters.

No particular time was necessarily fixed for presenting

(k) Syn. Angl. c. xvii. 138.

(l) Syn. Angl. 125, ch. xiii.; Journal of Conv. 1856, p. 121, Letter of Mr. Fraser.

(m) Page 139.

petitions to the Upper House, whether *vivâ voce* or *in scriptis*—or indeed to any other authority.

Standing orders.

In 1853, certain standing orders were adopted by the Lower House of Convocation (*n*).

Privileges.

In 1854, a committee of the Lower House under the superintendence of a very eminent prolocutor, Dr. Peacock, sat upon the general question of the privileges of their own house—the fruit of their labours was the following very valuable report, in which most of the subjects discussed in this chapter were touched upon.

Report of the committee of privileges in 1854.

"The committee of privileges of the Lower House of Convocation, appointed at its last session, met on the 14th of March, the 9th of May, the 6th and the 20th of June, and on the 19th of July, in the Jerusalem Chamber, the use of which was kindly allowed for that purpose by the dean and chapter of Westminster; and they report as follows (*o*):—

"That they have had under their consideration various points connected with the constitution, the privileges, and the practice of the Lower House of Convocation, about which doubts have been expressed and disputes have arisen, not only in ancient times, but even at our recent sessions, and which cannot remain unsettled without producing very serious inconveniences, or even endangering the harmonious co-operation of the two Houses of Convocation with each other.

"That the subjects to which they have chiefly directed their attention are, the powers of this house in complaints connected with the election of its members and the exercise of their rights; the duties and powers of the prolocutor in conducting the business of this house, in continuing or closing its debates, in acting as the organ of communication between the two houses and in the nomination of committees, whether by the authority of this house or at the command of the president; the mode of dealing with *gravamina* and *reformanda;* the business which it is competent for this house to enter upon; the general constitution and appointment of committees of the two houses, and the treatment of business committed to them; the forms of proceeding in the appointment and confirmation of the prolocutor and the nomination of a substitute; and the reception and treatment of petitions addressed to this house. They are noticed generally in the order in which they were considered by your committee.

(*n*) Synodalia, 123, 124.
(*o*) Synodalia, 1854, pp. 24—33.

"In the opinions they have expressed, and the recommendations they have made, they have not proposed to amend the constitution of Convocation, even in points where they may have considered it capable of amendment, but have been guided by a reference to ancient precedents, whenever these could be found of so clear and unambiguous a character as to authorize a definite conclusion; in other cases, where the precedents are doubtful or apparently at variance with each other, they have come to such conclusions as seem to be most conformable to the general constitution of Convocation.

Election of proctors.

"(1) Has this house the right of adjudicating in disputed elections of proctors?

"It is the opinion of this committee that the Lower House has no right to adjudicate in disputed elections of proctors.

"In the case of Dey against Knewstubbs, noticed at length in the acts of the Lower House for the 9th and 11th of November, 1586, where the prolocutor appoints and administers an oath to commissioners to inquire into the facts connected with the election, and adjudicates upon their report, it is probable that he acted by a commission from the president: for in the very same session in which he makes his adjudication, the decision of the president in another disputed election, that of West against Thorowgood, is made known though his registrar to the prolocutor, and by him communicated to the house.

"On the 14th of November, 1640, when it was no longer safe for the Upper House to meet in consequence of the public disturbances, the archbishop sent for the prolocutor and six of his brethren, and directed him and the rest of the clergy to inquire into a disputed election, that of Thorowgood against Porter: the bishops met no more; but the prolocutor and the Lower House, being thus authorized by the president, proceeded to adjudicate; the prolocutor, in accordance with the majority, pronounced for the election of Thorowgood.

"Representations, however, respecting disputed elections, or any irregularities connected with them, when made by any member in the form of petition or otherwise, may be taken into consideration by the Lower House, and treated like any other *gravamina* which are brought under their notice.

Precedents about 1700 doubtful.

"It appears that in the Convocations of the early part of the last century committees of elections were appointed, as well as committees of privileges and of *gravamina*. If the object of these committees had been inquiry merely,

"their functions might properly have been discharged by the committees of *gravamina*. It is therefore probable that their appointment originated in the claim of a right to adjudicate upon disputed elections. There are obvious reasons, however, which would make us hesitate to follow any precedent of that period, unless it was supported by other authorities.

"(2) What limitations are imposed upon the appointment or use of proxies?

Proxies.

"It is the opinion of this committee that those members of the Lower House, who are so in virtue of their office, can appoint proxies: and that the president is the sole judge of the validity of such appointments.

"In the Convocation of 1689, 'it was debated what proxies each man might have from those that were absent, and it was agreed that one man might have *four*:' in the Convocation of 1701, this number was further limited to *three*, but was extended to *five* by the standing orders of 1722, which orders were adopted by this house at the first session of this Convocation. Though it is the opinion of your committee that this house possesses no power of limiting the number of proxies which one of its members may hold, there are many reasons to be urged in favour of a further limitation of this privilege, as the accumulation of many votes in the hands of one member might be productive of some inconveniences.

"In the Convocation of 1689, 'it was agreed that proctors for the clergy who had not appeared might appoint *proxies*, precedents having been found for the same:' and in the Convocation of 1701 such proxies were admitted. The table of fees signed and established by Archbishop Whitgift, which is still in force, assigns a fee to the registrar to be paid by every dean or archdeacon who appears by proxy; and it may be inferred that a corresponding fee would have been assigned to be paid by every proctor of a chapter or of the clergy, who appointed a proxy, if such appointments had been authorized. It is stated by Atterbury in his *Rights, Powers, and Privileges of our English Convocation*, that proctors of the clergy and of chapters were sometimes authorized by the instruments of their appointment to name *substitutes*, not proxies, to appear for them: thus in the 1st of Edward VI., the proctor for the clergy of Hereford named two such substitutes, and in the last year of the same king, the procuratorium of the dean and chapter of St. Paul's had a clause in it to the same effect: in an ancient memorandum relating to a Convocation held at Carlisle, in the reign of Edward I., which

"Atterbury has quoted in his Appendix, it is stated that *Joh. de Wakerle, Clericus, Procurator Cleri Archidiac. Surr. habens potestatem alium procuratorem substituendi, substituit loco sui Joh. de Bray, Clericum.* It is probable that these were the precedents referred to by the Convocation in 1689.

Schedules of *gravamina et reformanda.*

"(3) The mode of dealing with schedules of *gravamina* and *reformanda.*

"When schedules of *gravamina* or *reformanda* are presented to the house, they may be referred, upon a motion duly made and carried, to a committee of *gravamina* and *reformanda*, by which they may be recommended as proper subjects to be made *articuli cleri*, and, when approved by the house, to be presented as such to the Upper House, through the prolocutor: but other *gravamina* or *reformanda*, more particularly if they be of a local and special, rather than of a general, character, may be transmitted to the Upper House through the prolocutor, in the name of the member who presents them. It has been the uniform practice to require that all representations, of whatever kind, which are presented to the Upper House, should be in writing.

"It has been usual to appoint a committee of *gravamina* and *reformanda* at the beginning of every Convocation, which committee has continued to act as such, until discharged by the authority of this House.

"It is provided by the 11th of the standing orders of 1722, 'that any members may come and propose anything to any committees of this house, but none to have liberty of suffrage except such as are deputed of the committee, unless when it is otherwise ordered by this house.' From a discussion which arose respecting this standing order at our last session, it seemed to be the general feeling of this house, though no motion to that effect was made, that no new propositions should be allowed to be submitted to the committee of *gravamina*, unless they had immediate reference to the subjects under its consideration: and it is our opinion that the preceding standing order should be so modified, as to exclude from the cognizance of your committees all matters not specifically referred to them by the vote of this house.

How far Lower is dependent on Upper House.

"(4) Has the Lower House the right of declining to enter upon the consideration of business submitted to it by the Upper House, or to appoint committees when required by the president to do so?

"It appears to be most conformable to ancient precedents that the Lower House should not decline to enter

"upon the consideration of business committed to it by the Upper House, or to appoint committees either for special business or to meet committees of the Upper House, when required by the president to do so.

"There are two well-known precedents in which the Lower House refused to appoint committees of their members to meet committees of the Upper House—the one in 1689 and the other in 1701—and these refusals formed a principal topic in the controversies which prevailed at the beginning of the last century respecting the relations of the two houses to each other.

"Heylin, in his MS. Extracts, as quoted by Atterbury, gives another instance of such refusal in 1542. The correction of the Romish service-books was committed by the Upper House to the bishops of Sarum and Ely, taking to each of them a certain number of the Lower House such as should be appointed: and it is stated that the Lower House excused themselves from making any such appointment, and left the two bishops to proceed with the business by themselves.

"Burnet in his History relates that in the Convocation of 1712, the bishops, having agreed upon a declaration respecting lay baptism, sent it down to the Lower House, 'but they would not,' says he, 'so much as take it into consideration, but laid it aside: thinking that it would encourage those who struck at the priesthood.' The detailed reasons, however, assigned by the Lower House for the course which they adopted, were in reality equivalent to a rejection of the proposition, which was quite within their province: this case therefore does not amount to a precedent in favour of the right of refusing to take the business proposed to them into consideration.

"Whatever force may be attributed to these precedents, as establishing the abstract right of the Lower House to refuse to appoint committees when required by the president to do so, or to enter upon the consideration of business committed to it—they do not appear to be sufficient to justify such refusals.

Must business be committed by Upper to Lower House?

"(5) Has the Lower House the right of entering upon the consideration of business not previously committed to it by the Upper House?

"It is the opinion of your committee that, in conformity with ancient precedent and the constitution of convocation, more especially as limited by the Act of Submission, the Lower House has no right to enter upon the consideration of any business, with a view to a synodal act, unless previously committed to it by the Upper House: but it

Petition. Address.

"may suggest the consideration of any business to the Upper House by way of petition or address.

"It is very difficult to define the precise boundaries which separate the questions which are, from those which are not, forbidden by the statute 25 Henry 8, c. 19, to be considered in convocation without the royal licence. It is stated by Atterbury, 'that in all the convocations since the 1st James 1, none of them took out licences but when they were to make canons.' His opponent Wake concurs in this statement, and adds, 'I do humbly insist upon it, that no restraint has been laid upon the clergy in convocation, but only in the point of *attempting* or *enacting*, or to express all in one word, *of making canons, constitutions, orders*, and *ordinances provincial*. In all other matters I account them still at liberty, not only to *treat* but to *resolve* too, as they did before; but in all such cases where the clergy are restrained, by the *Act of Submission*, from *enacting, promulging*, and *executing* without the king's licence, in the same they are also restrained from *attempting*, that is, from *treating* and *conferring* in order to *enact*.' As a natural inference from this opinion, which has been very generally held to be a correct interpretation of the statute, we should consider the house to be restrained from passing any resolution, which, if enacted, would become a canon: but the case would be different if such resolution took the form of an address or petition to the Upper House, with a view to obtain the royal licence to proceed to the consideration of such business.

"This principle is well illustrated by one of the proceedings of the Lower House of Convocation in 1709, which was the drawing up of a declaration that episcopacy was of divine and apostolical right, with an invitation to the Upper House to concur with them in pronouncing it a settled maxim of the church. 'But the bishops,' says Burnet, 'saw through their designs, and sent them for answer, that they acquiesced in the declaration already made on that head in the preface to the Book of Ordinations, and *that they did not think it safe either for them or for the clergy to go farther in that matter without a royal licence*.' Such a proposition, even if legitimate, ought to have proceeded from the Upper and not from the Lower House, and the declaration, if agreed to, would have amounted to such an attempt to make a canon or constitution as is forbidden by the Act of Submission.

Committees of Lower House

"(6) What are the objects for which committees may be appointed by the Lower House when it is not required

"to do so by the president, and in what manner are such committees appointed?

not required by president.

"It appears to be consistent with ancient precedents for the Lower House to appoint committees for its own purposes, and to give such instructions to them as it may think necessary. Of this kind are committees of privileges to consider all questions concerning the rights and privileges of the Lower House, and committees of *gravamina* and *reformanda* to consider complaints and representations made by members of the house, or in petitions transmitted through them.

"The appointment of such committees has usually been proposed and agreed to by the house at the beginning of each convocation, or whenever the occasion for making them occurred; after which the members to serve upon them have been nominated by the prolocutor, and submitted to the house for its approval.

"As the deliberations of such committees are entirely confined to the regulation of the affairs of the Lower House, or to the preparation of business which it has in hand, and in no respect affect the relations of the Lower to the Upper House, it does not appear to be necessary or required by general precedent to signify the appointment of such committees to the president, or to request his approval of the names of those who are appointed to serve upon them.

"(7) For what objects may the president require the appointment of committees of the Lower House, and in what manner are such committees appointed?

When president may require committees of Lower House.

"With respect to the right of the president to direct the Lower House, through its prolocutor, to name committees of its members for various specified purposes, the examination of the ancient documents would appear to lead to the following conclusions.

"The president, through the prolocutor, may direct the Lower House, as a body, to consider any subject committed to it, or to appoint a committee of its members for that purpose. Sometimes the number of members of such committee was prescribed; at other times it was left to the discretion of the house. The names of the persons so selected were sometimes communicated to the president, *ut decuit*, (as it was said,) that is, from a sense of propriety: and there can be little doubt, from a general consideration of the tenor of the precedents, that if a return of such names had been required in any case, it would have been held to be the duty of the Lower House to comply with the order.

When president may require committees of Lower House.

"Again, the president has been accustomed to direct the Lower House to appoint a certain number of its members to meet a certain number of those of the Upper House, and to return the names so appointed to the president for his approval.

"To such committees was entrusted, either a special inquiry, or the transaction of a special business, and, when the appointment was unconditional, it may reasonably be concluded that the members of the two houses possessed equal powers, and acted in every respect as one body. In other cases, they would appear to have been appointed to confer with a certain number of members of the Upper House, when it may be inferred that they were merely consulted by the latter, who were authorized to report, if they thought proper so to do, independently of them. Committees of the Lower House were also sometimes appointed to meet committees of the Upper House, when summoned, in which case it may be inferred that they met for deliberation in common, without the members of either house being pledged to adopt the opinion of the majority.

"The examination of the precedents would show many other forms in which the president could command the services of members of the Lower House; all clearly indicating that the Lower House, though possessing important prescriptive privileges of its own—in the appointment of committees for its own purposes, in its power of petition and representation, and more especially in that of a final negative upon all business committed to it—was considered as acting in general subordination to the orders of the president.

"Whilst we fully recognize the existence of precedents which lead to a contrary conclusion, we are of opinion that it is desirable that all the members of committees of the two houses, when they meet together—unless for the purpose of conference merely—should meet upon equal terms, and that the result of their joint deliberations should in all cases be reported to convocation.

"It would appear, as far as regards the Lower House, that the usual course of proceeding in the appointment of such committees has been as follows. The president directs the prolocutor to nominate the members of such committees, and to submit the names of the persons so nominated to him. The prolocutor then proceeds at once to make his nomination, without requesting the leave of the Lower House to do so: but the names so selected are submitted to the house for its approval.

"By this course of proceeding the Lower House is in no respect committed to the expression of any approval or disapproval of the object for which such joint committee is appointed, but simply accepts or rejects the names submitted to it by the prolocutor.

"(8) Is it consistent with ancient precedents that the Lower House should continue its debates, after the schedule of prorogation has been read?

No debates after schedule of prorogation read.

"We are of opinion that the Lower House has no power of continuing its debates after the schedule of prorogation has been read to the house, or the fact of its having been read in the Upper House has been announced by the prolocutor; but it appears to be not inconsistent with precedents for the prolocutor to exercise a discretion in deferring the announcement of the prorogation, until the consideration of the business before the house is concluded, unless it is declared by the president that the prorogation is immediate.

"(9) The form of appointing, presenting, and confirming the prolocutor.

How prolocutor is appointed.

"The *forma eligendi et præsentandi prolocutorem* drawn up by Archbishop Parker in 1562, is sufficiently full and precise, and appears to have been invariably followed. This form, as well as the *forma sive descriptio convocationis celebrandæ*, drawn up at the same time, are stated to have been designed not merely as a rule for himself in holding the first convocation, but also as a standing pattern for his successors.

"If a prolocutor dies or vacates his office, a new prolocutor is elected, presented, and confirmed, according to the accustomed forms.

"(10) The mode of appointing a deputy prolocutor, when the prolocutor is unable to attend from illness or other causes.

Deputy prolocutor.

"The prolocutor, with the sanction of the house, may name a deputy or deputies to act in his absence, but such nomination must be approved by the president.

"(11) Has the Lower House the right to receive petitions, and if so, in what form should they be addressed, or in what manner transmitted, to it?

Petitions to Lower House

"The convocation of this province, when the two houses are separated, is deemed to be held in the place where the Upper House assembles, and petitions therefore addressed to convocation generally should be transmitted to the Upper House.

"Petitions, however, addressed to the Lower House may be received in the same manner as other representa-

tions coming from the members who present them, and either referred to the committee of *gravamina* and *reformanda*, or be otherwise dealt with as may be determined. It is obviously the duty of the proctors of the chapters and clergy to present the *gravamina* and *reformanda* of those whom they represent to the consideration of the house.

Nothing said as to *consensus fratrum*.

"In conclusion, your committee beg to state that they have ventured to express no opinion respecting the rights and customs of the Upper House, except in their relation to those of the Lower House; and when they have spoken of the acts of the president, they have equally abstained from expressing any opinion whether they may or may not require the concurrence of his brother prelates.

"GEORGE PEACOCK, *Chairman*."

SECT. 5.—*General Powers and Privileges.*

Character and general power under the Canons of 1603.

By Can. 139 of 1603, "Whosoever shall affirm that the sacred synod of this nation, in the name of Christ and by the king's authority assembled, is not the true Church of England by representation, let him be excommunicated, and not restored until he repent and publicly revoke that his wicked error."

Can. 140. "Whosoever shall affirm that no manner of person, either of the clergy or laity, not being themselves particularly assembled in the said sacred synod, are to be subject to the decrees thereof in causes ecclesiastical (made and ratified by the king's supreme authority) as not having given their voices unto them, let him be excommunicated, and not restored until he repent and publicly revoke that his wicked error."

Can. 141. "Whosoever shall affirm that the sacred synod assembled as aforesaid was a company of such persons as did conspire together against godly and religious professors of the Gospel, and that therefore both they and their proceedings, in making of canons and constitutions in causes ecclesiastical by the king's authority as aforesaid, ought to be despised and contemned, the same being ratified, confirmed, and enjoined by the said regal power, supremacy and authority, let them be excommunicated, and not restored until they repent and publicly revoke that their wicked error."

No power to bind the temporalty.

Lord Coke says, a convocation may make constitutions by which those of the spiritualty shall be bound, for this,

that they all, either by representation or in person, are present, but not the temporalty (*p*).

And in *Matthews* v. *Burdett*, in 1 Anne, it was said, that, in the primitive church, the laity were present at all synods. When the empire became Christian, no canon was made without the emperor's consent. The emperor's consent included that of the people: he having in himself the whole legislative power, which our kings have not. Therefore if the king and clergy make a canon, it binds the clergy *in re ecclesiasticâ*, but it does not bind laymen; they are not represented in convocation, their consent being neither given nor asked (*q*).

And in *Cox's case*, in 1700, by Wright, Lord Keeper, the canons of a convocation do not bind the laity without an act of parliament (*r*).

And, finally, in the case of *Croft* v. *Middleton*, in 10 Geo. 2, it was determined by the unanimous resolution of the Court of King's Bench, that such canons do not *proprio vigore* bind the laity (*s*).

Nor against the law of the land.

The convocation can do nothing against the law of the land, for no part of the law, be it common law or statute law, can be abrogated or altered without act of parliament (*t*).

And by 25 Hen. 8, c. 19, it is provided, "That no canons, constitutions, or ordinances, shall be made or put in execution within this realm, by authority of the convocation of the clergy, which shall be contrariant or repugnant to the king's prerogative royal, or the customs, laws, or statutes, of this realm." This statute was declaratory of the old common law (*u*).

Appeal to the convocation.

By 24 Hen. 8, c. 12, it is enacted, "That in all causes testamentary, matrimonial, or of tithes, depending in the ecclesiastical courts, which shall touch the king, the party grieved may appeal to the upper house of convocation being then convocate by the king's writ, or next ensuing, within the province, so that such appeal be taken by the party grieved within fifteen days next after judgment given, and that determination shall be final, so as that the matter so determined shall never after come in question and debate, to be examined in any other court."

But it has been determined that this enactment is re-

(*p*) 12 Co. 73.
(*q*) 2 Salk. 412.
(*r*) 1 P. Wms. 32.
(*s*) Str. 1056; 2 Atk. 650; *vide supra*, p. 1076.
(*t*) 12 Co. 73.
(*u*) Ibid. 72; 1 Bl. Com. 279.

pealed, and that all appeals from the ecclesiastical courts lie to the crown in council (*v*).

Continuance.

The convocation usually continues during the time of parliament, but, as Dr. Warner observes, the parliament and convocation are separate bodies, independent on one another, and called together by different writs, and therefore the dissolution of parliament does not necessarily, or in any respect, dissolve the convocation, so that they may continue to sit longer than the parliament, if the king pleases (*x*).

Privilege of free coming to convocation.

After the clergy had furnished a tenth to Henry the Sixth (*y*), they obtained the statute of 8 Hen. 6, c. 1, which enacted, "Because the prelates and clergy of the realm called to the convocation, and their servants and familiars that come with them to such convocation, oftentimes be arrested, molested, and inquieted; our lord the king, willing to provide for the security and quietness of the said prelates and clergy, at the supplication of the same prelates and clergy, and by the consent of the great men and commons of the realm, hath ordained and established, that all the clergy hereafter to be called to the convocation by the king's writ, and their servants and familiars, shall for ever hereafter fully use and enjoy such liberty or defence in coming, tarrying, and returning, as the great men and commonalty of the realm, called or to be called to the king's parliament, do enjoy, and were wont to enjoy, or in time to come ought to enjoy."

And in the journals of the House of Lords, we find several applications to their lordships for redress in cases where this liberty of the convocation clergy has been invaded, which their lordships have formerly granted.

Trial of heresy.

There prevailed at one time considerable doubt whether the convocation might or might not try a clerk for heresy. It may be said that, even without considering the effect of the Clergy Discipline Act, 3 & 4 Vict. c. 86, s. 23, this doubt is now practically resolved, and that convocation has no such power (*z*).

(*v*) *Ex parte Bishop of Exeter*, 15 Q. B. 52; 10 C. B. 102; 5 Ex. 630; 14 Jur. 443, 480, 522, 876; 19 L. J. (N. S.) Q. B. 279; C. P. 200; Ex. 376.

(*x*) 2 Warn. 611, 612; and 8 Collier, Eccl. Hist. 182, 183. *Vide supra*, p. 1942.

(*y*) Collier, Eccl. Hist. iii. 351.

(*z*) See *Ex parte Bishop of Exeter*, 14 Jur. 443, 480, 522, 876; 5 Ex. 630; 15 Q. B. 52; 10 C. B. 102; 19 L. J. (N. S.) Q. B. 279; C. P. 200; Ex. 376. Lord Hale says, "Before the time of "Richard II., that is, before any "acts of parliament were made "about heretics, it is without "question that, in a convocation "of the clergy or provincial sy-"nod, they might and frequently "did here in England proceed "to the sentencing of heretics."

Condemnation of heretical book in 1864.

But the power of convocation to condemn an heretical work appears to be as well established. In 1864 convocation condemned a work entitled *Essays and Reviews.* The following account is taken from a record of their proceedings on this occasion:—

"The President.—If none other of my right reverend brethren are inclined to speak, I will in a very few words state my reasons for the course which I have felt it my duty to adopt throughout these proceedings. In the first place, I hold that this synod has the power, and that it is its province and function, to condemn erroneous books. If ever I entertained any doubt on that subject, that doubt has been cleared up by the opinion of Sir Hugh Cairns and Mr. Rolt. This was the case sent to those eminent gentlemen:—

"'The Committee of the Upper House of Convocation of the province of Canterbury is now sitting, and to enable them to make a report they desire the opinion of Sir Hugh Cairns and Mr. Rolt upon the following question:—

"'Is the convocation of the province of Canterbury, when legally assembled under the queen's writ, estopped by the statute of 25th Henry VIII. c. 19, or by any other statute, from proceeding to pronounce synodical condemnation upon a book, not intending to proceed against the author, without receiving the special royal licence for the purpose?'

"The opinion is this:—

"'We are of opinion that the convocation of the province of Canterbury is not estopped by the 25th Henry VIII. c. 19, or by any other statute, from expressing by resolution or otherwise their condemnation or disapprobation of a book, although no special royal licence is given for the purpose. Exception was taken early in the last century to the proposal of convocation to pass synodal censure on a sermon preached by Bishop Hoadley; but it was not alleged that they were disabled by statute from so doing.

Lincoln's Inn, 16th June, 1864. JOHN ROLT. H. M. CAIRNS.'

"All doubt having been cleared away upon that point, it evidently being the privilege and province of this synod to condemn books, the question in my mind simply is,

(1 H. H. 390.) Mr. Hawkins says, "It is certain that the "convocation may declare what "opinions are heretical; but it "hath been questioned of late, "whether they have power at "this day to convene and convict "the heretic." (1 Haw. 4.) And Bp. Gibson says, "How far the "convocation of each province, "which had once an undoubted "right to convict and punish "heretics in a synodical manner, "doth still retain or not retain "that authority, he will not pre-"sume to say, until the judges "shall be clear and final in their "opinions, and that point shall "have received a judicial deter-"mination." (Gibs. 353.)

"whether the occasion has arisen for such a course of proceeding. Now, I do most distinctly state—and I never felt a stronger conviction in my life—that the occasion has arisen—that if ever there was a book which deserved such condemnation, it is the book entitled *Essays and Reviews*" . . . .

"The Bishop of Oxford.—It is now my duty to move the following resolution:—

"That the Upper House of Convocation, having received and adopted the report of the committee of the whole house appointed by them to examine the volume entitled *Essays and Reviews*, invite the Lower House to concur with them in the following judgment:—'That this synod, having appointed committees of the Upper and Lower Houses to examine and report upon the volume entitled *Essays and Reviews*, and the said committees having severally reported thereon, doth hereby synodically condemn the said volume, as containing teaching contrary to the doctrine received by the United Church of England and Ireland, in common with the whole Catholic Church of Christ'" (*a*).

(*a*) Chronicle of Convocation, vol. 2, pp. 1681, 1682.

PART VIII.

THE CHURCH IN HER RELATION TO CHARITIES AND TO EDUCATION.

CHAPTER I.

INTRODUCTORY.

Origin of the relation of the church to charities.

THE sphere of the church's activity (*a*) and life is not confined to the performance of purely religious offices; and it was therefore extended to institutions of a charitable but secular character. The jurisdiction of the church was founded on the maxim that it was *pro salute animæ* of the founder or the testator that the church should administer the charity or the bequest. It is very remarkable that the ecclesiastical courts in England, till a very recent period, retained jurisdiction over testaments and the administration of personal property (*b*).

The great office of chancellor was always holden by ecclesiastics before the reign of Henry the Eighth, and during part of his reign; and the proceedings of the Court of Chancery were founded upon the basis of the civil and canon law (*b*).

Existing instances of ecclesiastical jurisdiction.

Remnants of the authority of the church in charitable and educational trusts still remain.

The gifts or bequests for the furtherance of religious objects are, according to English law, *charitable*, and liable to the provisions of the Mortmain Acts.

The bishops still have the power of licensing midwives, and the Archbishop of Canterbury of conferring medical as well as other degrees.

The education of the people is and probably always will be much guided by the teaching of the clergy under the inspection of the diocesan.

(*a*) Walter's Kirchenrecht, Von der besonderen Kirchlichen Anstalten, § 337, u. s. w.

(*b*) *Vide supra*, pp. 1075, 1076.

Severing of connection in modern times.

The effect of modern legislation, however, has been to sever the necessary connection between the church and education. The Toleration Acts have taken away the penalties which might at one time have been inflicted on teachers who did not profess obedience to the church. The canons that require licence from the ordinary for every teacher were not binding on the laity, and have become almost obsolete as to the clergy. Finally, in regard to the four great classes of teaching institutions, the University Commission Acts, and The University Tests Act, 1871, as to the universities; The Public Schools Act, 1868, for the larger schools; The Endowed Schools Act, 1869, for the middle class of schools; and The Elementary Education Act, 1870, for the primary schools, have either caused or recognized with a legislative sanction an increased separation between the church and education in this country.

Subject of part.

Such instances of ecclesiastical influence as still remain, which show themselves not in the mode of teaching so much, as in the nature and government of the teaching institutions, will be treated of in the following pages.

CHAPTER II.

CHARITABLE TRUSTS.

SECT. 1.—*Generally.*
2.—*Law of Mortmain.*

SECT. 1.—*Generally.*

THE connection of the church with charities, which was at one time productive of most important results in the application of general principles to both, still remains and operates in some material circumstances. These may thus be classified:—

Instances of connection between church and charities.

(A.) The established church itself is a charity, and all religious uses are charitable ones, and as such subject to the general law of charities,—including especially therein the law of mortmain.

(B.) The authorities of the church have certain jurisdiction over charities.

(C.) The church has, in some cases, recognized the status conferred on its members by their position in a charitable corporation.

(D.) Questions relating to charities have frequently been decided according to the principles of civil or ecclesiastical law.

(E.) By the law of the land the church has certain peculiar privileges in relation to charities.

(A.) The scope and meaning of the word "charity" as a legal term has been clearly laid down by judicial authority.

What are charities.

Charity may, "in its widest sense, denote all the good "affections men ought to bear towards each other; in its "most restricted and common sense, relief of the poor." But the legal sense of the term is neither of these. "Here its signification is derived chiefly from the Sta-"tute of Elizabeth. Those purposes are considered "charitable which that statute enumerates, or which by

"analogies are deemed within its spirit and intend-"ment" (a).

This statute of Elizabeth (43 Eliz. c. 4) provides for the issuing of certain commissions to inquire into and reform abuses and neglects of charities. Its active portion is practically obsolete, being now replaced by the institution of a permanent charity commission; but technically its machinery might still, if expedient, be put in force; and in any case the act remains as a declaration of the legal sense of the word charity.

43 Eliz. c. 4.

By sect. 1 of this act, reciting as follows:—"Whereas divers lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money, and stocks of money, have been heretofore given, limited, appointed, and assigned, as well by the queen's most excellent majesty, and her most noble progenitors, as by sundry other well disposed persons, some for relief of aged, impotent, and poor people; some for maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars in universities; some for repair of bridges, ports, havens, causeways, churches, sea banks, and highways; some for education and preferment of orphans; some for or towards relief, stock, or maintenance for houses of correction; some for marriages of poor maids; some for supportation, aid, and help of young tradesmen, handicraftsmen, and persons decayed; and other for relief or redemption of prisoners or captives: and for aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers, and other taxes; which . . . nevertheless have not been employed according to the charitable intent of the givers and founders thereof, by reason of fraud, breaches of trust, and negligence in those that should pay, deliver, and employ the same:" for remedy thereof it is enacted, that it shall be lawful for the lord chancellor or keeper of the great seal of England, and for the chancellor of the duchy of Lancaster, for lands within the county palatine of Lancaster, "from time to time to award commissions . . . to the bishop of every several diocese respectively, and his chancellor (in case there shall be any bishop of that diocese at the time of awarding the commission) and other persons of good and sound behaviour; authorizing them thereby, or any four or more of them, to inquire as well by the oaths of twelve lawful men or more of the county, as by all other good and lawful ways and means, of all and sin-

(a) Sir William Grant in *Morice* v. *Bishop of Durham*, 9 Ves. 405 (A.D. 1804).

gular such gifts, limitations, assignments, and appointments aforesaid, and of the abuses, breaches of trusts, negligences, misemployments, not employing, concealing, defrauding, misconverting, or misgovernment, of any lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money, or stocks of money, heretofore given, limited, appointed, or assigned, or which hereafter shall be given, limited, appointed, or assigned, to or for any the charitable and godly uses before rehearsed. And after, the said commissioners, or any four or more of them (upon calling the parties interested in any such lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money, and stocks of money), shall make inquiry by the oaths of twelve men or more of the said county (whereunto the said parties interested may have their lawful challenges): and upon such inquiry, hearing, and examining thereof, set down such orders, judgments, and decrees, as the said lands, tenements, rents, annuities, profits, goods, chattels, money, and stocks of money, may be duly and faithfully employed, to and for such of the charitable uses and intents before rehearsed respectively, for which they were given. Which orders, judgments, and decrees, not being contrary to the orders, statutes, or decrees of the donors or founders, shall stand firm and good, and be executed accordingly: until the same shall be undone or altered by the lord chancellor, or lord keeper, or chancellor of the county palatine of Lancaster respectively, upon complaint by any party grieved to be made unto them."

By sects. 2, 3, it is provided that this shall not extend to any lands, tenements, rents, annuities, profits, goods, chattels, money, or stocks of money, given or which shall be given to any college, hall, or house of learning within the universities of Oxford or Cambridge, or to any of the colleges of Westminster, Eton, or Winchester; or to any cathedral or collegiate church; or to any city or town corporate, or to any the lands or tenements given to the uses aforesaid, within any such city or town corporate, where there is a special governor or governors appointed to govern or direct the same; or to any college, hospital, or free school, which have special visitors, governors, or overseers appointed by their founders.

By sect. 4 it is provided also, that this shall not be prejudicial to the jurisdiction or power of the ordinary; but that he may lawfully, in every case, execute and perform the same, as though this act had not been made.

Church a charity.

The term charity, as construed by the statute of Elizabeth, has, it has been said, been always holden to extend

Church a charity.

to the church and to religious purposes. Specificially, bequests for the use or ornament of a parish church, for stipends to curates, singers and organists in churches, to societies for the spread and advancement of religion, either in England or abroad (*b*), have all been holden to be charitable legacies (*c*).

It should be noticed that while gifts for the repair of the church or ornaments in it are charitable, a gift for the repair of a grave in the churchyard and not in the church, is not charitable (*d*).

The peculiar principles of law which govern charities may be classified as follows:—

Privileges of charities.

(1.) Gifts to charities are especially favoured by the law, and every attempt is made to effectuate the charitable intention of the donor (*e*).

This takes place in several ways:

The courts supply any formal defects in the gift or assurance, or in the trustees who are to be the channels of the gift (*f*).

The courts seize on any intention of a charitable gift, however vague and uncertain the gift may be, and appropriate it to charitable purposes of some kind or other—those charitable purposes to be afterwards worked out by the court or the trustees (*g*).

Charities are exempted from the general rules of the law against perpetuities; and, where it is for the benefit of the charity, it will rather be construed as perpetual than otherwise (*h*).

One who has endowed a charity with lands is not allowed to defeat his gift by an attempted sale to a purchaser for value under 27 Eliz. c. 4 (*i*).

Control of charities by Court of Chancery.

(2.) Charities are under the especial control of the Court of Chancery, which frames schemes for their administration, directs the funds where the object of the founder has failed to be bestowed on the nearest resembling cha-

(*b*) The Society for the Propagation of the Gospel is within the law as to charities; *Chester* v. *Chester*, L. R., Weekly Notes (1871), 158.

(*c*) See cases cited in Tudor's Law of Charitable Trusts, pp. 10, 11; and *Attorney-General* v. *Bishop of Chester*, 1 Bro. C. C. 444; *Hoare* v. *Osborne*, L. R., 1 Eq. 585; *Fisk* v. *Attorney-General*, 4 Eq. 521; *Re Maguire*, 9 Eq. 632.

(*d*) *Hoare* v. *Osborne*, L. R., 1 Eq. 585; *Re Rigley's Trusts*, 36 L. J., Chan. 137.

(*e*) *Moggridge* v. *Thackwell*, 7 Ves. 36.

(*f*) Duke's Charitable Uses, pp. 84, 85, 115; Tudor's Law of Charitable Trusts, p. 37, and cases there cited; *Sayer* v. *Sayer*, 7 Hare, 377.

(*g*) *Moggridge* v. *Thackwell*, 7 Ves. 36; Tudor, pp. 207—229.

(*h*) Tudor, pp. 251—253.

(*i*) *Attorney-General* v. *Corporation of Newcastle*, 5 Beav. 307.

rity on what is called the "*cy-près*" principle, has peculiar modes of procedure open to charities, as by information, by petition under Sir S. Romilly's Act (52 Geo. 3, c. 101), or by summary proceedings in chambers under the Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137, ss. 28—31).

In other ways.

(3.) Charities are under the especial control of visitors or governors, of commissions issued under the principal statute of Elizabeth, and, by a series of acts from 1853 to 1870, of a permanent charity commission, with large administrative and judicial powers.

Mortmain.

(4.) Charities are subject to the doctrines of mortmain, all charities being subject to 9 Geo. 2, c. 36, and charitable corporations to the Statutes of Mortmain.

This subject will be further dealt with at greater length (*j*).

Jurisdiction of church over.

(B.) The authorities of the church have certain jurisdiction over charities.

By the 43 Eliz. c. 4, already cited, the commissions are to be awarded to the bishop of the diocese and his chancellor. On these words it was resolved in 44 Eliz. by Egerton, Popham and Anderson, and Coke, attorney-general, that the see being full at the time of sealing the commission, if the bishop is not named commissioner, the commission is void; but if he be named, it is not requisite that he be present at the execution, for that none is of the quorum; but any four or more may execute the same without the presence of the bishop or his chancellor (*k*).

It was also resolved in the last-mentioned case, that if the see of the bishop be void at the sealing of the commission, then the bishop need not to be named a commissioner, neither his chancellor. Or if the bishop be named a commissioner, and die before the certificate returned, this does not avoid the commission, but the other commissioners may proceed (*l*).

The ecclesiastical authorities have also jurisdiction over spiritual hospitals (*m*), and over grammar schools (*n*). For the power of the Archbishop of Canterbury to visit the universities of Oxford and Cambridge, see below (*o*), under the Chapter on Colleges.

Recognition by church of status in charitable corporation.

(C.) The church has in some cases recognized the status conferred on its members by their position in a charitable corporation.

(*j*) *Vide infra*, Sect. 2.

(*k*) Duke, Charitable Uses, 62, 63.

(*l*) Ibid. 63.

(*m*) *Vide infra*, Part VIII., Chap. III.

(*n*) *Vide infra*, Part VIII., Chap. V.

(*o*) Part VIII., Chap. IV.

Recognition by church of status in charitable corporation.

Thus, a fellowship in a college has always been considered as conferring a title to receive holy orders (*p*). The headship of any college or hall in either of the universities or of certain other charitable foundations is treated as a benefice for certain purposes in the statutes against pluralities (*q*).

The chapels of the colleges at Oxford and Cambridge, and probably of some other colleges and some hospitals, are considered as chapels dedicated and allowed by the ecclesiastical laws of this realm within the meaning of Canon 71 of 1603: they are exempt from the ordinary parochial jurisdiction, and in some cases even from the ordinary episcopal jurisdiction.

By recent statutes the same has been declared to be the law concerning the chapels of public schools, endowed schools, and many other charitable foundations (*r*).

Decisions according to ecclesiastical law.

(D.) Questions relating to charities have frequently been decided according to the principles of civil or ecclesiastical law.

This would naturally be the case, because they always came more especially under the control of the courts of equity, whose origin was ecclesiastical, and which always referred freely to the civil law in cases where the maxims of their own courts were silent (*s*). The decisions on analogous cases in charities proper and in ecclesiastical matters often throw light upon each other; and are frequently referred to in this book. In questions of visitation and of the powers and duties of visitors, the law is generally similar for charities proper and for ecclesiastical cases (*t*). So it is for elections into corporate bodies and for the action of such corporate bodies, as in colleges on the one hand and deans and chapters on the other (*u*).

Privileges of the church.

(E.) By the law of the land the church has certain peculiar privileges in relation to charities.

It was laid down by Lord Eldon, C., "that if land or "money were given for the purpose of building a church "or a house, or otherwise for the maintaining and propa- "gating the worship of God, and if there were nothing "more precise in the case, this court would execute such a "trust, by making it a provision for maintaining and pro- "pagating the established religion of the country" (*x*).

(*p*) *Vide supra*, pp. 119, 120.
(*q*) *Vide supra*, pp. 1176, 1177.
(*r*) *Vide supra*, Part VII., Chap. III., Sect. 5, pp. 1835, 1836.
(*s*) *Vide supra*, Part IV., Chap. I., p. 1075.
(*t*) *Vide supra*, Part IV., Chap. IX.; *infra*, Part VIII., Chap. IV.
(*u*) *Vide supra*, Part II., Chap. IV.
(*x*) *Attorney-General* v. *Pearson*, 3 Meriv. 409.

By the first Charitable Trusts Act (*y*) it is provided as follows: "Nothing herein contained shall diminish or detract from any right or privilege which by any rule or practice of the Court of Chancery, or by the construction of law, now subsists for the preference or the exclusive or special benefit of the Church of England, or the members of the same church, in settling any scheme for the regulation of any charity, or in the appointment or removal of trustees, or generally in the application or management of any charity."

Reservation of rights and privileges of Church of England with respect to charities.

The position and claims of the church in respect to schools, more especially grammar schools, is treated of more fully afterwards (*z*).

In favour of the church also, gifts for religious purposes, not being those of the Church of England, were at one time held unlawful as "superstitious uses." By successive statutes, however, the endowments of Protestant Dissenters, Roman Catholics and Jews have been rendered lawful (*a*), except in cases specified in the following paragraph.

Superstitious uses.

And it would seem now as if those uses only which come under the provisions of 23 Hen. 8, c. 10, 1 Edw. 6, c. 14, and 1 Geo. 1, st. 2, c. 50, being principally foundations for providing masses or prayers for the dead and supporting particular religious anniversaries, and not being protected by 2 & 3 Will. 4, c. 115, which extends only to Roman Catholic schools and places for religious worship, education and charitable purposes (*b*), were superstitious.

By 23 & 24 Vict. c. 134, s. 1, special provision is made, in the case of Roman Catholic charities, for separating the superstitious from the lawful part in certain mixed charitable benefactions made by persons of that church, and for apportioning the whole sum, and applying the portion bequeathed to superstitious uses upon other lawful trusts for the benefit of persons professing the Roman Catholic religion.

Sect. 2.—*Mortmain.*

The legal personality of the church, and its consequent capacity of inheriting (*c*), is a principle incorporated into the jurisprudence of all Christian countries under all forms

(*y*) 16 & 17 Vict. c. 137, s. 46.

(*z*) *Vide infra*, Part VIII., Chap. V.

(*a*) 1 Will. & Mar. c. 18; 53 Geo. 3, c. 160; 2 & 3 Will. 4, c. 115; 9 & 10 Vict. c. 59.

(*b*) *West* v. *Shuttleworth*, 2 My. & Ke. 684.

(*c*) Fifty years after the civil establishment of the church by Constantine, Valentinian the elder enacted the prototype of mortmain laws restraining, among other regulations, the prodigality of bequest by women to the church: and twenty years

of ecclesiastical government (*d*). The restrictions under which this capacity of inheritance is placed in this country remains to be considered.

Blackstone on this subject.

Blackstone in the eighteenth chapter of his first book on the Rights of Persons, says (*e*), "We before observed that it was incident to every corporation, to have a capacity to purchase lands for themselves and successors; and this is regularly true at the common law (*f*). But they are excepted out of the Statute of Wills (*g*); so that no devise of lands to a corporation by will is good; except for charitable uses, by statute 43 Eliz. c. 4 (*h*); which exception is again greatly narrowed by the statute 9 Geo. 2, c. 36. And also, by a great variety of statutes (*i*), their privilege even of purchasing from any living grantor is much abridged, so that now a corporation, either ecclesiastical or lay, must have a licence from the king to purchase (*k*); before they can exert that capacity which is vested in them by the common law; nor is even this in all cases sufficient. These statutes are generally called the Statutes of Mortmain: all purchases made by corporate bodies being said to be purchases in mortmain, *in mortuâ manu:* for the reason of which appellation Sir Edward Coke (*l*) offers many conjectures; but there is one which seems more probable than any that he has given us: viz. that these purchases being usually made by ecclesiastical bodies, the members of which (being professed) were reckoned dead persons in law, land therefore, holden by them, might with great propriety be said to be held *in mortuâ manu.*"

The restraints on inheritance by the church are therefore of two kinds: (a) By the Statutes of Mortmain, restricting the purchase of land by corporations of all kinds,

afterwards Theodosius the Great issued a similar edict. See a luminous chapter by Giannone on this subject (Ist. Civ. di Napoli. l. 2, c. 2, tit. 4), who mentions that Charlemagne in Germany, Edward I., Edward II., and Henry V. in England, and St. Louis ("cosa molto notabile") were among the Christian monarchs most hostile to property left in ecclesiastical mortmain.

(*d*) Decret. lib. 3, tit. 13, c. 21; Sarpi de Mat. Benef. Jenae, 1681, 16, pp. 91—93; J. H. Böhmer's Jus Eccles. Protest. lib. 3, tit. 5, §§ 29, 30; Jus Parochiale, sect. 5, c. 3, §§ 3, 4—5. *Vide supra*, Part V., Chap. I.

(*e*) Vol. 1, p. 478.

(*f*) *Case of Sutton's Hospital*, 10 Co. 30.

(*g*) 34 Hen. 8, c. 5, now repealed.

(*h*) *Griffith Flood's Case*, *Collison's Case*, Hob. 136.

(*i*) From Magna Charta to 9 Geo. 2, c. 36.

(*k*) By the civil law a corporation was incapable of taking lands, unless by special privilege from the emperor; collegium si nullo speciali privilegio subnixum sit, haereditatem capere non posse, dubium non est. Cod. 6, 21, 8.

(*l*) 1 Inst. 2.

ecclesiastical or civil; (b) By 9 Geo. 2, c. 36, prohibiting the devise of lands for the benefit of charities, corporate or incorporate.

(a) *The Statutes of Mortmain.*

Restraints of mortmain.

Before the Statutes of Mortmain, bodies once incorporated might have been endowed, *perpetuis futuris temporibus;* without licence from the king or any other (*m*).

The first enactment on mortmain is to be found in *Magna Charta*, c. 36, now repealed. The provisions of this enactment being speedily evaded, it was supplemented by 7 Edw. 1, st. 2, called the statute *De viris religiosis*, intended to provide against these devices, which is as follows: "Where of late it was provided that religious men should not enter into the fees of any without licence and will of the chief lord of whom such fees be holden immediately, and, notwithstanding, such religious men have entered as well into their own fees, as into the fees of other men, appropriating and buying them, and sometime receiving them of the gift of others, whereby the services that are due of such fees, and which at the beginning were provided for defence of the realm, are wrongfully withdrawn, and the chief lords do lose their escheats of the same," it is ordained "that no person religious or other whatsoever he be, that will buy or sell any lands or tenements, or under the colour of gift or lease, or that will receive by reason of any other title, whatsoever it be, lands or tenements, or by any other craft or engine will presume to appropre to himself, under pain of forfeiture of the same, whereby such lands or tenements may any wise come into mortmain;" and "if any person, religious or other, do presume either by craft or engine to offend against this statute, it shall be lawful for the lord of the fee to enter, and upon his neglect the king shall enter."

7 Edw. 1, st. 2.

That will buy or sell any Lands or Tenements, &c.]—The translation here, Lord Coke says, as in many other places in the printed books, seems to be imperfect. The sense is this, It is ordained, that no person, religious or other, whatsoever he be, shall presume to buy or sell, or, under colour of gift or lease or any other title whatsoever, to take of any person, or, by any other means by craft or engine, to appropriate unto himself any lands or tenements, whereby such lands and tenements may in any wise come into mortmain; on pain of forfeiture of the same.

(*m*) Gibs. 641. The reader will find an ingenious deduction of these acts of parliament, and of the evasions which rendered them necessary, in Mr. Highmore's History of Mortmain; and in Mr. Shelford's work on the same subject.

7 Edw. 1. st. 2.

The words are in the original: "*Statuimus et ordinavimus, quod nullus religiosus, aut alius quicumque, terras aut tenementa aliqua emere vel vendere, aut sub colore donationis aut termini, vel alterius tituli cujuscumque, ab aliquo recipere aut alio quovis modo arte vel ingenio sibi appropriare presumat, sub forisfactura eorumdem, per quod ad manum mortuam terre et tenementa hujusmodi deveniant quoquo modo.*"

Either by Craft or Engine.]—A man would have thought that this should have prevented all new devices, but they found also an evasion out of this statute; for this statute extendeth but to gifts, alienations and other conveyances made between them and others, by craft or engine: and therefore they gave over them, and they, pretending a title to the land that they meant to get, brought a *præcipe quod reddat* against the tenant of the land, and he by consent and collusion should make default, and thereupon they should recover the land, and enter by judgment of law; and so the statute was defrauded (*o*).

When this new invention was also provided for, and taken away by the statute of the 13 Edw. 1, c. 32, yet they found out an evasion out of all these statutes; for now they would neither get any lands by purchase, gift, lease or recovery, but they caused the lands to be conveyed by feoffment or in other manner to divers persons and their heirs, to the use of them and their successors, by reason whereof they took the profits. But this was enacted by the statute of the 15 Ric. 2, c. 5, to be mortmain, within the forfeiture of the said statute of the 7 Edw. 1 (*p*).

The statute 23 Hen. 8, c. 10, mentioned above (*q*), has reference to superstitious uses, and makes gifts to such uses void (*r*). Mortmain is also prohibited by 18 Edw. 1, c. 3.

Relaxation of those restraints.

Though the prohibition of mortmain in *Magna Charta* was absolute, yet with proper licence alienations might still be made, as appears from the preamble of the statute *De viris religiosis* before mentioned (*s*).

And by 18 Edw. 3, st. 3, c. 3, "If prelates, clerks beneficed, or religious people, which have purchased lands, and the same have put in mortmain, be impeached upon the same before our justices, and they show our charter of licence, and process thereupon made by an inquest of *ad*

(*o*) 2 Inst. 75.

(*p*) Ibid.: *vide supra*, p. 1780.

(*q*) *Supra*, p. 1971.

(*r*) *Martindale* v. *Martin*, Cro. Eliz. 288; *Porter's Case*, 1 Co. 26; Gib. 645.

(*s*) 2 Inst. 74.

quod damnum, or of our grace, or by fine; they shall be freely let in peace without being farther impeached for the same purchase."

It was also enacted by the statute of 7 & 8 Will. 3, c. 37, as follows: "Whereas it would be a great hindrance to learning and other good and charitable works, if persons well inclined may not be permitted to found colleges or schools for encouragement of learning, or to augment the revenues of colleges or schools already founded, by granting lands, tenements, rents, or other hereditaments, to such colleges or schools, or to grant lands or other hereditaments to other bodies politic or incorporated, now in being, or hereafter to be incorporated for other good and public uses;" it is enacted, "that it shall be lawful for the king, his heirs and successors, when and so often as they shall think fit, to grant to any person or persons, bodies politic or corporate, their heirs and successors, licence to aliene in mortmain, and also to purchase, take, and hold in mortmain, in perpetuity or otherwise, any lands, tenements, rents, or hereditaments whatsoever, of whomsoever the same shall be holden; and the same shall not be subject to any forfeiture, by reason of such alienation or acquisition."

Exemptions in favour of church.

The church has, however, been exempted from the Mortmain Acts in many respects by later statutes. These will be found treated of at more length in the following Part on Church Extension (*t*). The statutes may be enumerated as follows: 17 Car. 2, c. 3; 29 Car. 2, c. 8; 1 & 2 Will. 4, c. 45, and 13 & 14 Vict. c. 94, s. 23, enabling owners of tithes to grant them or part thereof for augmenting the benefice of the parish in respect of which they arise.

2 & 3 Ann. c. 20, ss. 4, 5, enabling gifts to the governors of Queen's Anne's Bounty.

42 Geo. 3, c. 116, s. 50, enabling bequests by will for the redemption of land tax on all charities.

43 Geo. 3, c. 108, enabling persons by deed enrolled or by will executed three months before their death, to give land not exceeding five acres, or goods and chattels not exceeding in value 500*l*., for building churches, providing mansion houses, or augmenting glebes in certain cases.

51 Geo. 3, c. 115, enabling lords of the manor to grant five acres of the waste for the same purposes.

58 Geo. 3, c. 45, ss. 33, 36, 52, enabling conveyances of lands not in mortmain to be made to the Church Building Commissioners as sites for churches, &c.

(*t*) Part IX., Chaps. IV., V.

Exemptions in favour of church.

3 Geo. 4, c. 72; 5 Geo. 4, c. 107; 1 & 2 Vict. c. 107; 3 & 4 Vict. c. 60, and 7 & 8 Vict. c. 65, extending this last provision.

The statutes authorizing the exchange of glebe lands, and in certain cases the purchase of lands for residence houses, 17 Geo. 3, c. 53; 55 Geo. 3, c. 147; 1 & 2 Vict. c. 23, and 28 & 29 Vict. c. 69 (*u*).

6 & 7 Vict. c. 37, ss. 12, 22, enabling ministers or incumbents created under that act to receive and take lands and goods.

14 & 15 Vict. c. 97, s. 8, enabling grants to create a repair fund for churches built under the Church Building Acts.

And 29 & 30 Vict. c. 111, s. 9, enabling the Ecclesiastical Commissioners to take and hold lands "which they may consider suitable and convenient for annexation to any benefice with cure of souls."

Re-investment of money in land.

By 18 & 19 Vict. c. 124 (The Charitable Trusts Amendment Act, 1855), s. 35, "Any incorporated charity may with the consent of the board invest money arising from any sale of land belonging to the charity, or received by way of equality of exchange or partition, in the purchase of land, and may hold such land or any land acquired by way of exchange or partition, for the benefit of such charity, without any licence in mortmain."

Sites for houses, &c.

And by sect. 41, incorporated trustees of any charity shall be competent to purchase and hold lands for sites of houses or buildings, with gardens and playgrounds adjoining, without licence in mortmain.

Investment on mortgage.

By 33 & 34 Vict. c. 34, s. 1, "It shall be lawful for all corporations and trustees in the United Kingdom holding moneys in trust for any public or charitable purpose to invest such moneys on any real security authorized by or consistent with the trusts on which such moneys are held, without being deemed thereby to have acquired or become possessed of any land within the meaning of the laws relating to mortmain, or of any prohibition or restraint against the holding of land by such corporations or trustees contained in any charter or act of parliament, and no contract for or conveyance of interest in land made *bonâ fide* for the purpose only of such security shall be deemed void by reason of any non-compliance with the conditions and solemnities required by 9 Geo. 2, c. 36."

Sect. 2, provides for a sale of the premises instead of a foreclosure being decreed in any suit relating thereto.

(*u*) *Vide supra*, Part V., Chaps. II. and VI., Sect. 2.

(b) 9 *Geo.* 2, *c.* 36.

By the 9 Geo. 2, c. 36, s. 1, "Whereas gifts or alienations of lands, tenements, or hereditaments in mortmain, are prohibited or restrained by *Magna Charta* and divers other wholesome laws, as prejudicial to and against the common utility, nevertheless this public mischief hath of late greatly increased, by many large and improvident alienations or dispositions made by languishing or dying persons, or by other persons, to uses called *charitable uses*, to take place after their deaths, to the disherison of their lawful heirs;" it is enacted, "that from and after June 24, 1736, no manors, lands, tenements, rents, advowsons, or other hereditaments, corporeal or incorporeal whatsoever, nor any sum or sums of money, goods, chattels, stocks in the public funds, securities for money or any other personal estate whatsoever to be laid out or disposed of in the purchase of any lands, tenements or hereditaments, shall be given, granted, aliened, limited, released, transferred, assigned, or appointed, or any ways conveyed or settled, to or upon any person or persons, bodies politic or corporate or otherwise, for any estate or interest whatsoever, or any ways charged or incumbered by any person or persons whatsoever, in trust or for the benefit of any charitable uses whatsoever: unless such gift, conveyance, appointment, or settlement of any such lands, tenements or hereditaments, sum or sums of money, or personal estate, (other than stocks in the public funds,) be made by deed, indented, sealed and delivered in the presence of two or more credible witnesses, twelve calendar months at least before the death of such donor or grantor, (including the days of the execution and death,) and be inrolled in his majesty's High Court of Chancery within six calendar months next after the execution thereof; and unless such stocks be transferred in the public books usually kept for the transfer of stocks, six calendar months at least before the death of such donor or grantor (including the days of the transfer and death); and unless the same be made to take effect in possession for the charitable use intended, immediately from the making thereof; and be without any power of revocation, reservation, trust, condition, limitation, clause or agreement whatsoever, for the benefit of the donor or grantor, or of any person or persons claiming under him."

No lands or stock, or money to be laid out in lands, to be given for charitable uses.

Unless by deed indented, executed before two witnesses twelve months before death of donor, and inrolled, &c.

Sect. 2. "Provided, that nothing hereinbefore mentioned, relating to the sealing and delivery of any deed or deeds, twelve calendar months at least before the death

Proviso as to purchases for value.

9 Geo. 2, c. 36.

of the grantor, or to the transfer to any stock, six calendar months before the death of the grantor or person making such transfer, shall extend to any purchase of any estate or interest in lands, tenements, or hereditaments, or any transfer of any stock to be made really and *bonâ fide* for a full and valuable consideration, actually paid at or before the making such conveyance or transfer, without fraud or collusion."

Gifts otherwise than according to act to be void.

Sect. 3. "And all gifts, grants, conveyances, appointments, assurances, transfers, and settlements whatsoever, of any lands, tenements, or other hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect any lands, tenements or hereditaments, or of any stock, money, goods, chattels or other personal estate or securities for money, to be laid out in the purchase of any lands, tenements or hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect the same, or to or in trust for any charitable uses whatsoever, which shall after the said 24th day of June, 1736, be made in any other manner or form than by this act is directed, shall be void."

Sections 4 and 5 relate to the universities and colleges.

Exemptions from this statute.

By 43 Geo. 3, c. 107 (*x*), this act shall not extend to lands, &c. bequeathed to the governors of Queen Anne's Bounty.

Several charities not particularly connected with the church have by special act obtained exemption from the restrictions of this statute (*y*).

By Magna Charta, citizens and freemen of London may devise lands in mortmain, and this privilege does not seem to be repealed by 9 Geo. 2, c. 36 (*z*).

Many of the acts, moreover, which have been already cited (*a*), and which have been passed since 9 Geo. 2, c. 36, exempt the charities to which they apply from the operation of this act, as well as from that of the older statutes of *mortmain*.

Purchasers for value.

Purchasers for valuable consideration, who had not complied with all the formalities of 9 Geo. 2, c. 36, have been protected by 9 Geo. 4, c. 85, and 24 Vict. c. 9 (*b*).

(*x*) See also 45 Geo. 3, c. 84, s. 3.

(*y*) See Tudor, Law of Charitable Trusts, pp. 97, 98.

(*z*) 25 Edw. 1, c. 9. See *Middleton* v. *Cater*, 4 Bro. C. C. 409.

(*a*) 42 Geo. 3, c. 116, s. 50; 43 Geo. 3, c. 108; 51 Geo. 3, c. 115; 1 & 2 Will. 4, c. 45; 3 & 4 Vict. c. 60; 6 & 7 Vict. c. 37; 13 & 14 Vict. c. 94; 14 & 15 Vict. c. 97.

(*b*) See also as to sites for schools for the poor, 4 & 5 Vict. c. 38, s. 16.

The latter statute was extended to purchases completed before May 17, 1866, by 27 Vict. c. 13, and to leases, by 26 & 27 Vict. c. 106, and still further by 29 & 30 Vict. c. 57.

By 31 & 32 Vict. c. 44, sites for buildings for religious, educational and other charitable purposes may be granted for valuable consideration, and shall not be avoided by the death of the grantor within six months. 34 & 35 Vict. c. 13, introduces a new system, that of enrolment in the books of the charity commissioners twelve months before death; by which method lands to a certain amount may be given for public parks, schools or museums, notwithstanding the act 9 Geo. 2, c. 36.

Construction of 9 Geo. 2, c. 36.

The act of 9 Geo. 2, c. 36, has received a most extensive interpretation from the courts. The decisions on this subject may be divided into two classes; (a) what may not be bequeathed: (b) for what purposes chattels in themselves lawfully bequeathable may not be bequeathed.

What may not be bequeathed.

(a) Under the first head, everything savouring of realty has been holden to be within the intention of the statute, and to be incapable therefore of being bequeathed upon charitable trusts. This rule has been holden to comprise bequests of growing crops, leaseholds, mortgages of all kinds, money secured by a vendor's lien, legacies charged on land, judgment debts secured on real estate, money secured by mortgage of turnpike and harbour tolls, or poor and county rates, rights of laying mooring chains in the bed of the River Thames, and shares in companies dealing only with land (*c*).

Some of the older navigation shares, as those of the River Avon, also come within this rule (*d*). There seems to be some conflict as to money borrowed on rates, other than poor and county rates, levied on the occupiers of land for special purposes (*e*).

Money to arise from the sale of real estate is clearly within the act; but for a long time it was doubtful whether, when a testator directed that land should be sold and the proceeds divided between certain legatees, and before the land was sold one of the legatees died leaving the proceeds to a charity, this last legacy was void or not. It seems, however, now, since the cases of *Lucas* v. *Jones* (*f*) and *Brook* v. *Badley* (*g*), to be clearly settled that such legacies are void as bequests of interests in land.

(*c*) Tudor, 66; and *Brook* v. *Badley*, L. R., 3 Ch. App. 672.

(*d*) *Howes* v. *Chapman*, 4 Ves. 544.

(*e*) Tudor, ibid.

(*f*) L. R., 4 Eq. 73.

(*g*) L. R., 3 Ch. App. 672; 4 Eq. 106.

Construction of 9 Geo. 2, c. 36.

Where a bequest is made to a charity out of a mixed fund, consisting partly of pure personalty and partly of personalty savouring of realty, the assets will not be marshalled so as to make the charitable bequest come out of the pure personalty, but the charity will have its bequest out of both funds rateably, and will lose all that portion of the bequest which would come out of the impure personalty (*f*).

For what purposes bequests may not be made.

(b) As to the second head: money or other lawful objects of bequest to charities cannot be bequeathed to them to be laid out in land, or for buildings which will require land for their sites, or for paying off incumbrances on land holden by charities (*g*).

Money may, however, be bequeathed for erecting or repairing buildings on land already in mortmain (*h*), or for building a charitable institution, if lands are given by some other person for the site of it (*i*): but money may not be given to trustees of a charity on condition of their finding lands on which an institution may be built (*k*).

Where a bequest can be applied in a legal or in an illegal way, the bequest will be upholden on the supposition that it will be applied for the lawful purposes (*l*). And the court has gone so far as to hold that a bequest of residue to trustees, to be applied by them "in aid of erecting or of endowing an additional church at A.," is good, and that the trustees are for this purpose entitled to take the whole of the residuary pure personalty and 500*l.* out of the impure personalty under 43 Geo. 3, c. 108 (*m*).

A legacy good if standing alone, but, grounded upon an illegal devise, is necessarily involved in the failure of such devise (*n*). Or, where it is accessory to such devise (*o*), and where it is dedicated to a separate and independent purpose, it is valid; yet, if its amount cannot be ascertained without the actual execution of the void purpose, the legacy will fail (*p*).

(*f*) Tudor, 74—83; *Re Watmough's Trusts*, L. R., 8 Eq. 272; *Hawkins* v. *Allen*, 10 Eq. 246, overruling *Booth* v. *Carter*, 3 Eq. 757.

(*g*) *Waite* v. *Webb*, 6 Madd. 71. See *Lewis* v. *Allenby*, L. R., 10 Eq. 668.

(*h*) Tudor, 75; *Sewell* v. *Crewe-Read*, L. R., 3 Eq. 61; *Cresswell* v. *Cresswell*, 6 Eq. 73.

(*i*) *Philpot* v. *St. George's Hospital*, 6 H. L. Ca. 338.

(*k*) *Attorney-General* v. *Davies*, 9 Ves. 535.

(*l*) Tudor, 79, 82; *Re Ludlow's Trusts*, L. R., Weekly Notes (1870), 218.

(*m*) *Sinnett* v. *Herbert*, L. R., 7 Ch. App. 232, reversing 12 Eq. 201.

(*n*) *Attorney-General* v. *Whitchurch*, 3 Ves. 141.

(*o*) *Attorney-General* v. *Hindman*, 2 J. & W. 270.

(*p*) *Attorney-General* v. *Davies*, 9 Ves. 535.

It only remains to add that, so rigidly have the courts executed the strict construction which has been put upon this statute, that even when a legacy, void as being within its operation, is actually paid (the party becoming entitled to it not choosing to avail himself of his right), the court will not execute the trust (*q*). So, if there be a devise of lands, with a secret trust for charity, the heir-at-law may file a bill of discovery, and if the devisee admit the trust (*r*), or it can be proved *aliunde* (*s*), the trust will vacate the devise, and let in the title of the heir-at-law. Where, however, there is a valid devise of real estate, and afterwards the testator, by a paper not duly signed and attested for the devise of real estate, declares a trust in favour of charity, the Statute of Frauds, as it affords the devisee a good defence against the charity, so it is equally a good defence against the claims of the heir-at-law (*t*).

(*q*) *Attorney-General* v. *Ackland*, 1 Russ. & My. 243.

(*r*) *Boston* v. *Statham*, 1 Ed. 508. See Tudor, 88; *Jones* v. *Badley*, L. R., 3 Eq. 635; 3 Ch. App. 362; *Springett* v. *Jenings*, 10 Eq. 488; affirmed on appeal, L. J., Notes of Cases (1871), p. 59.

(*s*) *Edwards* v. *Pike*, 1 Ed. 267; *S. C.*, 1 Cox, 17.

(*t*) *Adlington* v. *Cann*, 3 Atk. 141.

CHAPTER III.

HOSPITALS.

Division of corporations.

It is laid down in the books that corporations are of two kinds—ecclesiastical and lay. Ecclesiastical corporations are those of which not only the members are spiritual persons, but of which the object of the institution is also spiritual (*a*). Lay corporations are again divided into civil and eleemosynary. The universities are civil corporations, so is the College of Physicians (*b*). Eleemosynary corporations are of two general descriptions—colleges and hospitals.

Colleges and hospitals.

"There is no manner of difference between a college and an hospital, except only in degree: an hospital is for those that are poor and mean and low and sickly, a college is for another sort of indigent persons, but it hath another intent,—to study in, and breed up persons in the world that have not otherwise to live, but still it is as much within the reasons of hospitals. And if in an hospital the master and poor are incorporated, it is a college having a common seal to act by, although it hath not the name of a college (which always supposeth a corporation) because it is of an inferior degree; and in the one case and in the other there must be a visitor, either the founder and his heirs, or one appointed by him, and both are eleemosynary" (*c*).

Ecclesiastical hospitals.

There are, however, some hospitals which are spiritual corporations; and these are either visitable by the ordinary, or, where they were formerly exempt from visitation by him and subject to the pope alone, visitable now by commission from the king under the great seal by force of 25 Hen. 8, c. 21, s. 14. It seems, however, that these hospitals are very few in number. In the case of the *Attorney-General* v. *St. Cross Hospital* (*d*), it was holden, that a hospital for the poor without cure of souls

(*a*) Kyd on Corporations, 22; 3 Stephen's Blackstone (ed. 1858), 126; Tudor, Law of Charitable Trusts, 112.

(*b*) Kyd, 28, 29; Tudor, ibid.; 3 Stephen's, 127, 144.

(*c*) Holt, C. J., in *Philips* v. *Bury*, 2 T. R. 353.

(*d*) 17 Beav. 435. See also *S. C.*, 8 De G., M. & G. 38.

is a lay foundation, although the master is required to be in holy orders.

Inquiry into hospitals which were promotions spiritual in the reign of King Henry the Eighth.

By 3 & 4 Vict. c. 113, s. 65, "so soon as conveniently may be the ecclesiastical commissioners for England shall inquire and report to her majesty in council, respecting the state of all such hospitals as were returned as promotions spiritual in the reign of king Henry the Eighth; and in those cases in which it may appear, upon such inquiry, that the endowments of such hospitals are capable, after satisfying the objects of the founder's bounty, of affording a better provision for the cure of souls in the parishes with which they are connected, the said commissioners may in their report make such suggestions as they may deem advisable for effecting such provision."

When considered benefices.

By 3 Jac. 1, c. 13, papists are deprived of the right of collating or nominating to any free school, hospital or donative. Hospitals are not included under the definition of "preferment" in the Clergy Discipline Act (3 & 4 Vict. c. 86), s. 2; or that of "benefice" in 1 & 2 Vict. c. 106, s. 124.

Divers kinds of hospitals.

Of hospitals, some are corporations aggregate of many, as of master or warden, and his confreres; some, where the master or warden has only the estate of inheritance in him, and the brethren or sisters power to consent, having college and common seal; some, where the master or warden has only the estate in him, but has no college and common seal. And of these hospitals, some be eligible, some donative, and some presentable (*e*).

14 Eliz. c. 14, especially confirms the foundation of Christ's Hospital and St. Bartholomew's Hospital, and all gifts and devises to any hospital then existing, notwithstanding any misnomer of the corporation of the hospital in the gift or devise.

Power of foundation.

By 39 Eliz. c. 5 (made perpetual by 21 Jac. 1, c. 1), "every person seised of an estate in fee simple shall have full power at his will and pleasure, by deed enrolled in the High Court of Chancery, to erect, found, and establish an hospital, *maison de dieu*, abiding place, or house of correction, as well for the finding, sustentation and relief of the maimed, poor, needy, or impotent people, as to set the poor to work; to have continuance for ever; and from time to time, to place therein such head and members, and such number of poor as to him, his heirs and assigns, shall seem convenient: and such hospital so founded shall be incorporated, and have perpetual succession for ever;

(*e*) 1 Inst. 342.

Power of foundation.

by such name as the founder, his heirs, executors or assigns, shall appoint: and shall by the name of incorporation have capacity to purchase and hold any goods or freehold lands, not exceeding 200*l.* a year above reprises; without licence or writ of *ad quod damnum;* the Statute of Mortmain, or any other statute or law to the contrary notwithstanding." And they shall have a common seal (*f*). Provided, that no such hospital shall be founded or incorporated, unless upon the foundation or erection thereof, the same be endowed for ever, with lands, tenements, or hereditaments of the clear yearly value of 10*l.* And finally such constructions shall be made of this act, as shall be most beneficial for the maintenance of the poor, and for repressing and avoiding of all acts and devices to be invented or put in ure contrary to the true meaning of this act.

Not exceeding 200*l. a Year.*]—If they be at the time of the foundation or endowment of the yearly value of 200*l.* or under, and afterwards they become of greater value by good husbandry, rising of prices, sudden accidents, as by escheat, or otherwise; they shall continue good, to be enjoyed by the hospital, albeit they be above the yearly value of 200*l.*: for the yearly value must be accounted as it was at the time of the endowment made. Also goods and chattels (real or personal) they may take of what value soever (*g*).

It is understood that hospitals may at this time be founded and endowed under this statute, provided that the provisions of 9 Geo. 2, c. 36, be complied with.

Visitation and government.

By 39 Eliz. c. 5, the hospitals, so founded, shall be ordered and visited by such person or persons, as shall be assigned by the founder, his heirs or assigns, in writing under his or their hand and seal, not being repugnant or contrary to the laws and statutes of this realm.

If no such person be named, the visitorial power, in eleemosynary lay foundations, is, by law, thrown upon the founder and his heirs, whom failing, it devolves upon the crown, to be exercised by the chancellor (*h*).

2 Hen. 5, c. 1.

If the founder makes no appointment, then it is enacted by the 2 Hen. 5, c. 1, as follows: "Forasmuch as many hospitals within this realm, founded as well by the noble kings of this realm, and lords, and ladies, both spiritual and

(*f*) The safest way is, to found the hospital, and place the poor therein, and to incorporate the persons therein placed. 2 Inst. 724, where the case of Sutton Hospital is referred to in the margin. Serjt. Hill's MS. notes.

(*g*) 2 Inst. 722.

(*h*) *Vide infra*, pp. 2006, 2007.

temporal, as by divers other estates, to the honour of God and of his glorious mother, in aid and merit of the souls of the said founders, to the which hospitals the same founders have given a great part of their moveable goods for the building of the same, and a great part of their lands and tenements, therewith to sustain impotent men and women, lazars, men out of their wits, and poor women with child, and to nourish, relieve and refresh other poor people in the same, be now for the most part decayed, and the goods and profits of the same by divers persons as well spiritual as temporal, withdrawn and spent in other use, whereby many men and women have died in great misery, for default of aid, living and succour, to the displeasure of God, and peril of the souls of such manner of disposers; it is ordained and established, that as to the hospitals which be of the patronage and foundation of the king, the ordinaries, by virtue of the king's commission to them directed, shall inquire of the manner and foundation of the said hospitals, and of the governance and estate of the same, and of all other matters necessary and requisite in this behalf, and the inquisitions thereof taken shall certify in the king's chancery: and as to other hospitals which be of another foundation and patronage than of the king: the ordinaries shall enquire of the manner of the foundation, estate, and governance of the same, and of all other matters and things necessary in this behalf, and upon that make thereof correction and reformation, according to the laws of Holy Church, as to them belongeth."

Hospitals which have special visitors or governors are exempted from 43 Eliz. c. 4 (*i*).

Where an hospital is incorporated as a distinct body and governors are appointed, they are visitors (*j*). The case of *Sutton's Hospital*, mentioned by Lord Coke, is no exception to this rule, for it depended upon the express words of an act of parliament (*k*).

Of elections in hospitals (*l*).

By 39 Eliz. c. 5, in the hospitals so founded as aforesaid,

(*i*) *Ex parte Kirkby Ravensworth Hospital*, 15 Ves. 305; *et vide supra*, p. 1966.

(*j*) 2 Roll. Abr. 241.

(*k*) 10 Co. 13, 30, 31.

(*l*) On the subject of elections, *vide supra*, Part II., Chap. IV., Sect. 2; *infra*, Part VIII., Chap. IV. To which add, that all aggregate corporations have a power necessarily implied, of electing members to fill up vacancies in the body politic, in order to perpetuate it. 1 Roll. Abr. 514. If the mode of election is prescribed by charter, or grant, or established by prescription, it must be accurately observed; in the absence of these, it may be regulated by a bye-law, the right of making which is a power also incident to corporations in general; *Norling* v. *Francis*, 3 T. Rep. 189: 1 Bl.

Of elections in hospitals.

they shall be placed, or upon just cause displaced, by such person or persons as shall be assigned by the founder, his heirs or assigns, by writing under his or their hand and seal, not being repugnant or contrary to the laws and statutes of this realm.

And by another clause in the same statute, it shall be lawful to the founder, his heirs or assigns, upon the death or removing of any head or member, to place one other in the room of him that dies or is removed, successively for ever.

And by 31 Eliz. c. 6, if any person shall take any reward for nominating to an hospital, his place (if he shall have any) in such hospital shall be void. And any person receiving any reward for resigning his place in any such hospital, shall forfeit double the sum, and the person for whom he resigns shall be incapacitated.

Poor rate.

It was said by Holt, Chief Justice, that hospital lands are chargeable to the poor as well as others; for no man by appropriating his lands to an hospital, can discharge or exempt them from taxes to which they were subject before, and throw a greater burden upon his neighbours (*l*).

But in the case of St. Luke's Hospital for Lunatics, it was determined, that the said hospital was not chargeable to the parish rates; and that in general no hospital is so, with respect to the site thereof, except those parts of it which are inhabited by the officers belonging to the hospital, as the chaplain, physician, and the like in Chelsea Hospital. And these apartments are to be rated as single tenements, of which the said officers are the occupiers. The reason why the apartments in this hospital, of the sick or mad persons, are not to be rated, is, that there are no persons who can be said to be the occupiers of them, and it is upon the occupiers of houses that the rate is to be levied. For it would be absurd to call the poor objects so with respect to this purpose; and the

Com. 475. The right of election may also be regulated by a bye-law under the existence of a charter or prescription thus: if the power of making bye-laws originally is in the *body at large*, they may delegate the right of election to a *select body*, which thus becomes the representative of the whole community, for the purpose of election: but if the power of making bye-laws is vested in a select body, they cannot, by a bye-law, exclude an integral part of the body at large from voting; nor can they impose a qualification on the electors, contrary to the original constitution of the corporation; 4 Co. 77. The case of corporations, 4 Inst. 48; 3 Burr. 1827, *Rex* v. *Spencer*, common councilman of Maidstone; 4 Burr. 2515, *Rex* v. *Head*, freeman of Helston.

(*l*) 2 Salk. 527.

lessees of the hospital in trust for the charitable purposes to which it is applied cannot with any propriety be considered as the occupiers of it; nor, lastly, can the servants of the hospital, who attend there for their livelihood; and no other persons, said Lord Mansfield, Chief Justice, can with any shadow of reason be considered as the occupiers of it (*m*).

Land tax.

By 38 Geo. 3, c. 5, an act for raising the land tax, it is provided, by sects. 25—29, that the same shall not extend to charge any hospital, for or in respect to the site of such hospital, or any of the buildings within the walls and limits thereof; or to charge any of the houses or lands, which on or before March 25, 1693, did belong to Christ's Hospital, St. Bartholomew, Bridewell, St. Thomas, Bethlehem hospitals in London and Southwark; or to charge any other hospitals or alms-houses, for or in respect only of any rents or revenues, which on or before March 25, 1693, were payable to the said hospitals or alms-houses being to be received and disbursed for the immediate use and relief of the poor of the said hospitals and alms-houses only.

Provided, that no tenants that hold any lands or houses, by lease or other grant from any of the said hospitals or alms-houses, do claim any exemption; but that all the houses and lands which they so hold, shall be rated for so much as they are yearly worth, over and above the rents reserved and payable to the said hospitals or alms-houses, to be received and disbursed for the immediate support and relief of the poor of the said hospitals and alms-houses.

Provided, that nothing herein shall be construed to extend to discharge any tenant of any of the houses or lands belonging to the said hospitals or alms-houses, who by their leases or other contracts are obliged to pay all rates, taxes and impositions whatsoever; but that they shall be rated, and pay all such rates, taxes and impositions.

And if any question shall be made, how far any lands or tenements belonging to any hospital or alms-house, not exempted by name, ought to be assessed and charged, the same shall be determined by the commissioners upon the appeal day.

And there is, further, a general clause, that all such

(*m*) *Rex* v. *Occupiers of St. Luke's Hospital*, 2 Burr. 1053. See *Rex* v. *Inhabitants of St. Bartholomew's*, 4 Burr. 2435; *Rex* v. *Munday*, 1 East, 584; *Rex* v. *Watson*, 5 East, 580; *Rex* v. *Trustees of Tewkesbury*, 13 East, 155.

Land tax.

lands, revenues, or rents belonging to any hospital or alms-house, or settled to any charitable or pious use, as were assessed in the fourth year of William and Mary, shall be liable to be charged: and that no other lands, tenements, or hereditaments, revenues or rents whatsoever, than belonging to any hospital or alms-house, or settled to any charitable or pious uses, as aforesaid, shall be charged.

Hospitals endowed since the 9 Geo. 2, c. 36, by statute.

10 Geo. 4, c. 25, s. 37, empowers any person to leave lands or monies to Greenwich Hospital, founded by William III. 10th September, 1695, when an annual sum was granted to it by the Treasury, and the king was empowered to grant part of the manor of Greenwich to its use, and afterwards the rents of the forfeited Derwentwater estates were allotted to it. Many statutes have been passed relating to this hospital. See the last, 32 & 33 Vict. c. 44. The last statutes relating to Chelsea Hospital are 21 & 22 Vict. cc. 18, 21.

51 Geo. 3, c. 105, empowers any person to bequeath money or lands to the Royal Navy Asylum. 3 & 4 Will. 4, c. 9, s. 1, grants a similar exemption from the mortmain statutes to the Seaman's Hospital Society, except that its lands are restricted to the yearly value of 12,000*l.* 4 Will. 4, c. 38, accords the like privilege to St. George's Hospital at Hyde Park Corner, limiting the yearly value of the lands which its governors are empowered to receive to 20,000*l.* 9 Geo. 4, c. 40, gives similar powers to the visitors of the county lunatic asylums, with no limitation as to the yearly value of the lands.

13 Geo. 2, c. 29, enabled the governors of the Foundling Hospital, incorporated by charter, to hold lands to the value of 4,000*l.* a year.

The hospital of St. Catherine.

The hospital of St. Catherine was founded by charter of Queen Eleanor, dowager of Henry III. confirmed by charters of Edward II. and Edward III., which reserved the appointment of a master to the queen and all succeeding queens of England (*m*).

Dealings with estates.

As to dealings with their estates, hospitals founded under the provisions of 39 Eliz. c. 5, are, by sect. 2 of that act, prevented from making any grants or leases exceeding the number of twenty-one years, and that in possession, and then only when the accustomed yearly rent, according to that reserved for the last twenty years, be

(*m*) See Chief Justice Hale's remarks on this institution, *Atkins* v. *Montague*, 1 Cas. in Chan. 214; Dugdale's Monasticon, vol. ii. 460; and *Att.-Gen.* v. *Sir J. Butler*, Skinn. 414.

reserved: and, by sect. 6, there is a general restraint against alienation.

Hospitals, moreover, come within the restraining provisions of the several acts of Elizabeth—13 Eliz. c. 10; 14 Eliz. c. 11; 18 Eliz. c. 11 (*n*).

Since the passing of these acts, it is very doubtful whether a corporate hospital can alienate lands for more than twenty-one years or three lives—even with the consent of the Charity Commissioners.

The point was raised, but not decided, in *Governors of St. Thomas' Hospital* v. *Charing Cross Railway Company* (*o*).

"Ecclesiastical hospitals" and "the masters thereof" are specially exempted from the provisions of 5 & 6 Vict. c. 108, 14 & 15 Vict. c. 104, 17 & 18 Vict. c. 116, 21 & 22 Vict. c. 57, and 28 & 29 Vict. c. 57, the recent acts relating to leases and sales of ecclesiastical property.

(*n*) *Vide supra*, Part V., Chap. VI., Sect. 1; *et vide* 14 Eliz. c. 11, s. 3.

(*o*) 1 John. & Hemm. 400.

CHAPTER IV.

COLLEGES AND UNIVERSITIES.

Position of this subject in Dr. Burn's work.

In the last edition of Dr. Burn's Ecclesiastical Law, considerable space was devoted to the Universities of Oxford and Cambridge and the colleges therein, on account of their intimate connection with the church.

Changes in relation to church.

Since that time great changes have been made in the law, and much has been done to divest the universities, more particularly, but also the colleges to a certain extent, of the distinctive ecclesiastical features which they formerly possessed. Again, while the colleges still retain much of their ecclesiastical origin or position, their influence on the university has been largely diminished; individuals and societies have been allowed to enter into relations with the university apart from the colleges, and the universities are no longer mere aggregations of colleges and halls.

Many of these changes have been directly effected by express parliamentary legislation; some have been brought about by the ordinances of the commissioners appointed by statute; many more by the action of the universities themselves, with the new powers and under the new influences conferred or inspired by parliamentary legislation.

University commissions.

The commission for "enlarging the powers of making "and altering statutes and regulations now possessed by "the University of Oxford and the colleges thereof, and "for making and enabling to be made further provision for "the government and for the extension of the said university, and for the abrogation of oaths now taken therein, "and otherwise for maintaining and improving the discipline and studies and the good government of the said "University of Oxford and the colleges thereof," was created by 17 & 18 Vict. c. 81. Its powers were confirmed and extended by 19 & 20 Vict. c. 31, 20 & 21 Vict. c. 25, and 23 Vict. c. 23.

The acts for the Cambridge commission are 19 & 20 Vict. c. 88 and 22 & 23 Vict. c. 34. The college of St. Mary of Winchester, at Winchester, is included under the Oxford Act; and that of King Henry the Sixth at Eton, under the Cambridge Act. These colleges have, however,

since been dealt with further as schools under the Public Schools Act, 1868 (31 & 32 Vict. c. 118) (*a*). As to Oxford, provision is made for abolishing the old committee of heads of colleges (called "Hebdomadal Board"), with whom it rested to bring every matter before the governing body of the university; and for establishing in its stead an hebdomadal council, in which the colleges as such are only very slightly represented, the residue of the representation being given to the members of the general governing body without relation to colleges (*b*). As to both universities, directions are given for the establishment of private halls or hostels, to be licensed by the university, to which members of the university may attach themselves, without becoming members of any college (*c*). This last provision has recently been supplemented by statutes of the universities, allowing matriculation to persons without requiring them to become members of any college or hall or private hall, and making provision for their residence and separate good government.

Effect on universities.

The general result of these provisions has been to create a large and increasing class of persons, whose main or only status is an university one, quite apart from the colleges, and to reduce the colleges to somewhat of their old position as societies in, but not constituent parts of, the university.

As regards the ecclesiastical aspect of the universities, the principal direct changes made by the University Commission Acts were, by abolishing the oaths and subscriptions, most of them of a religious nature, formerly required at matriculation and on taking the degree of bachelor in any faculty except that of divinity (*d*). This provision has since been extended by the Universities Tests Act, 1871 (34 & 35 Vict. c. 26); and the result is that the universities and all the degrees except divinity degrees are now open to persons who are not members of the church.

34 & 35 Vict. c. 26.

By the Universities Tests Act, 1871, reciting as follows:—

"Whereas it is expedient that the benefits of the universities of Oxford, Cambridge, and Durham, and of the colleges and halls now subsisting therein, as places of religion and learning, should be rendered freely accessible to the nation:

And whereas, by means of divers restrictions, tests, and

(*a*) *Vide infra*, Part VIII., Ch. V.

(*b*) 17 & 18 Vict. c. 81, ss. 5, 6.

(*c*) 17 & 18 Vict. c. 81, ss. 25, 26, 27; 19 & 20 Vict. c. 88, ss. 23, 24, 25, 26.

(*d*) 17 & 18 Vict. c. 81, ss. 43, 44; 19 & 20 Vict. c. 88, ss. 45, 46

disabilities, many of her majesty's subjects are debarred from the full enjoyment of the same:

And whereas it is expedient that such restrictions, tests, and disabilities should be removed, under proper safeguards for the maintenance of religious instruction and worship in the said universities and the colleges and halls now subsisting within the same:"

It is enacted as follows:—

Persons taking lay academical degrees or holding lay academical or collegiate offices not to be required to subscribe any formulary of faith, &c.

Sect. 3. "No person shall be required, upon taking or to enable him to take any degree (other than a degree in divinity) within the Universities of Oxford, Cambridge, and Durham, or any of them, or upon exercising or to enable him to exercise any of the rights and privileges which may heretofore have been or may hereafter be exercised by graduates in the said universities or any of them, or in any college (*g*) subsisting at the time of the passing of this act in any of the said universities, or upon taking or holding or to enable him to take or hold any office (*h*) in any of the said universities or any such college as aforesaid, or upon teaching or to enable him to teach within any of the said universities or any such college as aforesaid, or upon opening or to enable him to open a private hall or hostel in any of the said universities for the reception of students, to subscribe any article or formulary of faith, or to make any declaration or take any oath respecting his religious belief or profession, or to conform to any religious observance, or to attend or abstain from attending any form of public worship, or to belong to any specified church, sect, or denomination: nor shall any person be compelled, in any of the said universities or any such college as aforesaid, to attend the public worship of any church, sect, or denomination to which he does not belong: Provided that—

(1.) Nothing in this section shall render a layman or a person not a member of the Church of England eligible to any office or capable of exercising any right or privilege in any of the said universities

(*g*) "College," by sect. 2, includes Christ Church and any hall not being a private hall under 17 & 18 Vict. c. 81, or a hostel under 19 & 20 Vict. c. 88.

(*h*) By sect. 2, "Office" includes every professorship other than professorships of divinity, every assistant or deputy professorship, public readership, prelectorship, lectureship, headship of a college or hall, fellowship, studentship, tutorship, scholarship, and exhibition, and also "any office or emolument not in this section specified, the income of which is payable out of the revenues of any of the said universities, or of any college within the said universities, or which is held or enjoyed by any member as such of any of the said universities, or of any college within any of the said universities."

or colleges, which office, right, or privilege, under the authority of any act of parliament or any statute or ordinance of such university or college in force at the time of the passing of this act, is restricted to persons in holy orders, or shall remove any obligation to enter into holy orders which is by such authority attached to any such office.

(2.) Nothing in this section shall open any office (not being an office mentioned in this section) to any person who is not a member of the Church of England, where such office is at the passing of this act confined to members of the said church by reason of any such degree as aforesaid, being a qualification for holding that office."

Act not to interfere with lawfully established system of religious instruction, worship and discipline.

Sect. 4. "Nothing in this act shall interfere with or affect, any further or otherwise than is hereby expressly enacted, the system of religious instruction, worship, and discipline which now is or which may hereafter be lawfully established in the said universities respectively, or in the colleges thereof or any of them, or the statutes and ordinances of the said universities and colleges respectively relating to such instruction, worship, and discipline."

Religious instruction.

Sect. 5. "The governing body of every college subsisting at the time of the passing of this act in any of the said universities shall provide sufficient religious instruction for all members thereof *in statu pupillari* belonging to the Established Church."

Morning and evening prayer to be used as heretofore, but an abridgment may be used on week days on request of governing body.

Sect. 6. "The morning and evening prayer according to the order of the Book of Common Prayer shall continue to be used daily as heretofore in the chapel of every college subsisting at the time of the passing of this act in any of the said universities; but notwithstanding anything contained in 14 Car. 2, c. 4, or in this act, it shall be lawful for the visitor of any such college, on the request of the governing body thereof, to authorize from time to time, in writing, the use on week days only of any abridgment or adaptation of the said morning and evening prayer in the chapel of such college instead of the order set forth in the Book of Common Prayer." (*e*)

Attendance at lectures.

Sect. 7. "No person shall be required to attend any college or university lecture to which he, if he be of full age, or, if he be not of full age, his parent or guardian, shall object upon religious grounds."

Effect on colleges.

As to the colleges, the only direct change in the nature

(*e*) This provision is not affected by the Act of Uniformity Amendment Act (35 & 36 Vict. c. 35). *Vide* sect. 7, and "Addenda."

Effect on colleges.

of secularizing these institutions made by the University Commission Acts was in giving them power, with certain sanctions, to separate ecclesiastical benefices which had become united to the headship or to any particular membership in the college, and to sell the advowsons and apply the proceeds of the sale for the benefit of the officer who would otherwise have holden the benefice (*f*), so that such officer need now no longer be an ecclesiastical person; and also in enabling them, with the sanction of the visitor, to apply funds holden in trust for the purchase of advowsons, "to "other purposes for the advancement of religion, learning "and education within the college" (*g*).

Indirectly, the commissioners, in the exercise of the powers given them by parliament, made ordinances throwing open a vast number of fellowships and other emoluments, formerly holden by clerical persons only, to laymen; and, by consequence, largely diminished the ecclesiastical element till then dominant in the governing bodies of the different colleges.

The colleges, however, still remain for very many purposes ecclesiastical, as will be seen in reading the last act.

Ecclesiastical elements in the universities.

The only ecclesiastical elements that seem to be left in the universities are the divinity degrees and certain professorships of divinity; the public prayers, sermons and religious ceremonies, and the examinations in certain matters of religion at present enjoined by the internal statutes of either university; certain positions and privileges accorded by the Church to graduates of the universities; and the right of presenting to livings whereof the advowsons are in the hands of papists (*h*).

Other universities.

Of the other universities in England (*i*), that of London has been always a purely secular institution. The University of Durham was originally founded in 1832 out of lands belonging to the dean and chapter of Durham. It was and still is subject to the jurisdiction of the bishop as visitor, and the dean and chapter as governors, and had once a specially ecclesiastical character (*k*).

By 24 & 25 Vict. c. 82, "An Act for making provi"sion for the good government and extension of the "University of Durham," commissioners were appointed

(*f*) 3 & 4 Vict. c. 113, s. 69; 19 & 20 Vict. c. 31, s. 4; c. 88, s. 28; 23 & 24 Vict. c. 59, s. 7.

(*g*) 20 & 21 Vict. c. 25, s. 3.

(*h*) *Vide supra*, pp. 391—400.

(*i*) By 35 & 36 Vict. c. 53, any application for a charter for a college or university may be referred to a committee of the Privy Council, and the application, with the report of the committee thereon and the draft charter applied for, is to be laid before both Houses of Parliament for thirty days before the report is submitted to the crown.

(*k*) 2 & 3 Will. 4, c. xix., private: 3 & 4 Vict. c. 113, ss. 37, 44.

with full powers for making ordinances of all kinds in relation to the university and its colleges, so long as such ordinances were not inconsistent with the above-mentioned act of Will. 4, and the charter granted to the university on the 1st of June, 1837; "but the admission of persons "other than those belonging to the Established Church "to the emoluments of the university shall not be deemed "inconsistent with the said act or charter" (sect. 7). Durham is expressly made subject to the Universities Tests Act, 1871.

Subject of chapter.

In this chapter colleges (*l*) will be generally treated of, such mention only being made of the universities (*m*) of Oxford and Cambridge as seems required by their present ecclesiastical position and their relation to the colleges (*n*).

(*l*) "Collegia" were objects of suspicion to the Roman law, "propter conjurationem in corpus et alia quædam incommoda," and they required a special permission of the senate, or, in later days, a constitution of the Emperor, such as sanctioned "Collegia in academiis literatorum hominum," "Sodalitia negotiatorum aut artificum," "Ambubaiarum collegia, pharmacopolæ," Hor. Sat. I. 1, 2; the "illicita sodalitia" were the subjects of the "Lex Licinia," see Calvin, Lex. jurid. tit. "Collegium," and Cicero's Orations, "Pro Syllâ," "Pro Muræenâ," "Pro Plancо;" and "De ambitu," Dig. iii. 4; xlvii. 22; l. 1, 4, 5, 6, 8, 9; Cod. x. 40—68; xi. 29—39. See also Mackeldey's Lehrbuch des Römischen Rechts, part 1, p. 227, and Savigny's System des Römischen Rechts, vol. iii. See Ayliffe's Hist. of Oxf. for a definition distinguishing our colleges from those mentioned in the Roman law, vol. ii. part i. ch. i. The only college of recent foundation is Keble College, incorporated by Royal Charter in 1870.

(*m*) The word "universitas" was applied to schools in the sense which it bears in the Roman law, namely, to signify a corporation.

During the middle ages, it was composed of very dissimilar elements in different places: Thus at Bologna we find "universitas scholarum," and at Paris "universitas magistrorum." The modern sense of an assemblage of all the sciences could not have prevailed at an epoch when there existed, in close vicinity, an university of jurists and an university of artists. It was not, indeed, till the twelfth century, that the word "universitas" was used to denote a gathering together of students and teachers in one spot. "Scholæ" or "studia" were the appellations of earlier times, and in the older Italian writers, the universities of Padua and Bologna are designated as "Studium Patavinum—Bononiense."

(*n*) The following works may be consulted upon the subject of this chapter:—

For Universities in General.

Meiner's Geschichte der hohen Schulen. 4 vols. 8vo. Göttingen, 1802.

Conringius de Antiquitatibus Academicis. Göttingen, 1739.

Itterus de Honoribus sive Gradibus Academicis, 1698.

Mendo de Jure Academico. Fol. Lugd. 1668.

Savigny, Geschichte des Römischen Rechts im Mittel Alter. Vol. iii., p. 412, &c.

Thomassini Vetus et Nova Ecclesiæ Disciplina, tit. Universitates—Scholæ—Studia.

Lyndwood's Glosses upon the Constitutions "De Magistris," cap. "Quia;" and "De Hæreticis," cap. "Finaliter," &c. and the Canonists generally.

For English Universities.

The King's Visitatorial Power asserted. By Nathl. Johnston. Lond. 1688. 4to.

Brief Historical Notices of the Interference of the Crown, &c. By G. E. Corrie. Camb. 1839. 8vo.

Die Englischen Universitäten. Von V. A. Huber. Cassel, 1839.

Origin of Universities. By H. Malden. Lond. 1835.

Oxford.

A. Wood's History. By Gutch. Oxf. 1786. 3 vols. 4to.

History of the University of Oxford. Oxf. 1773. 1 vol. 4to.

The Ancient and Present State of the University of Oxford. By John Ayliffe. Lond. 1773. 2 vols. 8vo. (This contains much of the law about Universities and Colleges.)

Ingram's Memorials of Oxford. Oxf. 1837. 3 vols. 8vo. (A very accurate and beautiful book.)

The Account of Pythagoras' School. (By J. Kilner.) Fol. Privately printed.

The Life of W. Wayntlete, founder of Magdalen College. By R. Chandler. Lond. 1811. 1 vol. 8vo.

The Life of W. of Wykeham, founder of New College. By R. Lowth, Bishop of Oxford. Oxf. 1777. 1 vol. 8vo.

Lives of the Founders of B. N. College. By R. Churton. Oxf. 1800. 1 vol. 8vo.

Life of H. Chichelé, founder of All Souls' College. By O. L. Spencer. Lond. 1783. 1 vol. 8vo.

Vita H. Chichelæ. Ab Arth. Duck. Oxon. 1617. 1 vol. 4to.

Wharton's Life of Sir T. Pope.

Smith's Annals of University College. Newcastle, 1728. In 8vo.

Statuta Univ. Oxon. 1768. 1 vol. 4to.

Cambridge.

Fuller's History of the University.

Dyer's History of the University of Cambridge. Lond. 1814. 2 vols. 8vo.

——— Privileges of the University of Cambridge. Lond. 1824. 2 vols. 8vo.

Masters' History of C. C. College. By John Lamb. Camb. & Lond. 1831. 1 vol. 4to.

A Collection of Letters, Statutes, &c. from the MS. Library of Corp. Christ. Coll. Edited by John Lamb. Lond. 1838. 1 vol. 8vo.

Hist. Coll. Jesu Cantab. a J. Shermanno. By J. O. Halliwell. Lond. 1840. 8vo.

Scotch Universities.

Reports of Royal Commissioners, (Very valuable.) 1832—1837, et seq.

Bown's History of the University of Edinburgh. Edinb. 1817. 2 vols. 8vo.

Foreign Universities.

Historia Univ. Parisiensis, &c. Auth. C. E. Bulæo. Paris. 1665, et seq. 6 vols. fol. (A most important work)

Academia Parisiensis illustrata. Auctore Joan. Lannoio. Paris. 1683. 2 vols. 4to.

Storia dell' Università di Roma, &c. Philippo M. Renazzi. Roma, 1803. 4 vols. 4to.

Die Preussischen Universitäten. Von I. F. W. Koch. Berlin, 1839. 8vo.

For others, see the list in Meiner's Geschichte der höhen Schulen, at the end of first and second vols.

According to the generally received opinion (*o*), the first authentic records of the universities of Oxford and Cambridge belong to the twelfth century (*p*): they seem in their origin to have been voluntary associations (*q*) of the clergy, for the purpose of promoting the study of whatever arts and sciences were then known to western Europe. Limited in the first place, probably, to one or two branches of knowledge, they gradually came to include distinct *Faculties* (*r*) of arts, medicine, law and theology,—the latter being justly considered the ultimate object of the human intellect. By a similar process, the voluntary ac-

Origin of Oxford and Cambridge.

Faculties.

(*o*) It has been said (note (*n*)), that it is not easy to assign a particular date to the origin of the common use of the word "University," in the restricted sense which it now bears. But it seems certain that the titles of "Scholæ" and "Studia" are more ancient, and that the term "Universitas," according to the older civil and canon law, merely denotes a collective or corporate body, without respect to the elements of which it is composed, or the objects for which it exists.

Discussions upon the use of the word will be found in the general works already referred to. See also Calvin, Lexicon Juridicum, in verb.; Co. Lit. 250 a; Lyndwood, pp. 285—299, ed. Oxon.; Bodin de Republicâ, lib. 3, c. 7, and particular illustrations, 3 Wilkins' Concilia, p. 144; Rymer's Fœdera (Hague edit.), vol. ii. pt. 1, pp. 5—139—150, &c.; Riley, Plac. 534; Ayliffe's Present State, &c. vol. ii. app. p. xvii.

(*p*) By the edict of Charlemagne, schools were attached to every cathedral and monastery (*vide infra*, Part VIII., Chap. V.). Thomassin, part 2, l. 1, c. 101, s. 1, remarks, "Ruente Caroli Magni stirpe et imperio collapsa dilapsaque sunt et hæc clericorum et vitæ communis collegia, &c. defluxisset clerus in altissimas ignorantiæ tenebras, nisi imminenti ei calamitati obviassent publicæ scholæ et universitates;" and in another place he uses the remarkable words "in eo quasi cleri vestibulo" for the schools of the cloister; and sect. 3, "nec tamen dissimulabimus ab Episcopis ipsa prima jacta fundamenta scholarum publicarum et universitatum hâc extremâ ætate quam ab Hugonis Capetii regno auspicamur;" and again, sect. 7, "Nec plura accumulari necesse jam est ut constet universitates ab iis manâsse scholis quæ in Ecclesiis ante cathedralibus effulserant," &c. Abelard, in the letter containing the history of his misfortunes, speaks more than once of schools "juxta claustrum ecclesiæ Parisiensis."

(*q*) Thomassin says, that the only "seminaria" existing A.D. 1000, were "cœnobia monachorum vel canonicorum regularium aut universitates," part 2, l. 1, c. 102, s. 1. See also Dyer's History of the University of Cambridge, pp. 138 and 55. A mother cathedral church with its officers and dependent churches, and a mother abbey with its dependent religious houses, was called "universitas." Calvin, in his Lexicon Juridicum (citing the canon law), says, "Collegium, corpus, universitas, conventus *idem* sæpe significant."

(*r*) Bulæus defines "Facultas" "Corpus et sodalitium plurium magistrorum certæ alicui disciplinæ addictorum." Hist. Univ. Paris. t. i. p. 251.

Degrees.

knowledgment of merit passed into formal recognitions of it by *Degrees*: while the Church, within whose bosom, and from the concourse of whose members the institutions had sprung up, silently incorporated them into her system, subjected them to her discipline, and gave authority and universal reception to their honorary distinctions (*s*).

Clerical education.

By these means clerical education, which long (*t*) before this period had been confined to cathedral and monastic schools, received a new direction; monasteries made provision by which their younger members might prosecute their studies to greater advantage under the more famous teachers in the universities; prelates and other benefactors gave stipends for assistance of the secular students; and while the former class were supported and superintended within seminaries dependent upon the mother house, the latter associated together in small bodies, and were domiciled during their studies in "Hostelries" (*u*), or "Halls," under the superintendence of particular teachers.

It was soon found, however, that uncertainty in the means of support, and the want of domestic discipline, exposed those of the students, who were not under the protection of the monastic system, to distress on the one hand, and irregularity of conduct on the other; and hence the origin of the present colleges (*w*).

(*s*) The catholicity of the degrees of any university are said to have been the results of the confirmation of them by the Pope. See Malden's Univ. p. 21.

(*t*) See note (*q*).

(*u*) Hospitia—Aulæ.

(*w*) The word "Collegium," like "Universitas," is in itself merely a corporate title; and thus in our earlier law books, "College and Common Seal" are not unfrequently used to denote incorporation. "Hospitium," or "Hostelry," was a term applied to the burgher's houses in which students lodged; Lynd. 285. "Aula" meant a locality wholly in possession of the students, or, as Lyndwood (ib.) calls it, "Habitaculum Scholarium;" and this might be occupied either by an unincorporated body, as is still the case in what are called "Halls" at Oxford, or by a "Collegium," or incorporated company. In the latter case, the body was designated either from its place of abode (as various colleges are at Cambridge), or (as is more common at Oxford) by its title as a corporation. This circumstance is well illustrated in the foundation deed "Aulæ Annunciationis Beatæ Mariæ in Cantab.," which runs "et volumus quod dictum collegium vocetur Collegium Annunciationis B. M., et domus quam inhabitabit dictum collegium nominetur Aula Annunciationis B. M. in Cantab." Gough's MSS. Camb. 23, in Bib. Bodl.

Aula, however, is not the most ancient name for the residence of collegiate bodies in the universities; "Domus Scholarium de Merton," and "Peterhouse," being earlier.

The influence of the corporate character has also had much to do with the titles of individual members. The term "Socius," or fellow, being relative to

Walter de Merton's college.

Of those institutions, in their complete and formal character (whatever merely eleemosynary provisions might before have been made), there seems every reason to believe that Walter de Merton (*x*), who was several times chancellor of England, and bishop of Rochester, was the first founder. But even he, in his first establishment of the body which for six hundred years has perpetuated his name, did not bring it into that mature form which he afterwards gave it. In the year 1264, he organized a body of students, to whom he assigned revenues for their support, and a capitular house for their occasional meeting, and for the residence of certain of their officers; but this mansion was not even in the neighbourhood of any university, and his intention was, that his band of scholars should wander about in search of knowledge wherever it might best be obtained:—"*Oxon. vel alibi ubi studium vigere contigerit.*"

Within ten years after, however, he, by two successive bodies of statutes, organized and settled it within the University of Oxford, reputed to be in those days, after Paris (*y*), "the second school of the church." He did

the collective existence, whereas "Scholaris" is the general word in the older statutes.

The distinction, (although by no means strictly observed) between "Collegium" and "Universitas," as a corporate title, is said to consist in the "vita communis," or living together in one house, with a common table, &c., being an incident of the former. Endowment, too, is sometimes mentioned as a feature (although not a distinctive one) of a college.

In another sense, besides that of mere incorporation (in which it is often applied alike to regular and secular bodies, as in Bede's Eccl. Hist. l. 3, c. 5; Leland's Collect. ii. p. 60; Mon. Angl. i. 270 *a*, &c.), the word collegium seems to have distinguished the societies of the secular from those of the monastic clergy (see Tanner's Pref. to Notitia Monastica, p. 15); and it is in this general sense that it is used in 37 Hen. 8, c. 4, and others of the Dissolution Acts. In this sense "Collegium," and "Ecclesia Collegiata," are often used indifferently; and, in fact, several of the colleges in Oxford and Cambridge are, properly speaking, "Collegiate Churches," *i.e.* these colleges are annexed to parochial or other churches.

There is a valuable gloss upon the use of these, and other similar words, in Lyndwood, ed. Oxon. p. 14, verb. "Capitulis."

(*x*) Walter de Merton's monument calls him the founder by example "omnium, quotquot extant, collegiorum."

(*y*) The great celebrity of the schools of theology at Paris induced the pope to found universities without professors of theology, "ut ad Parisiensem undique concurreretur, *quæ Europæ una sufficere videbatur*," c. 101, s. 4, part 2, l. 1, of Thomassin. The effect of the University of Paris on our universities is demonstrated with much learning by Huber, in his work "Die Englischen Universitäten." 1 vol. 8vo. (1830).

Walter de Merton's college.

not, however, prefer the place of his college to its purpose, but still contemplated and allowed for the possibility of its being removed elsewhere. And this allowance of removal from Oxford is still a portion of his statutes.

By the rules of his institution, careful provision was made for divine worship, for internal discipline, and for the management of its property. He contemplated it as the means of supporting a pious and industrious body of students, from their first instruction in grammar, up to the time of their becoming fitted for the highest offices of the church, unless they should prefer a life spent in contemplation and learning within its walls. For the acquisition of classical knowledge, he provided within the college itself; and for instruction in the higher branches, he relied upon the academical institution within which he had placed it.

Colleges before and since the Reformation.

This college, which may be rather called a private means for profitably using the university, than a constituent portion of it, was the model upon which the earlier colleges, both at Oxford and Cambridge (such as Peterhouse and Oriel), were formed. Those of later date, but before the Reformation (such as New College, Magdalen, and the like), were based upon the same principles, but included more largely the liturgical character of other ecclesiastical foundations, and in their scholastic provisions were more expressly connected with the university system in which they were placed. Those subsequent to the Reformation, again, are in their constitution more strictly academical, and more expressly related to the universities; but all, from the first to the last, are in themselves substantive institutions, having their separate corporate rights, their distinct revenues, and a system of internal discipline, over which the universities have no control.

Relation of colleges to universities.

It is evident, then, that according to the original idea of such colleges as are treated of in this chapter (*z*), they have no more necessary relation to the universities in which they stand, than that which arises from the inmates of the former being students and graduates in the latter. A more intricate state of things grew up in the course of time;—the universities consisting, with the exception of those members of it who had collegiate or monastic protection, of an unendowed, and, in many respects, ill-organized, body of teachers and hearers, were subject to diminution, sometimes almost to extinction, from the frequent ravages of disease, or the distresses consequent upon civil and ecclesiastical

(*z*) Ayliffe's Hist. of Univ. of Oxf., vol. ii. part ii. ch. 2, p. 21.

disorders, till at length the old "hostelries" or "halls" became deserted, and (with some exceptions at Oxford) disappeared; and while the monastic seminaries were swept away, together with their present foundations, the colleges becoming more numerous, and even those which were originally designed only for persons on their foundations having for the most part admitted independent members, they gradually absorbed the great body of students, and became by those means co-extensive with the universities themselves. It was natural that under these circumstances the heads of the colleges should acquire corresponding academical authority, and that the new statutes of the universities should be framed with a view to the existing state of things. And thus the systems both at Oxford and Cambridge assumed till recent legislation an appearance calculated to make even well informed men confuse the two classes of institutions, and to account the colleges merely as constituent parts of the universities. Very important distinctions, however, always existed between them.

Important distinctions between them.

The laws which govern the corporate existence, the property, and the privileges, incidental to these two classes of institutions, are in many points (particularly in that of visitation) distinct: and it is perfectly conceivable, either that the colleges should be swept away and the universities continue, or that the universities should be suppressed, and the colleges remain as independent seminaries. To state exactly wherein the connection (*a*) now subsists, would occupy a space inconsistent with the limits of this work. The object of the writer will have been attained, if these brief notices should prove sufficient to obviate a common misapprehension, and to guide others in a more detailed inquiry.

Colleges before the Reformation spiritual corporations.

Before the Reformation, colleges in this country were considered, as is evident from the earlier statutes of Eliza-

(*a*) One point of connection is well illustrated in the following passage from Kyd on Corporations, Introd. p. 35:—

"There are some towns in which there are several incorporated companies of trades, which have so far a connection with the general corporation of the town, that no man can be a freeman of the town at large, and consequently a member of the general corporation, without being previously a freeman of some one of these companies. Of this description is the Corporation of the City of London (*vide* Doug. 374, 359), and of many other cities and towns; and the general corporate bodies of the universities are constituted nearly in the same manner; for every member of the general corporation must be a member of some one or other of the colleges or halls within the university." By the word "member," as last used, is meant only a person having his name on the books, not a corporate member.

beth (*b*), and some of the cases in the Year Book (*c*), as corporations of an ecclesiastical character; and even since that period, they appear to be of a mixed lay and spiritual nature: for instance, the archbishops of Canterbury have successfully claimed a qualified right of visitation over them (*d*), and several of the canons (*e*) of 1603 directly relate to their dress and discipline. But, since the epoch of the Reformation, the doctrine of the common law is, that, generally, colleges in the university are lay corporations (*f*), although the members of the college may be all spiritual.

But since lay corporations.

Christ Church, Oxford.

But the dean and chapter of Christ Church in Oxford is a spiritual, and not a lay body (*g*). It has, however, been dealt with as a college under the recent acts (*h*).

By sect. 5 of 3 & 4 Vict. c. 113, the first vacant canonry in Christ Church is to be annexed to the Lady Margaret's professorship of divinity in the university, in lieu of the canonry in Worcester cathedral, now annexed thereunto; and by section 6 of the same statute, two canonries are to be annexed to two new professorships intended to be founded by her majesty in the University of Oxford: namely, those of Pastoral Theology and Ecclesiastical History. Section 7 provides that, otherwise than as above specified, the act shall not apply to Christ Church, which is in fact the only cathedral in England or Wales which, since the passing of this act, will retain its ancient complement. Christ Church has also been generally excluded from all the other acts relating to cathedrals. The rectory of Ewelme was separated from the Regius Professorship of

(*b*) 13 Eliz. c. 10; 43 Eliz. c. 4.

(*c*) See 8 Ass. 29, 30 (Edw. 3), where convent, hospital and college, are treated of as being in the same category. In this case the ordinary, as visitor, deprived the master of an hospital, and a writ of assise was refused by the judges.—"*L'ordinaire de lieu lui visit et pur defaut qu'il trouva en luy il luy deprive.*"

(*d*) *Vide post.*

(*e*) 16, 17, and 30.

(*f*) The legal doctrine, that colleges are lay corporations, depends mainly upon the case of *Dr. Patrick*, which is reported in Raym. & Keble. It is clear that in regard to colleges founded before the Reformation, this decision rests, to say the least, upon very uncertain grounds; but it would require a full examination of the arguments to point this out in a satisfactory manner; and it will therefore be enough here to direct attention to the question, which is still of importance in points bearing upon the legal incidents of the colleges. See also *Matthews* v. *Burdett*, 2 Salk. 672; *Att.-Gen.* v. *St. Cross Hospital*, 17 Beav. 435.

(*g*) *Fisher's case*, Bunb. 209.

(*h*) A special act regulating the constitution of the governing body and other matters relating to Christ Church has since been passed, 30 & 31 Vict. c. 76.

Divinity and Canonry of Christ Church by 34 & 35 Vict. c. 23.

Charters granted to the universities confirmed by statute.

The universities from time to time have had ample privileges granted to them by sundry charters of the kings of this realm (*i*). Particularly, divers ancient charters were granted to the University of Oxford, by King John, King Henry the Third, King Edward the First, and King Edward the Third: with power of coercion of the contumacious, by imprisonment and expulsion; and also by the censures of excommunication, indulged to them by the popes of Rome (especially Innocent the Fourth), and by the archbishops of Canterbury, the pope's legates. The University of Cambridge had the like privileges granted to them of ancient times; but most of their old charters were lost in the wars of King Henry the Third, or perished in the burning of the town in the time of King Richard the Second. Which king renewed or granted further privileges to both the universities; as did also divers other succeeding princes of this realm (*k*).

These powers and jurisdictions were confirmed to the universities by 13 Eliz. c. 29.

By which blessed act (as Lord Coke calls it (*l*)) all the courts, franchises, privileges, and immunities mentioned in any letters patents, to either of the said universities, that they might prosper in their study with quietness, are established and made good and effectual in the law, against any *quo warranto*, *scire facias*, or other suits, or any quarrel, concealment, or other opposition whatsoever (*m*).

(*i*) Amongst others, that of returning two members to parliament.

(*k*) Duck. 347, 348.

(*l*) 4 Inst. 227; Hale's Hist. Com. Law, 33.

(*m*) Besides the Colleges and Halls which belong to the Universities of Oxford, Cambridge and Durham, the following institutions have at various times been established as corporate bodies, bearing a similar title, in England:—King's College, London, incorporated by royal charter; patron, the Queen; visitor, the Archbishop of Canterbury.—University College, London, founded 1826.—Sion College, founded 1630; visitor, the Bishop of London.—St. Bees' College, founded 1817, for the education of candidates for holy orders in the four northern dioceses.—St. David's College, Lampeter, Cardigan, incorporated by royal charter in 1822, for the education of candidates for orders in the diocese of St. David's, &c.; visitor, Lord Bishop of St. David's. See sect. 72 of 3 & 4 Vict. c. 113.—Dulwich College, founded by Edward Alleyne, 1619. See *Att.-Gen.* v. *Dulwich College*, 4 Beav. 255.—Gresham College, founded by Sir Thomas Gresham, 1581, for lectures to be read during term time in the Royal Exchange.—East India College, visitor, Bishop of London. In Ireland there is the University of Dublin,

By 17 & 18 Vict. c. 81, s. 45, the university court is to be subject to the rules of the common law, instead of those of the civil law.

As to the internal government of colleges it may be well to borrow the language of Ayliffe (*n*):

Internal government of colleges.

"Although these colleges by their foundation have not any jurisdiction or commanding power, yet nevertheless they have always a restraining authority given them by their statutes and privileges, which authority is sometimes without and sometimes with a limitation; but when it is without any limitation or restriction, it is left unto the wisdom and discretion of the head and governing part thereof: and this power ought to be used and exercised with the same tenderness and moderation as a wise father would exhibit in the chastisement and correction of his children, and not with rigour and cruelty. Although heads and governors of colleges are invested with this power of correcting and punishing their fellows and scholars, yet this ought only to be understood in light matters, and for such crimes and misdemeanours alone as are expressed in their local statutes, or deducible from thence, according to the exigency of the same; but they cannot proceed and correct as the magistrate doth, by the prince's commission and authority.

Power of governors of colleges.

Consent of fellows.

"In all colleges, if the question be concerning any thing which is common to the fellows in particular, and as apart from the community, as a chamber, &c., the express consent of every one of them is therein particularly necessary; but if the question be concerning that which is common to them all jointly and indivisibly, it is sufficient, if the greater part of them concur in the same opinion, for they bind the rest: provided always, that nothing be ordained or decreed contrary to the college statutes legally established, or the laws of the realm.

College laws.

"Thus the college statutes and the laws of the realm standing entire, the greater part of the college may make decrees and ordinances for the public welfare, which shall

Trinity College; visitors, the Chancellor, or in his absence the Vice Chancellor, and the Archbishop of Dublin; and the Queen's University, with three colleges. The establishment of the four Scotch Universities of St. Andrews, Glasgow, Aberdeen, and Edinburgh, is confirmed by the Act of Union with Scotland. See Report of the Commissioners on the Scotch Universities. In the German work Conversations-Lexicon, v. 2, title "Universitäten," will be found a catalogue of all the Universities in Europe and America, with the date of their foundation.

(*n*) Ayliffe's Univ. of Oxford, vol. ii. pp. 49—52.

"oblige the lesser part altogether, and every fellow in particular; and thus also may all acts and decrees which have passed the consent and approbation of the whole college, be repealed and abrogated by the greater part, or, according to the civil and canon law, by two parts in three of the body assembled.

"A person chosen by a college to treat of and conclude matters common to the whole society, shall bind every particular fellow thereof, if such agent's commission be *cum nuda relatione* to the college; but sometimes he is only deputed to treat and debate matters, and then to make a report of his proceedings to the college itself, whereby he concludes nothing without the express consent of the body.

When null and void.

"If there should be a statute made which requires the consent of every individual fellow in matters relating to the college in general, such statute would be null and void from the beginning; for if that might take place, every particular fellow by himself alone might impeach and hinder the wisest decrees and resolutions of the whole society; which is contrary to the formal disposition of the law, requiring that in all acts touching a corporation, the judgment of the greater part should prevail over the lesser; and such a majority may give laws to all the fellows in particular, whether the rest of them be there present or not; for it is not necessary they should all be present for this end, and that especially in matters of light importance, &c., so that they be all summoned thereunto. This consent of the greatest part must be had and given in the common assembly of the college; for though all the fellows should separately and apart agree unto anything common unto them all, yet such act of agreement is not effectual or valid, no, not although it should be done in the presence of a public notary; for that is not done by the college which is executed by the fellows singly. Nor is it sufficient that the college be assembled unless the act be sped in due time and place, for the fellows are not bound to assemble at all times and in all places.

Consent of major part.

"But in a corporation within a corporation this common consent of the major part does not always oblige, nay, never does proceed, where there are persons acting under different characters, denominations and capacities, unless an uninterrupted immemorial custom, or some statute, has rendered it otherwise by requiring only common consent: and in confirmation hereof I will cite a case of my Lord Dyer's Reports, p. 247*a*, where it is said, 'That the warden, three bursars, five deans, and five senior fellows of

"New College in Oxford, have authority given them by the peculiar statutes of the house to dispense with the absence of a fellow above the space of two months, to the observation of which statute they all take an oath. The greater part of them granted and assented unto such dispensation, and the residue denied it. It was adjudged by the opinion of the two chief justices, the chief baron, Justice Whyddon, Brown and Weston, that this is not a good dispensation or leave of absence, for that it is out of the case of the statute of the 33 Hen. 8, c. 27, which extends to grants of leases, and other grants and elections made by the greater part of the whole number of the corporation, and not to any particular number, as the case is here.'

A fellow may not belong to two colleges.

"By the civil and canon law, a person cannot be a fellow in two colleges at one and the same time, which is to be understood when the studies and exercises of one college do thwart and impeach his studies and exercises in the other, and especially if these different colleges have no subordination the one to the other; for it may happen that he may be summoned at one and the same time to these different colleges, and he cannot serve both."

A mandamus lies to compel the warden of a college to affix the common seal of the college to an answer of the fellows, &c. in chancery, contrary to his own separate answer put in (*n*).

A mandamus has been refused for the deprivation of the head of a college, or for the expulsion of a fellow, or for the restoration of a fellow (*o*).

The various University Commission Acts gave full powers to the colleges with the consent of the commissioners, or for the commissioners in their default, to prepare new codes of statutes: and these powers were exercised in almost every case. By these acts it was declared that every oath not to disclose matters relating to the college when required to do so by lawful authority, or to resist or impede any change in the statutes of the college, was illegal, and should not be for the future administered (*p*).

Visitor.

Besides the authority within the colleges themselves, in all charitable foundations some one must be VISITOR (*q*). If no one be appointed by the founder of the charity, he himself during his life is visitor, and after his death the

(*n*) *Rex* v. *Windham*. Cowp. 377.

(*o*) *Vide infra*, pp. 2010, 2011.

(*p*) 17 & 18 Vict. c. 81, s. 24; 19 & 20 Vict. c. 88, s. 48.

(*q*) Comyn's Digest, tit. Visitor, and see Tudor's Law of Charitable Trusts, pp. 111, 399. *Vide supra*, Part IV., Chap. IX. Sects. 1, 4.

office devolves upon his heirs (*r*). Should they become extinct, the crown becomes visitor (*s*), as the sovereign is *mero jure* of all royal foundations, and also of those in which the crown and a subject are joint-founders (*t*), that is to say, contemporaneously joint-founders: for where the crown engrafts a charitable gift on an original foundation by a subject, both fall under the cognizance of the primary visitor (*u*).

Wherever the crown is visitor (*w*), the functions of the office are exercised by the lord chancellor or special commissioners (*x*).

It will be seen that on the principle that a man cannot visit himself, a *beneficial* interest in the charity disqualifies a person for the office of visitor (*y*). The questions as to the creation of a visitor, and the mode in which his power may be exercised, are fully discussed in the cases of *Green* v. *Rutherford* (*z*), before Lord Hardwicke, and of *Philips* v. *Bury* (*a*), before Lord Holt. Some valuable *dicta* on this subject will be found in Comyn's Digest, title *Visitor*, who relies chiefly, when speaking of the form and manner in which the visitatorial power is to be exercised, upon Ayliffe's observations in his History of the University of Oxford. According to this author the visitor should proceed "*summariè, simpliciter, et de plano, sine strepitu aut figurâ judicii*, according to the mere law and right of nations, wherein matter of necessary substance and not of positive form are observed" (*b*). And again, he says, a visitor may in his proceedings (*c*) "use a power and authority which is not expressly set forth and mentioned in the rules and orders of the society whereby he visits: for there are many things necessarily implied, and inseparably incident to the very power and office of a

(*r*) Com. Dig.

(*s*) See the case of *Catherine Hall*, Jac. 381; *Att.-Gen.* v. *Clarendon*, 17 Ves. 498; *Ex parte Wrangham*, 2 Ves. jun. 623.

(*t*) Comyn's Digest, tit. Visitor.

(*u*) Comyn's Digest, tit. Visitor, and *Att.-Gen.* v. *Talbot*, 3 Atk. 675.

(*w*) *Att.-Gen.* v. *Crook*, 1 Keen. 124.

(*x*) In *Re Christ Church* the Lord Chancellor (for the Crown) sanctioned the endowment of the Professor of Greek out of the funds of the House (L. R., 1 Ch. App. 526).

(*y*) *Rex* v. *Bishop of Chester*, Stra. 797; *Reg.* v. *Dean, &c. of Rochester*, 17 Ad. & El., N. S. 1.

(*z*) 1 Ves. 465.

(*a*) 2 T. R. 349.

(*b*) Ayliffe's Hist. of Univ. of Oxford, p. 95.

(*c*) In *Dr. Bentley's case* the proceedings were by articles. But in a case appealed from Jesus College, Oxford, to the Lord Chancellor (Lyndhurst) as Visitor in the absence of Lord Pembroke, where a fellow was deprived for an atrocious crime by the head of the college, the proceedings were of the most summary kind (1828).

Visitor.

"visitor, which need not be expressed: as the power of suspension and deprivation for contumacy and other reasonable causes, &c., for that his visitatorial power cannot be supported without the power of such and the like censures, and penal sanctions."—And again:

"Although a visitor may be restrained, by the particular laws and statutes of the founder, as to visit *ex officio* but once in two, three, four or five years: yet he has always a constant and standing authority given to him by the laws of the land, to hear and determine all particular differences whatsoever, that may arise in the college, whereof he is visitor, during the intermediate time of his general visitation: from whose sentence there lies no appeal to any court of law, but only to the queen in council as aforesaid. Diocesan bishops can visit but once in three years, yet their courts are always open to hear and determine quarrels and offences, and all particular complaints. And the like it is with visitors, whose general authority is restrained in point of time; and it would be a vain and absurd thing to suppose that the intention of the founder, or his laws, was that such disorders and causes of complaint should not be examined and redressed, in the intermediate time of a general visitation," &c. (*b*). He also observes that our colleges were of ecclesiastical origin, and that it was the object of their founders to make their institutions "as much ecclesiastical as in them lay, as appears by the style and dispensations of their statutes, which follow the model of the canon law, and for the most part square the best with it" (*c*).

Appointment of a visitor.

The appointment of a visitor may be made in any intelligible form of words which the founder chooses to adopt; "*visitationem illi commendamus*" are the words by which the Bishop of Ely is appointed visitor of St. John's College, Cambridge (*d*), and it has been laid down that "a power to interpret and determine doubts upon the statutes, given in clear words, may itself constitute visitatorial power" (*e*). A visitor may be either general or special. He is presumed to be the former, unless there are express words which abridge his authority (*f*). The founder may also appoint different visitors for different purposes (*g*).

(*b*) Ayliffe's Hist. of Univ. of Oxford, 84.

(*c*) Ibid. 51; see also p. 57.

(*d*) *Green* v. *Rutherford*, 1 Ves. 465.

(*e*) By Lord Eldon, *Ex parte Kirkby Ravensworth Hospital*, 15 Ves. 317.

(*f*) See on this point the cases of *Rex* v. *Bishop of Worcester*, 4 M. & S. 421 (1815); *St. John's College* v. *Todington*, 1 Burr. 200; *Philips* v. *Bury*, 2 T. R. 349.

(*g*) See also *St. John's College* v. *Todington* 1 Burr. 200; *Att.*-

There can be no question that the visitor possesses a judicial power as to explaining the true intent and meaning of the statutes which govern the foundation he visits. A reference to the reported cases will show that a close adherence to the directions given by the founder has invariably guided the exercise of this power of interpretation (*h*). It has been said that the visitor has a *judicial* power; but the better opinion seems to be, though no great authority can be cited for it, that he has no *legislative* authority. It would appear, from all analogy, that colleges must have a power to enact bye-laws (*i*), not at variance with the laws of the land or their fundamental statutes, for their own government: how far, or whether at all these are subject to the revision of the visitor, is a consideration of much difficulty, and which has not, I believe, yet received any authoritative decision.

Visitation in the crown.

It is now clear law, as has been already remarked, that in the case of a private eleemosynary foundation, if no special visitor be appointed by the founder, the right of visitation on the failure of his heirs devolves upon the king, to be exercised by the great seal (*k*). And where the heir of a founder of a charity is visitor, and has been found a lunatic by inquisition, the right of visitation during his lunacy devolves on the crown (*l*). The king's courts will not interfere where there is a visitor specifically appointed unless it be clearly shown that he has not jurisdiction. The leading case on this subject is *Philips* v. *Bury* (*m*).

Gen. v. *Middleton*, 2 Ves. 323; *Rex* v. *Bishop of Ely*, 2 T. R. 335; *Ex parte Kirby Ravensworth Hospital*, 8 East, 221.

(*h*) The cases of *Catherine Hall*, 5 Russ. 85, by Lord Eldon; of *Green* v. *Rutherford*, 1 Ves. 462, by Lord Hardwicke and Sir J. Strange; *Queen's College case*, 5 Russ. 65, by Lord Lyndhurst; *Downing College case*, 3 My. & Cr. 642, by Lord Cottenham.

(*i*) As to the power of a corporation to enact bye-laws, see 1 Black. Com. 476; *Blakemore* v. *Glamorganshire Canal Company*, 1 M. & K. 163; *Rex* v. *Gray's Inn*, 1 Doug. 354; *Rex* v. *Benchers of Lincoln's Inn*, 4 B. & C. 858; and an Essay on the Legislative Power of Colleges, Law Magazine, No. XL.

(*k*) *Rex* v. *St. Catherine's Hall, Cambridge*, 4 T. R. 233; and *Anon.* 12 Mod. 232; *Ex parte Wrangham*, 2 Ves. jun. 609, Lord Eldon; case of *two Fellowships of New College*, 3 Atk. 667; Lord Hardwicke, 1 Burr. 203; case of *Queen's College*, Jac. 19; *S. C.* Jac. 47; cases of *Grantham School and Richmond School*, cited 17 Ves. 499; and in *Re Garstang School* (1 August, 1829), 7 L. J. 169, 172, for cases where up to that time the great seal exercised the crown's visitatorial power.

(*l*) *Att.-Gen.* v. *Dixie*, 13 Ves. 519.

(*m*) Lord Raym. 5; 4 Mod. 106; Skin. 447; 2 T. R. 346.

Rex v. Chancellor, &c. of Cambridge.

In *Rex* v. *Chancellor, &c. of the University of Cambridge* (*n*), the Court of Queen's Bench took cognizance of proceedings in the congregation of the University, and after much argument and deliberation issued a mandamus to the university to restore Richard Bentley to his academical degrees, of which he had been deprived by a proceeding in the nature of one for contempt; but this decision was founded on the ground that it appeared that the university had no visitor according to the record.

Dr. Walker's case.

A mandamus was directed to Dr. Richard Walker, vice-master of Trinity College in Cambridge (*o*), reciting the statutes of the college, and that thereby it was ordained, that in case the master of the said college should at any time be examined before the visitor, the Bishop of Ely, and be lawfully convicted before the said visitor of dilapidation of the goods of the college, or violation of the statutes, he should without delay be deprived of the office of master by the vice-master of the said college, and that without appeal: and that a cause of office was lately depending before Thomas Lord Bishop of Ely, then and still visitor, at the promotion of Robert Jackson, clerk, one of the fellows of the said college, against Dr. Richard Bentley, master of the said college, for dilapidation of the goods of the said college, and violation of the statutes, wherein several articles were exhibited for that purpose, and that a prohibition, and afterwards a consultation, was awarded upon the said articles to the said Bishop of Ely the visitor: and that the said bishop, having considered the evidence on both sides, did adjudge, as visitor aforesaid, that the said Dr. Richard Bentley was guilty of dilapidation, and violation of the statutes, and thereby incurred the penalty of deprivation of his office; which said sentence is still in force; and that it is the duty of the said Richard Walker, as vice-master, to execute the said sentence, by depriving the said Dr. Richard Bentley of his office of master; and that the said Dr. Walker, having had due notice of the sentence, and being duly required to deprive him, neglects and refuses so to do: the writ therefore commands him without delay to deprive the said Dr. Bentley of the said office of master of the said college, or to show cause to the contrary. Dr. Walker returns, that the statute appointing the Bishop of Ely visitor is void; and that the college being of royal foundation, the king only is visitor. By

(*n*) Str. 557; Ld. Raym. 1334; 8 Mod. 148; 6 T. R. 104.

(*o*) *Dr. Walker's case*, Cas. t. Hardwicke, 212.

Lord Hardwicke, Chief Justice: "There are two things which seem to be aimed at by this writ and return, which I do not see that the court can do; first, to aid the jurisdiction of the Bishop of Ely as visitor; secondly, to determine that the king is general visitor. But the writ in this case is *felo de se;* for it suggests that the bishop is visitor of the college, and if so, he may visit, and remove, or punish the vice-master, and we could do no more; and on the contrary, if the king be visitor, as the return suggests, you may apply to the king for him to visit." And on the last day of the term the court quashed the writ of mandamus; but said they did not intend it should be understood that they had thereby determined whether the king or the bishop is general visitor.

Mandamus refused.

In *Rex* v. *The Bishop of Ely* (*p*) this case came to be considered, whether the Bishop of Ely was visitor or not; but not determined. The case was, a rule was made to show cause, why a mandamus should not go to the Bishop of Ely, commanding him to hear an appeal made to him as visitor of Trinity College in Cambridge, by Dr. Edward Vernon, who has therein complained, that he has been wrongfully deprived of his senior fellowship in the college, contrary to the statutes thereof, made upon affidavits that the bishop declined hearing the appeal until he could be satisfied that he had a right to visit the college. By Lee, Chief Justice: "It appears from the affidavits that there has been an appeal to the bishop as visitor; that the bishop has declined exercising any visitatorial power, in order to take the opinion of this court whether he has any right to exercise it. This is a controverted question, and it is not at all clear to the court who is visitor; and if we had seen and read all the statutes of the college, we have no authority to determine who is visitor, that being the proper province of a jury." And the rule was discharged.

Rex v. *Bishop of Ely.*

Court refuse to determine who is visitor.

It is, however, now settled, where there is no question in whom the right of visitation is vested, and a visitor refuses to receive and hear an appeal, that the Court of Queen's Bench will compel him by mandamus to exercise his visitatorial power: but that court will not interfere for the purpose of compelling him to give a particular decision upon the merits, or to control his judgment. And the visitor is not obliged to hear the party personally, or to receive parol evidence; but it is sufficient if the visitor receives the grounds of the appeal, and gives an answer to

Mandamus to visitor.

(*p*) 1 Wilson, 266; *S. C.* 1 W. Bl. 52.

them in writing (*q*). Lord Hardwicke held that the bare averment of there being a visitor was not sufficient to exclude the jurisdiction of the court; but the extent of his authority must appear, and the court must be satisfied that he can do complete justice, otherwise a mandamus will be issued (*r*). Nevertheless, it seems that a college may return generally that there is a visitor, without stating that by the statutes he has power to decide the particular matters in dispute, for it is incident to his office to determine all grievances which come before him (*s*).

Where the courts interfere.

But although the courts may not interfere with regard to the private statutes of the society, as established by the founder, yet as to the public laws of the land, it seems that they may interfere, for over these the founder could give to the visitor no exclusive jurisdiction. As in the *Case of St. John's College in Cambridge* (*t*): Where by an act of 1 Will. & Mar. c. 8, now repealed, if any fellow of any college in either of the universities should neglect or refuse to take the oaths for six months after the first day of August then next following, his fellowship was to be void, and several of the fellows of that college had not taken the oaths pursuant to the statute, and thereupon a mandamus was directed to Humphrey Gower, head of that college, setting forth the act, and that such fellows had not taken the oaths, and that they still continued in their fellowships, by which writ they were commanded to remove them, or to show cause. They return, that the college was founded by Margaret Countess of Richmond; that the Bishop of Ely for the time being was by her appointed visitor; and on their behalf it was objected, that a mandamus is a remedial writ; that no precedent can be produced where it has been granted to expel persons, but always to restore them to places of which they had been deprived; and that it will not lie where there is a local and proper visitor. But by Holt, Chief Justice: "The visitor is made by the founder, and is the proper judge of the laws of the college; he is to determine offences against these private laws; but where the law of the land is disobeyed (as it is in this case), the Court of King's Bench will take notice thereof, notwithstanding the visitor; and the proper remedy to put

(*q*) See *Rex* v. *Bishop of Ely*, 5 T. R. 475; this case is again referred to below. See also *Rex* v. *Bishop of Lincoln*, 2 T. R. 338; *Philips* v. *Bury*, 2 T. R. 346; *Rex* v. *Bishop of Worcester*, 4 M. & S. 415; *Ex parte Buller*, 1 C. L. R. 534; 1 Jur. N. S. 709.

(*r*) *Rex* v. *Bland*, cited 1 Ves. sen. 470.

(*s*) *Rex* v. *All Souls, Oxford*, Skinner, 13; Sir T. Jones, 174.

(*t*) 4 Mod. 233; 15 Viner, 200.

the law in execution is by a mandamus." But the cause was adjourned.

In general, where there is no other specific legal remedy to obtain the ends of justice, the courts of law will interfere, lest there should be a defect of justice. On this principle a mandamus was directed to the keepers of the seal of the University of Cambridge, to set the university seal to the appointment of a lord high steward (*u*). Also to compel the warden of Wadham College, Oxford, to affix the common seal of the college to an answer of the fellows to a bill in chancery, though contrary to his own separate answer put in (*x*); because these cases do not come within the cognizance of a visitor. Upon which principle a mandamus was also granted to the Bishop of Ely, to appoint one of two persons presented to him by the fellows of Peterhouse College, in Cambridge, to be master; the court being of opinion, from a view of the charters of the college, that the right which the bishop claimed of appointing to the mastership, on neglect of the fellows to elect, devolved on him, not as visitor, but by the special appointment of the founder; and therefore in this case the statutes were to be construed by the courts of law, for he could not visit himself (*y*). But if there be a visitor who can exercise jurisdiction, the appeal must be to him; and therefore a sentence of expulsion unappealed from being given in evidence on an indictment for assaulting a fellow commoner of Queen's College, Cambridge, by turning him out of the college garden, was holden conclusive for the defendant (*z*). And a bill filed by a purchaser of a set of chambers in an inn of court against the benchers, relative to a renewal of the grant of the chambers, was dismissed (*a*), the appeal being to the twelve judges, who are visitors (*b*). Where the right of visitation, in default of his heirs, devolves upon the king, and is to be exercised by the great seal, the King's Bench refused, in the case of St. Catherine's Hall, Cambridge, to interfere by mandamus to compel the master and fellows to declare one of the fellowships vacant, and to proceed to a new election, referring the question to the

(*u*) *Rex* v. *University of Cambridge*, 1 Black. Rep. 547.

(*x*) This case establishes the principle, that where a corporation enters into a dispute with a private person, the ordinary courts will interfere; *Rex* v. *Windham*, Cowp. 377. See also *Rex* v. *St. John's College*, 4 Mod. 260.

(*y*) *Rex* v. *Bishop of Ely*, 2 T. R. 290.

(*z*) *Rex* v. *Grunden*, Cowp. 315.

(*a*) *Cunningham* v. *Wegg*, 2 Br. C. C. 241.

(*b*) *Hart's* and *Savage's cases*, Doug. 353.

Where the courts interfere.

lord chancellor (*c*). Whether commoners, and other independent members of a college, belong to the foundation, so as to be entitled to the protection of the visitor, may perhaps depend on the statutes of the college; but in Davison's case, in chancery, Lord Apsley, assisted by De Grey, Chief Justice of the Common Pleas, and Mr. Baron Adams, was of opinion, that a commoner of University College in Oxford was a mere boarder, and therefore that his expulsion operated as a notice to quit (*d*). And in the above-mentioned case of *Rex* v. *The Bishop of Ely*, the Court of King's Bench was of opinion, that Mr. Longmire, who had been a fellow of Peterhouse, Cambridge, and had vacated his fellowship by taking a college living, but had continued his name on the college boards, was not entitled to any preference in the election of a master, as being a member of the *domus* or foundation, under these words: "*Ipsius domus atque sociorum ejusdem semper ratio habeatur, ut hi, si qui inter eos ad hoc munus obeundum inveneantur idonei, ceteris preferantur; sin hujusmodi in domo nulli extiterint, tum aliunde assumantur.*" A mandamus applied for to expel the fellow of a college has been refused (*e*). A mandamus was refused to the master and fellows of Caius College, Cambridge, to restore an usher of a free school of which they were visitors (*f*), and to restore a party to his fellowship of Christ College in Cambridge, who ought to appeal to the visitor (*g*).

Return of a visitor.

In the case of *Rex* v. *Whaley* (*g*), a mandamus was granted, directed to the defendant as master of Peterhouse College, in the University of Cambridge, to admit Thomas Rogers to a fellowship of that college, upon affidavit of his election. A motion was made to supersede this writ, upon affidavits of there being a visitor, namely, the Bishop of Ely. But the court put the master to make a return, and refused to determine the point upon affidavits, where the other party had no opportunity to right himself by an action. It must appear by matter of record, which the party may contest.

(*c*) *Reg.* v. *St. Catherine's Hall, Cambridge*, 4 T. R. 233.

(*d*) *Rex* v. *Grundon*, Cowp. 319.

(*e*) *Dr. Gower's case*, 3 Salk. 230.

(*f*) *The Protector* v. *Craford*, Styles, 457. See also *Stamp's case*, 1 Sid. 40; *Dr. Goddard's case*, ibid. 29; *Le case del Clerk de City Works de Londres*, 2 Sid. 112. See also the case of *Rex* v. *St. John's College*, 4 Mod. 260, as to a mandamus to *admit* a scholar not actually a member, but claiming to be one. So a mandamus to the visitors of the College of Advocates at Doctors' Commons was refused; *Ex parte Lee*, 5 Jur. N. S. 218; El. Bl. & El. 863.

(*g*) Str. 1139.

Court of equity will interfere to see a trust of a college executed.

The jurisdiction of courts of law is more easily distinguishable from that of the visitor than the jurisdiction of courts of equity. The trusts in equity seem to bear some resemblance to the duties which it is the visitor's province to enforce. It is clear law, that where there is a particular trust to be executed by the college, a court of equity will interfere to carry that trust into execution. The leading case on this subject is that of *Green* v. *Rutherford* (*h*). The following cases are also of importance on this subject: *Attorney-General* v. *Dulwich College* (*i*), *Attorney-General* v. *St. Cross Hospital* (*j*); *Daugars* v. *Rivaz* (*k*). In *Thomson* v. *University of London* (*l*), the Court of Chancery refused to interfere in a question relating to a gold medal granted by the university as the result of an examination, on the ground that it was a proper subject for the visitor; but query whether a university, not being an eleemosynary corporation (*m*), is subject to visitation (*n*).

The doctrine laid down in the case of *Green* v. *Rutherford*, as to the power of the *general* visitor over endowments engrafted on the original charity, without any declaration of a special trust or a special visitor, is confirmed by *Attorney-General* v. *Talbot* (*o*); by Lord Mansfield in *St. John's College* v. *Todington* (*p*); and by Lord Brougham in the case of *Ex parte Inge* (*q*).

The internal management of a charity has been holden to be the exclusive subject of visitatorial jurisdiction, but under a trust as to the revenue. Abuse by misapplication will be controlled by a court of equity (*r*).

In one case it was contended that the jurisdiction of the court of equity was excluded, because the persons who were to enjoy beneficial interests were members of the corporate body, but the Master of the Rolls, Lord Langdale, assumed as a matter of course that he had jurisdiction (*s*). In another case the Lord Chancellor, Lord

(*h*) 1 Ves. sen. 462. This case, and that of *Philips* v. *Bury*, 2 T. R. 346, determine the chief practical points respecting the nature of a visitor's jurisdiction.

(*i*) 4 Beav. 235.

(*j*) 17 Beav. 435.

(*k*) 6 Jur. N. S. 834; 28 Beav. 233.

(*l*) 10 Jur. N. S. 669.

(*m*) 3 Steph. Comm. 127.

(*n*) Tudor's Law of Charitable Trusts, pp. 111, 115; see *Rex* v. *Chancellor, &c. of the University of Cambridge*, Str. 557, p. 2010, *supra*.

(*o*) 3 Atk. 675.

(*p*) 2 Rush. Hist. Coll. 324—332.

(*q*) 2 R. & M. 596.

(*r*) *Ex parte Berkhampstead Free School*, 2 V. & B. 134.

(*s*) *Att.-Gen.* v. *Smithies*, 1 Keen, 299. In this case some of the corporate funds were received in trust, for payment of them to certain poor persons who were themselves members of the corporation.

Brougham, drew the following distinction: "The next question is, was this a beneficial interest, or was it a trust? and upon all the circumstances of the case, and upon the whole of the evidence, my opinion is that it was a trust only" (*r*).

In *Bentley* v. *Bishop of Ely* (*s*) a visitor was prohibited from proceeding against the master of a college in some articles, but a consultation was awarded as to the rest. In *St John's College* v. *Todington* (*t*), where it was disputed who was visitor, the cause was determined in a court of common law.

Case where a person to be visited happens to be also visitor.

In *Rex* v. *The Bishop of Chester* (*u*) a mandamus was directed to the bishop, as warden of Manchester College, to admit a chaplain. The bishop returns, that by the royal foundation he is appointed visitor. And upon argument it was objected, that though a mandamus will not lie where there is a visitor free from any objection, yet here the two offices being in the same person, he cannot visit himself; and no case can be shown where the founder has once granted the whole out of him, and on such a temporary suspension it has resulted back. And by the court: It is plain he cannot visit now, because his power is suspended, and these are powers that may cease and revive without inconvenience, since there is this court to resort to. In a lay corporation, the founder and his heirs are visitors; in a spiritual corporation, the jurisdiction is here unless there be an express visitor appointed: the ground of our interposing in this case is, that at present there is no other visitatorial power in being. And a peremptory mandamus was granted.

Per Buller, J.—A visitor cannot be a judge in his own cause, unless that power be expressly given him. A founder, indeed, may make him so, but such an authority is not to be implied; he cannot visit himself. But the possession of a bare legal interest in a charitable estate is not a disqualification for the office (*x*), it must be a beneficial interest.

(*r*) *Att.-Gen.* v. *Archbishop of York*, 2 Russ. & My. 467. In *Att.-Gen.* v. *Crook*, 1 Keen, 126, it was laid down, that if a spiritual duty, attached to the office of a corporator of a charitable corporation, be not properly performed, a court of equity will not interfere, but application should be made to the visitor or the proper spiritual authorities.

(*s*) Str. 912.

(*t*) 2 Rush. Hist. Coll. 324—332.

(*u*) Str. 797.

(*x*) *Att.-Gen.* v. *Middleton*, 2 Ves. sen. 328. See the case of *Eden* v. *Foster*, 2 P. Wms. 325, argued before Lord Chancellor Macclesfield, afterwards before Lord Chief Justice King, Lord Chief Justice Eyre, and Chief

In the case of *St. John's College* v. *Todington* (*y*), it was moved in behalf of the master and senior fellows of the said college for a prohibition, to prohibit the Bishop of Ely from proceeding as supposed visitor of the said college, on an appeal promoted by the said Mr. Todington for their not electing him fellow. The prohibition was ultimately refused, after examination of the statutes of the college.

Where it is disputed whether a person is visitor or not, the king's courts are to determine the cause.

In the case of *Regina* v. *The Dean and Chapter of Rochester* (*z*): "By statute 26 of the cathedral church of "Rochester a master was to be chosen by the dean and "chapter, to teach certain poor boys who, by the same "statute, were to be instructed in the cathedral; and the "master, if found negligent or unfit, was to be removed. "By statute 35, if any officer, of a description including "the master, committed a slight offence, he was to be cor- "rected at the discretion of the dean; if a weighty offence, "he was to be expelled by those who gave him his admis- "sion. By statute 38, the Bishop of Rochester for the "time being was appointed visitor, to see that the statutes "and ordinances were observed, and with full power to "convene and interrogate the dean, canons, minor canons, "clerks and other officers, on the articles contained in the "statutes, and all other things touching the welfare and "honour of the cathedral church, to punish ascertained "offences according to their degree, and reform them, "and to do all things which might seem necessary to the "extirpating of vices, and which pertained to the office of "a visitor.

Reg. v. *Dean, &c. of Rochester.*

"W., a schoolmaster appointed under statute 26, pub- "lished a pamphlet on cathedral trusts, accusing the dean "and chapter of having misappropriated the cathedral "revenues of Rochester to their own benefit, and the "injury of poor persons entitled to share in them, and "imputing to the then bishop, formerly Dean of Worcester, "that he had been guilty of similar misconduct as dean, "and had, as visitor, culpably, and with knowledge of the "facts, omitted to correct it in the dean and chapter of "Rochester. The dean and chapter cited W. to answer "before them for this publication; and afterwards dis- "missed him.

"A mandamus having issued to restore W., the dean "and chapter made a return, alleging that W. had been

Baron Gilbert, for the power of the crown to appoint a commission to visit governors of a school of royal foundation.

(*y*) 2 Rush. Hist. Coll. 321—332.

(*z*) 17 Ad. & El., N. S. 1.

Reg. v. Dean, &c. of Rochester.

"removed, to wit, for lawful cause, and had not appealed "to the visitor. W. pleaded that the bishop had an interest in the cause of removal which disqualified him from "acting as visitor, and by another plea he justified the "publication, and denied that he was lawfully dismissed. "On demurrer to the pleas it was holden, (1.) That on the "construction of the statutes the bishop (if not interested) "was the proper visitor in this case.

"(2.) That the bishop had not such an interest as dis-"qualified him from acting as visitor.

"(3.) That the prosecutor, therefore, should have ap-"pealed to the visitor, and not proceeded by mandamus. "And that, assuming the dismissal to have been improper, "the court was not authorized to interfere on the alleged "ground that the dean and chapter were acting in excess "of their jurisdiction."

The archbishop's general power of visitation.

In the thirteenth year of King Henry the Fourth happened the famous cause between the Archbishop of Canterbury and the chancellor and proctors of the University of Oxford (*b*); which was thus: Archbishop Arundel being in his visitation of the diocese of Lincoln, came in his way to visit the University of Oxford, which was then within the limits of that diocese. The university insisted upon their exemption by papal authority, and refused to submit to his visitation. The archbishop urged a sentence given against them in this same cause by King Richard the Second; but in vain. They stood upon their exemption, and referred themselves (in which the archbishop also agreed with them) to the king's judgment. Their cause was accordingly heard before the said King Henry the Fourth, and sentence given for the archbishop, and his visitatorial power over them. And this whole process and sentence, at the archbishop's petition, was ratified and enrolled in parliament, to prevent any future disputes upon that subject (*c*).

(*b*) Rot. Parl. 13 Hen. 4, num. 15; Wake's State of the Church, 318.

(*c*) See Strype's Life of Parker, vol. i. p. 528, c. 20, where it is said that the Archbishop ordered this decision to be put into his Register, with a memorandum, A.D. 1568. The notes of Dr. Yale, in the Cotton Library, confirm the prerogative of the archbishop; according to them the scholars of Oxon submit to the visitation, and "nequeunt se esse exceptos." In the reign of Richard II. a contest arose between the archbishop and chancellor, the latter alleging it belonged to the king alone; but "Declaratio regis per literas suas patentes quod jus visitandi cancellarium et universitatem Oxon. pertinet et pertinere debet, in perpetuum pertinebit ad Archiepiscopum Cantuar. et ecclesiam suam, et non ad ipsum

Upon this, the Archbishop of York put in his claim for the exception of the college called Queen Hall, in the said university; the result of which was this: that the Archbishop of Canterbury, in presence of the king and of the lords in the said parliament, promised, that if the Archbishop of York could sufficiently show any privilege or specialty of record, wherefore the said Archbishop of Canterbury might not use or exercise his visitation of the said college, he would then abstain; saving to him always the visitation of the scholars abiding in the said college, according to the judgments and decrees made and given by the said King Richard the Second and the said King Henry the Fourth (*d*).

But this claim of the Archbishop of York seems to have been frivolous, seeing the exclusive right which he insisted on was only in respect of his being local visitor of that college; for if the Archbishop of Canterbury had otherwise a power of visiting, the founder of the college could not take it from him by his statutes.

Afterwards, in the 12th year of King Charles the First, this matter was again contested by both the universities against Archbishop Laud, who claimed a right of visiting them *jure metropolitico*, and they pleaded that the power of visiting them was in the king alone as their founder. This cause also came to a hearing before his majesty in council.

For the archbishop it was urged, that his power of visitation within his province is of common right, and as ancient as the archbishopric itself; that it is a general power, and not over certain particular persons, but over clergy and people, in all causes ecclesiastical, and in all places within his province without exception; that if the universities have any exemption, it is incumbent upon them to show it; that the exemptions (if any) which they had by any bulls from the pope, were abolished by the act of parliament of 28 Hen. 8, c. 16, and not pleadable in any court; that this power of the archbishop does no way trench upon the king's power; but that the king by himself or his commissioners may visit as founder, and the archbishop nevertheless as metropolitan; that the archbishop's intention is not to visit the statutes of the university or of any particular college, but to visit metropolitically, that is, to visit the body of the university, and every scholar

regem." Westminster, 20th year of Rich. II.

(*d*) Rot. Parl. 13 Hen. 4, num. 15; Wake's State of the Church, 348.

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therein, for his obedience to the doctrine and discipline of the Church of England, but not to meddle with the statutes of colleges or of the university, or the particular visitors of any college.

For the University of Cambridge it was urged, that the power of visiting them of right belongs to the king, which is an exemption from any ordinary jurisdiction; and for other exemptions they had bulls from the pope and charters: that about the beginning of the reign of King Richard the Second, most of their charters were burned by an insurrection in the town; but many of them were confirmed in the time of Henry the Sixth, upon a suit made to the pope to give some confirmation to their privileges in regard their charters were burned; whereupon the pope granted a commission, and witnesses were examined; which examination was a means to produce two ancient bulls, exempting them from metropolitical visitation, the one bearing date in the year 624, and the other in 699.

For the University of Oxford it was argued, that it was an ancient university, founded long before the Conquest, and had as ancient privileges; and by bulls from the pope was ever exempt from the visitation of any archbishop, as in his metropolitical right, but that the few visitations which had been made by any of the archbishops were by virtue only of their legatine power; that as none can found an university but the king, so none has power but the king to visit it. That indeed their ancient charters are lost; but although there are no records so old, yet there are divers recitals in Edward the Third's time, which show that they had some original grant of exemption; and in confirmation thereof that there had never been in so many hundred years any visitation made by any archbishop as being within his province.

Upon the hearing of the whole cause it was declared by the king, with the advice of the privy council, that it was granted on all hands that the king had an undoubted right to visit the universities, and that the archbishop, in the right of his metropolitical church of Canterbury, had power to visit the whole province in which the universities were situated, and were under the same power, unless they could show privilege and exemption; that the exceptions then alleged were not such as could give satisfaction; that they could be exempted by no papal bull; and that they were exempted by none of their charters; that the long omission of the archbishops to visit, could be no prescription to bar the right of the metropolitical see; that it

appeared that both universities had been visited by three archbishops *jure metropolitico*, and not by a legatine power; that this coming in question upon the resistance of the University of Oxford, it was, upon full hearing of both parties, adjudged for the archbishop by King Richard the Second, and afterwards upon the like hearing and re-examination by King Henry the Fourth; and both of their judgments established by act of parliament, 13 Hen. 4. And the archbishop produced before his majesty an original deed from the University of Cambridge to the archbishop, under the hands of the heads of houses, containing a renunciation of all privileges from any pope, and wherein they bind themselves under the penalty of 1,000*l.* not to oppose the archbishop's jurisdiction: and this was in the 27 Hen. 8, being a year before the said bulls were abolished by act of parliament.

So the king and council adjudged the right of visiting the universities, chancellors, scholars, and all persons enjoying the privileges thereof, to belong to the archbishop and metropolitical church of Canterbury, by himself or his commissary.

Whereupon the archbishop made this motion to the king: first for himself, that his majesty would be graciously pleased that he might have the sentence drawn up by the advice of his majesty's learned counsel, and put under the broad seal, to settle all differences that hereafter might arise: then on the behalf of both the universities, that they should remain free and exempt from the visitation and jurisdiction of the bishop of the diocese or archdeacon.

The grounds of exemption from episcopal visitation, whilst at the same time they are supposed subject to the archiepiscopal, are not set forth: this must be from some clause of exemption in the university charters, or from some restrictive clause in the foundation of the bishoprics, especially of Oxford, where the episcopal see was not erected until the latter end of the reign of King Henry the Eighth; and even with respect to Cambridge this might be the case, if that is true which is intimated above, that the university there is at least as ancient as the year 624, for that was long before the erection of the bishopric of Ely, which was taken out of the diocese of Lincoln about the year 1111. Or else the archbishop here must have meant that the king, from his authority over the church here, and as visitor of the universities in right of foundation, should by his royal authority now establish it.

Furthermore, since it was declared to be the arch-

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bishop's right to visit metropolitically, and it was not limited by law how often, therefore the archbishop moved that notwithstanding the last custom of visitation was only once in the archbishop's time, he might by himself or his commissary visit the universities as often as any great emergent cause should move him; provided that neither he nor any of his successors should after the first visitation visit upon such emergent causes, unless it be first made known to his majesty and his successors.

All which was granted by the king and so settled.

Lastly, whereas it was alleged that the chancellors of either university were, and are like to be, persons of great honour and eminence, and therefore it might be inconvenient that they should be called to such visitation, it was declared by his majesty that in the course of law the chancellor would be allowed to appear by his proxy (*e*).

But Ayliffe (*f*) is indignant at this decision: he says, "It is allowed that the archbishop has power to visit the two universities metropolitically in matters relating to the doctrine and discipline of the Church of England, as for heresy and schism, but not for other crimes; and if he should attempt the same, he might be opposed. * * * * * * It is to be observed, that between Arundel and Laud there had been thirteen archbishops, among whom there was not any besides Cardinal Pole (who visited the university by his legatine authority) who pretended to revive their title to a metropolitical visitation or a legatine jurisdiction."

Exemption from 9 Geo. 2, c. 36.

By sect. 4 of 9 Geo. 2, c. 36, restraining gifts to charitable uses, it is provided that the same shall not extend to make void the dispositions of any lands, tenements, or hereditaments, which shall be made in other manner and form than in this act is directed, to or in trust for either of the two universities, or any of the colleges or houses of learning within the same; or to or in trust for the colleges of Eton, Winchester, or Westminster, for better support and maintenance of the scholars only upon the foundations of the said colleges of Eton, Winchester,

(*e*) The *ipsissima verba* of this decision, and a variety of illustrative matter, may be seen Collect. Br. Twyne, in Turr. Schol. Oxon. vol. vii. cited as Lib. Vis. in Wood's Annals, b. 1, 187, ed. Gutch, which contains also collections on the same subject. See Wilkins's Concilia, vol. iv., p. 528; also the Letters Patent founded on the foregoing judgments, and Vossius's Letter, ibid.

(*f*) Ayliffe's History of the University of Oxford, vol. ii. pp. 263, 264, part ii. ch. 5. See *Att.-Gen.* v. *Lady Downing*, Amb. 550; 3 Ves. jun. 714, and in the Opinions and Judgments by Lord Chief Justice Wilmot.

and Westminster (*g*). This proviso extends only to devises *bonâ fide* made to the actual colleges for their own benefit, and not in trust for other charitable purposes (*h*). It probably applies as well to colleges founded since the act as to the old ones (*i*).

The restrictive clause, sect. 5, as to the number of advowsons to be holden by a college, has since been repealed.

From other acts.

The universities and the colleges therein, and the colleges of Westminster, Eton and Winchester, are exempted from the operation of 43 Eliz. c. 4, and from the jurisdiction of the charity commissioners.

Elections.

The acts 33 Hen. 8, c. 27, and 31 Eliz. c. 6, as to elections into colleges, have been already set forth (*k*).

The following cases as to the election of fellows into colleges have occurred. They all turn on the construction of the old statutes:—

Marriott v. *Gregory* (*l*). Disputes as to elections in lay foundations are to be tried in the king's courts.

Rex v. *St. Catherine's Hall, Cambridge* (*m*). In the case of a private eleemosynary lay foundation, if no special visitor be appointed by the founder, the right of visitation, in default of his heirs, devolves upon the king, to be exercised by the great seal; on this ground the court refused to interfere by mandamus to compel the master and fellows to declare one of the fellowships vacant, and to proceed to a new election.

Rex v. *Gregory* (*n*). The court thought that a mandamus was the proper mode of trying the validity of an election to a vacant fellowship made by the fellows of Trinity Hall, Cambridge, which was disputed by the master.

In re Catherine Hall, Cambridge (*o*). In Catherine Hall, Cambridge, the election of fellows is to be "*communi omnium assensu aut saltem ex consensu magistri et majoris partis communitatis*;" and it was holden, that no election was valid in which the master did not concur.

In re Queen's College, Cambridge (*p*). The statutes of Queen's College, Cambridge, direct certain elections to

(*g*) *Vide supra*, Part VIII., Chap. II., Sect. 2, p. 1978.

(*h*) *Att.-Gen.* v. *Tancred*, 1 Eden, 15; Ambl. 351; *Att.-Gen.* v. *Munby*, 1 Mer. 327; *Whorwood* v. *Univ. College*, 1 Ves. sen. 53.

(*i*) *Att.-Gen.* v. *Bowyer*, 3 Ves. 728, n. 8.

(*k*) *Vide supra*, Part II., Chap. IV., Sect. 2, pp. 194—199.

(*l*) Lofft, 21.

(*m*) 4 T. R. 233.

(*n*) Ibid. 240, n. (*a*).

(*o*) 5 Russ. 85.

(*p*) Ibid. 65.

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be made by the president and the majority of the fellows; and it was holden that the concurrent voice of the president was necessary in all such elections. For a decision as to the form of admission of a president of this college, and as to the power of the crown to dispense with a restriction on the election of fellows and the presumption of such a dispensation, see *Case of Queen's College, Cambridge* (*q*).

In re Clare Hall, Cambridge (*r*). The statutes of Clare Hall, Cambridge, provide "that the election of a fellow shall be by the master and the major part of the fellows present;" and it was holden, that a valid election might be made without the concurrent voice of the master.

In re Gonville and Caius College, Cambridge (*s*). In Caius College, Cambridge, the election of a fellow is to be by the master and the major part of the fellows; and it was holden, that an election by the major part of the persons entitled to vote in the election is valid, though the master refuses to concur with them.

In re Downing College, Cambridge (*t*). Upon the true construction of the charter and statutes of Downing College, Cambridge, a person who is in holy orders is not ineligible to the office of master of the college, provided he has the other qualifications thereby prescribed. A further point was mooted in this case as to the election of the original fellows who were constituting the college, but was not expressly decided.

In re University College, Oxford (*u*), is a decision on the meaning of the words "*in sacerdotio constitutus*," and on another point now rendered immaterial by the general effect of modern university legislation.

In re St. Catherine Hall, Cambridge (*x*), is a decision on a question of the forfeiture of a fellowship.

Ex parte Edlestone (*y*). The new statutes of Trinity College, Cambridge, given by the crown in 1844, re-enact the provision in the original statutes of Elizabeth as to the Regius Professor of Greek, and repeal certain letters-patent of Charles II.; so that now, as before the time of Charles II., any fellow of Trinity College who becomes professor of Greek "*Socii nomen solum tenet.*"

There does not appear to be any case where the construction of any of the new codes of statutes given to the colleges by the university commissioners has been brought

(*q*) Jac. 1.
(*r*) Ibid. 73.
(*s*) Ibid. 76.
(*t*) 3 My. & Cr. 642.
(*u*) 2 Phillips, 521.
(*x*) 1 M. & G. 473.
(*y*) 3 De G. M. & G. 742.

before the law courts; but in several instances these new codes have given matter of appeal to the college visitor—notably in the case of All Souls College, Oxford—where there have been two appeals and two formal hearings, one of which is reported (*z*).

Ex parte Buller (*a*), is a case of an expulsion of a fellow, where a mandamus was sent to the visitor to hear the case; but on his deciding in favour of the expulsion a mandamus to the college to restore the fellow was refused.

Reg. v. *Dulwich College* (*b*), is an important case on the election of a warden for that college: in which the right of a founder of an incorporated college to make subsequent ordinances for the government of the college under a power reserved by the letters-patent, and by these ordinances to introduce strangers to the corporation as electors of the members of the corporation, is asserted and most carefully determined.

Preference given to founder's kinsmen.

Several founders of colleges have, in their statutes for the government of the said colleges, given a certain degree of preference, in the election of scholars or others, to those of their own blood. Concerning which there has been much dispute. But as the effect of the University Commission Acts and the subsequent legislation of the commissioners has been to abolish this preference in all the then existing cases, the learning on this subject has become almost obsolete (*c*). It is, however, possible that such a preference may be created in a modern benefaction; and this has actually been done in the case of the Fereday Scholarships at St. John's College, Oxford.

(*z*) *Watson* v. *All Souls' College*, 11 L. T., N. S. 166; see also *Att.-Gen.* v. *Sidney Sussex College*, 34 Beav. 651; 4 L. R., Ch. App. 722.

(*a*) 1 C. L. R. 534; 1 Jur., N. S. 709; *vide supra*, p. 2012.

(*b*) 17 Q. B. 600; 16 Jur. 654; see *Att.-Gen.* v. *Dulwich College*, 4 Beav. 255.

(*c*) Much of it may be found in Blackstone on Collateral Consanguinity; and see Report of the Appeal from the College of All-Souls to the Archbishop of Canterbury, in 1762, reported in Lord Chief Justice Wilmot's opinions and judgments, p. 163; the assessors in this case were, Sir J. E. Wilmot, one of the justices of the Court of Queen's Bench, and George Hay, D.C.L., vicar-general to the Archbishop of Canterbury; and of an appeal preferred by the provost and scholars of King's College, Cambridge, against the provost and fellows of Eton College, to the Lord Bishop of Lincoln, visitor of both societies, edited by P. Williams, Esq., 1816; the assessors were, Sir W. Grant, Master of the Rolls, and Sir W. Scott, judge of the Consistory of London; see also an Appeal to the Lord Bishop of Winchester, visitor of St. Mary Winton Colleges, edited by J. Phillimore, D.C.L., 1839, the assessors were, Mr. Justice Patteson and Dr. Lushington, Judge of the Consistory of London.

Principle derived from canon law.

The same or a closely analogous principle as to the preference of founders' kin is to be found in foreign charitable foundations. This principle may be clearly traced to the canon law as its fountain. "Benefactors to churches," (observes Bishop Gibson (*d*)), "and much more they who founded and endowed, had a title to maintenance if they or their sons came to poverty. "*Quicumque fidelium devotione propriâ de facultatibus suis Ecclesiæ aliquid contulerint, si forte ipsi, aut filii eorum reducti fuerint ad inopiam, ab eâdem Ecclesiâ suffragium vitæ pro temporis usu percipiant*" (*e*). To the same respect for natural feelings may be referred the preference given to inhabitants of the counties and dioceses in which the property of colleges is situated, and which do not benefit by the residence of the proprietors.

Preference to particular places.

Assignment of fellowship.

A fellowship may be assigned by the fellow, and the Court of Chancery will thereupon appoint a receiver of the profits of the fellowship (*f*).

Advowsons of papists.

The statutes giving the presentations to livings, the advowsons whereof are in the hands of papists, to the universities have been already mentioned (*g*).

Licence to preach.

By Canon 36 of 1603, the universities have a concurrent power with the archbishops and bishops, in granting licences to preach.

Title for orders.

By Canon 33 "No person shall be admitted into sacred orders, except he shall exhibit to the bishop a presentation or certificate, that he is provided of some church wherein to officiate: or that he is a fellow, or in right as a fellow, or to be a conduct or chaplain in some college in Cambridge or Oxford, or except he be a master of arts of five years standing, that liveth of his own charge, in either of the universities, or except he be to be admitted by the bishop himself to some benefice or curateship then void" (*h*).

What degrees are requisite for plurality.

By Canon 41. No licence or dispensation for the keeping of more benefices with cure than one, shall be granted to any, but such as shall have taken the degree of a master of arts at the least in one of the universities of this realm.

Pluralities.

By 13 & 14 Vict. c. 98, s. 5, deans of cathedrals are not to hold the office of heads of colleges or halls; and by sect. 6, heads of colleges or halls are not to hold a cathedral preferment and a benefice with their headship, unless either of them, the preferment or the benefice, are attached

(*d*) Vol. i. p. 188.

(*e*) Caus. 16, qu. 7, c. 30.

(*f*) *Feistel* v. *King's College, Cambridge*, 10 Beav. 491; see *Grenfell* v. *Dean, &c. of Windsor*, 2 Beav. 550; *supra*, p. 1723.

(*g*) *Vide supra*, Part II., Chap. XI., Sect. 3, pp. 394—400.

(*h*) *Vide supra*, Part II., Chap. III., Sect. 6, p. 119.

to and form part of the endowment of the headship (*i*). The saving in 1 & 2 Vict. c. 106, s. 38, of certain persons holding university and similar preferments from the operation of the laws as to residence of the clergy has been already set forth (*j*).

Residence.

The provisions in 17 Geo. 3, c. 53, 1 & 2 Vict. c. 23 and 1 & 2 Vict. c. 106, enabling colleges to lend money to the incumbents of benefices in their patronage to enable them to build houses of residence have been already mentioned (*k*).

Residence houses.

Colleges in Oxford and Cambridge, and the Colleges of Eton and Winchester, may augment vicarages whereof they are rectors by the grant of the tithes or a portion thereof, like other rectors under 1 & 2 Will. 4, c. 45 (*l*).

Augmentation of vicarages.

By 3 & 4 Vict. c. 113, s. 69, it is provided that, "So soon as conveniently may be, and by the authority hereinafter provided, such arrangements may be made with respect to benefices which are annexed by act of parliament or otherwise to the headships of colleges in the universities of Oxford and Cambridge, as may enable the respective colleges, if they shall think fit, to sell, or themselves to purchase, the advowsons of such benefices, and to invest the proceeds in proper securities, with provisions for the payment of the interest and annual profits thereof to the respective heads of the colleges for the time being; and that upon the completion of the said arrangements respectively the existing incumbents of such benefices respectively shall be at liberty, upon resigning the same, to receive the interest and annual profits of the proceeds arising from such sales respectively" (*m*).

Power to dissever benefices from headships of colleges.

And by 23 & 24 Vict. c. 59, s. 7, this section "shall be construed to extend to and shall include as well benefices with cure of souls, as ecclesiastical rectories, prebends, and other preferments without cure of souls, advowsons, and rights of patronage, whether exclusive or alternate, impropriate rectories, and other lands and hereditaments, annexed or belonging to or held either wholly or partly by, or in trust for, any of the universities of Oxford, Cambridge and Durham, or any college therein respectively, or either of the colleges of St. Mary of Winchester, near Winchester, and of King Henry the Sixth at Eton, or

Extension of this power.

(*i*) *Vide supra*, pp. 1176, 1177.

(*j*) *Vide supra*, p. 1150.

(*k*) *Vide supra*, Part V., Chap. II., Sect. 1, pp. 1475, 1476.

(*l*) *Vide infra*, Part IX., Chap. IV.

(*m*) By s. 70, the benefices annexed to the regius professorship of divinity at Cambridge are to be sold.

23 & 24 Vict. c. 59, s. 7.

the head or any other member of any such college, and also to extend to and to include and to authorize sales by each of the same universities, as well as each of the colleges therein respectively and the said colleges of St. Mary of Winchester, near Winchester, and of King Henry the Sixth at Eton; and shall also be construed to enable the said universities or colleges to sell advowsons of benefices, the patronage whereof shall be vested in any person or persons in trust for any of the said universities or colleges or for the benefit of the head or any other member thereof respectively; and also to authorize, under the authority hereinafter mentioned, the annexation of the whole or any part of the lands or other hereditaments or endowments belonging to any such ecclesiastical rectory, prebend or other preferment without cure of souls, impropriate rectories, and other lands and hereditaments aforesaid, or the application of the proceeds or any sale thereof; and also the application of the proceeds of any sale of advowsons and rights of patronage or any part of the proceeds of any such sales which may be made under the said section of the said last-mentioned act, or "The Universities and College Estates Act, 1858" (*n*), or under any other authority, or of any monies, stocks, funds, or securities belonging to such university, college, head, or member by way of endowment or augmentation of any benefice with cure of souls, the patronage whereof shall belong to or be held in trust for or for the benefit of such university or college, or the head or other member thereof. Provided nevertheless, that the powers conferred by this clause shall not be exercised to the prejudice of the existing interest of any such head or other member of a college without his consent: and in case of any diminution being occasioned in the income of any such head or other member of a college by any sale, annexation, purchase or investment that may be made under the provisions of the said acts, arrangements may be made under the like authority for giving to such head or other member adequate compensation for such diminution of his income out of the revenues of such college, or out of the proceeds of any such sale or investment, and the said section of the said last-mentioned act shall extend to authorize under the like authority the purchase out of any of the corporate funds or revenues of any such university or college of advowsons of benefices, and also of any rights of perpetual presentation or nomination to benefices, whether such benefices be or be not

(*n*) 21 & 22 Vict. c. 44.

annexed to or held by or in trust for any of the said universities, or any such college as aforesaid, or the head or other member of any such college, to be added to those in the patronage of such university or college; and the words "colleges" and "college" in the said section of the said last-mentioned act, shall include cathedral or house of Christ Church in Oxford, and the words, "proper securities" in the same section, shall be construed to extend to authorize and shall include the purchase of lands in fee simple; and also an investment on any of the parliamentary stocks or public funds of Great Britain; and all such securities, lands, and stocks or funds shall be settled, held, applied or disposed of in such manner as by the university or college effecting such sale, purchase, or investment, and by the like authority, shall be arranged and determined in that behalf; and every endowment or augmentation which shall be made by any university or college of any benefice with cure of souls under the authority of this section, or by virtue of the provisions of 1 & 2 Will. 4, c. 45 (*o*), or any other act or acts of parliament, shall be valid notwithstanding the clear annual value of such benefice shall, at the time of such endowment or augmentation, exceed or be thereby made to exceed the limits prescribed by section 16 of the said act, or any other act or acts of parliament: Provided that no such augmentation or endowment, beyond the clear annual value of five hundred pounds shall be made under the said act, except with the consent of the ecclesiastical commissioners for England (to be testified by writing under their common seal) in addition to such other consent as may be otherwise required thereto."

By sect. 8, provision is made as to the right of patronage in the severed benefice; by sect. 9, the provisions of the Lands Clauses Consolidation Act (*p*) is incorporated, and by sect. 10 the ecclesiastical commissioners are constituted "the authority" for the purposes before mentioned.

Power to divert to other uses money holden for purchase of advowsons.

By 20 & 21 Vict. c. 25, s. 3, "It shall be lawful for any college within the university from time to time, with consent of the visitor, to appropriate and apply any property, or the income of any property, held by or in trust for the college, for the purpose that the same, or the income thereof, may be applied in purchasing advowsons for the benefit of the college, to the augmentation of the endowment of livings in the patronage of the college to such an amount as may be by law allowed, or towards the building of fit and suitable parsonage houses on any livings in the

(*o*) *Vide supra*, p. 2027. (*p*) 8 Vict. c. 18.

patronage of the college, or to the foundation or augmentation of scholarships or exhibitions or to other purposes for the advancement of religious learning and education within the college; and in exercise of this power the college may annex to any living in the patronage of the college (by way of augmentation of the endowment of such living) any tithe rent-charge which may be vested in the college, or any portion thereof, in consideration of the appropriation to other purposes of the college of a part of the trust property or income not exceeding the amount which the visitor shall adjudge to be an adequate consideration for the tithe rent-charge to be annexed; provided that this power shall not extend to property or income applicable to the purchase of advowsons for the benefit of scholars or exhibitioners on any particular foundation within a college."

Canonries at Ely.

By sect. 12 of 3 & 4 Vict. c. 113, two canonries in the cathedral church of Ely are to be annexed to the regius professorships of Hebrew and Greek; and by sect. 15, it is enacted that provisions respecting the suspension of canonries shall not extend to any canonry in the chapter of Ely which may be annexed to any professorship.

First fruits and tenths.

By 1 Eliz. c. 4, for the restitution of first fruits and tenths to the crown, it is provided, that all grants, immunities and liberties given to the universities of Cambridge and Oxford, or to any college or hall in either of them, and to the colleges of Eton and Winchester, by King Henry the Eighth or any other of the queen's progenitors or predecessors, or by act of parliament, touching the release or discharge of first fruits and tenths, shall be always and remain in their full strength and virtue.

Land tax.

By 38 Geo. 3, c. 5, ss. 25, 26, it is provided, that the same shall not extend to charge any college or hall in either of the two universities of Oxford or Cambridge; or the colleges of Windsor, Eton, Winton, or Westminster; or the college of Bromley: for or in respect of the sites of the said colleges or halls, or any of the buildings within the walls or limits thereof; or any master, fellow, or scholar, or exhibitioner of any such college or hall, or any masters or ushers of any school, for or in respect of any stipend, wages, rents, profits, or exhibitions whatsoever, arising or growing due to them, in respect of the said several places or employments in the said universities, colleges or schools; or to charge any of the houses or lands, which on or before March 25th, 1693, did belong to the sites of any college or hall. Provided, that nothing herein shall be construed or taken to discharge any tenant of any of the houses or lands belonging to the said colleges,

halls or schools, who by their leases or other contracts are obliged to pay all rates, taxes and impositions whatsoever, but that they shall be rated and pay all such rates, taxes and impositions. Provided also, that all such lands, revenues or rents, settled to any charitable or pious use, as were assessed in the fourth year of the reign of William and Mary, shall be liable to be charged; and that no other lands, tenements or hereditaments, revenues or rents whatsoever, then settled to any charitable or pious uses, as aforesaid, shall be charged.

The provisions in 42 Geo. 3, c. 116, ss. 17, 78, for redemption and sale of the land-tax by *colleges* and other patrons of livings have been already mentioned (*o*).

In *All Souls College, Oxford*, v. *Costar* (*p*), it was holden, that the buildings of a college, taken into and made part of the college between the passing of the first land-tax act and the act which made that tax perpetual, were exempted from the land tax. But where a college, soon after the passing of the first land-tax act, purchased land of a parish under a private act of parliament, which provided that the college should pay all taxes which the premises then were or hereafter should be subject to, such lands were still liable to the land tax.

Real estates.

As to the administration of the real estates of colleges it will be sufficient to give a short summary of the law. Colleges, like other corporations, had at common law a right to deal with their property as they pleased (*q*). They were, however, made subject to the various statutes of Elizabeth restraining ecclesiastical corporations from alienating or even letting their lands except in the manner therein mentioned (*r*). They have not been included in the enabling leasing statutes of Victoria (*s*); but have been enabled now to sell or let their lands under the provisions of certain special acts, which may be thus summarized.

By 19 & 20 Vict. c. 95, and 19 & 20 Vict. c. 88, s. 48, power was given to the colleges of Oxford and Cambridge to sell their lands with the consent of the Church Estate Commissioners. These provisions were however repealed by 21 & 22 Vict. c. 44, s. 5.

Power, with consent of

By the Universities and Colleges Estates Acts, 1858 and 1860 (*t*), the universities of Oxford, Cambridge, and

(*o*) *Vide supra*, Part V., Chap. VIII., Sect. 2, pp. 1737, 1740.

(*p*) 3 Bos. & Pul. 635.

(*q*) Kyd on Corporations (ed. 1793), 108.

(*r*) *Vide supra*, Part V., Chap. VI., Sect. 1.

(*s*) Ibid. Sect. 3.

(*t*) 21 & 22 Vict. c. 44; 23 & 24 Vict. c. 59.

copyhold commissioners, to sell or exchange.

Durham, the colleges therein including Christ Church Oxford, and the colleges of Eton and Winchester may sell or exchange lands and may enfranchise copyholds (except reversions after leases for lives in certain cases) with the consent of the copyhold commissioners (*u*); and the money received on account of such sale, exchange or enfranchisement is to be invested in government securities and applied to the purchase of other lands. This power is extended to lands holden in trust or for special endowments; and individual members of an university or college in whom lands are vested on trusts for the university or college may, with the consent of the copyhold commissioners, transfer these lands to the university or college.

To accept surrenders of leases.

Powers are also given to accept surrenders of leases in consideration of annual payments to be made to the lessees, and to sell to or exchange with lessees, provisions being made for the apportionment of rent in certain cases and for the interests of under-lessees. With the consent of the copyhold commissioners, money may be raised on mortgage for the purchase of leases, for compensation for loss on fines on account of the non-renewal of leases, and for repair and augmentation of the corporate buildings.

To raise money.

In all cases where lands have been leased at rack rent they are henceforward to be leased in that way and not upon fines.

To lease for long terms.

Power is given to lease all lands and hereditaments (except the college buildings and mines underneath them, or any easement which would be injurious to the college buildings) for a term not exceeding twenty-one years at rack rent, to grant building and repairing leases for a term not exceeding ninety-nine years, to appropriate parts of lands for streets and squares, to make leases of wayleaves and waterleaves, to dispose of brick earth and to grant mining leases for a term not exceeding sixty years; and various provisions are inserted for the better carrying into effect of these powers.

In the cases of mining leases and licences or leases for brick earth, one-third only of the rents or royalties are to be applied in the way of ordinary income, and the other two-thirds are to be employed in the purchase of lands, in the erection of new buildings, and otherwise as capital and not in the nature of income.

As to copyholds.

Certain provisions in the Copyhold Acts, 1852 and 1858 (*x*), are amended in cases where manors belonging to

(*u*) *Vide supra*, p. 1590.

(*x*) 15 & 16 Vict. c. 51; 21 & 22 Vict. c. 94.

the university or college are in lease; and power is given to substitute lands or tithes in lieu of annual rents or payments charged on lands and hereditaments belonging to the university or college under 17 & 18 Vict. c. 84.

These acts repeal the provisions in 18 Eliz. c. 6, that in all leases some part of the rent reserved shall be made payable in coin; and they provide that nothing contained in them shall be taken to restrain any existing powers enjoyed by the universities or colleges.

Eton and Winchester.

By 31 & 32 Vict. c. 118, ("The Public Schools Act, 1868"), s. 24, a distinct provision is made for special schemes to be framed under that act, dealing with the estates of Eton and Winchester colleges in such a way as to bring the property under a system of leases at rack-rent, due compensation being made to the existing corporators for any present loss of income which they may thereby sustain.

CHAPTER V.

SCHOOLS.

SECT. 1.—*Origin and kinds of.*
2.—*Ecclesiastical Jurisdiction over Grammar Schools.*
3.—*Position of Dissenters in Grammar Schools.*
4.—*Recent Legislation.*

SECT. 1.—*Origin and kinds of.*

Origin of schools.

IT has been observed in the last Chapter that the earliest origin of universities is to be traced to the schools which grew up under the shelter of the church. The general establishment of universities throughout Europe overshadowed these humbler seminaries of religious and useful learning, and were occasionally designated by their name. We find after the tenth century the appellations of "*schola*" and "*studium generale*" applied by contemporary writers to the universities which were yet in their infancy. But during the earlier centuries of the Christian era, the schools of the church were, in this country particularly, but indeed in all with very few and special exceptions, the sole source of education. The school which obtained the earliest celebrity was that of Alexandria, which numbered among its disciples St. Athanasius, and among its preceptors Origen. Thomassin says, that in this school "*literæ humaniores*" were taught as well as the Scriptures. Theodoret bestows great praise on a similar institution at Edessa. During the sixth, seventh and eighth centuries, from the time of Clovis to Charlemagne, there appear to have been four distinct kinds of schools more or less prevalent, not only in Europe, but in such parts of Asia and Africa as had witnessed the establishment of the church. 1. Schools in the parochial districts. 2. Schools in bishops' houses. 3. Schools in monasteries. 4. The school of the archdeacon, which seems to have been peculiar to Africa. In

(*a*) Thomassini Vetus et Nova Ecclesiæ Disciplina, vol. i. pt. ii. cc. 90—100.

these schools were educated not merely those who were destined to discharge clerical functions, but all those who were to be employed in any civil offices of the state (*b*). Charlemagne (*c*), whose palace (*d*) was a seminary of all the learning which the age afforded, sent a circular letter to his bishops ordaining the general institution of schools throughout their dioceses, in order that the clergy being imbued (*e*) with the language of classical literature might the better be able to study the Holy Scriptures.

The capitularies of Louis the Debonnaire (823) contain directions that what were subsequently called the four faculties—namely, Theology, Law, Medicine and the Arts—should be taught in these schools, and about this time the Decretals of Gratian began to form a regular branch of study in the schools of monasteries and cathedrals. During the sixth, seventh and eighth centuries, the schools of Rome appear (*f*) to have served as a model for the rest of Europe, and especially for these islands. Thomassin cites with approbation the remark of Bede, that the discipline and studies of our schools were borrowed immediately from those of Ireland or France (*g*), of which the Roman school was the acknowledged archetype. The most flourishing epoch of the Anglican schools was, according to Bede, during the seventh century, while under the superintendence of Theodorus, Archbishop of Canter-

Anglican schools.

(*b*) There is a remarkable passage in a letter of Gregory of Tours, who writing about the studies pursued by the son of a senator, and a slave who was his schoolfellow, observes, "nam de operibus Virgilii, Legis Theodosianæ libris, arteque calculi apprimè eruditus est."

(*c*) See also the canon on this subject by Eugenius the Second, soon after the time of Charlemagne. Dist. 37, c. 12; and another ancient canon, Extra. l. 3, t. 1, c. 2.

(*d*) Erat ipsius Caroli palatium schola longè splendidissima, sedes potissima in quâ humanæ omnes divinæque literæ efflorescerent.

(*e*) "Quarum subsidio freti" is the expression cited by Thomassin, c. 96, s. 8, c. 2.

(*f*) Thomassin, citing Joannes Diaconus, the biographer of Gregory the Great, says, "Tunc, rerum sapientia Romæ sibi templum visibiliter quodammodo fabricarat, &c. &c., refloruerant ibi diversarum artium studia, &c." Vol. iii. l. i. c. 95, s. 3.

(*g*) "Conveniebat olim mirum in modum Angliæ Ecclesia cum Romanâ, Oswaldus Rex ex Hibernia arcessivit in Angliam sanctissimum episcopum," whom he placed at Lindisfarn. "Ex hâc scilicet scholâ Hiberni monachi ecclesiasticæ sapientiæ et disciplinæ fontes in omnem Angliam derivârunt, &c. ita episcopales et monasticæ scholæ cœperunt nec injucundè nec infructuosè immisceri;" and again Sigebert, king of East Anglia, "ea quæ in Gallos bene disposita vidit imitari cupiens, instituit scholam in quâ pueri litteris erudirentur, juvante se episcopo." See Thomassin, ut sup.; and Bede, lib. iii. s. 2, c. 27.

bury (*h*), whom Pope Agatho, writing to the sixth General Council, entitles, "*Τῆς μεγαλῆς νήσου Βρεταννίας Ἀρχιεπίσκοπον καὶ φιλόσοφόν.*" Bede enumerates Astronomy, Poetry and Arithmetic, among the elements of ecclesiastical instruction as administered in the age in which he lived, and of whose good effects he himself was the most remarkable example (*i*).

Schools after the 12th century.

The history of schools from the close of the eighth to that of the twelfth century is involved in considerable obscurity, but it would appear from the language of the Lateran Councils, enjoining the appointment of schoolmasters to be licensed by the bishop, in all monasteries and cathedrals, that they had fallen into considerable neglect. From the close of the twelfth century the universities became a sort of higher school for those who had derived the rudiments of instruction from the cloister (*k*). The chief provisions of the Councils of Lateran (*l*) have been incorporated in the ecclesiastical law of England, and any body consulting the Concilia of Spelman (*m*) will see that the practice of the church in this country was always in accordance with the spirit of the orders respecting schools contained in these Councils. The injunctions issued by Queen Elizabeth at the beginning of her reign, and the canons of 1571 and 1603, as will be seen in the course of this chapter, were to the same effect. It was doubtless with reference to these considerations, that Lord Keeper

(*h*) Thom. vol. ii. l. i. c. 95, s. 12.

(*i*) "Hæc omnia approbabit Beda exemplis meliuscule suis quam verbis. Æterna enim omnium harum disciplinarum monumenta ille ad nos transmisit, etsi jam inde a puero in monasteriis enutritus fuerit." Thom. ubi supra, s. 12.

(*k*) The language of Thomassin on this subject is very remarkable: "His accessêre concilia Lateranensia III. IV. ubi instituti grammaticæ et theologiæ lectores in omnibus ecclesiis metropolitanis et cathedralibus. *Cœpêre etiam increbescere universitates veluti cleri luculenta seminaria.* Quia et beneficiorum pars non mediocris gradibus universitatum dedicata fuit, et his quidam machinis expugnata est ignorantia." Thom. pt. ii., l. i. c. 91, s. 7.

(*l*) In the third Council of Lateran (1139), holden under Alexander the Third, the following Constitution was made and afterwards inserted in the body of the canon law. (Extra. l. v. t. 3, c. 1.) "Quoniam ecclesia Dei sicut pia mater providere tenetur ne pauperibus, qui parentum opibus juvari non possunt, legendi et proficiendi opportunitas per unamquamque cathedralem ecclesiam *magistro* qui clericos ejusdem et *scholares pauperes gratis* doceat competens aliquod beneficium præbeatur." This constitution was enlarged and confirmed by the fourth Lateran Council under Innocent the Third (1215).

(*m*) Spelman, vol. i. p. 595; vol. ii. pp. 42, 126.

Wright said, "I always was and still am of opinion that keeping of schools is by the old law of England of ecclesiastical cognizance (*n*)." So Bishop Gibson observes, "the truth is, in our records before the Reformation schools are often spoken of as *ecclesiastical* places, and the possession of them in *ecclesiastical* terms. So, where archbishops or bishops were patrons, the grant of them is styled *collation* (*o*)."

Of ecclesiastical cognizance in England.

In England, the names free school, endowed school and grammar school, are often used without discrimination. But they have distinct significations.

Different kinds of schools in England.

A free school, to speak strictly, is any school in which elementary instruction is gratuitously afforded, or very nearly so, to the children of a particular locality, whether the funds be supplied by private subscriptions, as in many of our parochial schools, or, as in some corporate towns, from the property of the corporation.

Free schools.

Endowed schools are those of which the whole or principal expenses are defrayed out of endowments bequeathed by the munificence of their founder.

Endowed schools.

Grammar schools are also endowed schools, but to which the constitution of their founder has annexed the condition that classical instruction shall form either the whole or a large portion of the education which they impart. These schools are no insignificant characteristic of the genius of this country. It is said that Spain is the only other kingdom in Europe which affords any similar instance of the existence of a large and wealthy class of national institutions, governed entirely by the original laws of their respective founders, with the exception of a few cases in which they have been modified by the tribunals of parliament or of courts of justice. After the Reformation the fortunes of the endowed grammar schools underwent considerable vicissitudes, for this event abolishing the use of Latin in the services of the church, rendered the knowledge of that language an attainment of less necessity and an object of less desire than it had hitherto been. The grammar schools situated in populous and wealthy towns, or those which afterwards became so, retained their importance; and many also were preserved by their connection with the universities, and the great advantages which they offered (*p*) in the shape of fellowships, scholarships

Grammar schools.

(*n*) *Vide infra*, p. 2042.

(*o*) Gibs. vol. ii. p. 1100, note.

(*p*) It is said by Mr. Carlisle, in his work on this subject, that out of 500 free and endowed, about 150 have these advantages. Since that time many of these preferences have been abolished by the University Commission Acts.

and exhibitions to those whom they educated. Those schools to which their founders had not annexed the condition of instruction in the dead languages have remained for the most part as charity or gratuitous schools of elementary education. The greater part of the schools now existing in this country have indeed been founded during the sixteenth and seventeenth centuries, when the liberal charity of individuals in some measure supplied the grievous deficiency of education occasioned by the spoliation of cathedrals and monasteries, and the confiscation of ecclesiastical property. Some, however, of the schools which most flourished in England, and have obtained the general appellation of public schools, are of considerable antiquity; some, like Eton and Westminster, being the fruit of royal, and some, like Winchester and the Charter House, of private munificence.

Foundation of grammar schools in England.

Relation to colleges.

Some of these schools are colleges, or parts of colleges, as Eton, Westminster, Winchester, Dulwich; some are hospitals, as Christ's Hospital, Sutton's Hospital (the Charter House), Emmanuel Hospital. Winchester was included under the Oxford University Commission Acts and Eton under the Cambridge ones (*r*). Both colleges are legislated for in the Universities and Colleges Estates Acts (*s*). Provisions as to the Westminster studentships at Christ Church, Oxford, are made by 30 & 31 Vict. c. 76, and as to the scholarships of the same school at Trinity College, Cambridge, by 19 & 20 Vict. c. 88, s. 36, and a subsequent order in council.

Erection of school in churchyard.

Faculties have recently been granted for the erection of schools on portions of churchyards, though at one time it seems to have been thought that they could not be built on consecrated ground (*t*).

Application of land not wanted for church.

3 & 4 Vict. c. 60, s. 19, as extended by 4 & 5 Vict. c. 38, s. 19, empowers the church building commissioners to apply land in any parish granted to them for any of the purposes of the Church Building Acts, "for the purpose of any parochial or charitable school."

Empowering grants of sites.

Several acts have been passed to enable bodies corporate and persons under disability to convey land for sites of schools for the education of poor children (*u*).

By 15 & 16 Vict. c. 49, reciting these acts, it is enacted that, "All the provisions contained in the said recited acts or any of them in relation to the conveyance and endow-

(*r*) *Vide supra*, p. 1990.

(*s*) *Vide supra*, pp. 2031—2033.

(*t*) *Vide supra*, p. 1783.

(*u*) 4 & 5 Vict. c. 38 (repealing 6 & 7 Will. 4. c. 70); 7 & 8 Vict. c. 37; 12 & 13 Vict. c. 49; 14 & 15 Vict. c. 24.

ment of sites for such schools as are contemplated by the provisions of the said acts respectively, shall apply to and be construed to be applicable to the cases of such schools as hereinafter specified; (that is to say) schools or colleges for the religious or educational training of the sons of yeomen or tradesmen or others, or for the theological training of candidates for holy orders, which are erected or maintained in part by charitable aid, and which in part are self supporting, in the same or the like manner as if such schools or colleges as last aforesaid had been expressly specified in the said act, 4 & 5 Vict. c. 38, and the said subsequent acts, and the same or the like powers had been thereby given for or in relation to the conveyance and endowments of sites for such schools or colleges, and for the residences of schoolmasters, or otherwise in connection therewith, as are by the said acts given for or in reference to the conveyance and endowment of sites for schools falling within the provisions of those acts: provided always, that no ecclesiastical corporation, sole or aggregate, shall be authorized to grant any site under this act, except for schools or colleges which shall be conducted upon the principles of and be in union with the Church of England and Ireland as by law established; and that no ecclesiastical corporation, aggregate or sole, shall grant by way of gift, and without a valuable consideration, for any of the purposes of this act, any greater quantity of land in the whole than two acres; and that no other person or persons or corporation not coming within the class or description of persons empowered by the second section of the said act of the fourth and fifth years of the reign of her present Majesty to convey land for sites as therein mentioned, shall grant, by way of sale for a valuable consideration for any of the purposes of this act, any greater quantity of land in the whole than two acres, or shall grant any land whatever for any of the purposes of this act by way of gift and without a valuable consideration, anything in the said recited acts or hereinbefore contained to the contrary notwithstanding."

Sites of colleges for sons of tradesmen and theological colleges.

By the old law a grammar school was holden to be so strictly intended for the purpose of teaching the learned languages, that it would be an alteration of the object of the charity to divert part of the funds to teaching modern languages or sciences. This rule was afterwards somewhat relaxed. But the great change was effected by 3 & 4 Vict. c. 77, which enabled courts to make schemes extending or altering the course of education, altering the terms of admission, and the appointment of the masters.

Law as to education in grammar schools.

Exemptions from this act.

By sect. 24, however, certain foundations are exempted from the operation of this act, viz., "the Universities of Oxford or Cambridge, or any college or hall within the same, or the University of London, or any colleges connected therewith, or the University of Durham, or the college of Saint David's or Saint Bee's, or the grammar schools of Westminster, Eton, Winchester, Harrow, Charter House, Rugby, Merchant Taylors, Saint Paul's, Christ's Hospital, Birmingham, Manchester, or Macclesfield, or Louth, or such schools as form part of any cathedral or collegiate church."

SECT. 2.—*Ecclesiastical Jurisdiction over Grammar Schools.*

Queen Elizabeth, in an injunction set forth in the first year of her reign, ordains that "no man shall take upon him to teach, but such as shall be allowed by the *ordinary*, and found meet as well for learning and dexterity in teaching, as for sober and honest conversation, and also for right understanding of God's true religion (*x*).

Licence, by Canon 77 of 1603.

By Canon 77 of 1603, no man shall teach either in public school or private house, but such as shall be allowed by the bishop of the diocese, or ordinary of the place, under his hand and seal; being found meet, as well for his learning and dexterity in teaching, as for sober and honest conversation, and also for right understanding of God's true religion: and also, except he first subscribe simply to the first and third articles in the thirty-sixth canon, concerning the king's supremacy and the Thirty-Nine Articles of religion, and to the two first clauses of the second article concerning the Book of Common Prayer, viz. that it contains nothing contrary to the word of God, and may lawfully be used.

Cory v. *Pepper*.

And in *Cory* v. *Pepper*, in 30 Car. 2, a consultation was granted in the Court of King's Bench, against one who taught without licence in contempt of the canons; and (the reporter says) the reason given by the court was, that the canons of 1603 are good by the statute 25 Hen. 8, c. 19, so long as they do not impugn the common law, or the prerogative royal (*y*).

Cox's case.

The argument in *Cox's case* seems to contain the substance of what has been alleged on both sides in this matter, and concludes in favour of the ecclesiastical juris-

(*x*) Spar. Col. p. 78; Inj. 40; Gibson's Cod. vol. ii. p. 1099, note.

(*y*) 2 Lev. 222; Gibs. 995.

diction. The case occurred in the year 1700, in the Court of Chancery. Cox was libelled against in the spiritual court at Exeter, for teaching school without licence from the bishop; and on motion before the lord chancellor, an order was made that cause should be shown why a prohibition should not go, and that in the meantime all things should stay. On showing cause, it was moved to discharge the said order, alleging, that before the Reformation this was certainly of ecclesiastical jurisdiction (*z*); and in proof thereof, was cited the 11th canon of the council of Lateran, holden in the year 1215, which canon has been received by custom in this kingdom, and so made part of our ecclesiastical laws; that the statute 1 Eliz. c. 1, having restored the spiritual jurisdiction to the crown, which had been usurped by the pope, immediately thereupon the queen set forth ecclesiastical injunctions, one of which was, that no man should teach school without being allowed thereto by the ordinary; that it must be admitted, these injunctions were not confirmed by any act of parliament, but their being referred to and mentioned in 5 Eliz. c. 1, was an argument that the legislature did approve them; that in the 12th year of that queen, the said injunctions (and amongst them, this of teaching school without licence from the ordinary) were, by the convocation then sitting, turned into canons; that afterwards the statute of the 23 Eliz. c. 1, was the first statute that prohibited it; since which, two others had followed, but none of them tended to destroy the ecclesiastical jurisdiction,—only, by making the offence punishable in both courts, gave a remedy where there was none before; that in the first year of King James, the convocation met, which reduced all the canons into one body, and then particularly made this canon, that none should teach school without licence from the ordinary; and though it might be difficult to prove that these canons were directly confirmed by act of parliament, yet there was a sort of confirmation of them in the statute 4 Jac. 1, c. 7, for the founding and incorporating a free grammar school at North-Leech, in the county of Gloucester, whereby the provost and scholars of Queen's College in Oxford were to nominate the schoolmaster and usher of the said school, and to make such ordinances for the government thereof as they should see meet, so that the same were not repugnant to the king's prerogative, to the

By Council of Lateran and by statute law.

(*z*) *I.e.* the 4th Council of Lateran. See s. xviii. of 3rd Council of Lateran, A.D. 1179, p. 1518, v. x. fol. ed. of Councils, printed at Paris, and remarks in preface to this chapter.

Cox's case.

laws and statutes of the realm, or to any ecclesiastical canons or constitutions of the Church of England. But on the other side, it was answered, that there could not be one canon or precedent before the Reformation cited to prove the keeping of school to be of ecclesiastical cognizance; for that supposing the council of Lateran to have been in every part thereof received in England, yet the canon cited did not prove the point for which it had been produced, that canon only appointing schoolmasters in every cathedral church, and such schoolmasters to be licensed by the bishop; which was but reasonable, namely, that he who taught in the bishop's church should be approved of by the bishop; that the teaching of school was not in the nature thereof spiritual; and it would be hard to affirm that it was of ecclesiastical jurisdiction, or cognizable by the old ecclesiastical laws of the kingdom received by common use, at the same time that not one single precedent of any such law or usage before the Reformation was to be found; and that as to the canons made since, they did not bind a layman (as Cox was suggested to be), because the laity were not represented in convocation; neither could a reference to the canons in a private act of parliament add any greater weight to them than they had before: that this was a case which deserved great consideration, having before been in the other courts of Westminster-hall, where several prohibitions had been granted on this very same point, in order that it might receive a judicial determination, but the other side would never venture to go on; as in *Oldfield's case*, M., 9 Will. 3; the case of *Belcham* v. *Barnardiston*, E., 10 Will. 3; *Chedwick's case*, M., 10 Will. 3; *Scorier's case*, T., 11 Will. 3; and *Davison's case*, T., 12 Will. 3 (*b*); that supposing it to have originally been a spiritual crime, yet being now made temporal by several acts of parliament, it was thereby drawn from the spiritual to the temporal jurisdiction. By Wright, Lord Keeper: "Both courts may have a concurrent jurisdiction; and a crime may be punishable both in the one and in the other: the canons of a convocation do not bind the laity without an act of parliament; but I always was, and still am of opinion, that keeping of school is by the old laws of England of ecclesiastical cognizance: and therefore let the order for a prohibition be discharged." Whereupon it was moved, that this libel was for teaching school generally, without showing what kind of school; and the

Over what schools the ecclesiastical court has jurisdiction.

(*b*) 1 Salk. 105.

Court Christian could not have jurisdiction of writing schools, reading schools, dancing schools, or such like (*c*). To which the lord keeper assented, and thereupon granted a prohibition as to the teaching of all schools, except grammar schools, which he thought to be of ecclesiastical cognizance (*d*).

This power of the ordinary was confirmed and strengthened by the following sections of the 3 & 4 Vict. c. 77:—

Schools to be grammar schools, though Greek and Latin dispensed with, and masters subject to the ordinary.

Sect. 7. "Although under the provisions hereinbefore contained the teaching of Greek or Latin in any grammar school may be dispensed with, every such school, and the masters thereof, shall be still considered as grammar schools and grammar schoolmasters, and shall continue subject to the jurisdiction of the ordinary as heretofore; and that no person shall be authorized to exercise the office of schoolmaster or under-master therein without having such licence, or without having made such oath, declaration, or subscription as may be required by law of the schoolmasters or under-masters respectively of other grammar schools."

Where no powers of visitation, court may create them.

Sect. 15. "In all cases in which no authority to be exercised by way of visitation in respect of the discipline of any grammar school is now vested in any known person or persons, it shall be lawful for the bishop of the diocese wherein the same is locally situated to apply to the Court of Chancery, stating the same; and the said court shall have power, if it so think fit, to order that the said bishop shall be at liberty to visit and regulate the said school in respect of the discipline thereof, but not further or otherwise."

Saving of rights of ordinary.

Sect. 24. "Provided always, that neither this act nor any thing therein contained shall be any way prejudicial or hurtful to the jurisdiction or power of the ordinary, but that he may lawfully execute and perform the same as heretofore he might according to the statutes, common law, and canons of this realm, and also as far as he may be further empowered by this act."

Visitation articles.

Among the articles preserved in Strype's Memorials of Archbishops' Visitations, the following is of constant occurrence:—

"Item. Whether your grammar school be well ordered; whether the number of children thereof be furnished; how many wanted, and by whose default? Whether they be

(*c*) It was said, in *Rector, &c. of St. George's, Hanover Square* v. *Stuart*, Stra. 1126, that a charity-school is not within ecclesiastical cognizance. *Vide supra*, p. 1783.

(*d*) 1 P. Will. 29.

diligently and godly brought up in the fear of God and wholesome doctrine: whether any of them have been received for money or rewards, and by whom? Whether the statute foundations, and other ordinances touching the said grammar school, the schoolmaster, or the scholars thereof, or any other having or doing therein, be kept? By whom it is not observed, or by whose fault? And the like in all points you shall require and present such your chorists and their master."

Articles for teaching without licence.

In the last edition of Dr. Burn's Ecclesiastical Law a form of certificate for obtaining a licence to teach, and one of articles against a person for teaching a grammar school, were inserted.

32 & 33 Vict. c. 56.

Now, however, by 32 & 33 Vict. c. 56, s. 20, the endowed schools commissioners are to provide in every scheme for a school coming under that act for the abolition of the power of the ordinary as to licensing (*e*).

The ordinary may refuse to grant licence;

In *Rex* v. *The Bishop of Lichfield and Coventry* (commonly called *Rushworth's case* (*f*)), a mandamus issued to the bishop, to grant a licence to Rushworth, a clergyman, who was nominated usher of a free grammar school within his diocese. To which he returned, that a caveat had been entered by some of the principal inhabitants of the place, with articles annexed, accusing him of drunkenness, incontinency, and neglect of preaching and reading prayers: and that the caveat being warned, he was proceeding to inquire into the truth of these things when the mandamus came, and therefore he had suspended the licensing him; and without entering much into the arguments, whether the bishop has the power of licensing, the court held, that the return should be allowed as a temporary excuse, for though the act of the 14 Car. 2, c. 4, obliges them only to assent to and subscribe the declaration, yet it added, *according to the laws and statutes of this realm*, which presupposes some necessary qualifications, which it is reasonable should be examined into (*g*).

and may examine a schoolmaster applying for a licence as to his morality, religion, and learning.

The ordinary may also examine the party applying for a licence to teach a grammar school as to his *learning*, as well as his morality and religion: and it is a good return to a mandamus to the ordinary to grant a licence, to state that he suspended the granting of it until the party would submit himself to be examined "touching his sufficiency in learning" (*h*).

(*e*) *Vide infra*, p. 2054.

(*f*) Str. 1023.

(*g*) *Rushworth* v. *Mason*, Com. 448.

(*h*) *Rex* v. *Archbishop of York*, 6 T. R. 490.

By Can. 137 of 1603, "Every schoolmaster shall, at the bishop's first visitation, or at the next visitation after his admission, exhibit his licence, to be by the said bishop either allowed, or (if there be just cause) disallowed and rejected."

137th canon.

In *Bale's case* (*i*), it was holden, that where the patronage is not in the ordinary, but in feoffees or other patrons, the ordinary cannot put a man out; and a prohibition was granted, the suggestion for which was, that he came in by election, and that it was his freehold.

Whether the ordinary may proceed to deprivation for teaching without licence.

Upon which Dr. Gibson justly observes, that if this be any bar to his being deprived by ordinary authority, the presentation to a benefice by a lay patron, and the parson's freehold in that benefice, would be as good a plea against the deprivation of the parson by the like authority; and yet this plea has been always rejected by the temporal courts: and in one circumstance at least, the being deprived of a school, notwithstanding the notion of a freehold, is more naturally supposed, than deprivation of a benefice, because the licence to a school is only during pleasure, whereas the institution to a benefice is absolute and unlimited (*k*).

By Can. 78, "In what parish church or chapel soever there is a curate which is a master of arts, or bachelor of arts, or is otherwise well able to teach youth, and will willingly so do, for the better increase of his living, and training up of children in principles of true religion, we will and ordain, that a licence to teach youth of the parish where he serveth, be granted to none by the ordinary of that place, but only to the said curate: provided always, that this constitution shall not extend to any parish or chapel in country towns, where there is a public school founded already, in which case, we think it not meet to allow any to teach grammar, but only him that is allowed for the said public school."

In what case curates shall have the preference in teaching schools.

"In the records of the see of Canterbury" (says Bishop Gibson) "I find two inhibitions to schoolmasters not to teach school *in præjudicium liberæ scholæ*,—one in the time of Archbishop Bancroft, and the other in the time of Archbishop Laud" (*l*).

Inhibitions to schoolmasters.

1 & 2 Vict. c. 106, which inflicts penalties on beneficed clergymen who engage in trade or buy to sell again for profit and trade, provided by sect. 30, "that nothing

Beneficed clergymen may keep schools.

(*i*) 2 Keb. 541.

(*k*) Gibs. 1110.

(*l*) Vol. ii. 1101, and see in his Appendix, sect. xix. p. 1571, a collection of instruments relating to schools.

hereinbefore contained shall subject to any penalty or forfeiture any spiritual person for keeping a school or seminary, or acting as a schoolmaster or tutor or instructor, or being in any manner concerned or engaged in giving instruction or education for profit or reward, or for buying or selling or doing any other thing in relation to the management of any such school, seminary, or employment" (*m*).

Order to be observed therein.

79th canon.

By Can. 79. "All schoolmasters shall teach in English or Latin, as the children are able to bear, the larger or shorter catechism, heretofore by public authority set forth. And as often as any sermon shall be upon holy and festival days, within the parish where they teach they shall bring their scholars to the church where such sermon shall be made, and there see them quietly and soberly behave themselves, and shall examine them at times convenient after their return, what they have borne away of such sermons. Upon other days, and at other times, they shall train them up with such sentences of Holy Scriptures as shall be most expedient to induce them to all godliness. And they shall teach the grammar set forth by King Henry VIII. and continued in the times of King Edward VI. and Queen Elizabeth of noble memory, and none other. And if any schoolmaster, being licensed, and having subscribed as is aforesaid, shall offend in any of the premises, or either speak, write or teach against any thing whereunto he hath formerly subscribed, if upon admonition by the ordinary he do not amend and reform himself, let him be suspended from teaching school any longer."

The larger or shorter Catechism.]—The larger is that in the Book of Common Prayer; the shorter was a catechism set forth by Edward VI., which he, by his letters-patent, commanded to be taught in all schools, which was examined, reviewed and corrected in the convocation of 1562, and published with those improvements in 1570, to be a guide to the younger clergy in the study of divinity, as containing the sum and substance of our reformed religion (*n*).

Shall bring their Scholars to the Church.]—In the case of *Belcham* v. *Barnardiston* (*o*), the chief question was, whether a schoolmaster might be prosecuted in the ecclesiastical court for not bringing his scholars to church, contrary to this canon. And it was the opinion of the

(*m*) *Vide supra*, p. 1143.
(*n*) Gibs. 374.
(*o*) 1 P. Will. 32.

court, that the schoolmaster, being a layman, was not bound by the canons. But this decision seems scarcely reconcileable with the admission of the temporal courts, that "keeping of schools is of ecclesiastical cognizance" (*p*).

Grammar.]—Compiled and set forth by William Lilly and others specially appointed by his majesty, in the preface to which book it is declared, that "as for the diversity of grammars, it is well and profitably taken away by the king's majesty's wisdom, who, foreseeing the inconvenience, and favourably providing the remedy, caused one kind of grammar by sundry learned men to be diligently drawn, and so to be set out only, everywhere to be taught for the use of learners, and for avoiding the hurt in changing of schoolmasters."

Heads of colleges to subscribe the Thirty-Nine Articles, and the Book of Common Prayer.

By 14 Car. 2, c. 4, s. 13, "Every governor or head of every college and hall in the universities, and of the colleges of Westminster, Winchester and Eton, within one month next after his election, or collation and admission into the same government or headship, shall openly and publicly in the church, chapel or other public place, of the same college or hall, and in the presence of the fellows and scholars of the same, or the greater part of them then resident, subscribe unto the nine and thirty articles of religion mentioned in the statute of 13 Eliz. c. 12, and unto the Book of Common Prayer, and declare his unfeigned assent and consent unto and approbation of the said articles and of the same book, and to the use of all the prayers, rites and ceremonies, forms and orders in the said book prescribed and contained, according to this form following:—

'*I, A. B., do declare my unfeigned assent and consent to all and everything contained and prescribed in and by the book intituled, The Book of Common Prayer and Administration of the Sacraments and other Rites and Ceremonies of the Church, according to the use of the Church of England; together with the Psalter or Psalms of David, pointed as they are to be sung or said in churches; and the Form and Manner of making, ordaining and consecrating of Bishops, Priests and Deacons.*'

And all such governors or heads of the said colleges and halls, or any of them, as shall be in holy orders, shall once at least in every quarter of the year (not having a lawful impediment), openly and publicly read the morning prayer and service in and by the said book appointed to be read,

(*p*) Per Lord Keeper Wright, *Cox's case*, 1 P. W. 29.

in the church, chapel or other public place of the same college or hall; upon pain to lose and be suspended of and from all the benefits and profits belonging to the same government or headship, by the space of six months, by the visitor or visitors of the same college or hall; and if any governor or head of any college or hall, suspended for not subscribing unto the said articles and book, or for not reading of the morning prayer and service as aforesaid, shall not at or before the end of six months next after such suspension subscribe unto the said articles and book, and declare his consent thereunto as aforesaid, or read the morning prayer and service as aforesaid, then such government or headship shall be *ipso facto* void."

This act has been repealed as to the universities and the colleges therein, but not as to the colleges of Westminster, Winchester and Eton, as to which it still remains in force.

As to Roman Catholics.

It is provided by 10 Geo. 4, c. 7, commonly called the Roman Catholic Relief Act, s. 16, as follows:—

Nothing in this act contained shall be construed to enable any persons, otherwise than as they are now by law enabled to hold, enjoy or exercise any office or place whatever, and by whatever name the same may be called, of, in or belonging to the colleges of Eton, Westminster or Winchester, or any college or school within this realm.

Sect. 3.—*Position of Dissenters in Grammar Schools.*

Two points.

The question has often been discussed before the Court of Chancery how far dissenters may claim to enjoy the educational privileges afforded by grammar schools. This question has generally taken one of two shapes; (a) Whether regulations for the government of the school shall be made which shall allow children to share in the general teaching while they are exempted from the religious teaching and religious services (which must, in the absence of special provision to the contrary, be those of the church (*q*)); (b) Whether dissenters may be appointed trustees of the school.

Admission of children of dissenters.

(a) On the first point the decisions seem to have varied a good deal; the present Master of the Rolls having gene-

(*q*) *Re Chelmsford Grammar School*, 1 K. & J. 543; *Re Stafford Charities*, 25 Beav. 28; 27 L. J., Cha. 381.

rally leaned to the admission of dissenters (*r*), and the late Lord Chancellor Hatherley, when vice-chancellor, in a contrary direction (*s*). In some cases the subject has been left to the discretion of the head-master or of the visitor (*t*).

In the case of *Re Ilminster Grammar School* (*u*), while it was distinctly laid down that all the religious teaching given must be that of the Church of England, a long-standing exemption of dissenters from attendance on that teaching was sanctioned.

In the case of the *Attorney-General* v. *Market Bosworth Schools* (*x*), leave was given to promote a bill in parliament for the regulation of the school, in order thereby to provide for the admission of dissenters to the benefits of the school; and it seems to have been considered, in that case at all events, that without legislation this object could not have been accomplished.

Power to trustees of endowed schools to make orders for the admission of children of denominations herein stated.

By 23 Vict. c. 11, s. 1, "It shall be lawful for the trustees or governors of every endowed school from time to time to make, and they shall be bound to make, such orders as, whilst they shall not interfere with the religious teaching of the other scholars as now fixed by statute or other legal requirement, and shall not authorize any religious teaching other than that previously afforded in the school, shall nevertheless provide for admitting to the benefits of the school the children of parents not in communion with the church, sect, or denomination according to the doctrines or formularies of which religious instruction is to be afforded under the endowment of the said school: provided that in the will or wills, deed or deeds, or other instrument or instruments regulating such endowment, nothing be contained expressly requiring the children educated under such endowment to learn or to be instructed according to the doctrines or formularies of such church, sect, or denomination."

Exceptions.

By sect. 2, this act is not to extend to schools exempted from 3 & 4 Vict. c. 77, nor to any school in union or to be in union with the National Society for Promoting the

(*r*) *Att.-Gen.* v. *Calvert*, 23 Beav. 248; *S. C.*, 26 L. J., Cha. 682; *Re Stafford Charities*, 25 Beav. 28; *S. C.*, 27 L. J., Cha. 381; *Att.-Gen.* v. *Clifton*, 32 Beav. 596; *S. C.*, 9 Jur., N. S. 939. See also *Att.-Gen.* v. *Bp. of Worcester*, 9 Hare, 367.

(*s*) *Re Chelmsford Grammar School*, 1 K. & J. 543; *S. C.*, 24 L. J., Cha. 742.

(*t*) *Re Warwick Grammar School*, 1 Phillips, 564; *Att.-Gen.* v. *Sherborne Grammar School*, 18 Beav. 256; *S. C.*, 24 L. J., Cha. 74.

(*u*) 2 De G. & J. 545. *Vide infra*, p. 2050.

(*x*) 35 Beav. 305.

Education of the Poor in the Principles of the Established Church (x).

Dissenters trustees.

(b) On the second point the law was clearly laid down by the House of Lords and the Court of Appeal in Chancery, in the case of *Re Ilminster School* (y) already mentioned, that where the school is one in connection with the church, even though dissenters' children are admitted to some of the teaching of the school, the trustees must be members of the church.

Sect. 4.—*Recent Legislation.*

It has been thought necessary to enter so far into the question of schools, and especially grammar schools, on account of the connection which they still have with ecclesiastical law; but in the last few years a course of legislation has been inaugurated, and in many respects completed, by the Public Schools Act, the Endowed Schools Act, and the Elementary Education Act, which leaves very little of ecclesiastical jurisdiction over schools.

Public schools.

By 31 & 32 Vict. c. 118, amended by 32 & 33 Vict. c. 58 (z), power is given to make new governing bodies, either wholly or partially distinct from the existing governing bodies, of the seven public schools comprehended under the act, that is, Eton, Westminster, Winchester, the Charter-house, Harrow, Rugby and Shrewsbury (a); and the governing bodies are given large powers of altering the existing constitution of these schools (b).

By sect. 5 (6) of 31 & 32 Vict. c. 118, they may remove all conditions previously necessary for the tenure of any mastership: by sect. 13, the head-master is to be appointed by them, and to be dismissible at pleasure, and all other masters are to be appointed by and dismissible by the head-master.

By sect. 12 (4), the governing bodies may make regulations with respect to attendance at divine service and, where the school has a chapel of its own, with respect to the church services and the appointment of preachers; and, by the same section (9), they may make regulations with respect to giving facilities for the education of boys whose

(x) *Vide infra*, Part IX., Chap. VII.

(y) 2 De G. & J. 535; *S. C.*, nom. *Baker* v. *Lee*, 8 H. of L. 495.

(z) See also 33 & 34 Vict. c. 84; 34 & 35 Vict. c. 60; 35 & 36 Vict. c. 54.

(a) 31 & 32 Vict. c. 118, s. 5; 32 & 33 Vict. c. 58, s. 1.

(b) 31 & 32 Vict. c. 118, ss. 6, 7, 12.

parents or guardians wish to withdraw them from the religious instruction given in the school.

Certain special commissioners are appointed with certain powers of legislation on the same subjects; and all statutes made by the governing bodies are to be approved by them and by the queen in council (sects. 9, 10, 15—19). By sect. 20, provision is made for the transfer by the dean and chapter of Westminster and the ecclesiastical commissioners of lands and money to Westminster School. Sect. 22 provides for the sale of livings belonging to Shrewsbury School; sect. 23, for separating the spiritual cure of the parish of Eton from the provostship of the college.

Provision as to college chapels.

By sect. 31, "The chapel of every school to which this act applies shall be deemed to be a chapel dedicated and allowed by the ecclesiastical law of this realm for the performance of public worship and the administration of the sacraments according to the liturgy of the Church of England, and to be free from the jurisdiction or control of the incumbent of the parish in which such chapel is situate.

"Any scheme which may be made in pursuance of this act constituting the parish of Eton a separate vicarage shall contain provisions making the existing chapel of ease at Eton the parish church of Eton, and exempting the college chapel from being dealt with as a parish church."

Nothing is said in the acts as to the members of the governing bodies being members of the Church of England or otherwise. In the two governing bodies which were first created, those of Eton and Westminster, provision has been made in the constituting statutes for all members of the governing bodies being members of the Church of England. In the cases of some of the other schools a similar provision was proposed to be inserted, but objections were raised in parliament and elsewhere, and it is understood that this provision was omitted. Bearing in mind the fact that the religious education in these schools is to be still, as it has been, that of the church, it would seem to follow that the governors should be—as it was decided in *Re Ilminster School* (*c*), that the trustees of other grammar schools must be—members of the church.

Endowed schools.

The Endowed Schools Act (32 & 33 Vict. c. 56) seems to apply to all schools in England, except those specially excepted by sect. 8. These are:—

Nothing in this act, ex-

"(1.) Any school mentioned in sect. 3 of the Public Schools Act, 1868 (*d*).

(*c*) *Vide supra*, p. 2050. (*d*) 31 & 32 Vict. c. 118.

cept as expressly provided, to apply to certain schools herein named.

"(2.) Any school which, on January 1st, 1869, was maintained wholly or partly out of annual voluntary subscriptions, and had no endowment except school buildings or teachers' residences, or play-ground or gardens attached to such buildings or residences.

"(3.) Any school which, at the commencement of this act, is in receipt of an annual grant out of any sum of money appropriated by parliament to the civil service, intituled 'For Public Education of Great Britain,' unless such school is a grammar school, as defined by 3 & 4 Vict. c. 77, or a school, a department of which only is in receipt of such grant.

"(4.) Any school (unless it is otherwise subject to this act) which is maintained out of any endowment, the income of which may, in the discretion of the governing body thereof, be wholly applied to other than educational purposes.

"(5.) Any school (unless it is otherwise subject to this act) which receives assistance out of any endowment, the income of which may, in the discretion of the governing body of such endowment, be applied to some other school.

"(6.) Any endowment applicable and applied solely for promoting the education of the ministers of any church or religious denomination, or for teaching any particular profession, or any school (unless it is otherwise subject to this act) which receives assistance out of such endowment.

"(7.) Any school which, during the six months before January 1st, 1869, was used solely for the education of choristers, or the endowment of any such school, if applicable solely for such education."

As to these schools it is provided as follows:—

Not to authorize schemes for interfering with modern endowments, cathedral schools, etc.

Sect. 14. "Nothing in this act shall authorize the making of any scheme interfering—

"(1.) With any endowment or part of an endowment (as the case may be) originally given to charitable uses, or to such uses as are referred to in this act, less than fifty years before the commencement of this act, unless the governing body of such endowment assent to the scheme.

"(2.) With the constitution of the governing body of any school wholly or partly maintained out of the endowment of any cathedral or collegiate church, or forming part of the foundation of any cathedral or collegiate church, unless the dean and chapter of such church assent to the scheme."

As to religious education in day schools.

Sect. 15. "In every scheme (except as hereinafter mentioned) relating to any endowed school or educational endowment, the commissioners shall provide that the parent

or guardian of, or person liable to maintain or having the actual custody of, any scholar attending such school as a day scholar, may claim, by notice in writing addressed to the principal teacher of such school, the exemption of such scholar from attending prayer or religious worship, or from any lesson or series of lessons on a religious subject, and that such scholar shall be exempted accordingly; and that a scholar shall not by reason of any exemption from attending prayer or religious worship, or from any lesson or series of lessons on a religious subject, be deprived of any advantage or emolument in such endowed school, or out of any such endowment to which he would otherwise have been entitled, except such as may by the scheme be expressly made dependent on the scholar learning such lessons.

"They shall further provide, that if any teacher, in the course of other lessons at which any such scholar is in accordance with the ordinary rules of such school present, teaches systematically and persistently any particular religious doctrine, from the teaching of which any exemption has been claimed by such a notice as is in this section before provided, the governing body shall, on complaint made in writing to them by the parent, guardian or person having the actual custody of such scholar, hear the complainant and inquire into the circumstances, and, if the complaint is judged to be reasonable, make all proper provisions for remedying the matter complained of."

As to religious education in boarding schools.

Sect. 16. "In every scheme (except as hereinafter mentioned) relating to an endowed school, the commissioners shall provide, that if the parent or guardian of, or person liable to maintain or having the actual custody of, any scholar who is about to attend such school, and who, but for this section could only be admitted as a boarder, desires the exemption of such scholar from attending prayer or religious worship, or from any lesson or series of lessons on a religious subject, but the persons in charge of the boarding houses of such school are not willing to allow such exemption, then it shall be the duty of the governing body of such school to make proper provisions for enabling the scholar to attend the school and have such exemption as a day scholar, without being deprived of any advantage or emolument to which he would otherwise have been entitled, except such as may by the scheme be expressly made dependent on the scholar learning such lessons; and a like provision shall be made for a complaint by such parent, guardian, or person as in the case of a day school."

Governing body not to be

Sect. 17. "In every scheme (except as hereinafter mentioned) relating to any educational endowment the

disqualified on ground of religious opinions.

commissioners shall provide that the religious opinions of any person, or his attendance or non-attendance at any particular form of religious worship, shall not in any way affect his qualification for being one of the governing body of such endowment."

Masters not to be required to be in holy orders.

Sect. 18. "In every scheme (except as hereinafter mentioned) relating to an endowed school, the commissioners shall provide that a person shall not be disqualified for being a master in such school by reason of his not being or not intending to be in holy orders."

Schools excepted from provisions as to religion.

Sect. 19. "A scheme relating to—

"(1.) Any school which is maintained out of the endowment of any cathedral or collegiate church, or forms part of the foundation of any cathedral or collegiate church: or

"(2.) Any educational endowment, the scholars educated by which are, in the opinion of the commissioners (subject to appeal to her majesty in council as mentioned in this act), required by the express terms of the original instrument of foundation or of the statutes or regulations made by the founder or under his authority in his lifetime or within fifty years after his death (which terms have been observed down to the commencement of this act) to learn or to be instructed according to the doctrines or formularies of any particular church, sect, or denomination, is excepted from the foregoing provisions respecting religious instruction and attendance at religious worship (other than the provisions for the exemption of day scholars from attending prayer or religious worship, or lessons on a religious subject, when such exemption has been claimed on their behalf), and respecting the qualification of the governing body and masters (unless the governing body, constituted as it would have been if no scheme under this act had been made, assents to such scheme).

"And a scheme relating to any such school or endowment shall not, without the consent of the governing body thereof, make any provision respecting the religious instruction or attendance at religious worship of the scholars (except for securing such exemption as aforesaid), or respecting the religious opinions of the governing body or masters."

Abolition of jurisdiction of ordinary as to licensing masters.

Sect. 21. "In every scheme the commissioners shall provide for the abolition of all jurisdiction of the ordinary relating to the licensing of masters in any endowed school or of any jurisdiction arising from such licensing."

Sect. 20 empowers the commissioners to provide by scheme for the transference of the visitatorial power from special visitors to the charity commissioners; and sect. 22 makes all teachers in the schools dismissible at pleasure.

Claims of cathedral schools against ecclesiastical commissioners.

Sect. 27. "Where an educational endowment at the commencement of this act forms or has formed part of the endowment of any cathedral or collegiate church, the commissioners shall inquire into the adequacy of such educational endowment, and may submit to the ecclesiastical commissioners for England proposals for meeting, out of the common fund of the ecclesiastical commissioners, the claim of any school receiving assistance out of the endowment of any such church, to have an increased provision made for it in respect of any estates of such church which may have been transferred to the ecclesiastical commissioners. And the ecclesiastical commissioners, on assenting to any such proposal or any modification of it, may make such provision out of their common fund by such means and in such manner as they think best, and a scheme under this act may, with their consent, be made for carrying such proposal into effect."

School chapels appropriated for religious worship free from parochial jurisdiction.

Sect. 53. "The chapel of an endowed school subject to this act, which either has been before or after the commencement of this act consecrated according to law, or is authorized for the time being by the bishop of the diocese in which the chapel is situate, by writing under his hand to be used as a chapel for such school, shall be deemed to be allowed by law for the performance of public worship and the administration of the sacraments according to the liturgy of the Church of England, and shall be free from the jurisdiction and control of the incumbent of the parish in which such chapel is situate."

Elementary schools.

By the Elementary Education Act, 1870 (33 & 34 Vict. c. 75), the following provisions are made as to the religious nature of primary schools.

Regulations for conduct of public elementary school.

Sect. 7. "Every elementary school which is conducted in accordance with the following regulations shall be a public elementary school within the meaning of this act; and every public elementary school shall be conducted in accordance with the following regulations (a copy of which regulations shall be conspicuously put up in every such school); namely,—

"(1.) It shall not be required, as a condition of any child being admitted into or continuing in the school, that he shall attend or abstain from attending any Sunday-school, or any place of religious worship, or that he shall

attend any religious observance or any instruction on religious subjects in the school or elsewhere, from which observance or instruction he may be withdrawn by his parent, or that he shall, if withdrawn by his parent, attend the school on any day exclusively set apart for religious observance by the religious body to which his parent belongs.

"(2.) The time or times during which any religious observance is practised or instruction in religious subjects is given at any meeting of the school, shall be either at the beginning or at the end, or at the beginning and the end of such meeting, and shall be inserted in a time table to be approved by the education department, and to be kept permanently and conspicuously affixed in every schoolroom; and any scholar may be withdrawn by his parent from such observance or instruction without forfeiting any of the other benefits of the school.

"(3.) The school shall be open at all times to the inspection of any of her majesty's inspectors, so, however, that it shall be no part of the duties of such inspector to inquire into any instruction in religious subjects given at such school, or to examine any scholar therein in religious knowledge, or in any religious subject or book.

"(4.) The school shall be conducted in accordance with the conditions required to be fulfilled by an elementary school in order to obtain an annual parliamentary grant."

Management of school by school board.

Sect. 14. "Every school provided by a school board shall be conducted under the control and management of such board in accordance with the following regulations:—

"(1.) The school shall be a public elementary school within the meaning of this act.

"(2.) No religious catechism or religious formulary which is distinctive of any particular denomination shall be taught in the school."

Transfer to school board.

By sect. 23, the managers of any elementary school may transfer their school to the school board, wherever there is one established. Sect. 75 makes provision for schools with small endowments, which are excepted from the Endowed Schools Act.

Inspection of voluntary schools by inspector not one of Her Majesty's inspectors.

Sect. 76. "Where the managers of any public elementary school not provided by a school board desire to have their school inspected or the scholars therein examined, as well in respect of religious as of other subjects, by an inspector other than one of her majesty's inspectors, such managers may fix a day or days not exceeding two in any one year for such inspection or examination.

"The managers shall, not less than fourteen days before any day so fixed, cause public notice of the day to be given in the school, and notice in writing of such day to be conspicuously affixed in the school.

"On any such day any religious observance may be practised, and any instruction in religious subjects given, at any time during the meeting of the school; but any scholar who has been withdrawn by his parent from any religious observance or instruction in religious subjects shall not be required to attend the school on any such day."

Parliamentary grant to public elementary school only.

Sect. 96. "After the 31st of March, 1871, no parliamentary grant shall be made to any elementary school which is not a public elementary school within the meaning of this act."

Conditions of annual parliamentary grant.

Sect. 97. "The conditions required to be fulfilled by an elementary school in order to obtain an annual parliamentary grant shall be those contained in the minutes of the education department in force for the time being, and shall, amongst other matters, provide that after March 31, 1871—

"Such grant shall not be made in respect of any instruction in religious subjects:

"But such conditions shall not require that the school shall be in connection with a religious denomination, or that religious instruction shall be given in the school, and shall not give any preference or advantage to any school on the ground that it is or is not provided by a school board."

CHAPTER VI.

MISCELLANEOUS.

The church has still some remains of jurisdiction over and legal connection with the learned and scientific professions and learning generally, which require to be noticed.

Notaries public.

The jurisdiction of the master of the faculties, the officer of the Archbishop of Canterbury, in the creation and government of notaries public, has already been mentioned (*a*).

As to physicians, the following constitution and statutes are of ecclesiastical interest:—

Physicians.

"Forasmuch as the soul is far more precious than the "body, we do prohibit under the pain of anathema, that no "physician for the health of the body shall prescribe to a "sick person anything which may prove perilous to the "soul. But when it happens that he is called to a sick "person, he shall first of all effectually persuade him to "send for the physicians of the soul; that after the sick "person hath taken care for his spiritual mendicament, he "may with better effect proceed to the cure of his body. "And the transgressors of this constitution shall not escape "the punishment appointed by the council" (*b*).

That is, by the council of Lateran, under Innocent III., from the canons of which council this constitution was taken; which punishment is a prohibition from the entrance of the church until they shall have made competent satisfaction (*c*).

3 Hen. 8, c. 11.

By 3 Hen. 8, c. 11: "Forasmuch as the science and "cunning of physic and surgery (to the perfect knowledge "whereof be requisite both great learning and ripe experi-"ence) is daily within this realm exercised by a great mul-"titude of ignorant persons, of whom the greater part have "no manner of insight in the same nor in any other kind "of learning, some also can no letters on the book; so far "forth, that common artificers, as smiths, weavers, and "women, boldly and accustomably take upon them great "cures, and things of great difficulty, in the which they "partly use sorcery and witchcraft, partly apply such

(*a*) *Vide supra*, Part IV., Chap. V., Sect 5.

(*b*) Wethershed, Lind. 330.

(*c*) Wethershed, Johns.

"medicines unto the disease as be very noious, and nothing meet thereof; to the high displeasure of God, great infamy to the faculty, and the grievous hurt and destruction of many of the king's liege people, most especially of them that cannot discern the uncunning from the cunning: Be it therefore (to the surety and comfort of all manner of people) enacted, that no person within the city of London, nor within seven miles of the same, shall take upon him to exercise and occupy as a physician or surgeon, except he be first examined, approved, and admitted by the Bishop of London, or by the Dean of St. Paul's for the time being, calling to him or them four doctors of physic, and for surgery other expert persons in that faculty, and for the first examination such as they shall think convenient, and afterwards always four of them that have been so approved; upon pain of forfeiture, for every month that they do occupy as physicians or surgeons, not admitted nor examined after the tenor of this act, of 5*l.*, half to the king, and half to him that shall sue. And that no person out of the said city, and precinct of seven miles of the same, except he have been, as is aforesaid, approved in the same, take upon him to exercise and occupy as a physician or surgeon, in any diocese within this realm, unless he be first examined and approved by the bishop of the same diocese, or (he being out of the diocese) by his vicar general, either of them calling to them such expert persons in the said faculties as their discretion shall think convenient, and giving their letters testimonial under their seal to him that they shall so approve, upon like pain to them that occupy contrary to this act (as is aforesaid), to be levied and employed after the form before expressed (*d*):

"Provided that this act shall not be prejudicial to the Universities of Oxford or Cambridge, or either of them, or to any privileges granted to them."

14 & 15 Hen. 8, c. 5.

The Act 14 & 15 Hen. 8, c. 5, confirmed by 1 Mar. sess. 2, c. 9, incorporated the College of Physicians, and contained divers provisions for the licensing of physicians by the president and elects of the college.

These acts, however, have been practically repealed, and new provisions wholly of a secular character have been made by The Medical Act, 1858 (21 & 22 Vict. c. 90), and the Act to amend the Medical Act (23 & 24 Vict. c. 66).

Surgeons.

As to surgeons, the old law was, that they shall be licensed by the bishop of the diocese, or his vicar general respectively.

(*d*) See 34 & 35 Hen. 8, c. 8.

Surgeons.

By 32 Hen. 8, c. 40, the barbers and surgeons of London were united and incorporated, and exempted from bearing arms, or serving on inquests or offices. But they were not to use each other's trade. By 18 Geo. 2, c. 15, the union was dissolved; and the surgeons of London were made a separate corporation, with power to enjoy the same privileges as by former acts or grants (*e*).

Knowledge of Latin is a previous qualification necessary even to be apprenticed to a London surgeon (*f*).

In the case of the *College of Physicians* v. *Levett*, the plaintiffs brought an action of debt against the defendant for 25*l.* for having practised physic within London five months without licence. Upon *nil debet* pleaded, it was tried before Holt, Chief Justice, at Guildhall; and the defence was, that he was a graduate doctor of Oxford. But it was ruled by Holt, upon consideration of all the statutes concerning this matter, that he could not practise within *London*, or seven miles round, without licence of the College of Physicians. And by his direction a verdict was given for the plaintiffs (*g*).

And the like was adjudged on a special verdict, in 1717, in the case of Dr. West, who was a graduate of Oxford (*h*).

Apothecaries.

By 55 Geo. 3, c. 194, many important regulations were made as to the education, examination, admission and practice of apothecaries. See also 6 Geo. 4, c. 133; 2 & 3 Will. 4, c. 75; 15 & 16 Vict. c. 56. But the most important acts are the Medical Act, 1858 (21 & 22 Vict. c. 90), and its amending acts, 22 Vict. c. 21; 23 Vict. c. 7; 23 & 24 Vict. c. 66; 25 & 26 Vict. c. 91; 31 & 32 Vict. cc. 29, 121; 32 & 33 Vict. c. 117.

Midwives.

Heretofore, in cases of necessity, the office of baptizing was frequently performed by the midwife; and it is very probable that this gave occasion first to midwives being licensed by the bishop or his delegate's officer (*i*).

And by several constitutions the minister was required frequently to instruct the people, in the form of words to be used in such cases of necessity.

In order for the midwife's obtaining a licence, she must be recommended under the hand of matrons, who have experienced her skill, and also of the parish minister,

(*e*) See *Sharpe, q. t.* v. *Law*, 4 Burr. 2133.

(*f*) *Rex* v. *Surgeons' Company*, 2 Burr. 892.

(*g*) Lord Raymond, 472. See also *Dr. Bonham's case*, 8 Co. 107.

(*h*) Ibid.; 10 Mod. 353.

(*i*) Wats. c. 31; 2 Burnet's Hist. Ref. 77.

certifying as to her life and conversation, and that she is a member of the Church of England.

Oath of.

The oath to be administered to a midwife by the bishop or his chancellor, when she is licensed to exercise that office, is said to have been as follows:—

"You shall swear, first, that you shall be diligent and "faithful and ready to help every woman labouring with "child, as well the poor as the rich; and that in time of "necessity you shall not forsake the poor woman to go to "the rich.

"Item. You shall neither cause nor suffer any woman "to name or put any other father to the child, but on him "which is the very true father thereof indeed.

"Item. You shall not suffer any woman to pretend, "feign or surmise herself to be delivered of a child who is "not indeed; neither to claim any other woman's child for "her own.

"Item. You shall not suffer any woman's child to be "murdered, maimed, or otherwise hurt, as much as you "may; and so often as you shall perceive any peril or "jeopardy, either in the woman or in the child, in any "such wise as you shall be in doubt what shall chance "thereof, you shall thenceforth in due time send for other "midwives and expert women in that faculty, and use "their advice and council in that behalf.

"Item. You shall not in anywise use or exercise any "manner of witchcraft, charm or sorcery, invocation or "other prayers, than may stand with God's laws and the "king's.

"Item. You shall not give any counsel or minister any "herb, medicine, or potion, or any other thing, to any "woman being with child, whereby she should destroy or "cast out that she goeth withal before her time.

"Item. You shall not enforce any woman being with "child, by any pain, or by any ungodly ways or means, "to give you any more for your pains or your labour in "bringing her to bed than they would otherwise do.

"Item. You shall not consent, agree, give or keep "counsel, that any woman be delivered secretly of that "which she goeth with, but in the presence of two or "three lights ready.

"Item. You shall be secret, and not open any matter "appertaining to your office, in the presence of any man, "unless necessity, or great urgent cause, do constrain you "so to do.

"Item. If any child be dead born, you yourself shall "see it buried in such secret place as neither hog or dog,

Midwives. Oath of.

"nor any other beast, may come unto it, and in such sort "done as it be not found nor perceived, as much as you "may; and that you shall not suffer any such child to be "cast into the jaques or any other inconvenient place.

"Item. If you shall know any midwife using or doing "anything contrary to any of the premisses, or in any "otherwise than shall be seemly or convenient, you shall "forthwith detect, open or show the same to me or my "chancellor for the time being.

"Item. You shall use yourself in honest behaviour "unto the woman being lawfully admitted to the room "and office of a midwife, in all things accordingly.

"Item. That you shall truly present to myself or my "chancellor all such women as you shall know from time "to time to occupy and exercise the room of a midwife "within my aforesaid diocese and jurisdiction of ——, "without any licence and admission.

"Item. You shall not make or assign any deputy or "deputies to exercise or occupy under you in your absence "the office or room of a midwife but such as you shall "perfectly know to be of right honest and discreet beha- "viour, and also apt, able and having sufficient know- "ledge and experience to exercise the said room and office.

"Item. You shall not be privy or consent that any "priest or other party shall in your absence or in your "company, or of your knowledge or sufferance, baptize "any child by any mass, Latin service or prayers, than "such as are appointed by the laws of the Church of Eng- "land; neither shall you consent that any child born by "any woman who shall be delivered by you shall be carried "away without being baptized in the parish by the ordi- "nary minister where the said child is born, unless it be "in case of necessity baptized privately according to the "Book of Common Prayer; but you shall forthwith, upon "understanding thereof, either give knowledge to me the "said bishop, or my chancellor for the time being.

"All which articles and charge you shall faithfully "observe and keep, so help you God, and by the contents "of this book" (*l*).

It seems, however, that if there be a suit in the spiritual court against a woman for exercising the trade of a midwife without licence of the ordinary, against the canons, a prohibition lies: for this is not any spiritual function of which they have cognizance (*m*).

(*l*) Book of Oaths.

(*m*) 2 Rolle's Abr. 286. The practice of baptism by midwives is alluded to in vol. 6 of Burnet's History of his Own Times (8vo. ed.). The practice was, how-

By 7 Ann. c. 14, s. 1: "Whereas in many places in England the provision for the clergy is so mean that the necessary expense of books for the better prosecution of their studies cannot be defrayed by them; and whereas several persons of late years have by charitable contributions erected libraries within several parishes and districts; but some provision is wanting to preserve the same, and such others as shall be provided in the same manner, from embezzlement:" it is enacted, "that in every parish or place where such a library is or shall be erected, the same shall be preserved for such uses as the same is and shall be given; and the orders and rules of the founders thereof shall be observed and kept."

Parochial libraries. Establishment of parochial libraries confirmed.

Sect. 3. "And it shall be lawful for the proper ordinary, or his commissary or official, or the archdeacon, or by his direction his official or surrogate, if the said archdeacon be not the incumbent of the place where such library is, in their visitation to inquire into the state and condition of the said libraries, and to amend and redress the grievances and defects of and concerning the same, as to him or them shall seem meet; and it shall be lawful for the proper ordinary from time to time, as often as shall be thought fit, to appoint such persons as he shall think fit, to view the state and condition of such libraries; and the said ordinaries, archdeacons, or officials respectively, shall have free access to the same, at such times as they shall respectively appoint."

Ordinary to visit the same.

Sect. 6. "And to prevent any embezzlement of books upon the death or removal of any incumbent, immediately after such death or removal, the library belonging to such parish or place shall be forthwith shut up and locked, or otherwise secured by the churchwardens, or by such persons as shall be authorized by the proper ordinary or archdeacon respectively, so that the same shall not be opened again till a new incumbent, rector, vicar, minister, or curate shall be inducted or admitted."

To be locked up during the vacancy of the church.

Sect. 7. "Provided, that if the place where such library shall be kept shall be used for any public occasion, for meeting of the vestry, or otherwise for the dispatch of any business of the said parish, or for any other public occasion for which the said place hath been ordinarily used, the said place shall, nevertheless, be made use of as formerly for such purposes, and after such business dispatched,

ever, among those which were first condemned by the Church. See the 9th section of the third book of the Apostolical Institutions, tit. "Quod non oportet mulieres baptizare, esse enim impium et a doctrina Christi alienum."

shall be again forthwith shut and locked up, or otherwise secured as is before directed."

New incumbent to give security.

Sect. 2. "And for the encouragement of such founders and benefactors, and to the intent they may be satisfied that their pious and charitable intent may not be frustrated, every incumbent, rector, vicar, minister, or curate of a parish, before he shall be permitted to use or enjoy such library, shall enter into such security by bond or otherwise for preservation of such library and due observance of the rules and orders belonging to the same, as the proper ordinaries within their respective jurisdictions in their discretion shall think fit."

And to make new catalogues.

Sect. 4. "And where any library is appropriated to the use of the minister of any parish or place, every rector, vicar, minister or curate of the same, within six months after his institution, induction or admission, shall make a new catalogue of all books remaining in or belonging to such library, and shall sign the said catalogue, thereby acknowledging the custody and possession of the said books; which said catalogue so signed shall be delivered to the proper ordinary within the time aforesaid, to be kept or registered in his court, without any fee or reward for the same."

Sect. 5. "And where any library shall at any time hereafter be given and appropriated to the use of any parish or place where there shall be an incumbent, rector, vicar, minister or curate in possession, he shall make a catalogue thereof, and deliver the same as aforesaid, within six months after he shall receive such library."

Books not to be alienated.

Sect. 10. "And none of the said books shall in any case be alienable or be alienated, without the consent of the proper ordinary, and then only when there is a duplicate of such book.

Remedy in case of books lost or detained.

"And in case any book or books be taken or otherwise lost out of the said library, it shall be lawful for a justice of the peace to grant his warrant to search for the same; and in case the same be found, such book or books so found shall, immediately, by order of such justice, be restored to the said library."

Sect. 2. "And in case any book or books belonging to the said library shall be taken away and detained, it shall be lawful for the incumbent, rector, vicar, minister or curate for the time being, or any other person or persons, to bring an action of trover and conversion in the name of the proper ordinaries within their respective jurisdictions, whereupon treble damages shall be given, with full costs of suit, as if the same were his or their proper book

or books, which damages shall be applied to the use and benefit of the said library."

Sect. 8. "And for the better preservation of such books, and that the benefactions given towards the same may appear, a book shall be kept within the said library for the entering and registering of all such benefactions and such books as shall be given towards the same, and therein the minister shall enter such benefaction, and an account of all such books as shall from time to time be given, and by whom given."

Account to be kept of new benefactions.

Sect. 9. "And for the better governing the said libraries, and preserving of the same, it shall be lawful for the proper ordinary, together with the donor of such benefaction (if living) and after the death of such donor, for the proper ordinary alone, to make such other rules and orders concerning the same, over and above, and besides, but not contrary to such as the donor of such benefaction shall, in his discretion, judge fit and necessary, which said orders and rules so to be made shall from time to time be entered in the said book, or some other book to be prepared for the purpose, and kept in the said library."

New regulations from time to time, how to be made.

By sect. 11, it is provided that this act shall not extend to a public library at Ryegate (Reigate) in Surrey: "the " said library being constituted in another manner than " the libraries provided for by this act."

Exception.

Provision for public libraries in towns is made by 18 & 19 Vict. c. 70 (amended by 29 & 30 Vict. c. 114, and 34 & 35 Vict. c. 71); but these libraries have no ecclesiastical character.

Town libraries.

PART IX.

CHURCH EXTENSION.

CHAPTER I.

INTRODUCTORY.

Early ecclesiastical arrangement.

FROM a very early period of English history, at the very latest computation many years before Magna Charta, England was, as it has been said, for ecclesiastical purposes, divided into provinces, bishoprics and parishes (*a*); and as every portion of the soil of England, except certain "peculiar" places, was situated within some bishopric and province, so, with the exception of certain "extra-parochial" places, is every portion of such soil within some parish. A parish is the place in which the people belonging to one church dwell (*b*), and, properly, every parish had a church situate therein; and with this church there was one parson having the cure of souls of the whole parish. The church and the parson had certain lands and endowments vested in them from time immemorial, the freehold whereof is in the parson for the time being, and which are said by Blackstone to be holden in frankalmoign (*c*).

Besides the parish church there was also a cathedral church for the whole diocese; and there were certain auxiliary chapels (*d*).

Its unalterableness.

The ecclesiastical arrangement of England being thus constituted, remained unalterable, even by the highest authorities of the church, without the consent of parliament. For the parish was a division of civil as well as ecclesiastical importance, and, dating from time immemorial, could only be altered by or under the provisions of an act of parliament.

(*a*) 1 Steph. Blackstone (ed. 1858), p. 115. *Vide supra*, pp. 27, 263, 329.

(*b*) *Jeffrey's case*, 5 Co. 67a.

(*c*) 1 Steph. Blackstone (ed. 1858), p. 227.

(*d*) *Vide supra*, Part VI., Chap. III.

Moreover, as every parish church had to be consecrated and set apart from all profane uses and vested in the great corporation of the church, and as all endowments in land for the benefit of the parson were also vested in a corporate body, no land could be, after the passing of the Statutes of Mortmain (*e*), conveyed to these uses or consecrated without the consent of the crown, and at one time also of the immediate lords of the fee. Ecclesiastical purposes, being also charities, came under the restrictions of 9 Geo. 2, c. 36 (*f*).

Local acts of parliament.

In this way it had become practically impossible to extend or increase the provisions of church accommodation by the ordinary powers and authorities of the church; and to meet the grave and increasing deficiencies in the ministration of the offices of religion in all large towns, the population of the country ever growing and, moreover, shifting its centres, it became necessary to procure local or private acts of parliament; such acts were obtained for the metropolis, Liverpool, Brighton, and many other places.

Acts for augmenting benefices, &c.

The statutes 17 Car. 2, c. 3, and 29 Car. 2, c. 8, had enabled certain augmentations to be made of poor livings; and the great gift of Queen Anne's Bounty (carried into effect by 2 & 3 Ann. c. 2, and 1 Geo. 1, stat. 2, c. 10) had also contributed to the same purpose. Still later, by 43 Geo. 3, cc. 107, 108; 51 Geo. 3, c. 115, and 52 Geo. 3, c. 161, further facilities were given for the building and endowment of churches, and the augmentation of benefices with lands and hereditaments; but none of the statutes provided for any division or alteration of the old parishes, and of the cure of souls belonging to the parson thereof.

For division of parishes.

The first act providing for the division of parishes was 58 Geo. 3, c. 45. This act has since been followed by 59 Geo. 3, c. 134; 3 Geo. 4, c. 72; 5 Geo. 4, c. 103; 7 & 8 Geo. 4, c. 72; 1 & 2 Will. 4, c. 38; 1 & 2 Vict. c. 107; 2 & 3 Vict. c. 49; 3 & 4 Vict. c. 60; 6 & 7 Vict. c. 37; 7 & 8 Vict. c. 94; 8 & 9 Vict. c. 70; 11 & 12 Vict. c. 37; 14 & 15 Vict. c. 97; 19 & 20 Vict. c. 104; 32 & 33 Vict. c. 94. These, with some other ancillary acts, contain the complicated and contradictory provisions out of which the law as to the building of churches and the division of parishes is to be gathered.

As to the ecclesiastical commissioners.

The source, however, from which the largest funds have been and still are provided for the division of parishes

(*e*) *Vide supra*, Part VIII., Chap. II., Sect. 2.

(*f*) Ibid.

and the formation of new benefices is that supplied by the ecclesiastical commissioners, from the surplus income of the property of the bishops, deans and chapters, and other wealthy spiritual persons. Moreover, to the ecclesiastical commissioners large administrative powers have been given, which take effect in the alteration of dioceses and parishes, the abolition of peculiar jurisdictions, and many other changes in the territorial arrangement of the church.

Subjects of part.

It will be best, therefore, to treat first of Queen Anne's Bounty, then of the Ecclesiastical Commissioners, and then of the augmentation of benefices by private persons, of the building of churches, of the division of parishes, and, lastly, of the voluntary church societies, some of which have been incorporated and endowed with certain privileges by the state for carrying on the work of extending the influence of the church both in England and abroad.

CHAPTER II.

QUEEN ANNE'S BOUNTY.

It has been already stated, that by the law of England, previous to the reign of Henry VIII., certain duties called first fruits and tenths were paid by the incumbents of ecclesiastical benefices to the pope, and that these first fruits and tenths were taken from the pope, and were annexed to the crown of England by 26 Hen. 8, c. 3 (*a*).

Sources of.

These first fruits and tenths continued to form part of the revenues of the crown, till Queen Anne determined to apply them to the augmentation of the livings of the poorer clergy. This she was enabled to do by 2 & 3 Ann. c. 20, which provided as follows:—

Queen Anne's grant.

Sect. 1. "It shall be lawful for the queen, by her letters patent under the great seal, to incorporate such persons as she shall therein nominate or appoint, to be one body politic and corporate, to have a common seal and perpetual succession, and also at her majesty's will and pleasure, by the same or any other letters patent, to grant, limit or settle to or upon the said corporation and their successors for ever, all the revenue of first fruits and yearly perpetual tenths of all dignities, offices, benefices, and promotions spiritual, to be applied and disposed of for the augmentation of the maintenance of such parsons, vicars, curates and ministers officiating in any church or chapel where the liturgy and rites of the Church of England as now by law established shall be used and observed; with such lawful powers, authorities, directions, limitations and appointments, and under such rules and restrictions, and in such manner and form, as shall be therein expressed."

Power to incorporate governors, and to grant first fruits and tenths to them.

Sect. 3. "But this shall not affect any grant, exchange, alienation or incumbrance heretofore made of or upon the said revenues of first fruits and tenths, but the same, during the continuance of such grant, exchange, alienation or incumbrance, shall remain in such force as if this act had not been made."

Saving of former grants.

The first fruits and tenths so granted are called Queen Anne's Bounty.

(*a*) *Supra*, Part V., Chap. VIII., Sect. 1.

Letters patent of incorporation.

In pursuance of this act, the queen, by letters patent, bearing date November 3, in the third year of her reign, incorporated the archbishops, bishops, deans, speaker of the house of commons, master of the rolls, privy councillors, lieutenants and *custodes rotulorum* of the counties, the judges, the queen's serjeants at law, attorney and solicitor-general, advocate-general, chancellors and vice-chancellors of the two universities, mayor and aldermen of London, and mayors of the respective cities, for the time being, according to the purport of the said statute (unto whom, by a supplemental charter bearing date March 5, in the twelfth year of her majesty's reign, were added, the officers of the Board of Green Cloth, the queen's counsel learned in the law, and the four clerks of the privy council), to be a body corporate, by the name of *The Governors of the Bounty of Queen Anne, for the Augmentation of the Maintenance of the Poor Clergy:* and thereby granted to them the said revenue of the first fruits and tenths for the purposes aforesaid, under the rules and directions to be established pursuant to the said letters patent, together with these following directions: that is to say, that they shall keep four general courts at least in every year, at some convenient place within London and Westminster (notice being in that behalf first given in the Gazette, or otherwise, fourteen days before); the said courts to be in the months of March, June, September, and December; that the said governors, or so many of them as shall assemble, not less than seven in number at any one meeting (whereof, by the aforesaid supplemental charter, a privy councillor, bishop, judge, or one of the queen's counsel to be one) shall be a general court, and dispatch business by majority of votes, with power to appoint committees for the easier dispatch of business.

And to draw up rules and orders for the better rule and government of the said corporation and members thereof, and receiving, accounting for, and managing the said revenues, and for disposing of the same, and of such other gifts and benevolences as shall be given to them for the purposes aforesaid: which being approved, altered or amended by the crown, and so signified under the great seal, to be the rules whereby the governors shall manage the said revenue, and such other gifts and benevolences whereof the donors shall not particularly direct the application.

And that they shall inform themselves of the true yearly value of the maintenance of every such parson, vicar, curate and minister officiating in any such church or chapel as aforesaid, for whom a maintenance of the yearly value

of 80*l.* is not sufficiently provided, and the distances of such churches and chapels from London, and which of them are in towns corporate or market towns, and which not, and how they are supplied with preaching ministers, and where the incumbents have more than one living.

And that they shall have a secretary and treasurer, and such inferior officers, substitutes, and servants as they shall think fit, to be chosen by a majority of votes at a general court, and to continue during the pleasure of the said governors; the secretary and treasurer to be first sworn at a general court, for the due and faithful execution of their offices; and the treasurer to give security for his faithful accounting for the monies he shall receive by virtue of the said office.

And with the power to admit into their said corporation all such persons who shall be piously disposed to contribute towards such augmentation as the said governors in a general court shall think fit.

And that they shall cause to be entered in a book to be kept for that purpose, the names of all the contributors, with their several contributions, to the end a perpetual memorial may be had thereof, and whereby the treasurer may be charged with the more certainty in his account.

And by 1 Geo. 1, st. 2, c. 10, s. 19, the courts and committees of the said governors shall have power to administer an oath to such persons as shall give them information or be examined concerning any thing relating to the execution of their trust.

Rules and orders made in pursuance of the said letters patent.

And in pursuance of the said letters patent, the following rules and orders have been established: viz.—

(1) That the augmentations to be made by the said corporation shall be by the way of purchase, and not by the way of pension.

(2) That the stated sum to be allowed to each cure which shall be augmented be 200*l.* to be invested in a purchase, at the expense of the corporation.

(3) That as soon as all the cures not exceeding 10*l.* *per annum*, which are fitly qualified, shall have received our bounty of 200*l.*, the governors shall then proceed to augment those cures that do not exceed 20*l.* *per annum*, and shall augment no other till those have all received our bounty of 200*l.*, except in the cases and according to the limitations hereafter named. And that from and after such time as all the cures not exceeding 10*l.* a year, which are fitly qualified, shall have received our bounty of 200*l.*, the like rules, orders and directions shall be from thenceforth by the governors observed and kept in relation to

Rules and orders made in pursuance of the said letters patent.

cures not exceeding 20*l.* a year, as are now in force and ought to be by them observed and kept in relation to cures not exceeding 10*l.* a year.

(4) That in order to encourage benefactions from others, and thereby the sooner to complete the good intended by our bounty, the governors may give the sum of 200*l.* to cures not exceeding 45*l.* a year, where any persons will give the same or a greater sum, or the value thereof in lands, tithes or rent charges.

(5) That the governors shall every year, between Christmas and Easter, cause the account of what money they have to distribute that year to be audited; and when they know the sum, public notice shall be given in the Gazette or such other way as shall be judged proper, that they have such a sum to distribute in so many shares, and that they will be ready to apply those shares to such cures as want the same, and are by the rules of the corporation qualified to receive them, where any persons will add the like or greater sum to it, or the value in land or tithes, for any such particular cure.

(6) That if several benefactors offer themselves, the governors shall first comply with those that offer most.

(7) Where the sums offered by other benefactors are equal, the governors shall always prefer the poorer living.

(8) Where the cures to be augmented are of equal value, and the benefactions offered by others are equal, there they shall be preferred that first offer.

(9) Provided, nevertheless, that the preference shall be so far given to cures not exceeding 20*l.* a year, that the governors shall not apply above one-third part of the money they have to distribute that year to cures exceeding that value.

(10) Where the governors have expected till Michaelmas what benefactors will offer themselves, then no more proposals shall be received for that year; but if any money remain after that to be disposed of, in the first place two or more of the cures in the gift of the crown, not exceeding 10*l.* a year, shall be chosen by lot, to be augmented preferably to all others; the precise number of these to be settled by a general court, when an exact list of them shall be brought in to the governors.

(11) As for what shall remain of the money to be disposed of after that, a list shall be taken of all the cures in the Church of England, not exceeding 10*l.* a year, and so many of them be chosen by lot as there shall remain sums of 200*l.* for their augmentation.

(12) Provided that when all the cures not exceeding 20*l.* a year, which are fitly qualified, shall be so augmented, the governors shall then proceed to augment those of greater value, according to such rules as shall at any time hereafter be proposed by them, and approved by us, our heirs or successors, under our or their sign manual.

(13) That all charitable gifts in real or personal estates, made to the corporation, shall be strictly applied according to the particular direction of the donor or donors thereof, where the donor shall give particular direction for the disposition thereof; and where the gift shall be generally to the corporation, without any such particular direction, the same shall be applied as the rest of the fund or stock of the corporation is to be applied.

(14) That a book shall be kept wherein shall be entered all the subscriptions, contributions, gifts, devises or appointments made or given of any monies, or of any real or personal estate whatsoever, to the charity mentioned in the charter, and the names of the donors thereof, with the particulars of the matters so given; the same book to be kept by the secretary of the corporation.

(15) That a memorial of the benefactions and augmentations made to each cure shall, at the charge of the corporation, be set up in writing on a stone to be fixed in the church of the cure so to be increased, there to remain in perpetual memory thereof.

(16) When the treasurer shall have received any sum of money for the use of the corporation, he shall, at the next general court to be holden after such receipt, lay an account thereof before the governors, who may order and direct the same to be placed out for the improvement thereof, upon some public fund or other security, till they have an opportunity of laying it out in proper purchases for the augmentation of cures.

(17) That the treasurer do account annually before such a committee of the governors as shall be appointed by a general court of the said corporation, who shall audit and state the same; and the said account shall be entered in a book to be kept for that purpose, and shall be laid before the next general court after such stating, the same to be there re-examined and determined.

(18) The persons whose cures shall be augmented shall pay no manner of fee or gratification to any of the officers or servants of this corporation.

Rules confirmed.

By 1 Geo. 1, st. 2, c. 10, s. 3, all such rules and orders as shall from time to time be by the governors agreed upon, prepared, and proposed to the king, according to the

true intent of the said letters patent, and by him approved under his *sign manual*, shall be as good as if they were established under the *great seal*.

Quorum.

By 28 & 29 Vict. c. 69, s. 5, any five of the governors, of whom three at least shall be archbishops and bishops, shall be a quorum, and sufficient at any court for the dispatch by majority of votes of all business (*b*).

Ascertaining the valuation of livings to be augmented.

By 6 Ann. c. 24, all benefices with cure of souls, not exceeding the clear improved yearly value of 50*l.* (as has been said), are discharged from first fruits and tenths; and the bishops and guardians of the spiritualties *sede vacante* were to inform themselves of the values of all such benefices.

And by 1 Geo. 1, st. 2, c. 10, s. 1, the bishops of every diocese, and the guardians of the spiritualties *sede vacante*, are empowered and required, from time to time as they shall see occasion, as well by the oath of two or more witnesses (which they or others commissioned by them under their hands and seals are empowered to administer) as by all other lawful ways and means, to inform themselves of the clear improved yearly value of every benefice with cure of souls, living, and curacy within their several dioceses, or within any peculiars or places of exempt jurisdiction within the limits of their respective dioceses, or adjoining or contiguous thereunto, although the same be exempt from the jurisdiction of any bishop in other cases, and how such yearly values arise, with the other circumstances thereof; and the same or such of them whereof they shall have fully informed themselves from time to time, with all convenient speed, to certify under their hands and seals, or seals of their respective offices, to the governors of the bounty.

Sect. 2. Provided that where by certificates returned into the exchequer by 6 Ann. c. 24, the yearly values of any livings not exceeding the clear yearly value of 50*l.* are particularly and duly expressed and specified, such certificates shall ascertain the yearly value of such livings, in order to their being augmented; and no new or different valuation thereof shall be returned to the said governors by this act (*c*).

Agreement with benefactors for the nomination.

By 1 Geo. 1, st. 2, c. 10, s. 8, all agreements with benefactors, with the consent and approbation of the governors, touching the patronage or right of presentation, or nomina-

(*b*) By 33 & 34 Vict. c. 89, the governors may grant superannuation allowances to their clerks and servants.

(*c*) *Vide infra*, 45 Geo. 3, c. 84, s. 1.

tion to such augmented cure, made for the benefit of such benefactor, his heirs or successors, by the king under his sign manual, or by any bodies politic or corporate, or by any person of the age of twenty-one years, having an estate of inheritance in fee simple or fee tail in his own right, or in the right of his church, or of his wife, or jointly with his wife made before coverture or after, or having an estate for life or for years determinable upon his own life, with remainder in fee simple or fee tail to any issue of his own body, in such patronage or right of presentation, or nomination in possession, reversion or remainder, shall be good and effectual in the law; and the advowson, patronage, and right of presentation and nomination to such augmented churches and chapels, shall be vested in such benefactors, their heirs and successors, or the said bodies politic and corporate, and their successors, or the said respective persons as aforesaid, as fully as if the same had been granted by the king under his great seal, and as if such bodies politic or corporate had been free from any restraint, and as if such other person so agreeing had been sole seised in their own right of such advowson, patronage, right of presentation, and nomination in fee simple, and had granted the same to such benefactors, their heirs and successors respectively, according to such agreements.

By sect. 9, the agreements of guardians on behalf of infants or idiots were to be as effectual as if the said infants or idiots had been of full age and sound mind, and had themselves entered into such agreements. But this was repealed by 11 Geo. 4 & 1 Will. 4, c. 65, s. 25. By 16 & 17 Vict. c. 70, s. 128, this power as to lunatics is vested in the committee of their estate.

Sect. 10. But in case of such agreement by any parson or vicar, the same shall be with the consent and approbation of his patron and ordinary.

Sect. 11. And in case of such agreement made by any person seised in right of his wife, the wife shall be a party to the agreement, and seal and execute the same.

Sect. 12. And such agreements with benefactors so made as aforesaid, shall be as effectual for the supplying cures vacant at the time of such augmentation made or proposed, as for the advowson or nomination to future vacancies.

Agreement with patrons and others for a stipend, in case of augmentation by lot.

Sect. 16. Where it shall fall to the lot of any donative, curacy, or chapelry to receive an augmentation, according to the rules established or to be established, it shall be lawful for the governors, before they make the augmentation, to treat and agree with the patron of any donative,

impropriator of any rectory, impropriated without endowment of any vicarage, or parson, or vicar of any mother church, for a perpetual, yearly, or other payment or allowance to the minister or curate of such augmented donative curacy, or chapelry, and his successors, and for charging with and subjecting the impropriate rectory or the mother church or vicarage thereunto, in such manner and with such remedies as shall be thought fit; and such agreements made with the king under his sign manual, or with any bodies politic or corporate, or any other person having any estate or interest in possession, reversion or remainder in any such impropriate rectory in his own right or in the right of his church or his wife, or with the guardian of any person having such estate, or interest, or with any parson or vicar of any mother church, shall be as effectual with respect to such charges, as agreements made with the king, or with the same persons or bodies politic or corporate touching the patronage or right of presentation or nomination. And if such impropriator other than the king, and such parson or vicar, will not or shall not make such agreement with the said governors, the said governors may refuse such augmentation, and apply the money arising from the bounty which ought to have been employed therein, for augmenting some other cure, according to the rules then in force.

Capacity of ministers for receiving the augmentation.

And by 6 Ann. c. 24, s. 5, whereas the augmentation is intended for the maintenance, not only of parsons and vicars, but also of curates and other ministers officiating in churches or chapels: therefore, for the preventing of all doubts touching the capacity of such ministers who are to receive the benefit of such augmentation, it is enacted, that when any part or portion of the first fruits or tenths shall be annually or otherwise applied or disposed of towards the maintenance of any minister officiating in any church or chapel as aforesaid, such part or portion shall from thenceforth for ever be in the like manner continued to the minister from time to time so officiating in the same church or chapel: and every such minister, whether parson, vicar, curate, or other minister for the time being, so officiating in such church or chapel, shall enjoy the same for ever.

Augmentation of benefices vacant.

And by 1 Geo. 1, st. 2, c. 10, s. 21, to the end that churches and chapels may at all times be capable of receiving augmentations; if the governors shall, by any deed or instrument in writing under their common seal, allot or apply to any church or chapel any lands, tithes, or hereditaments arising from the said bounty, or from private contribution or benefaction, and shall declare that the

same shall be for ever annexed to such church or chapel; then such lands, tithes and hereditaments shall from thenceforth be holden and enjoyed, and go in succession with such church and chapel for ever: and such augmentation so made shall be good and effectual to all intents and purposes, whether such church or chapel for which such augmentation is intended, be then full or vacant of an incumbent or minister; provided, such deed or instrument be inrolled in the chancery within six months after the day of the date thereof.

Benefices augmented shall be perpetual cures.

And by 1 Geo. 1, st. 2, c. 10, s. 4, all churches, curacies, or chapels which shall be augmented by the governors of the bounty, shall be from the time of such augmentation perpetual cures and benefices; and the ministers duly nominated and licensed thereunto, and their successors respectively, shall be in law bodies politic and corporate, and shall have perpetual succession by such name and names as in the grant of such augmentation shall be mentioned, and shall have a legal capacity, and be enabled to take in perpetuity to them and their successors, all such lands, tenements, tithes and hereditaments, as shall be granted unto or purchased for them respectively by the said governors, or other persons contributing with the said governors as benefactors. And the impropriators or patrons of any augmented churches or donatives for the time being, and their heirs, and the rectors and vicars of the mother churches whereto any such augmented curacy or chapel does appertain, and their successors, shall be utterly excluded from having or receiving directly or indirectly any profit or benefit by such augmentation, and shall pay and allow to the ministers officiating in any such augmented church and chapel respectively, such annual and other pensions, salaries and allowances, which by ancient custom or otherwise of right, and not of bounty, ought to be by them respectively paid and allowed, and which they might by due course of law, before the making of this act, have been compelled to pay or allow, and such other yearly sum or allowance as shall be agreed upon (if any shall be) between the said governors and such patron or impropriator upon making the augmentation, and the same shall be perfectly vested in the ministers officiating in such augmented church or chapel respectively and their successors.

As to cure of souls.

Sect. 5. Provided, that no such rector or vicar of such mother church, or any other ecclesiastical person having cure of souls within the parish or place where such augmented church or chapel shall be situate, shall hereby be

devested or discharged from the same; but the cure of souls, with all other parochial rites and duties (such augmentation and allowances to the augmented church or chapel as aforesaid only excepted), shall remain in the same state, plight, and manner, as before the making of this act.

Now, however, by 2 & 3 Vict. c. 49, ss. 2, 3, 4, 5, any chapel having a district assigned to it shall be a perpetual curacy, with cure of souls, though it has been augmented by Queen Anne's Bounty, and the governors of the bounty may augment before or after the assignment of a district.

And lapse thereof may incur.

By 1 Geo. 1, st. 2, c. 10, s. 6, if such augmented cures be suffered to remain void for six months, without a nomination within that time of a fit person to serve the same (by the person having right of nomination) to be licensed for that purpose; the same shall lapse to the bishop or other ordinary, and from him to the metropolitan, and from the metropolitan to the crown, according to the course of law used in cases of presentative livings: and the right of nomination to such augmented cure may be granted or recovered, and the incumbency thereof shall cease and be determined, in like manner as in a vicarage presentative.

Sect. 7. Provided, that if the person entitled to nominate in such augmented cure shall suffer lapse to incur, but shall nominate before advantage taken thereof; such nomination shall be as effectual as if made within six months, although so much time be elapsed as that the title of lapse be vested in the crown.

Donatives, how affected by the augmentation.

Sect. 14. All donatives exempt from ecclesiastical jurisdiction, and augmented by virtue of the powers given by this act, shall be subject to the visitation and jurisdiction of the bishop of the diocese.

Sect. 15. But no donative shall be augmented without the consent of the patron in writing under his hand and seal.

Exchanging of lands settled by the augmentation.

Sect. 13. It shall be lawful, with the concurrence of the governors, and the incumbent, patron and ordinary of any augmented living or cure, to exchange all or any part of the estate settled for the augmentation thereof, for any other estate in lands or tithes, of equal or greater value, to be conveyed to the same uses.

By 43 Geo. 3, c. 107, s. 2, this power shall be extended to all the messuages, buildings and lands belonging to every such augmented living or cure.

Power to build or purchase

Sect. 3. "Where a living shall have been or shall be augmented by the said governors, either by way of lot or

benefaction, and there is no parsonage house suitable for the residence of the minister, it shall and may be lawful for the said governors, and they are hereby empowered, from time to time, in order to promote the residence of the clergy on their benefices, to apply and dispose of the money appropriated for such augmentation, and remaining in their hands, or any part thereof, in such manner as they shall deem most advisable, in or towards the building, rebuilding or purchasing a house, and other proper erections within the parish, convenient and suitable for the residence of the minister thereof, which house shall for ever thereafter be deemed the parsonage house appertaining to such living, to all intents and purposes whatsoever; anything in any act or acts or the rules of the said governors contained to the contrary notwithstanding."

house out of augmentation monies.

By 45 Geo. 3, c. 84, "The respective bishops of every diocese, and the guardians of spiritualties *sede vacante*, shall be and are hereby empowered from time to time as they shall see occasion, and as may best serve the purposes of the said bounty to the poor clergy, by such ways and means as in 1 Geo. 1, st. 2, c. 10, are mentioned in that behalf, to inform themselves of the clear improved yearly value of such benefices with cure of souls, livings and curacies as were returned into the exchequer in pursuance of 6 Ann. cc. 24, 54, within their several dioceses, or within any peculiars or places of exempt jurisdiction within the bounds and limits of their respective dioceses, or adjoining or contiguous thereto, although the same be exempt from the jurisdiction of any bishop in other cases, and how such yearly values arise, with the other circumstances thereof; and the same or such of them, whereof they shall have fully informed themselves, from time to time with all convenient speed to certify to the said governors of the bounty of Queen Anne, for the augmentation of the maintenance of the poor clergy, for their better information in the premises; and the said governors are hereby authorized and empowered, with respect to the augmentation of such livings, so formerly certified into the exchequer as aforesaid, to act upon and be guided by such new certificates of the value and other circumstances thereof, made in pursuance of this act, as fully and effectually to all intents and purposes as they are in and by the said first hereinbefore mentioned and in part recited act enabled to do with regard to such livings as were not so certified into the exchequer, and as if the restraint of the said proviso therein had not been made, the same

Bishops and guardians to inquire into value of benefices returned into the exchequer, and certify the same to the governors of Queen Anne's Bounty, who shall be empowered to act upon such new certificate as they are now enabled to do with respect to livings not returned into the exchequer.

proviso or anything in the said recited act to the contrary thereof in anywise notwithstanding."

Not to affect livings with respect to their discharge from first fruits and tenths.

Sect. 2. "Provided always, that such certificates as were returned into the exchequer for the purpose of ascertaining what livings were to be discharged from first fruits and tenths, shall not, so far as the same relate to the first fruits and tenths, be affected or altered in any manner whatsoever by anything in this act contained."

Registry to be kept of all matters relating to the augmentation.

By 1 Geo. 1, st. 2, c. 10, s. 20, all the augmentations, certificates, agreements, and exchanges, to be made by virtue of this act, shall be carefully examined and entered in a book to be provided and kept by the governors for that purpose; which said entries being approved at a court of the said governors, and attested by the governors then present, shall be taken to be as records; and the true copies thereof, or of the said entries, being proved by one witness, shall be sufficient evidence in law touching the matters contained therein or relating thereto.

Abolition of office of first fruits, &c.

By 1 Vict. c. 20, ss. 1, 2, the offices of first fruits and tenths were abolished, and the books, vouchers, etc., belonging to them were delivered up to the treasurer of Queen Anne's Bounty; who by sects. 3, 5, is to be sole collector of first fruits and tenths.

By sect. 4, the governors are to have the same remedies as the old collectors and remembrancer had for collecting the first fruits and tenths. Provision is made for searches of documents in the office by sects. 6, 7. Sects. 8, 9, provide for sending notices to incumbents of their liability to pay either first fruits or tenths.

Bishop of Ripon and bishops of any future sees to be governors.

Sect. 16. "The Bishop of Ripon for the time being shall be a governor of the bounty of Queen Anne for the augmentation of the maintenance of the poor clergy; and in the event of the foundation of any new see or sees in England or Wales the bishop or bishops thereof for the time being shall be a governor or governors of the said bounty."

General meeting of governors to be holden yearly.

Sect. 17. "Between the first day of February and the first day of July in every year, on some convenient day and at some convenient place in the city of London or Westminster, to be respectively appointed for that purpose by the said governors of the bounty of Queen Anne, they the said governors shall hold an extraordinary general court or meeting for the despatch of the business of the said governors, and that at least fourteen days previous notice of the time and place of such general court or meeting shall be yearly given in the London Gazette."

Sect. 18. "The said governors of the bounty of Queen Anne shall, in the month of November in every year, make out in writing a return of all their receipts and disbursements during the preceding year ending on the thirty-first day of December then last past, and of all sums of money which at the time of making such account or return shall appear to be due or in arrear from any person or persons whomsoever for or in respect of first fruits and tenths respectively, and shall present such account or return to her Majesty in council; and that the same or copies thereof shall, at the commencement of the ensuing session, be laid before both houses of parliament; and shall cause a duplicate of each such account or return to be deposited, on or before the first day of December in every year, at the office of the secretary of the said governors for the time being, who shall keep and preserve the same respectively at his said office; and all persons whatsoever may at all seasonable times have access thereto, and be furnished by the said secretary with copies or extracts thereof, or of such part or parts thereof as they shall require, stamped with the common seal of the said governors, on giving reasonable notice to the said secretary, and on payment of two shillings and sixpence for such inspection, and after the rate of threepence for every seventy-two words contained in such copy or extract; and all copies of or extracts from any of the said duplicates of the said accounts or returns, purporting to be stamped with the common seal of the said governors, shall be received in evidence in all courts and before all judges whatsoever without any further proof thereof."

Account to be annually laid before her Majesty in council and both houses of parliament.

Sect. 19. "It shall be lawful for her Majesty and her successors, under her or their royal sign manual, from time to time as there shall be occasion, and at the recommendation of the said governors of the bounty of Queen Anne, to make rules, orders, regulations, and arrangements for the better collecting, receiving, and enforcing the payment of the said first fruits and tenths, and accounting for the same, and for prescribing or regulating the duties of the said treasurer for the time being with respect to the said first fruits and tenths, and his receipt, disposition, and accounting for the same, and the number, duties, and employment of the clerks or other persons to be employed therein under the direction of such treasurer or otherwise, and for the remuneration of the said treasurer, clerks, and other persons respectively, for the duties performed by him and them respectively in the matters aforesaid, either by a

Governors empowered to make rules and orders.

fixed salary or salaries, or by the appropriation to him or them respectively, for his or their own benefit, of all or any of the fees hereinbefore directed to be paid to such treasurer for the time being, and for enforcing and carrying into more complete operation the objects and purposes of this act."

Deeds for purchases, &c. to be made in the following form.

Sect. 20. "All conveyances and grants, either by way of purchase or by way of gift or of benefaction, of lands, tenements, and hereditaments hereafter to be made to or by the direction of the said governors and their successors, according to the rules and orders established for the regulation of the said bounty by letters patent under the great seal of Great Britain, and pursuant to the charter of incorporation of the said governors, and the several acts of parliament in that case made and provided for the perpetual augmentation of small livings and cures, may be made according to the following form, or as near thereto as the number of the parties and the circumstances of the case will admit, namely:—

'*I*, —— *of* ——, *in consideration of* [state the consideration], *do hereby grant and convey to the said governors, their successors and assigns*, [or *to the rector, vicar, curate*, or *incumbent of the rectory, vicarage, curacy, or chapelry of* —— (as the case may be), *and his successors, by the direction of the said governors, (testified by their affixing their common seal to this deed)*], *all* [describing the premises to be conveyed], *together with all ways, rights, and appurtenances thereunto belonging, and all such estate, right, title, and interest in and to the same and every part thereof as I am or shall become seised or possessed of, to hold the said premises to the said governors, their successors and assigns, for ever, to be by them applied and disposed of* [or *to hold the said premises to the said rector, &c.*, as the case may be, *and his successors, for ever*,] *for the augmentation of the maintenance of the said rector, vicar, curate*, or *incumbent* [as the case may be], *of the rectory, vicarage, curacy*, or *chapelry of* ——. *In witness whereof, &c.*'

And all such conveyances and grants shall be valid and effectual in the law to convey all the right, title, and interest of the grantors or grantor in the premises thereby conveyed or granted."

Deed for granting stipends, &c. to be in the following form.

Sect. 21. "All deeds for the purpose of granting stipends, rent-charges, or annuities, to or by the direction of the said governors for the augmentation of small livings and cures, may be made according to the form following, or as near

thereto as the number of the parties and the circumstances of the case will admit, viz.—

'*I, —— of ——, in consideration of* [state the consideration], *do hereby give and grant unto the governors of the bounty of Queen Anne for the augmentation of the maintenance of the poor clergy, and their successors* [or *to the rector, vicar, curate,* or *incumbent of the rectory, vicarage, curacy, &c. of ——, and his successors, by the direction of the said governors, testified by their affixing their common seal to this grant*], *the clear rent-charge or annual sum of —— to be issuing out of and charged upon all* [describe the premises charged], *to hold the said clear rent-charge or annual sum of ——, free from all charges and deductions now payable or hereafter to be made payable, unto the said governors, their successors and assigns, to be by them applied to the perpetual augmentation of the maintenance of the rector, vicar, curate,* or *incumbent* (as the case may be), *of, &c.* [or *unto the rector, vicar, curate,* or *incumbent of, &c.* (as the case may be), *for the perpetual augmentation of the said rectory, vicarage, curacy,* or *benefice*], *such clear rent-charge or annual sum to be paid yearly for ever, by four equal quarterly payments, on the days and times following,* [specify the days and times and the place at which the payments are to be made], *the first payment to be made on such of the said days as shall first happen next after the date hereof. In witness whereof, &c.*'

And every such gift and grant shall be valid and effectual in the law for the purpose of securing the payment of such clear rent-charge or annual sum as shall be therein expressed to be granted, as far as the estate or interest of the grantors or grantor in the tenements and hereditaments thereby charged shall extend, and shall be construed and adjudged in all courts of judicature to authorize and empower the grantees or grantee therein named, and their respective successors and assigns, if such clear rent-charge or annual sum, or any part thereof, shall be in arrear for the space of twenty-eight days, to levy the same by distraining any goods upon the premises charged, and selling the distress, as in the case of rent reserved on common leases for years, and to repeat such distress and sale from time to time, whenever necessary, until such clear rent-charge or annual sum, and all arrears thereof, and any costs attending the nonpayment thereof, shall be fully discharged."

By sect. 22, the word "grant" in all conveyances, etc. made for valuable consideration to the governors, shall imply the usual covenants for title.

By sect. 23, the governors may cause deeds to be enrolled.

By sect. 24, the forms of deeds authorized by former statutes may still be used.

Holding endowments under Church Building Acts.

By 2 & 3 Vict. c. 49, s. 12, the governors of Queen Anne's Bounty may take and hold any endowments which might be taken and holden by private trustees for the use and benefit of any church or chapel built or acquired under the powers of the previous Church Building Acts, or the incumbent of or spiritual person serving such church or chapel; and private trustees may assign these endowments to the governors, but the governors are first to signify their consent to accept the same by an instrument under their common seal.

By sect. 13, the money so given is to be paid to the treasurer of the bounty.

By 3 & 4 Vict. c. 20, s. 5, money so accepted by the governors is to be holden by them (except in special cases) upon the same trusts as money appropriated by themselves to any benefice.

Sale of lands purchased for endowment.

By 2 & 3 Vict. c. 49, ss. 15, 16, 18, 19, where lands have been purchased by the governors for the endowment of a benefice, which are not situate in the parish of the benefice or some adjoining parishes, the incumbent thereof may, with the consent of the governors, sell the same; and, where the lands so purchased are situate in the parish or adjoining parishes, but for special reasons it would be desirable to sell the same, the incumbent may, with the consent of the governors and the archbishop, sell the same; the purchase-money is to be paid to the treasurer and to be appropriated and invested for the benefit of the benefice as before (*d*).

3 & 4 Vict. c. 20.

By 3 & 4 Vict. c. 20, reciting the letters patent incorporating Queen Anne's Bounty, certain of the rules made by the governors and 1 Geo. 1, stat. 2, c. 10, and further reciting that, "under the provisions of the hereinbefore recited letters patent and act of parliament, or some or one of them, divers rules, orders, and constitutions have been from time to time made, whereby the power of the said governors to augment cures to the augmentation of which any benefactor or benefactors should also contribute as aforesaid has from time to time been enlarged and ex-

(*d*) *Vide supra*, pp. 1688—1690.

tended, both with respect to the amount of the yearly value of the cures which the said governors were empowered to augment, and with respect to the amount which the said governors were empowered to appropriate out of the funds at their disposal towards such augmentation, and such power so enlarged and extended has in many cases been exercised by the said governors, and in some of such cases agreements have been made with the benefactor or benefactors contributing to such augmentations touching the patronage or right of presentation or nomination to such augmented cures, according to the provision of the said recited act:" and that "doubts have arisen whether appropriations made by the said governors for the augmentation of any cure were strictly authorized by the rules, orders, and constitutions for the time being in force, in those cases in which the amount so appropriated to any cure by the said governors has exceeded in any one year the sum of two hundred pounds; and doubts have also arisen whether the agreements made with such benefactor or benefactors as aforesaid are strictly valid and effectual in those cases in which the yearly value of the augmented cure has previously to such augmentation exceeded the sum of thirty-five pounds, or the amount so appropriated by the said governors as aforesaid has exceeded in any one year the sum of two hundred pounds:" and that "it is expedient to remove and obviate all such doubts as aforesaid, both with respect to appropriations made by the said governors, and with respect to agreement made and to be made with any such benefactor or benefactors as aforesaid:" it is enacted as follows:—

Certain appropriations made by the governors confirmed.

Sect. 1. "All appropriations heretofore made by the said governors of any sum or sums of money out of the monies at their disposal to the augmentation of any cure shall be good, valid, and effectual, to all intents and purposes whatsoever, in all cases in which any benefactor or benefactors has or have, in order to obtain any such appropriation for the augmentation of the same cure, contributed not less than the amount of benefaction which was at the time of any such augmentation required in that behalf by the rules, orders, and constitutions then in force, notwithstanding that the sum or sums so appropriated by the said governors to the augmentation of such cure shall have exceeded in any one year the sum of two hundred pounds."

Certain agreements made by the governors confirmed, and provisions of

Sect. 2. "All agreements already made and hereafter to be made, with such consent and approbation of the patron and ordinary as required by the said recited act, and with the consent and approbation of the said governors,

recited act extended.

with any benefactor or benefactors contributing to the augmentation of any cure, touching the patronage or right of presentation or nomination to such augmented cure, for the benefit of such benefactor or benefactors, his, her, or their heirs or successors, according to the provisions of the said recited act, and all grants and assurances made and to be made for carrying such agreements into effect, shall be good, valid, and effectual in the law, to all intents and purposes whatsoever, in all cases in which the yearly value of the augmented cure shall have been or shall be within the limits prescribed for the same by the rules, orders, and constitutions which shall have been or shall be in force at the time of making such agreements respectively as aforesaid, notwithstanding that such yearly value shall have exceeded or shall exceed the sum of thirty-five pounds, or that the amount appropriated by the said governors out of the monies at their disposal to the augmentation of such cure shall have exceeded or shall exceed in any one year the sum of two hundred pounds, or that such yearly value and also the amount so appropriated shall both have exceeded or shall both exceed the same several sums respectively: Provided nevertheless, that so far as relates to such agreements as aforesaid the amount of all appropriations hereafter to be made by the said governors to the augmentation of any cure shall be within the limits prescribed for the same by the rules, orders, and constitutions which shall be in force at the time of making such agreements respectively as aforesaid."

Amount of appropriations hereafter to be made shall be within the limit prescribed by rules in force at the time.

Provisions of 1 Geo 1, st. 2, c. 10, extended to this act in cases where no appropriation shall be made by the governors.

Sect. 3. "All agreements hereafter to be made, with such consent and approbation of the patron and ordinary, as required by the said recited act, and with the consent and approbation of the said governors, with any benefactor or benefactors contributing to or providing for the augmentation of any cure, touching the patronage or right of presentation or nomination to such cure, for the benefit of such benefactor or benefactors, his, her, or their heirs or successors, according to the provisions of the said recited act, and all grants and assurances to be made for carrying such agreements into effect, shall be good, valid, and effectual in the law, to all intents and purposes whatsoever, in all cases in which the yearly value of such cure shall be within the limits prescribed for the same by the rules, orders, and constitutions which at the time of making such agreements respectively as aforesaid shall be in force with respect to cures for the augmentation of which appropriations to meet benefactions may be made by the said governors out of the funds at their disposal, notwithstanding that in any of such

cases no appropriation whatsoever shall be made by the said governors out of the funds at their disposal to the augmentation of the cure to which such agreements as aforesaid shall respectively relate."

On completion of an agreement for transfer of patronage of a cure to a benefactor, though no appropriation be made by the governors, the cure to be considered as one augmented by them.

Sect. 4. "Every cure touching the patronage or right of nomination to which any such agreement as aforesaid with any benefactor or benefactors shall be made for the benefit of such benefactor or benefactors, his, her, or their heirs or successors, though no appropriation whatsoever to the said cure for the augmentation thereof shall be made by the said governors out of the funds at their disposal, shall, from and immediately after the completion of such agreement, be deemed and considered in law, in all respects, and to all intents and purposes whatsoever, as a cure augmented by the said governors, and the same, and the minister or incumbent thereof, and his successors, shall be subject and liable to all the laws, rules, and regulations relating to or concerning cures augmented by them and the ministers or incumbents thereof."

Loans to ecclesiastical commissioners.

By 6 & 7 Vict. c. 37, the governors of the bounty and the Archbishop of Canterbury are empowered to lend a sum of 600,000*l.* stock, standing in their names, to the ecclesiastical commissioners, in order that the commissioners may thereout make better and more immediate provision for the spiritual cure of populous parishes. The governors are also empowered to lend a further sum of stock. Provision is made for the payment of interest and giving security; and the governors may require at the end of thirty years the replacing of the stock, which is to be done by the commissioners in twelve yearly instalments (*e*).

General powers of governors.

The governors of Queen Anne's Bounty have had also conferred on them by statute certain administrative powers with respect to the dealings by the clergy with their houses and glebes. By 17 Geo. 3, c. 53, s. 12, the governors may lend money to incumbents to repair and rebuild their residence houses under that act, to the amount of 100*l.*, on which no interest is to be paid, where the annual value of the living is under 50*l.*, and to the amount of two years' value of the living in other cases, on which interest at four per cent. is to be paid (*f*).

By 1 & 2 Vict. c. 23, s. 4, a similar provision is made.

By 1 & 2 Vict. c. 106, s. 72, the governors may lend for the purposes of the act any sum not exceeding the

(*e*) Sects. 1—8; see also 29 & 30 Vict. c. 111, s. 11.

(*f*) *Vide supra*, Part V., Chap. II, Sect. I.

General powers of governors.

amount thereby authorized to be raised upon mortgage, and shall receive interest at four per cent.

By 1 & 2 Vict. c. 23, s. 7, and 1 & 2 Vict. c. 29, incumbents were allowed in certain cases to sell their houses of residence; when they do so, the money is, by sect. 8, to be paid to the treasurer of the bounty (*g*).

By 2 & 3 Vict. c. 49, s. 14, the money so paid is to be invested and the dividends are to be accumulated, till it is required: and in case there be any surplus over what is required it is to be applied by the governors for the benefit of the benefice.

By sect. 17, the power of sale given by the previous act is extended to dwelling-houses other than the house of residence, shops, warehouses and other buildings.

By 21 & 22 Vict. c. 94, s. 17, the governors may receive and apply compensation moneys in respect of the enfranchisement of copyholds on any benefice (*h*).

Under Dilapidation Acts.

By 34 & 35 Vict. c. 43, The Ecclesiastical Dilapidations Act, 1871, and the amending act 35 & 36 Vict. c. 96, very considerable powers and duties are conferred upon the governors of the bounty. By the first act they may lend money for the execution of the works required (ss. 17, 18); they are to receive money from sequestrators where benefices are under sequestration and employ it in making repairs (ss. 20, 21, 23, 45). They are to receive from the incoming incumbent all the money recovered by him for dilapidations from his predecessor, and they may advance money on the faith of such expected receipt (ss. 37, 38, 39, 40, 43, 44, 46). The buildings in every benefice are to be insured against fire to the satisfaction of the governors, and the money received on such insurance is to be paid over to them (ss. 54, 56). They are to invest all monies paid over to them; and they may retain such a per centage of the monies paid over to them, as the lords of the treasury may think proper, for office expenses (s. 65) (*k*).

Alteration of the length of mortgage term, and of the conditions of repayment of advances.

By 35 & 36 Vict. c. 96, s. 1, "As to loans made under the provisions of the acts, 17 Geo. 3, c. 53; 21 Geo. 3, c. 66; 7 Geo. 4, c. 66; 1 & 2 Vict. c. 23, and 28 & 29 Vict. c. 69, it shall be lawful for the governors, with the stipulated consent of the bishop and patron, if they think fit, to vary the length of the mortgage term for all new mortgages by making the term for the repayment of the loan shorter than is directed by the said acts; and the governors,

(*g*) *Vide supra*, Part V., Chap. VI., Sect. 2.

(*h*) *Vide supra*, p. 1715.

(*k*) *Vide supra*, Part V., Chap. V., Sect. 2.

with the stipulated consent of the bishop and patron, are also authorized, if they think fit, to lend any sum that may be required for the purposes of, and they may also from time to time vary the form of the deed of security prescribed by, the acts specified in the said recited schedule." "Provided always, that it shall not be lawful for the governors to allow a benefice to be mortgaged to them for any or all of the purposes of any of these acts to an amount exceeding in the whole three years' net income of such benefice" (*h*).

Sale of general lands.

By 28 & 29 Vict. c. 69, s. 2, the governors may sell all lands, tithes, and other hereditaments vested in them, for the purpose generally of augmenting the maintenance of the poor clergy.

(*h*) For provisions in sect. 2, as to altering the day of paying the interest, *vide supra*, Part V., Chap. V., Sect. 2.

CHAPTER III.

THE ECCLESIASTICAL COMMISSIONERS.

A corporation.

The Ecclesiastical Commissioners for England are a corporation, with perpetual succession and a common seal, and with power to take, purchase, and hold real estate, notwithstanding the statutes of mortmain. The corporation is established by 6 & 7 Will. 4, c. 77, and 3 & 4 Vict. c. 113. These acts, however, have been amended by several subsequent statutes.

To execute reports of commissioners.

The professed object of the original acts was to carry into effect the reports of certain commissioners, previously appointed by the crown. The later acts have, however, diverged into many matters not comprehended in the original intentions of the commissions. It may, however, still be well to explain the general nature of the recommendations of these preliminary commissions.

Origin of commission.

On the 4th February, 1835, King William the Fourth issued a commission of inquiry into the state of the Established Church in England and Wales, directed to the heads of the church and of the government, and certain other commissioners, containing the following instructions:—

"To consider the state of the several dioceses in England and Wales, with reference to the amount of their revenues and the more equal distribution of episcopal duties, and the prevention of the necessity of attaching by commendam to bishoprics benefices with cure of souls; to consider also the state of the several cathedral and collegiate churches in England and Wales, with a view to the suggestion of such measures as may render them more conducive to the efficiency of the Established Church; and to devise the best mode of providing for the cure of souls, with special reference to the residence of the clergy on their respective benefices."

Reports.

The first report under this commission was made on the 17th March, 1835. A new commission was issued on the 6th June following, with a change only in those commissioners who were members of the government; and three further reports were made, dated 4th March, 20th May, and 24th June, 1836. The draft of a fifth report was also prepared, but not having been signed before the commission

expired by reason of the demise of the crown, that draft was made a parliamentary paper by the secretary of state in the following session.

Episcopal recommendations.

The first and third of these reports related chiefly to the first or *episcopal* branch of the inquiry; and the general purpose of their recommendations was to make such a new distribution of the duties and revenues of the bishops, as should diminish the motive for translations, and entirely prevent the necessity for commendams.

Cathedral and parochial recommendations.

The second and fourth reports, and the draft of the fifth report, comprehended the two other, viz., the *cathedral* and *parochial* branches of the inquiry; and the general object of the recommendations contained in these reports was, by means of an appropriation of part of the corporate revenues of the cathedral and collegiate churches, and of the whole endowments of the non-residentiary prebends, dignities, and offices, to establish a *Fund*, out of which better provision might be made for the *Cure of Souls* in parishes where such assistance was most required.

Constitution of corporation.

The first act, whereby the corporation was established, passed in August, 1836. Under this act the number of the commissioners was thirteen; namely, the two archbishops, the Bishop of London, and five of the chief officers of state for the time being, all *ex officio;* and two other bishops and three other lay commissioners by name (*a*), removable at the pleasure of the crown, and their vacancies to be supplied from time to time under the royal sign manual, by bishops or laymen, as the case might be (*b*).

By the second act the constitution of the corporation was materially changed: all the members of the episcopal bench, the deans of Canterbury, St. Paul's, and Westminster, the two chief justices, the master of the rolls, the chief baron, and the judges of the Prerogative and Admiralty Courts, for the time being, were appointed commissioners *ex officio:* power was given to the crown to appoint four, and to the Archbishop of Canterbury to appoint two lay commissioners, in addition to the three already appointed (*c*), and from time to time to fill up vacancies (*d*), and the power of removal by the crown was repealed (*e*).

By 13 & 14 Vict. c. 94, the following further provisions were made:—

Church estates commissioners.

The crown was empowered to appoint two laymen by

(*a*) 6 & 7 Will. 4, c. 77, s. 1.
(*b*) Ibid. s. 2.
(*c*) 3 & 4 Vict. c. 113, s. 78.
(*d*) Ibid. s. 79.
(*e*) Ibid. s. 81.

Church estates commissioners.

the title of first and second church estates commissioners, and the Archbishop of Canterbury was also empowered to appoint a church estates commissioner.

These commissioners are to hold office during the pleasure of their respective appointors, and are to be as such ecclesiastical commissioners.

Any ecclesiastical commissioner, not being such by virtue of some office, may be appointed a church estates commissioner; and again may cease to be a church estates commissioner without thereby ceasing to be an ecclesiastical commissioner (*f*).

The first church estates commissioner is to have a salary not exceeding 1,200*l.* a year, and the commissioner appointed by the Archbishop of Canterbury one not exceeding 1,000*l.* a year (*g*).

There is a special provision that the first commissioner may sit in the House of Commons (*h*). Upon the other commissioners there is no restriction as to this matter.

Every lay commissioner and every church estates commissioner is required to be (*i*), and to subscribe a declaration that he is (*k*), a member of the united Church of England and Ireland.

Meetings.

Five commissioners are to be a quorum for the transaction of business, provided that two of them are church estates commissioners (*l*): but no proceeding can be ratified under the common seal, without the presence of two episcopal commissioners; and it must be postponed, if they, being the only episcopal commissioners present, object (*m*).

Chairman.

The Archbishop of Canterbury is to be chairman when present; when he is not present a chairman is to be chosen by the commissioners assembled (*n*). The chairman is to have a second or casting vote, in case of equality (*o*).

Adjournments.

Meetings may be adjourned; but at an adjourned meeting no proceeding can be ratified under the common seal, unless the intention to consider it finally was notified together with the summons for the original meeting (*p*).

Evidence.

The commissioners may summon and examine witnesses, administer an oath or declaration, and require the production of books, papers, and writings, touching any matter of which they have cognizance (*q*).

(*f*) Sect. 1.

(*g*) Sect. 2.

(*h*) Sect. 3.

(*i*) 6 & 7 Will. 4, c. 77, s. 1; 3 & 4 Vict. c. 113, s. 78.

(*k*) 6 & 7 Will. 4, c. 77, s. 3; 3 & 4 Vict. c. 113, s. 80; 13 & 14 Vict. c. 94, s. 4.

(*l*) 13 & 14 Vict. c. 94, s. 10.

(*m*) 6 & 7 Will. 4, c. 77, ss. 4, 5.

(*n*) 13 & 14 Vict. c. 94, s. 13.

(*o*) Ibid. s. 6.

(*p*) 4 & 5 Vict. c. 39, s. 1.

(*q*) 6 & 7 Will. 4, c. 77, s. 9; 3 & 4 Vict. c. 113, s. 90; 4 & 5 Vict. c. 39, s. 30.

Officers.

Under the first act the commissioners are to appoint a treasurer, secretary, and other officers; and the lords of the treasury are to assign salaries (*r*). By the second act the two first appointments are united, and to form one office, which is confirmed to the then holder of the two offices, *quamdiu se bene gesserit;* and the commissioners are empowered from time to time to appoint a successor under their common seal (*s*).

Treasurers.

By 13 & 14 Vict. c. 94, the first church estates commissioner and the church estates commissioner appointed by the archbishop are to be joint treasurers, but are not, as such, to have any salary, and the secretary is to be appointed as heretofore (*t*). And all lands and hereditaments formerly vested or to be vested in the secretary and treasurer are to be vested in the first church estates commissioner (*u*).

By 29 & 30 Vict. c. 111, the three church estates commissioners are to be joint treasurers, and the receipt of any two of them, or of one of them, countersigned by the accountant or assistant accountant, is to be a good discharge (*x*).

Sect. 14 of 13 & 14 Vict. c. 94, provides for an audit of the accounts of the ecclesiastical commissioners.

The estates committee.

By this last act the church estates commissioners are to form a committee of the ecclesiastical commission, to be called "the estates committee;" to this committee the ecclesiastical commissioners may add annually two of their number, one to be a layman not sitting as a commissioner in right of any office (*y*). At the meetings of this committee the first church estates commissioner shall preside, if present; if he is not present the other church estates commissioners shall preside at alternate meetings.

By 22 & 23 Vict. c. 46, any two church estates commissioners may do all acts required by law to be done by the church estates commissioners; and by 29 & 30 Vict. c. 111, s. 2, any two members of the estates committee, being church estates commissioners, may do all acts required by law to be done by the estates committee.

The ecclesiastical commissioners may make special references for the consideration of the estates committee; and they may even authorize this committee or the church estates commissioners, or any two of them, to do any act within the powers of the whole commission, except affix-

(*r*) 6 & 7 Will. 4, c. 77, s. 7.
(*s*) 3 & 4 Vict. c. 113, s. 91.
(*t*) Sect. 5.
(*u*) Sect. 6.
(*x*) Sect. 3.
(*y*) Sect. 7.

ing the common seal to any scheme which they are not otherwise authorized to seal "without reporting to or requiring further instructions from" the ecclesiastical commissioners (*z*).

The ecclesiastical commissioners may from time to time make general rules for the estates committee, regulating the transaction of business and declaring the general principles which shall guide the decision of the committee. These rules are to be laid before parliament (*a*).

The estates committee to manage all property of the commissioners.

By 13 & 14 Vict. c. 94, s. 8, "It shall be the duty of such estates committee, or any three of them, of whom two or more shall be church estates commissioners, to consider all matters in any way relating or incident to the sale, purchase, exchange, letting, or management, by or on behalf of the ecclesiastical commissioners, of any lands, tithes, or hereditaments, and to devise such measures touching the same as shall appear to such committee to be most expedient, and such estates committee, or any three of them, of whom two or more shall be church estates commissioners, shall have full power and authority, subject to such general rules as are hereinafter mentioned, and as shall have been made by the ecclesiastical commissioners, to do and execute any act, including the affixing of the common seal to any scheme or other instrument, within the power of the ecclesiastical commissioners, in respect of the sale, purchase, exchange, letting, or management of any lands, tithes, or hereditaments: provided always, that no such act shall be done or executed by the ecclesiastical commissioners otherwise than by the estates committee, nor by such committee unless with the concurrence of two at least of the church estates commissioners."

By 28 & 29 Vict. c. 68, the ecclesiastical commissioners are empowered to give superannuation allowances to their clerks and servants.

Mode of administration.

The mode of legislation originally contemplated in the earlier statutes was partly by *express*, partly by *qualified* enactments: in the latter case certain propositions were laid down, and an *authority* was established, by which those propositions were to be carried into effect and made law.

The *authority* so established was the joint authority of the commissioners and of the Queen in council. But by later acts many powers are given to the commissioners alone, as for instance under the Ecclesiastical Leasing Acts, the acts as to providing houses of residence, and in

(*z*) 13 & 14 Vict. c. 94, s. 11. (*a*) Ibid. s. 12.

the cases where aid is given to supply the spiritual want of populous places.

Schemes of commissioners.

The commissioners are to prepare, and lay before her Majesty in council, such schemes as shall appear best adapted for carrying the various acts into full effect; proposing such modifications or variations as to matters of detail and regulation as shall not be substantially repugnant to any provision of the acts; notice of every scheme is to be given to any corporation aggregate or sole affected thereby; and the objections, if any, are to be laid before her Majesty in council, together with the scheme (*b*). The Queen in council may ratify any scheme by order, specifying the time for its taking effect; every order to be registered in each diocese whereof the bishop, or within which any cathedral or collegiate church, dignitary, chapter, member of chapter, officer, incumbent, or any other person or body corporate, may be in any respect affected thereby (*c*), or in cases under 29 & 30 Vict. c. 111, in the diocesan registries specified in the order (*d*); and upon being gazetted, it is to be of the same force and effect as if enacted (*e*).

Orders of Queen in council.

When gazetted to be law.

To be laid before parliament.

Copies of all orders in council are to be laid before parliament in January in every year, or if parliament be not then sitting, within one week after the next meeting (*f*).

Annual report.

The commissioners are to make an annual report to one of the secretaries of state, before the 1st of March, of their proceedings up to the previous 1st of November, and are to annex to this report copies of all schemes sanctioned by orders in council and an abstract of accounts. This report is to be laid before parliament (*g*).

In cases under 29 & 30 Vict. c. 111, where no order in council is required, copies of all instruments under the seal of the commissioners are to be annexed to the report (*h*). Proceedings under 14 & 15 Vict. c. 104, and 17 & 18 Vict. c. 116, are similarly to be reported.

Episcopal arrangements.

In the first act (*i*), which relates to the first or episcopal branch of the subject, certain propositions appended to the third report of the church inquiry commissioners are recited

(*b*) 6 & 7 Will. 4, c. 77, s. 10; 3 & 4 Vict. c. 113, s. 83; 4 & 5 Vict. c. 39, s. 30.

(*c*) 3 & 4 Vict. c. 113, s. 84; 4 & 5 Vict. c. 39, s. 30.

(*d*) 29 & 30 Vict. c. 111, s. 10.

(*e*) 3 & 4 Vict. c. 113, s. 86; 4 & 5 Vict. c. 39, s. 30.

(*f*) 6 & 7 Will. 4, c. 77, s. 15; 3 & 4 Vict. c. 113, s. 87; 4 & 5 Vict. c. 39, s. 30.

(*g*) 13 & 14 Vict. c. 94, s. 26.

(*h*) Sect. 6.

(*i*) 6 & 7 Will. 4, c. 77.

in the preamble as expedient to be carried into effect, and the joint authority already mentioned is established for that purpose.

This preamble has been already set forth in full in the chapter on Bishops; where also are to be found the subsequent extensions and modifications of the schemes there recited (*k*).

This preamble not only relates to the alteration of episcopal incomes and the boundaries of dioceses, but has provisions as to the University of Durham, first fruits, tenure of benefices in commendam, houses of residence, the jurisdiction of the ecclesiastical courts, and the foundation of new archdeaconries (*l*).

Peculiars.

The commissioners are especially to have power to propose in any of their schemes that all parishes, &c., subject to any other jurisdiction than that of the bishop of the diocese in which they are locally situate, be transferred to the jurisdiction of that bishop (*m*). Schemes may be framed for this purpose only (*n*).

Incomes of bishops.

By 13 & 14 Vict. c. 94, s. 17, fixed, instead of fluctuating incomes might be secured by the commissioners to all archbishops and bishops appointed since January 1, 1848. This provision has been repealed as to all bishops succeeding to their sees after the passing of 23 & 24 Vict. c. 142; and it is enacted by this last act as follows:—

The lands of each see to vest in the commissioners on the next avoidance.

Sect. 2. "Upon the first avoidance of the see of any archbishop or bishop in England after the passing of this act, all the lands, hereditaments, and emoluments of or belonging to such see (except all rights of patronage or presentation and the residences of the archbishop or bishop, and such lands necessary for the enjoyment of such residences as shall be attached thereto by any scheme sanctioned by order in council) shall become vested absolutely in the ecclesiastical commissioners for England, for the purposes and subject to the provisions applicable to other hereditaments vested in the said commissioners."

Lands sufficient to afford the statutory income to be secured to each see.

Sect. 3. "After the lands of a see have become vested in the commissioners as aforesaid, an arrangement shall be made as soon as conveniently may be, and with all reasonable dispatch, for assigning to the archbishop or bishop of such see and his successors, as an endowment for the see, such of the lands and hereditaments then vested in the ecclesiastical commissioners for England as in the judg-

(*k*) *Vide supra*, Part II., Chap. I., Sect. 2, pp. 23—35.

(*l*) *Vide infra*, p. 2105.

(*m*) 6 & 7 Will. 4, c. 77, s. 10.

(*n*) 13 & 14 Vict. c. 94, s. 24.

ment of the estates committee of the said ecclesiastical commissioners, and subject to the approbation of such archbishop or bishop, may be deemed convenient to be held as such endowment, and will secure as nearly as may be, after deducting costs of management, a net annual income equal to that named for the archbishop or bishop of the see by any act of parliament or order in council then in force, and no more; and in the meantime, until such endowment is so assigned, the ecclesiastical commissioners shall pay to the archbishop or bishop of the see the annual income named for him as aforesaid, at the time at which the same would have been payable if this act had not been passed."

Like arrangement may be made before next avoidance, on request of the bishop.

Sect. 4. "In case any archbishop or bishop who may have succeeded on an avoidance happening before the passing of this act, and having an income named as aforesaid, signify his willingness to accept an endowment for his see in lands and hereditaments, in lieu of his income, it shall be lawful to make the like arrangement for that purpose as might have been made if the lands of the see had become vested in the commissioners as aforesaid, and upon such arrangement being made all the lands, hereditaments, and emoluments of or belonging to the see, except such as may be assigned under such arrangement, and such rights of patronage or presentation, and residences as aforesaid, shall become vested absolutely in the said ecclesiastical commissioners."

Arrangements to be revised on avoidance.

Sect. 5. "On the avoidance from time to time of any see, after the assignment of an endowment for the same, the estates committee of the ecclesiastical commissioners may, if they shall think fit, revise the arrangement in force in relation to such endowment, and for that purpose inquire into the state and productiveness of such endowment, and if such endowment, in the judgment of the committee, will secure a net annual income exceeding that named for the archbishop or bishop as aforesaid, or will not secure the full amount of such annual income, such committee may report thereon to the said ecclesiastical commissioners, and the said commissioners shall, if they think fit, make an arrangement by vesting part of the lands and hereditaments constituting such endowment in the ecclesiastical commissioners, or by assigning lands and hereditaments by way of addition to such endowment, or by means of annual or other payments to or by the ecclesiastical commissioners, as the case may require, which may secure, in the judgment of the said committee, to the archbishop or bishop who may succeed upon that avoidance, the net annual income so

named, or as near thereto as circumstances will allow: provided always, that if a difference of opinion as to the value or sufficiency of the estates which such committee may propose to leave or to assign to any see shall arise between the archbishop or bishop thereof and the said committee, such difference shall be settled by arbitration before such arrangement as is last mentioned shall be made."

Endowments to be in lieu of the fixed income.

Sect. 6. "When the arrangement is completed under this act for the endowment of a see the lands and hereditaments thereby assigned shall be the endowment of the see, and shall be taken in lieu of the income intended to be secured thereby."

Arrangements how to be made.

Sect. 7. "All arrangements for the purposes of this act shall be made by the authority and in the manner by and in which arrangements for carrying into effect the recommendations recited in 6 & 7 Will. 4, c. 77, may now be made."

Leases.

By sect. 8, the lands so assigned as an endowment shall only be let from year to year or under provisions similar to those contained in 5 Vict. sess. 2, c. 27, for incumbents' leases (*o*); except that with the approval of the estates committee the archbishop or bishop may grant mining or building leases; but then the committee may, if they think fit, require a portion of the rent to be reserved to the ecclesiastical commissioners.

Sect. 9 of this act, and sects. 12, 13 of 29 & 30 Vict. c. 111, provide for dilapidations on the estates so assigned (*p*).

Provision for the improvement of lands.

By sect. 10 of 23 & 24 Vict. c. 124, "It shall be lawful for the estates committee, upon the application of any archbishop or bishop, to undertake or authorize any works of permanent improvement which such committee may think advisable, on any lands assigned by way of endowment to such archbishop or bishop, and the ecclesiastical commissioners may advance out of the common fund the money which may be required for the purpose of such works, and the money so advanced shall be repaid with such interest, and at such times, and until repaid shall be charged on such of the said lands as may be agreed upon by the said committee and the said archbishop or bishop, and his or their tenants interested in such improvements."

Estates committee where required to manage the lands assigned.

Sect. 11. "The estates committee shall, when required by any archbishop or bishop to whom lands may have been assigned as an endowment under this act, undertake the

(*o*) *Vide supra*, Part V., Chap. VI., Sect. 3, pp. 1692—1694.

(*p*) *Vide supra*, Part V., Chap. V., Sect. 2, pp. 1632, 1633.

management of such lands, and receive the rents and profits thereof during the incumbency of the archbishop or bishop; and in every such case as aforesaid the estates committee, during their management, may grant all such leases as might have been granted by such archbishop or bishop if the lands had continued under his or their management, and may, with the approval of such archbishop or bishop, grant such other leases as might have been granted by him or them, with the approval of the estates committee; and the commissioners shall, during the time such lands are under the management of the said estates committee, pay to such archbishop or bishop the annual income to secure which the lands may have been assigned."

Cathedral and parochial arrangements.

The act 3 & 4 Vict. c. 113, which passed in August, 1840, although it purports to carry into effect the fourth report of the commissioners of inquiry, in fact comprehends, with alterations and modifications, the propositions of the second and fourth reports, and of the draft fifth report, and deals with the two remaining branches of the subject, viz., the *cathedral* and *parochial;* except so far as the latter had been already disposed of by 1 & 2 Vict. c. 106.

This act has been largely extended and amended by 4 & 5 Vict. c. 39, and 31 & 32 Vict. c. 114. A special act, 7 & 8 Vict. c. 77, was passed for Wales.

The provisions of these acts relating to deans and canons have already been set forth in the chapter on deans and chapters (*q*). It is only necessary to add, that the provisions in sect. 29 of 3 & 4 Vict. c. 113 (*r*), for the annexation of certain parishes to canonries at Westminster, have been extended to afford endowments out of the surplus revenues of these canonries for several parishes in the city of Westminster, with a special proviso securing free seats in the churches of these parishes, by 4 & 5 Vict. c. 39, s. 8, and 29 & 30 Vict. c. 111, s. 17; and that by 24 & 25 Vict. c. 116, the emoluments of the seventh and eighth canonries at Windsor are to be retained by the dean and chapter, and to be appropriated, one for the benefit of the military knights, and one in augmentation of the livings of certain Windsor clergy (*s*).

Temporary Suspension Acts.

By a series of acts commencing soon after the issuing of the first commission of inquiry in 1835 (*t*), the appointment to all sinecure rectories in public patronage, to non-

(*q*) *Vide supra*, Part II., Chap. IV., Sect. 3.

(*r*) Ibid. p. 223.

(*s*) Ibid. p. 225.

(*t*) 5 & 6 Will. 4, c. 30; 6 & 7 Will. 4, c. 67; 1 Vict. c. 71; 1 & 2 Vict. c. 108; 2 & 3 Vict. c. 55.

residentiary cathedral preferments, and to all canonries above a specified number, had been suspended from session to session, the proceeds being received and holden in trust by the treasurer of Queen Anne's Bounty: all monies so received are also directed to be paid over to the commissioners (*u*).

Main object of fund, the *cure of souls.*

The main object, for which the commissioners are entrusted with all these revenues, is defined to be that of making *better provision for the cure of souls in parishes where such assistance is most required.* All monies are, in the first instance, directed to be carried over to a common fund: discretion is given as to the mode of making the provision, either by means of money payments out of this fund, or by actual conveyance of lands, tithes, or other hereditaments; provided that due consideration shall be had of the wants and circumstances of the places in which the lands and hereditaments or tithes vested in the commissioners are situate or arise, and in which the lands, hereditaments and tithes belonging to any ecclesiastical corporation which has to pay a portion of its income over to the commissioners are situate or arise (*v*).

Loans of stock from Queen Anne's Bounty.

By 6 & 7 Vict. c. 37, the governors of Queen Anne's Bounty Board were empowered to lend to the commissioners for these purposes a sum of 600,000*l.* three per cent. stock, which is to be paid off by the commissioners in twelve instalments, the first to be paid at the end of thirty years from the granting of the loan. The bounty board were also empowered to lend further sums of stock on the same terms (*x*).

Mode of distribution.

With reference to this part of the subject, certain resolutions were early made by the commissioners regulating the distribution of the funds coming to their hands, which will be found in a later page (*y*).

By 23 & 24 Vict. c. 124, the commissioners were empowered to give preference to places where contributions from other sources will be made in aid of the grant (*z*), and to mining districts (*a*).

Augmentation of livings.

Numerous orders in council have been issued, ratifying schemes of the commissioners, by which churches have been endowed or augmented. By 29 & 30 Vict. c. 111, no order in council is any longer necessary for these purposes, publication in the Gazette being sufficient; the

(*u*) 3 & 4 Vict. c. 113, s. 60; 7 & 8 Vict. c. 77.

(*v*) Ibid. s. 67; 23 & 24 Vict. c. 124; ss. 12, 13.

(*x*) 6 & 7 Vict. c. 37, ss. 1—8; see 29 & 30 Vict. c. 111, s. 11.

(*y*) *Vide infra*, p. 2106.

(*z*) Sect. 14.

(*a*) Sect. 15.

commissioners have power to take lands for annexation to benefices without licence in mortmain, and the instrument conveying such lands may, if it be declared that it shall so operate, vest the lands in the incumbent of the benefice at once: such instruments are to be free from stamp duty (*b*).

Separate estates of deans, &c. vested in commissioners.

By 3 & 4 Vict. c. 113, s. 50, the estate which the holder of any deanry or canonry had in any hereditaments annually holden with such deanry or canonry (except any right of patronage), or in any hereditaments, the rents and profits whereof have been usually taken by such holder separately, and in addition to the corporate revenues of the chapter, are vested in the ecclesiastical commissioners. It has been holden, that the separate estate of a dean in a chapter does not include a rectory previously by statute annexed to the deanry, and such a rectory is not, by force of this enactment, severed from the deanry and vested in the commissioners (*c*).

The like as to certain prebends.

By sect. 51 of this same act, the estates of non-residentiary prebends, with certain exceptions (and the estates of these excepted prebends, with consent of their patron, on an annual income being paid to the prebendary (*d*)), and the estates of certain deanries therein mentioned, are to be vested in the commissioners.

Estates of minor cathedral corporations.

By 27 & 28 Vict. c. 70, any corporation of vicars choral, priest vicars, senior vicars, custos and vicars, warden and vicars or minor canons, may, with the consent of their visitor, transfer their lands and hereditaments to the commissioners under a scheme sanctioned by an order in council, in consideration of an annual or other money payment.

Power to commissioners to make allowances to minor canons, organists, schoolmasters, &c.

By 29 & 30 Vict. c. 111, s. 18, "When the ecclesiastical commissioners are or may be in receipt of any income arising from estates that belong, or have belonged, to any dean or chapter, or any major or minor corporation of any cathedral or collegiate church, they shall be at liberty (whether an order of her Majesty in council has or has not been passed in relation to such income, and notwithstanding any limitation contained in any act of parliament as to the stipends and allowances of any of the persons hereinafter mentioned), out of such income, to make such provision as to them may seem needful for securing adequate stipends and allowances to the minor canons, schoolmasters, organists, vicars choral, lay clerks,

(*b*) Sects. 5, 9.

(*c*) *Reg.* v. *Champneys*, L. R., 6 C. P. 384; 19 W. R. 386: *vide supra*, p. 227.

(*d*) 13 & 14 Vict. c. 94, s. 20; *vide supra*, p. 227.

officers, choristers, bedesmen, servants and other members of the cathedral or collegiate church, and for securing adequate sums of money for the maintenance of any existing college or school (*e*) in connection with the cathedral or collegiate church."

Power to make exchanges between ecclesiastical corporations.

By sect. 4, "If, after the commissioners have effected the endowment of any archbishoprick or bishoprick, or of any chapter, with lands or hereditaments, it shall appear to them that it would be beneficial to such archbishoprick or bishoprick, or to such chapter, that any part or parts of such lands or hereditaments should be exchanged for any lands or hereditaments belonging to any other archbishop or bishop, or chapter, or to the commissioners, it shall be lawful to effect such exchange, with the consent in writing of every archbishop or bishop, or chapter thereby affected, and by the authority of a scheme passed by the commissioners, and an order of her Majesty ratifying the same: provided always, that no such exchange shall be made unless the commissioners shall be satisfied of the reasonable equality in value of the lands and hereditaments so to be exchanged, and shall, in such last-mentioned scheme, make a statement to that effect."

As to transfer of estates of deans and chapters.

None of these acts appear to authorize the transference by a dean and chapter, or other ecclesiastical corporation, except those specially mentioned in 27 & 28 Vict. c. 70, of their lands and hereditaments to the commissioners, in return for an annual or other money payment, as had been authorized in the case of the special corporations by 27 & 28 Vict. c. 70, thereby, in fact, bringing about a similar arrangement to that provided for bishops by 23 & 24 Vict. c. 124. Nevertheless, several schemes were made, sanctioned by orders in council, and acted upon, at various times from the year 1852, dealing with eighteen cathedral corporations on this footing. The irregularity having been discovered, the arrangements in these cases were, in 1868, validated retrospectively by 31 Vict. c. 19.

31 & 32 Vict. c. 114. Objects of scheme.

And now, by 31 & 32 Vict. c. 114, s. 3, "The ecclesiastical commissioners for England (in this act referred to as the commissioners) may, with the consent in writing of any dean and chapter in England under their common seal, and of the visitor of such dean and chapter, from time to time lay before her Majesty in council schemes for effecting

(*e*) *Vide* 32 & 33 Vict. c. 56, s. 27; *et supra*, Part VIII., Chap. V., p. 2055.

with respect to the consenting dean and chapter all or any of the following things, namely,

(1.) For transferring to the commissioners the whole or some specified part of the property of the dean and chapter (except the cathedral or collegiate church and the buildings belonging thereto, and any ecclesiastical, educational or other like patronage), for such consideration, whether consisting of a money payment or other property, or partly one and partly the other, and generally on such terms, as the commissioners think fair and reasonable, including the extinguishment of any right of the commissioners to receive any part of the income or property of the dean and chapter, or of any member thereof:

(2.) For transferring lands to the dean and chapter in lieu of any annual sum payable to them by the commissioners either under this act or otherwise:

(3.) For making such incidental provisions as may be necessary for carrying into effect any of the above-mentioned objects."

Capital sum for fabric.

Sect. 4. "The commissioners on a transfer under this act may set apart as part of the consideration a capital sum to be expended to the satisfaction of the commissioners in substantial repairs, restoration, and improvements of the cathedral or collegiate church and the buildings belonging thereto."

Order in council confirming scheme to be made, &c. under 3 & 4 Vict. c. 113, ss. 84—89.

By sect. 5, sections 84 to 89 (both inclusive) of 3 & 4 Vict. c. 113, "which relate to the making, publishing and registering of an order in council for ratifying a scheme, and to the laying the same before parliament, shall apply to any scheme made under this act."

Order to effect transfer without conveyance.

Sect. 6. "After the date of the publication of an order in council ratifying any scheme made in pursuance of this act, and without any further conveyance or act in the law, the property expressed to be thereby transferred shall (so far as the same can be vested by this act) vest in the transferees and their successors, and (so far as the same cannot be so vested) shall be deemed to be held in trust for the transferees and their successors; and the transferees and their successors shall, as far as may be, take the same for the same estate and interest and subject to the same liabilities for and subject to which it was held at the said date by the dean and chapter or the commissioners, as the case may be."

Application of transferred property.

Sect. 8. "All property transferred to the commissioners by an order in council under this act shall be held by them in the same manner, and for the same purposes, and subject to the same provisions as the property of which the rents and profits are to be carried over to their common fund, and the income thereof shall be applied accordingly; and all property transferred to a dean and chapter by an order in council under this act shall be held upon the trusts and for the purposes directed by the order, and subject thereto shall form part of the endowment of such dean and chapter; and any annual sum paid to a dean and chapter in pursuance of an order in council under this act shall be applied in the manner in which it would be applicable if it were the income of property transferred to the dean and chapter."

By sect. 9, similar provisions are made as to the letting of lands assigned by way of endowments to deans and chapters as had been made with respect to lands assigned to bishops (*e*).

Settlement of treaty and its terms may be referred to arbitration.

Sect. 10. "In all cases where an agreement has been or shall be entered into, or a treaty has been or shall be commenced, or is or shall be pending, between a dean and chapter and any of their lessees, for any sale and purchase under 14 & 15 Vict. c. 104, 17 & 18 Vict. c. 116, or 23 & 24 Vict. c. 124 (*f*), and the capitular estate is transferred to the commissioners under the provisions of this act, it shall be competent to the church estates commissioners to approve and confirm as heretofore such agreement, and to continue and bring to a conclusion and approve such treaty: provided always, that in the event of the church estates commissioners declining to approve such agreement or treaty, the ecclesiastical commissioners shall be bound to purchase the lessee's interest, if required by the lessee, with all the benefits, as to arbitration and otherwise, to which lessees are entitled under the above-mentioned acts or any of them; and in every case the costs of such arbitration and award shall be in the discretion of the said arbitrators or umpire, as the case may be."

Application of act to canonries, &c.

Sect. 13. "The provisions of this act with respect to the property of deans and chapters shall apply in the case of the property of any deanery, canonry, prebend, archdeaconry, or office in any cathedral or collegiate church in

(*e*) *Vide supra*, p. 2098.

(*f*) *Vide supra*, Part V., Chap. VI., Sect. 5, pp. 1702—1713.

England, in the like manner, *mutatis mutandis*, as they apply to the property of a dean and chapter."

Trusts.

By sect. 7, a special provision is made for saving all trusts imposed on the property in the hands of the deans and chapters when the property is transferred. It had been already holden by the master of the rolls, in the case of *Attorney-General* v. *Dean, &c. of Windsor*, that the commissioners claiming as successors to a dean and chapter under 3 & 4 Vict. c. 113, took their property subject to all trusts (*g*).

Archdeacons.

As to archdeacons (*h*), the act 6 & 7 Will. 4, c. 77, besides providing that all archdeacons are to have full and equal jurisdiction, authorizes the creation of new archdeaconries, and the re-arrangement of the limits of the existing archdeaconries and rural deaneries. These provisions are extended by 3 & 4 Vict. c. 113, s. 32. Not only may archdeaconries be endowed with canonries in certain specified cases, but in all cases with the bishop's consent they may be so endowed, either with an entire canonry or with a canonry charged with a portion of the income as an endowment for another archdeaconry, or with a benefice, or with such a sum out of the common fund as will raise their income to 200*l*. a year (*i*). If any archdeaconry be so endowed, all the estates of the archdeaconry previously belonging to it and any benefice annexed to it may be vested in the commissioners for their general purposes. In all cases benefices may be disannexed from archdeaconries, whether so endowed or not, in which event the patronage reverts to the original patron of the benefice (*k*). Special enactments have been made to vest the estates of the archdeaconries of Rochester (*l*) and Colchester (*m*) in the commissioners.

Parochial arrangements.

By The Parish of Manchester Division Act, 1850 (*n*), certain special powers are given to the commissioners with reference to the cathedral arrangements, and to the providing for spiritual destitution within the parish and city of Manchester; and by 28 & 29 Vict. c. 117, and 29 & 30 Vict. c. 86, the endowments of the vicarage of Rochdale are vested in the commissioners, and many provisions are made for the spiritual benefit of the population of Rochdale. A special act also, 21 & 22 Vict. c. 58, has been passed for the rectories of Stanhope and Wolsingham, and

(*g*) 24 Beav. 679; 4 Jur., N. S. 818.

(*h*) *Vide supra*, Part II., Chap. V., Sect. 2, pp. 247—250.

(*i*) 3 & 4 Vict. c. 113, s. 34; 4 & 5 Vict. c. 39, ss. 9, 12.

(*k*) 3 & 4 Vict. c. 113, s. 56; 13 & 14 Vict. c. 94, s. 25.

(*l*) 24 & 25 Vict. c. 131.

(*m*) 29 & 30 Vict. c. 111, ss. 15, 16.

(*n*) 13 & 14 Vict. c. 41.

one, 13 & 14 Vict. c. 76, for abolishing the royal peculiar of St. Burian; both these acts were promoted by the commissioners.

Lambeth.

By 29 & 30 Vict. c. 111, ss. 7, 8, the library and the Lollards and Morton Towers of Lambeth Palace are to be vested in and maintained by the commissioners.

Sundry powers.

The powers of the commissioners to annex sinecures to benefices (*o*), to suppress other sinecure rectories (*p*), and to enable the sale of advowsons annexed to the headships of colleges (*q*), have been already mentioned. They may, also, with consent of the patron, apportion differently the incomes of two benefices in the same patronage (*r*).

Commissioners to be tithe owners.

With respect to the estates vested in the commissioners, they are to have all the same rights and powers as the original holders possessed, or a successor would have had (*s*); and they are to be deemed to be owners or joint-owners, as the case may be, for the purposes of the Tithe Commutation Acts, of all tithes vested or liable to be vested in them (*t*).

Resolutions respecting Grants in Augmentation of Livings (*u*).

The ecclesiastical commissioners for England, having carefully considered how provision may best be made for the cure of souls out of the limited amount of monies at their disposal, in conformity with the intent and meaning of the acts 3 & 4 Vict. c. 113, and 4 & 5 Vict. c. 39, have resolved to recommend to her Majesty in council:

That grants should be made, either in augmentation of the incomes of, or towards providing fit houses of residence for, the incumbents of certain benefices and churches, with cure of souls, that is to say, being either parish churches or churches or chapels with districts legally belonging or assigned thereto; in certain classes; subject to such limitations, as are hereinafter mentioned, or as may from time to time be determined on; and subject also to their right to decline recommending a grant, in any case in which from special circumstances they shall be of opinion that such grant is not expedient.

That the first class should consist of grants, made unconditionally, to benefices or churches with cure of souls as aforesaid, being in public patronage, namely, in the patronage of her majesty, either in right of the crown or of the

(*o*) *Vide supra*, p. 551.
(*p*) *Vide supra*, p. 506.
(*q*) *Vide supra*, p. 2027.
(*r*) 3 & 4 Vict. c. 113, s. 74.
(*s*) Ibid. s. 57; 4 & 5 Vict. c. 39, s. 6.
(*t*) 4 & 5 Vict. c. 39, s. 29.
(*u*) *Vide supra*, p. 2100.

duchy of Lancaster, of the Duke of Cornwall, of any archbishop or bishop, of any dean and chapter, dean, archdeacon, prebendary, or other dignitary or officer in any cathedral or collegiate church, or of any rector, vicar, or perpetual curate, as such; and that this class should at present be limited to benefices and churches, having a population of 2,000 at the least, and an average annual net income below 150*l.*; and to the raising of such income, as nearly as may be, to that amount.

That the second class should consist of grants made to benefices or churches with cure of souls as aforesaid, whether in public patronage as aforesaid; or in private patronage, namely, any patronage whatsoever other than as aforesaid; upon condition of such grants being met by benefactions from other sources, either paid to the commissioners, on account of the same benefices or churches, or secured in perpetuity to the incumbents thereof; and that this class should at present be limited to benefices and churches having a like amount of population, and an average annual net income below 200*l.*

That the third class should consist of grants made to benefices or churches with cure of souls as aforesaid, in consideration of their being situate within the places in which any of the tithes vested in the commissioners now arise, or the tithes, in lieu of which any of the lands or other hereditaments vested in them were allotted or assigned, have heretofore arisen; such grants not exceeding the actual value of the tithes or of the lands or other hereditaments in respect of which the same shall be made.

Special powers.

The ecclesiastical commissioners have some other powers given them by various statutes which are not so easily to be classified.

Advowsons in hands of municipal corporations.

By 6 & 7 Will. 4, c. 77, s. 26, they have transferred to them all the powers respecting the sale of livings in the patronage of municipal corporations which were given to the commissioners of inquiry by the Municipal Reform Act, 5 & 6 Will. 4, c. 76.

Houses of residence.

By 5 & 6 Vict. c. 26, s. 13, their consent is necessary to enable any incumbent, whose living has been augmented by them, to raise money for improving the parsonage-house of his benefice (x). They, submitting a scheme to the Queen in council, are to be "the authority" under the same act for carrying into execution the provisions as to episcopal and canonical houses therein contained (y).

(x) *Vide supra*, Part V., Chap. II., Sect. 2, p. 1460.

(y) *Vide supra*, Part V., Chap. II., Sect. 2, pp. 1479—1482.

Leases.

Their duties and powers as to making and sanctioning leases by ecclesiastical corporations (*s*), and in the extinguishment of old leasehold interests under such corporations (*t*), have been mentioned.

Copyholds.

Under 21 & 22 Vict. c. 94, s. 19, they are to have notice of all proceedings to enfranchise copyholds holden under ecclesiastical persons, and certain powers of dissenting to such proceedings (*u*).

Exchange of advowsons.

They have also powers in respect of the exchange of advowsons and rights of patronage (*v*), and certain duties under 26 & 27 Vict. c. 120, as to the sale of livings in the gift of the lord chancellor (*x*).

Augmentations.

They must consent to the augmentation of any benefice which is to be made by any ecclesiastical corporation affected by the acts 3 & 4 Vict. c. 113, and 4 & 5 Vict. c. 39 (*y*).

Unions.

By 23 & 24 Vict. c. 142, they have power to frame schemes for the union of benefices within the metropolis (*z*).

New parishes.

It has been already stated that under 6 & 7 Vict. c. 36, certain sums of stock were to be lent by the governors of Queen Anne's Bounty to the commissioners, for the purpose of better providing for spiritual destitution. Their powers under this and subsequent acts as to the formation of new parishes, the acceptance of sites for churches, and generally as to the revision of the ecclesiastical arrangements consequent thereon, will be dealt with in later chapters (*a*).

Church building commissioners.

It should, however, be here stated, that by 19 & 20 Vict. c. 55, the ecclesiastical commissioners have become the church building commissioners, with all the rights, privileges and estates of such commissioners, compensation being made to the officers of the church building commissioners out of the common fund of the ecclesiastical commissioners (*b*).

The church building commissioners were originally established for ten years by 58 Geo. 3, c. 45. They were made a body corporate with a common seal by 59 Geo. 3, c. 134. The commission was continued by divers acts of parliament for periods of years till it was finally incorporated with the ecclesiastical commission. The primary object

(*s*) *Vide supra*, Part V., Chap. VI., Sect. 3, pp. 1692—1702.

(*t*) Ibid. Sect. 5, pp. 1702—1713.

(*u*) *Vide supra*, p. 1715.

(*v*) *Vide supra*, Part II., Chap. XI., Sect. 2, pp. 344—348.

(*x*) Ibid. Sect. 3, pp. 386—393.

(*y*) 3 & 4 Vict. c. 113, s. 76; 4 & 5 Vict. c. 39, s. 26.

(*z*) *Vide supra*, Part II., Chap. XIV., pp. 540—551.

(*a*) *Vide infra*, Part IX., Chaps. V., VI.

(*b*) 19 & 20 Vict. c. 55, s. 2; 29 & 30 Vict. c. 111, s. 19.

of the commission was to distribute a sum of 1,000,000*l.* granted in exchequer bills to assist the building of new churches, and increased by 500,000*l.* by 5 Geo. 4, c. 103. For this purpose, and under the three acts already cited and 3 Geo. 4, c. 72, they had power to build or assist in building churches, to grant sites, to make loans, and especially to make grants or loans to meet contributions or church-rates. They have also numerous powers to exercise as to the division and re-arrangement of parishes, which will be more properly treated of in later chapters (*c*). They may accept sites for churches, and they may in certain cases put in force compulsory powers, under provisions similar to those contained in the Lands Clauses Consolidation Act (*d*), for the purpose of acquiring sites for churches. It has been holden that where these powers are exercised for the purpose of procuring a title from persons under a disability to convey and the money is paid into the Court of Chancery, the church building commissioners, or now the ecclesiastical commissioners as representing them, will have to pay the costs of a petition for payment of the money out of court to the person entitled to receive it, thereby following the ordinary rule under the Lands Clauses Act and other analogous acts (*e*).

(*c*) *Vide infra*, Part IX., Chaps. V., VI.

(*d*) 8 Vict. c. 18.

(*e*) *Ex parte Vicar of Margate*, 12 L. T., N. S. 792.

CHAPTER IV.

THE AUGMENTATION OF BENEFICES BY PRIVATE PERSONS.

17 Car. 2, c. 3. Impropriators may annex tithes.

By 17 Car. 2, c. 3, ss. 7, 8, the owners or impropriators of tithes may annex the same to the parsonage or vicarage of the parish church or chapel where they arise, without licence in mortmain; and where the settled maintenance of any parsonage or vicarage is under 100*l.* per annum the parson or vicar may take and hold lands and other hereditaments conveyed to him without licence in mortmain (*a*).

29 Car. 2, c. 8. Ecclesiastical corporations may reserve benefits for vicars upon leases.

By 29 Car. 2, c. 8, s. 1, reciting that divers archbishops, bishops and other ecclesiastical persons have, upon renewing their leases of tithes, made reservations beyond the ancient rent for the augmentation of the endowment of the vicars or curates, it is enacted, that "every augmentation granted or intended to be granted since the said 1st day of June (*b*) or which shall at any time hereafter be granted, reserved, or made payable to any vicar or curate, or reserved by way of increase of rent to the lessors, but intended to be for the benefit of such vicar or curate, by any archbishop, bishop, dean, provost, dean and chapter, archdeacon, prebendary, or other ecclesiastical corporation, person or persons whatever, so making the said reservation out of any rectory impropriate or portion of tithes belonging to them or any of them respectively, shall continue and remain as well during the continuance of the estate or term upon which the said augmentations were granted, reserved, or agreed to be made payable, as afterwards, in whose hands soever the said rectories or portions of tithes shall be chargeable therewith, whether the same be reserved again or not; and the said vicars and curates respectively are hereby adjudged to be in the actual possession thereof for the use of themselves and their successors, and the same shall for ever hereafter be taken, received, and enjoyed by the said vicars and curates and their successors, as well during the continuance of the term or estate upon which the said augmentations were

(*a*) *Vide supra*, Part VIII., Chap. II., Sect. 2.

(*b*) That is, June 1, 1660.

granted, as afterwards, and the said vicars and curates shall have remedy for the same, either by distress upon the rectories impropriate, or portions of tithes charged therewith, or by action of debt against the person who ought to have paid the same, his executors or administrators; any disability in the person or persons, bodies politic or corporate so granting, or any disability or incapacity in the vicars or curates, to whom or for whose use or benefit the same are granted or intended to be granted, the statute of mortmain, or any other law, custom, or other matter or thing whatsoever, to the contrary notwithstanding."

Sects. 3, 4 and 5 provide for the registration of these augmentations.

This act was repealed by 1 & 2 Vict. c. 106, s. 15, but restored again by 6 & 7 Vict. c. 37, s. 25.

2 & 3 Anne, c. 20.

By 2 & 3 Anne, c. 20, s. 1, it was provided, as has been already said (*c*), that the Queen might by letters patent erect a corporation and grant thereto the first fruits and tenths, to be applied by the corporation for the augmentation of the maintenance of poor parsons.

Lands and goods may be given to Queen Anne's Bounty by deed enrolled or will.

And by sects. 4, 5, and 6, "For the encouragement of such well disposed persons as shall, by her Majesty's royal example, be moved to contribute to so pious and charitable a purpose, and that such their charity may be rightly applied; all and every person and persons, having in his or their own right any estate or interest in possession, reversion, or contingency of or in any lands, tenements or hereditaments or any property of or in any goods or chattels, shall have full power, licence and authority, at his, her and their will and pleasure, by deed enrolled in such manner, and within such time, as is directed by the statute 27 Hen. 8, c. 16, for enrolment of bargains and sales, or by his, her or their last will, or testament in writing, duly executed according to law, to give and grant to, and vest in the said corporation, and their successors, all such his, her, or their estate, interest, or property in such lands, tenements and hereditaments, goods and chattels, or any part or parts thereof, for and towards the augmentation of the maintenance of such ministers as aforesaid, officiating in such church or chapel, where the liturgy and rites of the said church are or shall be so used or observed as aforesaid and having no settled competent provision belonging to the same, and to be for that purpose applied according to the will of the said benefactor,

(*c*) *Vide supra*, Part IX., Chap. II.

in and by such deed enrolled, or by such will or testament executed as aforesaid, expressed: and in default of such direction, limitation or appointment, in such manner as by her Majesty's letters patent shall be directed and appointed as aforesaid. And such corporation and their successors shall have full capacity and ability to purchase, receive, take, hold and enjoy, for the purposes aforesaid, as well from such persons as shall be so charitably disposed to give the same, as from all other persons as shall be willing to sell or alien to the said corporation any manors, lands, tenements, goods or chattels, without any licence or writ of *ad quod damnum;* the statute of mortmain, or any other statute or law, to the contrary notwithstanding.

Except by persons under legal disability.

"This act or anything therein contained shall not extend to enable any person or persons, being within age, or of non-sane memory, or women covert, without their husbands, to make any such gift, grant or alienation; any thing in this act to the contrary in anywise notwithstanding."

By 43 Geo. 3, c. 107, s. 1, the benefactions made under 2 & 3 Anne, c. 20, are exempted from the provisions of 9 Geo. 2, c. 36 (*c*).

Land tax.

By 42 Geo. 3, c. 116, s. 50, money may be left to redeem the land tax on charities, notwithstanding the mortmain laws.

43 Geo. 3, c. 108. Gifts of land not more than five acres, and goods not more than 500*l.*, may be made for building churches, and providing manses and glebes.

By 43 Geo. 3, c. 108, s. 1, it is enacted, "That all and every person and persons, having in his or their own right any estate or interest in possession, reversion, or contingency, of or in any lands or tenements, or of any property of or in any goods or chattels, shall have full power, licence, and authority, at his and their will and pleasure, by deed enrolled, in such manner, and within such time, as is directed in England by the statute 27 Hen. 8, c. 16, or by his, her or their last will or testament in writing, duly executed according to law, such deed, or such will or testament, being duly executed three calendar months at least before the death of such grantor or testator, including the days of the execution and death, to give and grant to and vest in any person or persons, or body politic or corporate, and their heirs and successors respectively, all such his, her, or their estate, interest, or property in such lands or tenements, not exceeding five acres, or goods and chattels, or any part or parts thereof, not exceeding in value five hundred pounds, for or towards the erecting, rebuilding, repairing, purchasing, or providing any church

(*c*) *Vide supra.* Part VIII., Chap. II., Sect. 2.

or chapel where the liturgy and rites of the said united church are or shall be used or observed, or any mansion house for the residence of any minister of the said united church officiating, or to officiate in any such church or chapel, or of any outbuildings, offices, churchyard (*d*), or glebe, for the same respectively, and to be for those purposes applied, according to the will of the said benefactor, in and by such deed enrolled, or by such will or testament executed as aforesaid expressed, the consent and approbation of the ordinary been first obtained, and in default of such direction, limitation, or appointment in such manner as shall be directed and appointed by the patron and ordinary, with the consent and approbation of the parson, vicar, or other incumbent."

Excessive gift to be reduced.

By sect. 2, only one such gift shall be made by one person, and where it exceeds five acres or five hundred pounds the chancellor may reduce it.

Restriction.

By sect. 3, no glebe upwards of fifty acres shall be augmented with more than one acre.

Small plots of land may be granted to be holden in mortmain.

Sect. 4. "And whereas it often happens that small plots of land held in mortmain lie convenient to be annexed to some such church or chapel, or house of residence, as aforesaid, or to some churchyard, or curtilage thereto belonging, or convenient to be employed as the site of some such church or chapel, or house to be hereafter erected, and for the necessary and commodious use and enjoyment thereof, it is therefore further enacted, that it shall be lawful for every body politic or corporate, sole or aggregate, by deed enrolled as aforesaid, with or without confirmation, as the law may require, to give and grant, either by way of exchange or benefaction, any such small plot of land not exceeding one acre, to any person or persons, body politic or corporate, his and their heirs and successors respectively, to be held, used and applied for the purposes aforesaid; and such last-mentioned person and persons, bodies politic and corporate, and their heirs and successors respectively, shall have full capacity and ability, with consent of the incumbent, patron and ordinary, to take, hold and enjoy such small plot of land for the purposes aforesaid."

Grants of waste.

By 51 Geo. 3, c. 115, s. 2, any person having the fee simple of a manor may grant five acres of land for a church or churchyard, or parsonage or glebe, if the church for which

(*d*) This does not authorize a gift for the repair of a vault and other objects in a churchyard (*Re Rigley's Trusts*, 36 L. J., Cha. 137).

or the minister whereof the same is given be a parochial church or chapel. In *Forbes* v. *The Ecclesiastical Commissioners* (*e*), Vice-Chancellor Wickens held, that this provision did not enable a lord of the manor to grant part of the village green, holden under special circumstances, for the site of a church. By 58 Geo. 3, c. 45, ss. 33, 36, 52, lands not in mortmain, to an extent not exceeding ten acres, may be conveyed by gift or sale to and holden by the church building commissioners for sites for houses of residence and for glebes for the ministers of new churches built under that act (*f*).

6 & 7 Vict. c. 37.

By 6 & 7 Vict. c. 37, which provides for the establishment in certain cases of districts for spiritual purposes and for the appointment of a minister or perpetual curate to such district, it is further provided as follows:—

Ministers of churches built under the act may take and hold gifts.

Sect. 12. "Such minister and perpetual curate respectively may, in such name and character respectively, notwithstanding the statutes of mortmain, receive and take, to him and his successors, as well every grant of endowment or augmentation made or granted by the authority aforesaid, as also any real or personal estate or effects whatsoever which any person or persons or body corporate may give or grant to him according to law."

Powers of bounty board as to endowment under 2 & 3 Anne, c. 20, and 45 Geo. 3, c. 84, conferred upon commissioners for the purposes of this act.

Sect. 22. "For the encouragement of such persons as shall be disposed to contribute towards the purposes of this act, and that their charity may be rightly applied, all and every person or persons, or body corporate, having in his or their own right any estate or interest in possession, reversion or contingency of or in any lands, tithes, tenements or other hereditaments, or any property of or in any goods or chattels, shall have full power, licence, and authority at his and their will and pleasure, by deed enrolled in such manner and within such time as is directed by 27 Hen. 8, c. 16, in the case of any lands, tithes, tenements, or other hereditaments (but without any deed in the case of any goods or chattels), or by his or their testament in writing duly executed according to law, to give and grant to and vest in the ecclesiastical commissioners for England and their successors, all such his or their estate, interest, or property in such lands, tithes, tenements or other hereditaments, goods, and chattels, or any part or parts thereof, for and towards the endowment or augmentation of the income of such ministers or perpetual curates as aforesaid, or for or towards providing

(*e*) L. J., Notes of Cases (1872), 160; L. R., Weekly Notes, 204.

(*f*) *Vide infra*, Part IX., Chap. V.

any church or chapel for the purposes and subject to the provisions of this act, and to be for such purposes respectively applied, according to the will of such benefactors respectively, as in and by such deed enrolled, or such testament executed as aforesaid, may be expressed, or, in the case of no deed or testament, as may in some other manner be directed, and in default of such expression or direction then in such manner as shall be directed by the authority hereinbefore mentioned; and such commissioners and their successors shall have full capacity and ability to purchase, receive, take, hold, and enjoy for the purposes aforesaid, as well from such persons as shall be so charitably disposed to give the same, as from all other persons who shall be willing to sell or aliene to the said commissioners any lands, tithes, tenements or other hereditaments, goods, or chattels, without any licence or writ of *ad quod damnum*, the statute of mortmain, or any other statute or law, to the contrary notwithstanding."

13 & 14 Vict. c. 94.

Owners of impropriation tithes may annex the same to the parsonage or vicarage.

By 13 & 14 Vict. c. 94, s. 23, "The owner or proprietor of any impropriation tithes, portion of tithes or rent-charge in lieu of tithes, shall and may have power to annex the same or any part thereof unto the parsonage, vicarage or curacy of the parish church or chapel where the same lie or arise or to settle the same in trust for the benefit of such parsonage, vicarage or curacy, any statute or law whatsoever to the contrary thereof in anywise notwithstanding."

In *Burr* v. *Miller* (*g*), Vice-Chancellor Wickens appears to have holden that this provision did not *pro tanto* repeal 9 Geo. 2, c. 36, and that a devise of tithes for those purposes by will was, therefore, still void.

29 & 30 Vict. c. 111.

Commissioners may take lands.

By 29 & 30 Vict. c. 111, "The commissioners may take and hold, without licence in mortmain, lands which they consider convenient to be annexed to any benefice with cure of souls, and they may appropriate monies in their hands belonging to such benefice towards buying such lands."

Conversion into rectories.

By 3 Geo. 4, c. 72, ss. 13, 14, the church building commissioners are empowered to convert vicarages or divisions of vicarages into rectories, on receiving from the owners entitled in fee simple to the tithes, if it be an impropriate rectory, or the patron and incumbent of any sinecure rectory, the whole or such part as they may think proper of the tithes, glebe and rectorial rights, to be annexed to the vicarage or vicarages; and the commissioners

(*g*) L. J., Notes of Cases (1872), 55.

are to execute an instrument declaring such annexation, which is to be enrolled in chancery and registered in the registry of the diocese. And if the arrangement cannot be fully carried out at once, the commissioners are empowered to accept and record the offers of the impropriators, patrons and incumbents, which are to be binding upon their successors in title (*h*).

1 & 2 Will. 4, c. 45.

The principal act on the augmentation of benefices is 1 & 2 Will. 4, c. 45. It recites 29 Car. 2, c. 8, and provides as follows:—

Explaining doubts as to portion of tithes, &c.

Sect. 2. "The provisions of the said recited act shall extend to any augmentation to be made out of tithes, although the same may not be a portion of tithes; and further, that it shall be lawful, under the power given by the said recited act, to grant, reserve, or make payable any such augmentation as aforesaid to the incumbent of any church or chapel within the parish or place in which the rectory impropriate shall lie, or in which the tithes or portion of tithes shall arise (as the case may be), whether such incumbent shall be a vicar or curate, or otherwise: provided also, that no such augmentation shall be made payable to any other person whomsoever."

Extension of 29 *Car.* 2, *c.* 8, *for the future.*

Recited act to extend to augmentations by colleges and hospitals.

Sect. 3. "In every case in which any augmentation shall at any time hereafter be granted, reserved, or made payable to the incumbent of any church or chapel, or reserved by way of increase of rent to the lessors, but intended to be to or for the use or benefit of any incumbent, by the master and fellows of any college, or the master or guardian of any hospital so making the said grant or reservation out of any rectory impropriate, or tithes or portion of tithes, belonging to the master and fellows of such college, or the master or guardian of such hospital, all the provisions hereinbefore recited and set forth, except the provision hereinbefore repealed (*i*), shall apply to such case in the same manner as if the same provisions, except as aforesaid (with such alterations therein as the difference between the cases would require), were herein expressly set forth and enacted with reference thereto: Provided always, that every such augmentation shall be made to the incumbent of some church or chapel within the parish or place in which the rectory impropriate shall lie, or in which the tithes or portion of tithes shall arise (as the case may be)."

(*h*) *Vide supra*, p. 295.

(*i*) A restriction contained in sect. 2.

Sect. 4. "In every case in which any augmentation shall at any time hereafter be granted, reserved, or made payable to the incumbent of any church or chapel being in the patronage of the grantor or grantors, or lessor or lessors, or be reserved by way of increase of rent to the lessor or lessors, but intended to be to or for the use or benefit of any such incumbent, by any archbishop, bishop, dean, dean and chapter, archdeacon, prebendary, or other ecclesiastical corporation, person or persons whatsoever, or the master and fellows of any college, or the master or guardian of any hospital so making the said grant or reservation out of any lands, tenements, or other hereditaments belonging to such archbishop, bishop, dean, dean and chapter, archdeacon, prebendary, or other ecclesiastical corporation, person or persons whatsoever, or the master and fellows of such college, or the master or guardian of such hospital, all the provisions hereinbefore recited and set forth (except the provision hereinbefore repealed) shall apply to such case in the same manner as if the same provisions, except as aforesaid (with such alterations therein as the difference between the cases would require), were herein expressly set forth and enacted with reference thereto."

The same statute to extend to augmentations made by spiritual persons, colleges and hospitals, out of any hereditaments, to any church or chapel being in their patronage.

Sect. 5. "Every augmentation which at any time hereafter shall be granted, reserved, or made payable, either under the power given by the said recited act, or under either of the powers hereinbefore contained, shall be in the form of an annual rent, and that the provisions of the said recited act, and the provisions hereinbefore contained, shall not apply to any other kind of augmentation whatsoever to be made after the passing of this act."

All such augmentations to be in the form of annual rents.

As to Leases on augmented Benefices.

Sect. 6. "Where any such rectory impropriate, or tithes or portion of tithes, or any such lands, tenements, or other hereditaments as aforesaid, shall respectively be subject to any lease on which an annual rent shall be reserved or be payable to the person or persons or body politic making the augmentation, it shall be lawful, during the continuance of such lease, to exercise the power given by the said recited act, or either of the powers hereinbefore contained (so far as the same shall apply), by granting to the incumbent of the benefice (*k*) intended to be augmented

Where hereditaments are in lease, a part of the reserved rent may be granted as an augmentation.

(*k*) By sect. 28 "benefice" comprehends "rectories, vicarages, donatives, perpetual curacies, parochial and consolidated chapelries, district parishes and district chapelries, and churches and chapels having a district assigned thereto."

a part of the rent which shall be so reserved or made payable as aforesaid, and then and in every such case the same premises shall for ever, as well after the determination of such lease as during the continuance thereof, be chargeable to such incumbent, and his successors, with the augmentation which shall have been so granted to him as aforesaid; and from and after such time as notice of the said grant shall be given to the person or persons entitled in possession under the said lease, and thenceforth during the continuance of the same, such incumbent, and his successors, shall have all the same powers for enforcing payment of such augmentation as the person or persons or body politic by whom the augmentation shall have been granted might have had in that behalf in case no grant of the same had been made; and after the determination of the said lease, the said incumbent and his successors shall have such remedy for enforcing payment of such augmentation as aforesaid as is provided by the said recited act with respect to augmentations granted, reserved, or made payable under the authority thereof."

Where hereditaments are subject to a lease not reserving a rack rent, an augmentation may be granted, to take effect on the determination of such lease.

Sect. 7. "Where any such rectory impropriate, or tithes or portion of tithes, lands, tenements, or other hereditaments as aforesaid, shall be subject to any lease for any term not exceeding twenty-one years or three lives, or (in the case of such houses as under the provisions of 14 Eliz. c. 11, may lawfully be leased for forty years (*l*)) not exceeding forty years, on which lease the most improved rent at the time of making the same shall not have been reserved, it shall be lawful at any time during the continuance of such lease to exercise the power given by the said recited act, or either of the powers hereinbefore contained, by granting out of the said premises an augmentation, to take effect in possession after the expiration surrender, or other determination of such lease, and then and in every such case the said premises shall, from and after the expiration, surrender, or other determination of the said lease, and for ever thereafter, be chargeable with the said augmentation; and the provisions of the said recited act and of this act respectively shall in all respects apply to every augmentation which shall be so granted in the same manner as in other cases of augmentations to be granted under the powers of the said recited act or of this act."

Power in such cases to defer the commence-

Sect. 8. "'And whereas it is apprehended that it may be desirable in many cases to make grants of augmenta-

(*l*) *Vide supra*, p. 1665.

tions in the manner last hereinbefore mentioned, and that such grants would be much discouraged if the augmentation to be granted should necessarily take effect in possession upon a surrender of the lease during which the same had been granted as aforesaid for the purpose of such lease being renewed;' be it therefore further enacted, that in any case in which an augmentation shall have been granted to take effect in possession after the expiration, surrender, or other determination of any lease in the manner authorized by the clause last hereinbefore contained, and a renewal of such lease shall take place before the expiration thereof, it shall be lawful in and by the renewed lease to defer the time from which such augmentation is to take effect in possession as aforesaid until any time to be therein specified in that behalf: Provided always, that the time to which the augmentation shall be so deferred shall be some time not exceeding twenty-one years, or (in the case of such houses as by the said act 14 Eliz. c. 11, may lawfully be leased for forty years) not exceeding forty years, to be respectively computed from the commencement of the lease during which the augmentation shall have been granted."

ment of the augmentation upon a renewal of the lease.

Sect. 9. "Where any such augmentation as aforesaid shall have become chargeable, under or by virtue of the said recited act or of this act, upon any rectory impropriate, tithes, portion of tithes, lands, tenements, or other hereditaments, if any lease shall afterwards be granted of any part of the same premises separately from the rest thereof, then and in every such case, and from time to time so often as the same shall happen, it shall be lawful for the person or persons granting such lease to provide and agree that any part of such augmentation shall during such lease be paid out of such part of the hereditaments previously charged therewith as shall be comprised in the said lease, and then and in such case, and thenceforth during the lease so to be made as aforesaid, no further or other part of the said augmentation shall be charged on the premises comprised in the said lease than such part of the said augmentation as shall be so agreed to be paid out of the same: Provided always, that in every such case the hereditaments which shall be leased in severalty as aforesaid shall be a competent security for such part of the said augmentation as shall be agreed to be paid out of the same, and the remainder of the hereditaments originally charged with the said augmentation shall be a competent security for the residue thereof."

Power to apportion augmentations on future leases.

Restriction on the exercise of the power of apportionment.

Repeal of so much of 14 Eliz. as requires an express continuance of the augmentation in new leases.

Sect. 10. "'And whereas by the said recited act it was enacted, that if upon the surrender, expiration, or other determination of any lease wherein such augmentation had been or should be granted, any new lease of the premises, or any part thereof, should thereafter be made without express continuance of the said augmentation, every such new lease should be utterly void;' be it further enacted, that the said last-mentioned provision, so far as relates to any augmentation which may be granted after the passing of this act, shall be and the same is hereby repealed."

As to Ecclesiastical Corporations.

Ecclesiastical corporations, colleges, &c. holding impropriate rectories or tithes, may annex the same to any church or chapel within the parish in which the rectory lies or the tithes arise.

Sect. 11. "It shall be lawful for any archbishop, bishop, dean, dean and chapter, archdeacon, prebendary, or other ecclesiastical corporation or person or persons, or the master and fellows of any college, or the master or guardian of any hospital, being, in his or their corporate capacity, the owner or owners of any rectory impropriate, or of any tithes or portion of tithes arising in any particular parish or place, by a deed duly executed, to annex such rectory impropriate, or tithes or portion of tithes as aforesaid, or any lands or tithes, being part or parcel thereof, with the appurtenances, unto any church or chapel within the parish or place in which the rectory impropriate shall lie, or in which the tithes or portion of tithes shall arise, to the intent and in order that the same may be held and enjoyed by the incumbent for the time being of such church or chapel; and every such deed shall be effectual to all intents and purposes whatsoever, any law or statute to the contrary notwithstanding."

Power to annex lands, &c. held by them to any church or chapel under their patronage.

Sect. 12. "It shall be lawful for any archbishop, bishop, dean, dean and chapter, archdeacon, prebendary, or other ecclesiastical corporation or person or persons, or the master and fellows of any college, or the master or guardian of any hospital, being, in his or their corporate capacity, the owner or owners of any lands, tenements, or other hereditaments whatsoever, and also being in his or their corporate capacity the patron or patrons of any church or chapel, by a deed duly executed, to annex such lands, tenements, or other hereditaments, with the appurtenances, unto such church or chapel, to the intent and in order that the same premises may be held and enjoyed by the incumbent for the time being thereof; and every such deed shall be effectual to all intents and purposes whatsoever, any law or statute to the contrary notwithstanding."

Such annexations to be

Sect. 13. "In any case in which any rectory impro-

priate, tithes or portion of tithes, lands, tenements, or other hereditaments, shall be annexed to any church or chapel, pursuant to either of the powers hereinbefore in that behalf contained, the annexation thereof shall be subject and without prejudice to any lease or leases which previously to such annexation may have been made or granted of the same premises or any part thereof; provided also, that in every such case any rent or rents which may have been reserved in respect of the said premises in and by such lease or leases, or (in case any other hereditaments shall have been also comprised in such lease or leases) some proportional part of such rent or rents, such proportional part to be fixed and determined in and by the instrument by which the annexation shall be made, shall during the continuance of the said lease or leases be payable to the incumbent for the time being of the church or chapel to which the premises shall be annexed as aforesaid; and accordingly such incumbent for the time being shall, during the continuance of such lease or leases, have all the same powers for enforcing payment of the same rent or rents, or of such proportional part thereof as aforesaid, as the person or persons or body politic by whom the annexation shall have been made might have had in that behalf in case the said premises had not been annexed."

subject to prior leases and the rents reserved upon the same or some portion thereof to be determined by the deed of annexation.

Sect. 14. "Where any rectory impropriate, tithes or portion of tithes, lands, tenements, or other hereditaments, which shall be annexed to any church or chapel under either of the powers hereinbefore in that behalf contained, or any part thereof, shall have been anciently or accustomably demised with other hereditaments in one lease, under one rent, or divers rents issuing out of the whole, and after such annexation such other hereditaments as aforesaid, or any part thereof, shall be demised by a separate lease or leases, all the provisions of 39 & 40 Geo. 3, c. 41, shall apply and take effect in the same manner as if the premises which shall be so annexed as aforesaid had been retained in the possession or occupation of the person or persons by whom such lease or leases as aforesaid shall be made."

Provisions of 39 & 40 Geo. 3, c. 41, to extend to such annexations, in certain cases.

Sect. 15. "Such of the powers hereinbefore contained as are restricted to cases in which the corporation or persons by whom the same may be exercised shall be the patron of the benefice which it shall be intended or desired to augment, shall apply to and may be exercised in cases in which such corporation or person shall be entitled only to the alternate right of presentation to such benefice."

Certain powers to apply to persons entitled to alternate presentations.

This is to apply to all heads of colleges, under whatever denomination.

Sect. 29. "That the powers by this act given to the master and fellows of any college shall apply to cases in which the head of the college shall be called the warden, dean, provost, president, rector, or principal thereof, or shall be called by any other denomination, and that such powers shall extend to every college and hall in the universities of Oxford and Cambridge, and to the colleges of Eton and Winchester."

What Benefices are to be raised.

Benefices exceeding in yearly value 300*l.* exclusive of surplice fees, not to be raised, and all others to be limited.

Sect. 16. "Provided always, that the power given by the said recited act shall not at any time hereafter, nor shall any of the powers hereinbefore contained, in any case, be exercised so as to augment in value any benefice whatsoever, which at the time of the exercise of the power shall exceed in clear annual value the sum of three hundred pounds, or so as to raise the clear annual value of any benefice to any greater amount than such sum of three hundred and fifty pounds, or three hundred pounds, not taking account of surplice fees."

Power to determine the yearly value of any hereditaments for the purposes of the act.

Sect. 17. "In every case in which it shall be desired, upon the exercise of any of the said powers, to ascertain, for the purposes of this act, the clear yearly value of any benefice, or of any rectory impropriate, tithes or portion of tithes, lands, tenements, or other hereditaments, it shall be lawful for the archbishop or bishop of the diocese within which the benefice to be augmented shall be situate, or where the same shall be situate within a peculiar jurisdiction belonging to any archbishop or bishop, then for the archbishop or bishop to whom such peculiar jurisdiction shall belong, to cause such clear yearly value to be determined and ascertained by any two persons whom he shall appoint for that purpose, by writing under his hand (which writing is hereby directed to be afterwards annexed to the instrument by which the power shall be exercised), and a certificate of such clear yearly value, written or endorsed on the instrument by which the power shall be exercised, and signed by such persons as aforesaid, shall for all the purposes of this act be conclusive evidence of such clear yearly value as aforesaid."

How and by whom the Powers in the Act are to be exercised.

By whom the above-mentioned powers may be exer-

Sect. 18. "Provided also, that in every case in which the power given by the said recited act, or any of the powers hereinbefore contained (other than and except the

aforesaid power of deferring the time at which an augmentation is to take effect in possession), shall be exercised by any bishop, dean, archdeacon, or prebendary, or by the master or guardian of any hospital, the same shall be so exercised, in the case of a bishop, with the consent of the archbishop of the province, or in the case of a dean, with the consent of the dean and chapter, or in the case of an archdeacon or prebendary, with the consent of the archbishop or bishop to whose jurisdiction or control they shall be respectively subject, or in the case of the master or guardian of a hospital, with the consent of the patron or patrons, visitor or visitors (if any) of such hospital, such consent as aforesaid to be testified by the said archbishop, dean and chapter, bishop, or patron or patrons, visitor or visitors (as the case may require), executing the instrument by which the power shall be exercised."

cised, and with whose consent.

Sect. 19. "Provided always, that the incumbent of any benefice or living shall not be authorized to exercise any of the powers aforesaid with respect to any hereditaments to which he may be entitled in right of his benefice."

Incumbents not to exercise them.

Sect. 20. "Provided also, that where the incumbent of any benefice shall in right of the same be entitled to any tithes or portion of tithes arising in any parish or place not being within the limits of such benefice, it shall be lawful for the incumbent for the time being of such benefice, by a deed duly executed by him, to annex such tithes or portion of tithes as aforesaid, or any part thereof, to any church or chapel within the parish or place in which such tithes or portion of tithes shall arise, to the intent that the same may be enjoyed by the incumbent for the time being of such church or chapel; and every such deed shall be effectual to all intents and purposes whatsoever, any law or statute to the contrary notwithstanding: Provided always, that every such annexation as aforesaid shall be made with the consent of the archbishop or bishop of the diocese within which the said benefice shall be situate (or if the said benefice shall be situate within a peculiar jurisdiction belonging to any archbishop or bishop, then with the consent of the archbishop or bishop to whom such peculiar jurisdiction shall belong), and also with the consent of the patron or patrons of the said benefice, such consent to be testified by the said archbishop or bishop and the said patron or patrons respectively executing the instrument by which the annexation shall be made."

Incumbent may annex tithes, &c. to which he is entitled, arising out of the limits of his benefice, to the church or chapel of the parish where they arise.

Sect. 21. "And whereas it is expedient that rectors and vicars should be enabled, under proper restrictions,

Power to rectors or vicars to

charge their rectories and vicarages for the benefit of chapels of ease, &c.

to charge their rectories and vicarages for the benefit and support of chapels of ease situate within such rectories and vicarages, as also in certain other cases; be it therefore further enacted, that it shall be lawful for any rector or vicar for the time being of any rectory or vicarage, by a deed duly executed by him, to annex to any chapel of ease or parochial chapel, or to any district church or chapel, or any chapel having a district assigned thereto, whether already built or hereafter to be built (such chapel of ease or other chapel or church, with the district or place to which the same belongs, being situate within the limits, or within the original limits, of the said rectory or vicarage), any part or parts of the tithes or other annual revenues belonging to such rectory or vicarage, or to grant to the incumbent for the time being of any such chapel of ease or other chapel or church, and his successors, any annual sum of money, to be payable by equal quarterly or equal half-yearly payments, and to charge the same on all or any part of such tithes or other revenues as aforesaid, or on any lands or other hereditaments belonging to the said rectory or vicarage; and in every case in which any such tithes or other revenues shall be annexed to any such church or chapel as aforesaid, the incumbent for the time being thereof shall thenceforth have all the same remedies for recovering and enforcing payment of the premises which shall be so annexed as the rector or vicar for the time being of the rectory or vicarage might have had if such annexation had not been made; and in every case in which any annual sum of money shall be so granted as aforesaid, the incumbent for the time being entitled thereto shall have all such remedies for recovering and enforcing payment thereof by action of debt against the incumbent for the time being of the said rectory or vicarage, or by distress upon the hereditaments to be charged therewith, or otherwise, as shall in that behalf be specified and given by the deed by which the grant shall be made: Provided always, that every such grant and annexation shall be made with the consent of the archbishop or bishop of the diocese within which the rectory or vicarage shall be situate (or if the rectory or vicarage shall be situate within a peculiar jurisdiction belonging to any archbishop or bishop, then with the consent of the archbishop or bishop to whom such peculiar jurisdiction shall belong), and also with the consent of the patron or patrons of the said rectory or vicarage, such consent to be testified by the said archbishop or bishop, and the said patron or patrons respectively executing the instrument by which the annexation or grant shall be made."

Hughes v. *Denton.*

In the case of *Hughes* v. *Denton* (*m*), the church of St. Bartholomew, Moorfields, was built and endowed within the limits of the parish of St. Giles, Cripplegate. By an order in council in 1850, a particular district was assigned to the church, and authority given to publish banns and solemnize marriages and pay the fees to its incumbent. Then it became a separate and distinct parish for ecclesiastical purposes (*n*). By a local act, 7 Geo. 4, c. liv, tithes were abolished in the parish of St. Giles, and an annuity of 1,800*l.* was secured to the vicar instead. In 1857 the vicar, by a deed under this last section, purported to annex one-sixth of this sum to the incumbency of St. Bartholomew. It was holden (1) that it was possible under the last act to annex a portion of an annuity granted in lieu of tithes; (2) that though St. Bartholomew had become a separate parish, it still remained a church to which a district had been assigned, locally situate within the limits of St. Giles, and therefore capable of augmentation out of the funds thereof.

Exception to the preceding power.

58 Geo. 3, c. 45.

Sect. 22. "And whereas by 58 Geo. 3, c. 45, provision was made, under certain restrictions, for enabling any parish to be divided into two or more distinct parishes, and for apportioning in such cases the glebe lands, tithes, moduses, or other endowments between the respective divisions; and it was thereby provided with respect to every such case, that during the incumbency of the existing incumbent of the parish every new church intended as the parish church of any division intended to become a distinct parish should remain a chapel of ease: be it further enacted, that the power last hereinbefore contained shall not be exercised for the purpose of making an annexation or grant to any chapel of ease situate within any division which under the provisions of the said last recited act shall be intended to become a distinct parish."

As to Patrons (*o*).

Manner in which consent to the exercise of powers in this act shall be testified, where patronage of benefice is in the crown.

Sect. 23. "In any case in which the consent of the patron of any benefice shall be required to the exercise of any power given by this act, and the patronage of such benefice shall be in the crown, the consent of the crown to the exercise of such power shall be testified in the manner hereinafter mentioned; (that is to say) if such benefice

(*m*) 5 C. B., N. S. 765; 28 L. J., C. P. 140.

(*n*) *Vide infra*, Part IX., Chap. VI.

(*o*) *Vide* 17 & 18 Vict. c. 84, s. 6, *infra*, p. 2130.

shall be above the yearly value of twenty pounds in the king's books, the instrument by which the power shall be exercised shall be executed by the lord high treasurer or first lord commissioner of the treasury for the time being; and if such benefice shall not exceed the yearly value of twenty pounds in the king's books, such instrument shall be executed by the lord high chancellor, lord keeper, or lords commissioners of the great seal for the time being; and if such benefice shall be within the patronage of the crown in right of the duchy of Lancaster, such instrument shall be executed by the chancellor of the said duchy for the time being; and the execution of such instrument by such person or persons shall be deemed and taken, for the purposes of this act, to be an execution by the patron of the benefice."

Where patron is an incapacitated person.

Sect. 24. "Where the patron of such benefice shall be a minor, idiot, lunatic, or *feme covert*, it shall be lawful for the guardian or guardians, committee or committees, or husband of such patron (but in case of a *feme covert* with her consent in writing), to execute the instrument by which such power shall be exercised, in testimony of the consent of such patron; and such execution shall for the purposes of this act be deemed and taken to be an execution by the patron of the benefice."

Where patronage is part of the possessions of the duchy of Cornwall.

Sect. 25. "Where the advowson and right of patronage of such benefice shall be part of the possessions of the duchy of Cornwall, the consent of the patron of such benefice to the exercise of such power shall be testified in the manner hereinafter mentioned; (that is to say,) the instrument by which the power shall be exercised shall be executed by the Duke of Cornwall for the time being, if of full age, but if such benefice shall be within the patronage of the crown in right of the duchy of Cornwall, such instrument shall be executed by the same person or persons who is or are by this act authorized to testify the consent of the crown to the exercise of any power given by this act in respect of any benefice in the patronage of the crown: and the execution of such instrument by such person or persons shall be deemed and taken, for the purposes of this act, to be an execution by the patron of the benefice."

Custody of Instruments.

Instruments to be deposited in the registry of the diocese.

Sect. 26. "In every case in which the power given by the said recited act 29 Car. 2, c. 8, or any of the powers hereinbefore contained, shall be exercised, the instrument by which the same shall be so exercised shall within two

calendar months after the date of the same be deposited in the registry of the diocese within which the benefice augmented or otherwise benefited shall be locally situate, or where the same shall be situate within a peculiar jurisdiction belonging to any archbishop or bishop, then in the registry of such peculiar jurisdiction."

Office copies of instruments deposited in the registry to be evidence.

Sect. 27. "An office copy of any instrument which under the provisions of this act shall be deposited in any such registry as aforesaid (such office copy being certified by the registrar or his deputy) shall be allowed as evidence thereof in all courts and places, and every person shall be entitled to require any such office copy, and shall also be allowed, at all usual and proper times, to search for and inspect any instrument which shall be so deposited, and the registrar shall be entitled to the sum of five shillings and no more for depositing any such instrument as aforesaid, and to the sum of one shilling and no more for allowing any such search or inspection as aforesaid, and to the sum of sixpence and no more (besides stamp duty) for every law folio of seventy-two words in any office copy to be made and to be certified as aforesaid."

Fee to the registrar.

1 & 2 Vict. c. 107.

Extension of 1 & 2 Will. 4, c. 45, s. 21.

By 1 & 2 Vict. c. 197, s. 14, reciting 1 & 2 Will. 4, c. 45, s. 21, it is further enacted, that "in all cases in which any contiguous parts of several parishes may have been or shall hereafter be united into a separate and distinct district for all ecclesiastical purposes, and such district shall have been or shall hereafter be duly constituted a consolidated chapelry, it shall be lawful for the rectors or vicars for the time being of the several parishes, parts of which shall have been so united, to have, use and exercise respectively all the same powers and authorities for annexing to any such consolidated chapelry any part or parts of the tithes or other annual revenues belonging to their rectories or vicarages respectively, and for granting to the incumbent for the time being of any such consolidated chapelry and his successors any annual sum of money, to be payable by equal quarterly or half-yearly payments, and for charging the same on all or any part of such tithes or other revenues as aforesaid, or on any land or other hereditaments belonging to the said rectories or vicarages respectively, as are by the said last-recited act given to rectors and vicars for the augmentation of chapels of ease, and such other chapels and churches as are therein and hereinbefore specified: Provided always, that the exercise of such powers shall be subject to the like consents (to be signified in the same manner) as is required by the said act with regard to the exercise of the powers of the said

act for the augmentation of chapels of ease, and the other chapels and churches therein specified; and in every case in which any such tithes or other revenues shall be annexed by virtue of this act to any consolidated chapelry, the incumbent for the time being thereof shall thenceforth have all the same remedies for recovering and enforcing payment of the premises which shall be so annexed as the rectors or vicars for the time being of the said rectories or vicarages respectively might have had if such annexation had not been made; and in every case in which any annual sum of money shall be granted by virtue of this act to the incumbent of a consolidated chapelry, such incumbent and his successors shall have all such remedies for recovery and enforcing payment thereof by action of debt against the incumbent of the rectory or vicarage by whom any such annual sum shall have been granted, or the incumbent thereof for the time being, or by distress upon the hereditaments to be charged therewith, or otherwise as shall in that behalf be specified and given by the deed by which the grant shall be made."

Where benefices are united.

Provisions as to the augmentation of one benefice out of the funds of some other benefice, when this latter is to be united to a third, and the two last have revenues more than sufficient for the duties thereof, are contained in 1 & 2 Vict. c. 106, ss. 17, 18, 19; and further provisions to the same effect were contained in the act 18 & 19 Vict. c. 127, ss. 3—7, now expired (*p*).

The provisions of those acts are further extended by 17 & 18 Vict. c. 84, which enacts as follows:—

Powers given by sect. 21 of 1 & 2 Will. 4, c. 45, and sect. 14 of 1 & 2 Vict. c. 107, may be exercised by all incumbents, &c.

Sect. 1. "The powers which by 1 & 2 Will. 4, c. 45, s. 21, and 1 & 2 Vict. c. 107, s. 14, are given to rectors or vicars of making annexations or grants in aid of churches and chapels may be exercised by the incumbent of any benefice whatsoever within the meaning of the said act 1 & 2 Will. 4, c. 45, and may be so exercised although part only of the district chapelry or place to which the church or chapel belongs may be within the limits of such benefice, and whether such church or chapel may be within the limits of such benefice or not."

Incumbent entitled to glebe land, &c. may annex the same to church of district wherein situate.

Sect. 2. "Where the incumbent of any benefice shall, in right of the same, be entitled to any glebe land or other land, it shall be lawful for the incumbent for the time being of such benefice, with such consents as hereinafter mentioned, by a deed duly executed by him, to annex such glebe land or other land as aforesaid, or any part

(*p*) *Vide supra*, Part II., Chap. IV., Sect. 1.

thereof, with the appurtenances, to any church or chapel within the parish, district or place in which such glebe land or other land as aforesaid shall be situate, to the intent that the same may be held and enjoyed by the incumbent for the time being of such church or chapel; and every such deed shall be effectual to all intents and purposes whatsoever, any law or statute to the contrary notwithstanding."

Consents of archbishop or bishop and patron to annexation and grant.

Sect. 3. "Every annexation and grant which shall be made by the incumbent of any benefice in pursuance of any power hereinbefore contained shall be made with the consent of the archbishop or bishop of the diocese within which such benefice shall be situate, and also with the consent of the patron or patrons of such benefice, such consent to be signified by the said archbishop or bishop and the said patron or patrons respectively executing the instrument by which the annexation or grant shall be made."

Section 13 of 1 & 2 Will. 4, c. 45, to extend to annexations under this act.

Sect. 4. "In every case in which any land subject to any lease shall be annexed to any church or chapel, in pursuance of the power hereinbefore in that behalf contained, the provisions of 1 & 2 Will. 4, c. 45, s. 13, shall apply to such land in the same manner as if such provisions were herein expressly set forth, and in every case in which any rectory impropriate, tithes or portion of tithes, lands, tenements, or other hereditaments, have been or shall be annexed to any church or chapel, in pursuance of any power contained in the said act 1 & 2 Will. 4, c. 45, or in this act, and the premises so annexed shall be comprised together with other hereditaments in any lease, the incumbent for the time being of the said church or chapel shall as to the premises so annexed, and the person, corporation, or body politic by whom such annexation shall have been made, and his or their successors and assigns shall as to the said other hereditaments, have the same rights and remedies for enforcing payment of the proportion of rent payable to them respectively, and otherwise have the same rights and remedies under and by virtue of the covenants, provisoes and agreements contained in the said lease, as if the said premises so annexed or the said other hereditaments, as the case may be, were the cnly hereditaments comprised in the said lease."

Rectories impropriate, tithes, &c. may be released from rent-charges, with

Sect. 5. "Where any rent or annual sum of money granted, reserved, or made payable, or to be granted, reserved, or made payable, under any of the powers of the said hereinbefore mentioned acts or of this act, to the incumbent of any church or chapel, is or shall be granted,

the consent of archbishop, &c.

reserved, or made payable out of or charged upon any rectory impropriate, tithes, annual revenues, lands, tenements, or other hereditaments, it shall be lawful for the incumbent for the time being of the said church or chapel by a deed duly executed by him, to release any such rectory impropriate, or any of the said tithes or annual revenues, lands, tenements, or other hereditaments respectively, or any part thereof respectively, from the said rent or annual sum, and the premises so released shall be thenceforth wholly discharged from the said rent or annual sum, and from all remedies for recovering and compelling payment thereof, but without in anywise discharging therefrom respectively any rectory impropriate, tithes and revenues, lands, tenements, or hereditaments, theretofore charged with the said rent or annual sum, and not by the said deed expressed to be released, or the person or persons, corporation or body politic, for the time being liable for the payment of the said rent or annual sum: Provided always, that every such release shall be made with the consent of the archbishop or bishop of the diocese within which the said church or chapel shall be situate, and also with the consent of the patron or patrons of the said church or chapel, such consents to be signified by the archbishop or bishop and the said patron or patrons respectively executing the instrument by which the release shall be made: Provided also, that no consent of any archbishop or bishop shall be given to any such release as aforesaid unless some rectory impropriate, tithes or other revenues, lands, tenements, or other hereditaments theretofore charged with the said rent or annual sum shall remain unreleased, and be proved to the satisfaction of the said archbishop or bishop to be a competent security for the same, and be expressed to be so proved in the instrument by which such consent shall be signified."

Who shall be deemed the patron to consent.

Sect. 6. "In every case in which the consent of the patron or patrons of the benefice or of any church or chapel is required by any of the hereinbefore mentioned acts or by this act to the exercise of any of the said powers given by the hereinbefore-mentioned acts or any of them, or by this act, and the person or persons or body to consent as such patron or patrons is not by the said act 1 & 2 Will. 4, c. 45, defined, the person or persons or body who, if the said benefice or church or chapel were then vacant, would be entitled to present or nominate or to collate thereto, shall be deemed the patron or patrons whose consent is so required."

By sect. 7, this act is to be read as part of 1 & 2 Will. 4, c. 45.

It is enacted by 3 & 4 Vict. c. 113, as follows:—

Sect. 71. "With respect to any benefice with cure of souls which is held together with or in the patronage of the holder of any prebend or other sinecure preferment belonging to any college in either of the universities, or to any private patron, arrangements may be made by the like authority, and with the consents of the respective patrons, for permanently uniting such preferment with such benefice: Provided that this act shall not apply to or affect any prebend or other sinecure preferment in the patronage of any college or of any lay patron in any other manner than as is herein expressly enacted."

Sinecure preferments may be annexed to benefices with cure of souls, with consent of patrons.

By sect. 73, with an especial view to the better care of populous parishes, arrangements may be made for improving the value or making a better provision for the spiritual duties of ill-endowed parishes or districts, by means of exchange of advowsons, or other alterations in the exercise of patronage (*q*).

Provisions for securing the better performance of spiritual duties in ill-endowed parishes.

Sect. 74. "Arrangements may be made by the like authority for the apportionment of the income of two benefices belonging to the same patron between the incumbents or ministers of such benefices, or the churches or chapels connected therewith: Provided that no such arrangement shall be made with respect to benefices in lay patronage without the consents of the respective patrons, nor in any case so as to prejudice the interests of any existing incumbent, nor without the consent of the bishop of the diocese, nor, in the case of benefices lying in more than one diocese, without the consent of the bishop of each diocese, nor where a bishop is himself one of the patrons, without the consent of the archbishop also."

Income of benefices belonging to one patron may be apportioned in certain cases.

By 17 & 18 Vict. c. 84, s. 8, "the provisions of this last section shall apply to any lands, tithes, tithe rent-charges, or other hereditaments or sources of income of what nature or kind soever belonging to such benefices, and shall apply to any number of benefices belonging to the same patron, including any united benefice; and that every church or chapel possessed of any endowment or capable of receiving the same, and also any sinecure rectory, so far as regards the transfer of its endowment or any portion thereof to any benefice, shall be deemed a benefice for the purpose of such arrangements or any of them."

Extended by 17 & 18 Vict. c. 84.

Sect. 76 of 3 & 4 Vict. c. 113, enacts, that nothing in

Declaration as

(*q*) *Vide supra*, p. 316.

to 1 & 2 Will. 4, c. 45, and 29 Car. 2, c. 8.

this act shall prejudice 1 & 2 Will. 4, c. 45, or 29 Car. 2, c. 8, "provided nevertheless, that after the passing of this act no augmentation made under such provisions, by any bishop or by any chapter whose revenues are affected by this act or the said first-recited act, shall be valid and effectual without the consent of the Ecclesiastical Commissioners for England."

4 & 5 Vict. c. 39.

Augmentations under 1 & 2 Will. 4, c. 45, may be made by all corporations sole;

and building land may be let or sold for that purpose.

This is extended by 4 & 5 Vict. c. 39, s. 26, to every dean, canon, prebendary or other dignitary or officer whose revenues are or may be affected by any of the provisions of the said two first recited acts or either of them, or of this act. This section continues: "And if for the purpose of more fully carrying into effect the provisions of the said act relative to augmentations it shall appear to the said commissioners and to any bishop or chapter to be expedient that any land belonging to such bishop or chapter adjacent to or situate within the distance of twenty miles from any city or town should be let or sold for purposes of building or other improvement, it shall be lawful for such bishop or chapter, as the case may be, with the consent of the said commissioners under their common seal, to grant any lease or leases of such land for such period or periods and upon such conditions as the said commissioners, having regard to the circumstances of the case, shall deem just and equitable, or, with the like consent, to convey the said land in fee simple for such price as shall appear to the said commissioners to be the full value thereof: Provided that the rent in the former case, or the purchase-money in the latter case, after reserving to the bishop or chapter, as the case may be, an annual payment equal to the amount theretofore enjoyed in respect of the land so let or sold, shall be wholly applied to the purposes of the said last-mentioned act, the consent of the said commissioners being in all cases necessary to the particular application thereof: Provided also, that if it be deemed expedient with a view to the better effecting of such purposes, such rent or purchase-money, or any part thereof, may, with the like consent, be at any time re-invested in the purchase of land."

Any augmented church or chapel having a district to be a perpetual curacy, and the minister to be an incumbent, with perpetual succession, &c.

By 2 & 3 Vict. c. 49, s. 2, it is provided, "that in the case of any church or chapel which has already been or hereafter may be augmented by the said governors of the bounty of Queen Anne, and for or to which any district chapelry has already been or hereafter may be assigned, whether before or after such augmentation under the provisions of the said recited acts or some of them, such church or chapel, from and after such augmentation, and

the assignment of such district chapelry, shall be and is hereby declared to be a perpetual curacy and benefice, and the minister duly nominated and licensed thereto, and his successors, shall not be a stipendiary curate, but shall be and esteemed in law to be a perpetual curate, and a body politic and corporate, with perpetual succession, and may receive and take to himself and his successors all such lands, tenements, tithes, rent-charges, and hereditaments as shall be granted unto or purchased for him or them by the said governors of the bounty of Queen Anne, or otherwise; and such perpetual curate shall thenceforth have within the district chapelry so assigned as aforesaid sole and exclusive cure of souls, and shall not be in anywise subject to the control or interference of the rector, vicar, or minister of the parish or place from which such district chapelry shall have been taken, any law or statute to the contrary notwithstanding" (*r*).

Order in Council for the augmentation of benefices.

By an Order in Council, dated October 21, 1842, the following scheme, recommended by the Ecclesiastical Commissioners, was carried into effect:

"Whereas the Ecclesiastical Commissioners for England have, in pursuance of an act passed in the session of parliament holden in the 3rd and 4th years of her Majesty's reign, intituled 'An Act to carry into effect, with certain Modifications, the Fourth Report of the Commissioners of Ecclesiastical Duties and Revenues,' duly prepared and laid before her Majesty in Council a scheme, bearing date the 5th day of October, 1841, in the words and figures following, that is to say:

"We, the Ecclesiastical Commissioners for England, in pursuance of an act passed in the session of parliament held in the 3rd and 4th years of your Majesty's reign, intituled 'An Act to carry into effect, with certain Modifications, the Fourth Report of the Commissioners of of Ecclesiastical Duties and Revenues,' have prepared and now humbly lay before your Majesty in Council the following scheme for making additional provision for the cure of souls in certain parishes where such assistance is most required:

"Whereas by reason of the suspension of certain canonries and prebends in several cathedral and collegiate churches, under the operation of the said act, divers sums of money have already been paid to us, and have been by us carried over to a common fund, as by the same act is directed; and divers other monies will be yearly and every

(*r*) *Vide supra*, Part IX., Chap. II.

Order in council for the augmentation of benefices.

year, in like manner, payable to us, and will by us be carried over to the same fund:

"And whereas it appears to us, after having carefully considered how the limited amount of monies which are now in course of annually accruing to the said common fund may be most usefully distributed according to the provisions of the said act, that it will be most conducive to the efficiency of the Established Church to grant out of the said fund (in the first instance) such augmentations only as may be requisite to secure, as nearly as may be, an average annual net income of 150*l.* to the incumbent of every benefice or church with cure of souls, being either a parish church or chapel with a district legally assigned thereto, and having a population amounting to 2,000, and being in the patronage either of your Majesty, or some archbishop or bishop, dean and chapter, dean, archdeacon, prebendary, or other dignitary or officer in some cathedral or collegiate church, or of some rector or vicar; reserving to ourselves, nevertheless, the right of abstaining from recommending such augmentation in any case in which, from special circumstances, we shall be of opinion that it is not at present expedient:

"And whereas we have satisfied ourselves, after due inquiry, that the benefices and churches described in the schedule hereunto annexed fall within the class above defined, and are fit and proper to be forthwith augmented:

"We, therefore, humbly recommend and propose, that, in order to raise to the sum of 150*l.* (as nearly as may be) the average annual net income of the several benefices and churches enumerated and described in the said schedule, there shall be paid by us, in each and every year, out of the common fund aforesaid, to the incumbent, for the time being, of each of such benefices and churches, the fixed annual sum which we have set opposite to the name thereof in the last column of the said schedule, by equal half-yearly payments on the 1st day of May and the 1st day of November in each year, and that the first of such payments shall be made on the 1st day of November next; and that whenever a vacancy in any of the said benefices or churches shall happen on any other day than the 1st day of May or the 1st day of November, the next half-yearly payment shall, in every case, be apportioned between the incumbent making the vacancy, or his representatives, and the incumbent succeeding to the benefice or church so becoming vacant, according to the time which shall have elapsed from the last day of payment to the day of the vacancy inclusive;

and such proportions shall be paid to the respective parties accordingly:

"And we further recommend and propose, that nothing herein contained shall prevent the further augmentation of any of such benefices or churches, if it shall be deemed fit, when there shall be sufficient means for that purpose, and that if it shall appear to us to be expedient, at any future time, that instead of the annual sum then in course of payment by us to any benefice, or of any part of such sum, a sum of stock in the three pounds per centum reduced or consolidated bank annuities should be appropriated thereto, or any land, tithe, or other hereditament, should be conveyed thereto in fee, nothing herein contained shall prevent us from recommending and proposing such a substitution, provided that such stock, or such land, tithe, or other hereditament, as the case may be, shall produce an annual sum not less than the annual sum for which the same shall be substituted; and provided also that no such change shall take effect except by the appropriation of stock as aforesaid, until the then next vacancy of the benefice affected thereby, without the written consent of the then existing incumbent thereof:

"And we further recommend and propose, that nothing herein contained shall prevent us from recommending and proposing the augmentation of any other benefice which, upon further inquiry, shall appear to us to come within the said class, and to be fit for augmentation: nor for extending augmentations to other classes, when the fund applicable thereto shall have sufficiently increased."

Then followed a schedule of the benefices augmented, under the following divisions: 1st, name of benefice; 2nd, quality; 3rd, diocese; 4th, county; 5th, annual payment of each benefice.

3 & 4 Vict. c. 60.

Licence in mortmain not necessary in cases of endowment.

By 3 & 4 Vict. c. 60, s. 2, "In any case where, under the hereinbefore recited acts (*s*), or either of them, or of this act, an endowment, grant or conveyance, consisting of or arising out of houses, lands, tithes, advowsons, rent-charges, tenements or other hereditaments, or consisting of money to be laid out in lands or other hereditaments, is authorized to be made, for the purpose of a site for any church or chapel, or churchyard, or parsonage house or glebe, or for the use or benefit of any church or chapel, or of the incumbent or minister thereof, or for the repairs thereof, such endowment, grant, or conveyance, whether made before or after the passing of this act, shall

(*s*) Apparently all the previous Church Building Acts.

be good and valid, without any licence or writ of *ad quod damnum*, the statutes of mortmain, or any other statute or law to the contrary notwithstanding.

Unless the endowment exceeds 300*l.* a year.

Sect. 3. "Nothing herein contained shall authorize an exemption from the provisions of the mortmain acts where, in the case of an endowment as aforesaid for the use or benefit of any church or chapel, or of the incumbent or minister thereof, such endowment, whether made at one period or at different periods, shall in any one case exceed in the whole the clear annual value of 300*l.*

By sect. 4 power is given to the church building commissioners, or to the bishop, to cause the clear annual value of the endowment to be determined.

Additional endowments may be made at any time.

Sect. 17. "An additional permanent endowment may be at any time made for the use or benefit of any church or chapel, or of the incumbent or minister thereof, which may have been previously built and endowed under the said last-mentioned acts or either of them; and such additional endowment may consist of houses, lands, tithes, advowsons, rent-charges, tenements or other hereditaments, or of money in the funds, or of money to be laid out in lands, or other hereditaments: Provided always, that nothing herein contained shall be construed to extend to the authorizing any such additional endowment, without the same being subject to the provisions of the mortmain acts, which shall amount, together with the former endowment or endowments, in any one case to more than the clear yearly value of 300*l.*"

6 & 7 Vict. c. 37, s. 22; 7 & 8 Vict. c. 94, s. 7; and 28 Vict. c. 42, s. 7.

By 6 & 7 Vict. c. 37, s. 22, as amended and extended by 7 & 8 Vict. c. 94, s. 7, and 28 Vict. c. 42, s. 7, it is enacted, that "all and every person or persons, or body corporate, having in his or their own right any estate or interest in possession, reversion, or contingency of or in any lands, tithes, tenements, or other hereditaments, or any personal estate or property whatsoever, shall have full power, licence and authority, at his and their will and pleasure, by deed enrolled in such manner and within such time as is directed by 27 Hen. 8, c. 16, in the case of any lands, tithes, tenements, or other hereditaments (but without any deed in the case of any personal estate or property), or by his or their testament in writing (including therein any testamentary paper or testamentary appointment under a power) duly executed according to law, to give and grant to and vest in the ecclesiastical commissioners and their successors all such his or their estate, interest, or property in such lands, tithes, tenements or other hereditaments, personal estate and property

whatsoever, or any part or parts thereof, for and towards the endowment or augmentation of the income of such ministers or perpetual curates as aforesaid, or for or towards providing any church or chapel for the purposes and subject to the provisions of this act, or for the purposes of purchasing any tithes, or to give any tithes with a view to the annexation of such tithes to a district church, and to be for such purposes respectively applied, according, to the will of such benefactors respectively, as in and by such deed enrolled, or such testament executed as aforesaid, may be expressed, or in the case of no deed or testament, as may in some other manner be directed, and in default of such expression or direction, then in such manner as shall be directed by the authority hereinbefore mentioned; and such commissioners and their successors shall have full capacity and ability to purchase, receive, take, hold, and enjoy, for the purposes aforesaid, as well from such persons as shall be so charitably disposed to give the same, as from all other persons who shall be willing to sell or alien to the said commissioners any lands, tithes, tenements, or other hereditaments, personal estate or property, without any licence or writ of *ad quod damnum*, the Statute of Mortmain, or any other statute or law, to the contrary notwithstanding."

A bequest of money, contingent upon the object being legally attained at the testator's death or within twenty-one years after, for providing a site for a church at B., in the parish of W., with proper schools, and for endowing the church, is good under this last section, and will pass to the ecclesiastical commissioners, if within the time a district is constituted under the statute (*t*).

Any ecclesiastical corporation may grant land or tithes.

By 14 & 15 Vict. c. 97, s. 24, "The powers and provisions contained in 6 & 7 Vict. c. 37, s. 22, enabling persons and bodies corporate to give and grant lands, tithes, tenements, or other hereditaments for the purposes of the said act, shall be construed and held to authorize any ecclesiastical corporation, aggregate or sole, to give or grant any land or tithes belonging to such corporation in the manner and for the purposes in the said act mentioned: Provided always, that the power hereby given shall only be exercised with the following consents in writing; that is to say, in the case of a college, with the consent of a visitor; in the case of a bishop, with the consent of the archbishop of the province; in the case of a dean, with the consent of the dean and chapter: in the

(*t*) *Baldwin* v. *Baldwin*, 22 Beav. 419; 26 L. J., Cha. 121.

case of a canon or prebendary, with the consent of the patron of such canon or prebend respectively; in the case of the incumbent of a benefice, with the consents of the bishop of the diocese and the patron of such benefice; and that the provisions of 1 & 2 Vict. c. 106 (*u*), respecting the party or parties to be deemed patron or patrons, and also respecting the manner in which and the party by whom any such consent is to be given, shall be held to apply to the consents hereby required."

Section 22 of 6 & 7 Vict. c. 37, to apply to ecclesiastical and collegiate corporations.

By 19 & 20 Vict. c. 104, s. 4, "the powers and provisions contained in the twenty-second section of 6 & 7 Vict. c. 37, enabling any person or body corporate to give and grant lands, tithes, tenements, or other hereditaments, goods or chattels, for the purposes of the said act, shall be construed and held to authorize any ecclesiastical or collegiate corporation, aggregate or sole, to give or grant any lands, tithes, tenements, or other hereditaments, goods or chattels, belonging to such corporation, in such manner as is in the said firstly and secondly recited acts mentioned, for the purposes of the said recited acts or of this act: Provided always, that the said powers shall not be exercised by the incumbent of any benefice with cure of souls without the consent of the patron of such benefice."

Lands, tithes, &c. and other endowments to vest in incumbent and his successors.

By sect. 23, "All endowments, of whatever form and character, which shall hereafter be provided for any parish, district, or benefice, and the church or chapel thereof, under the provisions of the said firstly and secondly recited acts or of this act, shall be settled and assured by the body or person providing the same, to the satisfaction of the commissioners, by such deed or deeds and in such manner as the commissioners shall from time to time direct, unto and to the use of the incumbent for the time being of the church or chapel of such parish, district, or benefice, and his successors for ever; and such deeds shall be valid and effectual in law to all intents and purposes, whether such church or chapel shall be vacant or full of an incumbent, and notwithstanding the Statute of Mortmain or any other law or statute whatsoever."

What are intended by words "district church," "district," "tithes" under this act.

By 28 Vict. c. 42, The District Church Tithes Act, 1865, it is enacted as follows:—Sect. 2. "For the purposes of this act 'district church' shall include any chapel of ease or parochial chapel, or any district church or chapel or any church or chapel having a district assigned thereto, whether already built or hereafter to be built, and the church of any parish formed or to be formed under the new Parishes Acts, 1843, 1844, and 1856, or any of such

(*u*) *Vide supra*, pp. 1476—1478.

acts (*v*); and 'district' shall include any such parish as last aforesaid, or any ancient or consolidated chapelry, or any parish or district formed under any of the Church Building Acts, or any other general or local act; and 'tithes' shall include 'commutation rent-charges, and all moduses, compositions, prescriptive and other payments, or redemption money in lieu of tithes,' or any part or parts thereof respectively, and any land for which such tithes, or other payments in lieu thereof, may have been commuted."

Sect. 3. "The rector or vicar for the time being of any rectory or vicarage may agree with the incumbent of any district church either wholly or in part situate within the limits or original limits of the said rectory or vicarage, to annex to such district church the tithes or part of the tithes belonging to such rectory or vicarage, and arising in respect of property situate within the district belonging to such district church, in consideration of a sufficient compensation being made to the said rector or vicar and his successors for the loss of the said tithes out of the endowments of the said district church or by some other means."

Any rector may annex tithes arising within the district to a district church.

Sect. 4. "No agreement shall be valid on the part of a rector or vicar under this act unless it be assented to, firstly, by the archbishop or bishop of the diocese within which his rectory or vicarage is situate, or if it be situate within a peculiar jurisdiction belonging to an archbishop or bishop by such last-mentioned archbishop or bishop, and, secondly, by the patron of the rectory or vicarage; and no agreement shall be valid on the part of the incumbent of a district church, except with the consent of the patron of such church, and with the approval of the Ecclesiastical Commissioners for England, where the compensation to be made to the rector or vicar is payable out of funds in the hands of the said commissioners, and of the governors of the bounty of Queen Anne for the augmentation of the maintenance of poor clergy, where the compensation to be made is payable out of funds in the hands or subject to the control of the said governors."

Consents required to such annexation.

Sect. 5. "Any agreement under this act between a rector and vicar on the one part, and an incumbent of a district church on the other, shall be in writing under their respective hands."

Agreements to be in writing.

Sect. 6. "Any assents required by this act may be testified by the assenting party executing the agreement

How assents to be testified.

(*v*) *Vide infra*, Part IX., Chap. VI.

between the rector or vicar and the incumbent of the district church, and the provisions of the above-mentioned act, and of the act 17 & 18 Vict. c. 84 (*w*), as to patrons of benefices, shall apply to the assent of patrons under this act."

Ecclesiastical commissioners to carry agreement into execution.

And by sect. 8, modified by 29 & 30 Vict. c. 111, s. 22, it is provided, that "Any agreement made in pursuance of this act shall be carried into effect by the Ecclesiastical Commissioners for England, and any instrument under the corporate seal of the said commissioners made in pursuance of such agreement, and transferring on the one side the tithes proposed to be transferred to the incumbent of the district church, and on the other securing to the rector or vicar the compensation agreed upon, shall be valid to vest in the said incumbent and his successors such tithes, and to secure to the said rector or vicar such compensation; and when the approval of the governors of the bounty of Queen Anne is required, such approval may be certified by any instrument under their corporate seal, and when the approval of the said ecclesiastical commissioners is required, it shall be implied by such order in council as aforesaid being passed."

Augmentation on exchange.

Former owners of advowsons, who have exchanged them for others under the provisions of 16 & 17 Vict. c. 50, may nevertheless, by sect. 4, have the same powers of augmenting them as if they had not passed from them (*x*).

By municipal corporations.

By 1 & 2 Vict. c. 31, s. 3, municipal corporations may continue to augment priestships, preacherships, &c. in their gift as before (*y*).

By parishioners.

By lord chancellor.

Where advowsons are sold by parishioners and others under 19 & 20 Vict. c. 50 (*z*), or by the lord chancellor under 26 & 27 Vict. c. 120 (*a*), the proceeds of the sale may be applied in augmenting the benefice, or in some cases other benefices in the gift of the lord chancellor.

(*w*) *Vide supra*, p. 2130.
(*x*) *Vide supra*, p. 345.
(*y*) *Vide supra*, p. 371.
(*z*) *Vide supra*, p. 364.
(*a*) *Vide supra*, pp. 386—393.

CHAPTER V.

THE BUILDING OF CHURCHES.

Object of acts.

THE various acts with reference to this purpose have had for their immediate object the best method of disposing of certain sums of 1,000,000*l.* and 500,000*l.* voted by parliament, and of the benefactions which private individuals have been authorized to make, in order to increase the number of churches in the kingdom. The sum of 1,000,000*l.* in exchequer bills was granted by 58 Geo. 3, c. 45; and the further sum of 500,000*l.* by 5 Geo. 4, c. 103.

43 Geo. 3, c. 108, as to benefactions in favour of churches.

Previously, however, to these acts had been passed 43 Geo. 3, c. 108, which is set out in the previous chapter (*a*), by sect. 1 whereof it is provided that any person, not being under age, insane, or a feme covert, may by deed or will give lands not exceeding five acres, or goods and chattels not exceeding 500*l.*, for building churches or chapels and for supplying mansion-houses with glebes, under certain restrictions and provisions. By sect. 4, small plots of land already holden in mortmain and lying convenient to be annexed to some church may be granted, either by way of exchange or benefaction, for that purpose. It appears that where a bequest of pure and impure personalty, that is, personalty savouring of realty, is made for the endowment of a future church, in such a manner as not to violate the provisions of 9 Geo. 2, c. 36, the trustees of the bequest are entitled to claim 500*l.* out of the *impure*, in addition to the whole of the *pure* personalty (*b*).

51 Geo. 3, c. 115.

By 51 Geo. 3, c. 115, s. 1, the crown is empowered to grant lands to an amount not exceeding five acres in any one grant for the same purpose. By sect. 2, any lord of the manor may grant five acres of the waste of the manor for similar purposes.

The case of *Forbes* v. *The Ecclesiastical Commissioners* (*c*), decided on the construction of this section, has been already mentioned (*d*).

(*a*) *Vide supra*, pp. 2112, 2113.

(*b*) *Sinnett* v. *Herbert*, L. R., 7 Ch. App. 232; *vide supra*, p. 1980.

(*c*) L. J., Notes of Cases (1872), 160.

(*d*) *Vide supra*, p. 2114.

52 Geo. 3, c. 161.

And by 52 Geo. 3, c. 161, s. 27, the lords of the treasury may by warrant appropriate small portions of crown lands for curtilages or accesses to churches.

58 Geo. 3, c. 45.

Appointment of church building commissioners.

By the aforesaid act, 58 Geo. 3, c. 45, certain commissioners, commonly called "The Church Building Commissioners," were appointed for ten years, who were to examine and inquire into the spiritual condition of parishes in order to ascertain where new churches were most required, and to employ the sum of 1,000,000*l.* above mentioned in building the churches requisite, and otherwise to carry into execution the provisions of the act. The commissioners were afterwards made a body corporate, and the term of their commission was continued by divers acts, till at last by 19 & 20 Vict. c. 55, their powers were, from January 1, 1857, transferred to the ecclesiastical commissioners (*e*).

Provisions as to church rates.

One of the means by which the church building commissioners were authorized to assist the building of new churches was by making loans to parishes on security of the church rates, or meeting funds raised by church rates by contributions to an equal amount out of their own fund. Since The Compulsory Church Rate Abolition Act, 1860, 31 & 32 Vict. c. 109, these provisions have become obsolete, except in so far as they relate to past transactions in which the loans on the security of the church rates have not yet been paid off. The provisions which appear to have no application, except to this purpose, are contained in 58 Geo. 3, c. 45, ss. 35, 54—61; 59 Geo. 3, c. 134, ss. 14, 23—25, 36, 40; 3 Geo. 4, c. 72, ss. 5—7, 11; 5 Geo. 4, c. 103, s. 13.

On the construction of some of these now obsolete sections were decided the cases of *Warner* v. *Gater* (*f*) and *Piggott* v. *Bearblock* (*g*).

Distribution of parliamentary grant.

Certain rules were laid down for the guidance of the church building commissioners in the distribution of the sums voted by parliament, as to the amount of population and the existing church accommodation, the prospect of subscriptions in aid, &c., in the parishes to be benefited; but as the sums voted by parliament have been long since practically expended, these provisions are not now of much practical importance. They were contained in 58 Geo. 3, c. 45, ss. 13, 14, 15; 59 Geo. 3, c. 134, ss, 4, 5, 6, 7, 22; 3 Geo. 4, c. 72, s. 32; 8 & 9 Vict. c. 70, s. 12.

Acceptance of

By 58 Geo. 3, c. 45, s. 33, the commissioners are em-

(*e*) *Vide supra*, Part. IX., Chap. III. p. 2108.

(*f*) 2 Curteis, 315.

(*g*) 3 Notes of Cases, 85.

powered to accept sites for churches and chapels with churchyards; and every such site when it is conveyed to the commissioners and the church is erected thereupon, and notice thereof is given to the bishop of the diocese, shall become for ever thereafter devoted to ecclesiastical purposes only, in order that the same may be consecrated by the bishop.

sites for churches.

Grants by persons under disability.

By various sections (*h*) in this and the following acts, powers, similar to those given to so many public undertakings by virtue of the Lands Clauses Consolidation Act (*i*), are given to the crown, to public bodies, corporations, and generally to persons under disability, of conveying sites for churches and chapels to the commissioners. Provision was made for apportioning quit or other rents in cases where the lands so conveyed were, with other lands, subject to quit rents or comprised in a lease, by 3 Geo. 4, c. 72, s. 9, for cases under that act; and generally by 14 & 15 Vict. c. 97, s. 27, and 17 & 18 Vict. c. 22.

Compulsory purchase.

The commissioners may also, under certain restrictions (*k*), put in force compulsory powers for taking sites which they may require; and where a parish does not require their aid in other respects, they may be invoked for the purpose alone of procuring a safe conveyance of a site through their instrumentality (*l*). Provision is made for the ascertainment and payment of the purchase-money, and for the re-sale of lands not required. The title to a site is not to be questioned after five years (*m*). This provision, it has been decided, must be construed most strictly, so as to extend only to *sites* transferred to the commissioners for building churches or chapels thereon, and not to chapels actually built which are transferred to them in violation of some trust (*n*). In the same case it was holden that the words in 3 Geo. 4, c. 72, s. 1, which are the largest in any of the church building acts, empowering the master general of the ordnance, the principal officers of any public department, and "any and every body politic, corporate

(*h*) 58 Geo. 3, c. 45, ss. 34, 36—54; 3 Geo. 4, c. 72, ss. 1—4, 8, 29, 32; 5 Geo. 4, c. 103, s. 19; 1 & 2 Vict. c. 107, s. 6; 8 & 9 Vict. c. 70, ss. 19, 20, 21, 24; 19 & 20 Vict. c. 104, s. 28. By 59 Geo. 3, c. 134, s. 20, corporations and persons under disability may grant stone, timber, &c. for building churches.

(*i*) 8 Vict. c. 18.

(*k*) 58 Geo. 3, c. 45, s. 53.

(*l*) Ibid. s. 52.

(*m*) 3 Geo. 4, c. 72, s. 29. A similar provision is contained in 1 & 2 Will. 4, c. 38, s. 17, as to sites conveyed to private persons building and endowing under that act, provided they pay the original value of the lands (s. 18).

(*n*) *Att.-Gen.* v. *Bp. of Manchester*, L. R., 3 Eq 436.

"and collegiate and corporation aggregate or sole," and "any trustees, guardians, commissioners, or other persons "having the control, care, or management of any hospital, "schools, charitable foundations, or other public institu- "tions, to give, grant and convey any messuages, build- "ings, lands, grounds, tenements or hereditaments respec- "tively," do not authorize the conveyance of a private chapel belonging to a charity in violation of the rights of the charity by the trustees thereof, not for valuable consideration, but in order that the chapel might be consecrated and made a parish church. In this case the chapel had been actually consecrated, and an order in council assigning a district to it had been obtained; but on an information and bill filed, the Court of Chancery held the conveyance to the commissioners to be a breach of trust and ordered them to re-convey the chapel to the trustees of the charity.

Where land not required for church.

Provision was made in the acts for the case of lands being in the possession of the commissioners and not yet consecrated at the expiration of the term of years to which the commission was limited by 59 Geo. 3, c. 134, s. 34; and by 3 & 4 Vict. c. 60, s. 19, in cases where land has been conveyed to the commissioners under 1 & 2 Will. 4, c. 38, to be hereafter referred to, or 1 & 2 Vict. c. 107, and a part only of the land is required for the purposes for which it was originally conveyed to them, the commissioners may, with the consent of the grantor or donor, appropriate the rest to other ecclesiastical purposes or to any charitable or public purpose relating to the parish or place in which the land is situate.

Remission of duties.

It should be here noted that for the purposes of these acts, and for facilitating the erection of churches under them, various duties on brick, stone and timber (then liable), and stamp duties on instruments, were remitted (*o*).

Cases under special acts or trusts.

By 3 Geo. 4, c. 72, all powers and provisions in local acts are to remain good, and may be put in force for the objects of this act (*p*). And, by sect. 33, the commissioners may make grants to churches or chapels already subject to special trusts, and may at the same time, by special resolution, confirm the trusts already existing.

In whom sites to be vested.

By the earlier acts, 58 Geo. 3, c. 45, 59 Geo. 3, c. 134, and 3 Geo. 4, c. 72, the sites were to be conveyed to the commissioners for the purpose of consecration; but by 5 Geo. 4, c. 103, s. 14, lands conveyed under the provi-

(*o*) 59 Geo. 3, c. 134, ss. 21, 35; 3 Geo. 4, c. 72, ss. 27, 28.
(*p*) Sects. 7, 35.

sions of that act are to be vested in the persons specified in the sentence of consecration, and some similar vesting seems to be contemplated by 1 & 2 Will. 4, c. 38, in cases under that act; but now by the joint effect of 8 & 9 Vict. c. 70, s. 13, and 19 & 20 Vict. c. 104, s. 10, it would appear that, in all cases arising under the church building acts, the freehold of the church, churchyard and all lands, tithes and hereditaments belonging to the church, and the house of residence, are to vest in the incumbent, except that, where by local act of parliament the same are vested in any vestry, they shall not be vested in the incumbent without the consent of the vestry.

In the case of *Champneys* v. *Arrowsmith* (*q*), the facts were these:—In 1816, under a local act, a new church was built in St. Pancras, which was to be "the parish church," the old church being thereby converted into a "parish chapel." In 1853, by an order in council, the original burial place for the parish, which surrounded the old church, and also an additional ground provided under an earlier local act, were closed, and a cemetery was provided for the whole parish. In 1863, that part of the parish in which the old church stood was turned into a new district, and the "parish chapel" was declared to be the church of that district. It was holden by the Exchequer Chamber, affirming the judgment of the Court of Common Pleas (*r*), that the 10th section of 19 & 20 Vict. c. 104, did not operate to vest the old churchyard in the incumbent of the new district church, but that the freehold thereof still remained in the vicar of the parish.

Patronage.

In incumbent or patron of former parish.

As to the patronage of the churches built or endowed under the provisions of these acts, it was provided, in the case of chapels built by church rates, that the patronage should be in the incumbent of the parish (*s*). With this exception the patronage of all churches to which districts or district parishes are attached is vested in the patron of the parish out of which the district or district parish is taken (*t*). But where such a district or district parish is again subdivided, the patronage is in the incumbent of such district or district parish (*u*). Where a consolidated chapelry is formed out of several parishes or extra-parochial places, the patronage is in such persons as the several patrons of such parishes and extra-parochial places

In nominee of patrons of former parishes.

(*q*) L. R., 3 C. P. 107.
(*r*) L. R., 2 C. P. 602.
(*s*) 58 Geo. 3, c. 45, s. 68.
(*t*) Ibid. s. 67; 59 Geo. 3, c. 134, s. 13.
(*u*) 1 & 2 Vict. c. 107, s. 12.

or the majority of them, subject to the approval of the commissioners, agree to nominate (*x*).

In bishop. By 3 Geo. 4, c. 72, s. 31, in any case where the commissioners build or assist in building a church or chapel "in any parish or place in which the patronage of or "nomination or appointment of the ecclesiastical person "to serve such church or chapel" shall not belong to anyone, the commissioners may declare the patronage to be in the bishop of the diocese, or if the place be exempt from the jurisdiction of a bishop, then in the bishop within whose diocese the place is locally situate. And by 14 & 15 Vict. c. 97, s. 26 (except where the commissioners with the consent of the bishop otherwise determine), the patronage of all new churches built in extra-parochial places is to be in the bishop of the diocese.

Surrender of patronage. It should here be mentioned that, by virtue of 59 Geo. 3, c. 134, s. 15, 3 Geo. 4, c. 72, s. 15, and 1 & 2 Vict. c. 107, s. 15, any corporation, trustees, persons with only a limited interest or under disability are empowered to surrender or agree to surrender to the commissioners, or the bishop, or any other persons, with the sanction of the commissioners and bishop, all rights of patronage that they may possess for facilitating any of the purposes of any of these acts.

Agreements as to patronage. By 1 & 2 Will. 4, c. 38, ss. 24, 26, 8 & 9 Vict. c. 70, s. 23, and 11 & 12 Vict. c. 37, s. 4, the patron and incumbent of the parish in which a new church is being built may, before its consecration, enter into any agreement in writing as to the future patronage thereof, and such agreement is to be binding upon them.

Building by private persons. By a series of acts beginning with 5 Geo. 4, c. 103, a power of building and endowing churches and chapels was conferred in certain circumstances upon private persons, without the intervention of the commissioners in any way.

Under 5 Geo. 4, c. 103. By 5 Geo. 4, c. 103, s. 5, where there is not spiritual accommodation for more than one-fourth of the inhabitants of any parish, township or place, and twelve householders shall certify to the bishop that they are willing to raise by subscription money to build or buy a church or chapel, and to provide out of the pew rents for the maintenance and repair of the chapel, and the stipend of a minister and clerk, the bishop may consent to the building or buying of such chapel. By the same act the money necessary might have been raised, to the extent of one moiety, out of the church rates (sect. 9). By sect. 10, every applica-

(*x*) 59 Geo. 3, c. 134, s. 6; 14 & 15 Vict. c. 97, s. 20.

tion to the bishop shall offer to set apart such number and proportion of free seats as is required by the previous acts, in cases in which churches or chapels are built or purchased under the provisions of the said acts (y), with any money advanced by the commissioners under the said acts; and no pew rents are to be taken nor service performed in such church or chapel till it has been consecrated.

By sect. 6, certain life-trustees are to be appointed "for the general regulation of the temporal affairs of the chapel;" and by sect. 15, these life-trustees may sell the vaults and burial places under the church or chapel, and out of the proceeds of such sale they are to pay the incumbent the ordinary dues receivable by an incumbent on the opening of vaults in a parish church, and the residue of the proceeds is to be invested, and the income applied in aid of the payment of stipends and general expenses of the chapel. The provisions of the former church building acts for enforcing payment of pew rents, and for the recovery of his salary by the incumbent, are applied to this act (z).

7 & 8 Geo. 4, c. 72.

The next provision made on this subject was 7 & 8 Geo. 4, c. 72, s. 3; but this section, after having given rise to a most elaborate discussion in the case of *Bliss* v. *Woods* (a), was repealed by 1 & 2 Will. 4, c. 38, s. 1.

1 & 2 Will. 4, c. 38.

By sect. 2 of this last act, as amended and extended by 1 & 2 Vict. c. 107, ss. 1, 3, and 3 & 4 Vict. c. 60, ss. 13, 14, in all parishes and extra-parochial places, the population of which according to the last census shall amount to 2,000, and in which the existing churches or chapels do not afford accommodation for more than one-third of the inhabitants for attendance upon divine service, and also in all parishes and extra-parochial places in which 300 persons, whatever be the amount of the whole population, are resident more than two miles from any existing church or chapel, and within one mile of the site of the proposed church or chapel, and where any persons are ready to build a church or chapel, or to purchase a building fit in the opinion of the bishop to be used as a church or chapel, or where a church or chapel has been built on the faith of the repealed act of 7 & 8 Geo. 4, c. 72, s. 3, in such a situation as shall in the opinion of the bishop be adapted for the inhabitants for whom more spiritual accommoda-

(y) This probably refers to 58 Geo. 3, c. 45, s. 75, requiring one-fifth of the seats to be free in any case where the church or chapel is built wholly or partially out of rates.

(z) 5 Geo. 4, c. 103, s. 18.

(a) 3 Hagg. 511.

1 & 2 Will. 4, c. 38.

tion is necessary, and where such persons are ready to provide a sum of 1,000*l.* or an annuity of 40*l.* charged on lands, tithes or other hereditaments, at least, by way of endowment for such church or chapel in addition to the pew-rents and other profits, if any, and further to provide a repair fund after a certain ratio therein mentioned, and to set apart one-third at least of the sittings as free seats if the bishop shall so require, it seems that such church or chapel may be consecrated, and certain privileges as to the patronage thereof are given to the subscribers thereto, which will be referred to hereafter; provided always, that no such church or chapel shall be built for the accommodation of 300 persons as above mentioned within two miles of the existing parochial church or chapel.

It has been decided that the conditions specified in this act are conditions precedent, which must be strictly complied with before the benefits given by it can be claimed, and that the existence of a proper repair fund is one of these conditions (*b*).

It is also provided that nothing in the act shall extend to repeal or alter any local acts, unless with the sanction of the incumbent, patron and vestry (*c*).

Previous notice and preference.

But before the powers given by this act can be put in force notice of the intention to build, or purchase and endow such a chapel, must be served upon the patron and incumbent of the parish (*d*) with certain particulars; and if the patron shall within two months bind himself to build and endow an additional church or chapel to the satisfaction of the bishop, then the patron shall be preferred; or where there is a population of 1,000 within two miles of an existing church, and any persons shall, with the consent of the vestry, bind themselves to enlarge the existing church to a certain specified extent, they shall be preferred, that is, their scheme shall be taken instead of the scheme of building a new chapel (*e*).

Endowment and repair fund.

By 3 & 4 Vict. c. 60, s. 12, the endowment required by 1 & 2 Will. 4, c. 38, s. 2, may be in lands or houses worth 1,000*l.*, or partly in them and partly in the funds; and by sect. 15, for the purposes of the repair fund required a perpetual rent-charge equal in value to it on lands or hereditaments may be given, and the incumbent

(*b*) *Williams* v. *Brown*, 1 Curt. 54.

(*c*) Sect. 27. *See Fitzgerald* v. *Champneys*, 2 John. & H. 31, decided on the act 2 & 3 Vict. c. 49.

(*d*) Where there is no incumbent on the patron alone, 1 & 2 Vict. c. 107, s. 2, and in extra-parochial places on the bishop, 3 & 4 Vict. c. 60, s. 16.

(*e*) 1 & 2 Will. 4, c. 38, ss. 7, 8.

instead of the trustees provided by the original act may hold such rent-charge, and in cases where the rent-charge comes into the hands of trustees they may assign it to the incumbent. By 23 & 24 Vict. c. 124, s. 30, the commissioners may release a rent-charge granted to them by way of endowment only, in consideration of a sum of Consolidated Bank Annuities to be transferred into their names (*f*).

Life trustees.

The trustees just mentioned were first established by 5 Geo. 4, c. 103, s. 6. This section provides for the appointment of three life trustees by the subscribers of 50*l.* and upwards from among themselves "for the management and general regulation of the temporal affairs of the church." They are to continue trustees as long as the church shall be served by any presentee of theirs as hereinafter mentioned.

By sect. 7, if any trustee dies or resigns, a meeting is to be called, and the majority of the subscribers of 50*l.* and upwards, being owners or renters of pews, may appoint a new trustee from among themselves. It appears from the case of *Fowler* v. *Allen* (*g*) that this meeting must be called by one of the surviving trustees.

By sect. 8, if the number of persons subscribing does not exceed three, the subscribers are the life trustees, and any one of them dying or resigning may by his will or any instrument signed by him appoint a trustee in his place. This last provision, it was holden in the same case of *Fowler* v. *Allen*, applies only where the original subscribers did not exceed three, not where they have been reduced to that number in course of time.

By sect. 12, if all the subscribers die, so that no election of trustees can be made, the incumbent of the parish becomes a trustee. By the same section the trustees have the patronage of the living for the first two turns, or any number of turns occurring within forty years; but if they all die, the incumbent of the parish has the nomination for the residue of this period. At the expiration of this period the patronage vests in the incumbent of the parish, unless the chapel is made into a district church, in which case it vests in the patron of the original parish. By sect. 13, in cases where chapels were built by rates, the incumbent of the parish had the patronage, unless the chapel were made into a district church.

By sect. 15 of the same act, the trustees may sell the vaults under the church or in the churchyard, and after

(*f*) *Vide infra*, p. 2154. (*g*) L. R., 4 C. P. 668.

paying a portion of the purchase-money to the incumbent of the parish in lieu of fees, shall invest the residue and employ the income in paying the stipend of the minister, the salary of the clerk, and other expenses.

By sect. 18, the powers and provisions of the previous acts as to the recovery and payment of stipends and salaries, and the recovery of pew rents, are to apply to chapels built under this act.

Patronage of churches built under last-mentioned acts.

The provisions of 1 & 2 Will. 4, c. 38, s. 2 (amended by 1 & 2 Vict. c. 107, s. 1, and 3 & 4 Vict. c. 60, s. 13), as to the patronage of churches or chapels built under it, were these:—The bishop may, by writing under his hand and seal, declare that the patronage of such church or chapel, when all the conditions have been complied with (*h*), shall be in the persons building, or purchasing and endowing, their heirs and assigns, or in such trustees, being members of the church, as they shall appoint, and in such future trustees as may be appointed, or in some ecclesiastical person or body corporate; provided that the number of trustees, except in some particular specified cases, shall not exceed five. By 14 & 15 Vict. c. 97, s. 14, however, this power is taken away from the bishop, and it would now appear to be vested, if at all, in the commissioners.

By sect. 5 of 1 & 2 Will. 4, c. 38, in all cases not thereinbefore provided for, where any persons declare their intention of endowing any chapel already built or intended to be built by them with some permanent endowment to the satisfaction of the commissioners, they may, by instrument under their seal (sect. 19), declare the patronage to be in such persons, their heirs and assigns, or such persons, ecclesiastical person or body corporate as they shall appoint; or if the chapel is built by subscription, then in such persons, &c. as the major part in value of such subscribers (being subscribers of 50*l.* at least (*i*)) shall at any time appoint (*k*): provided that, except in certain particular cases, the number of patrons does not exceed five. But before the commissioners can so declare, an application in writing must be made to them setting forth certain particulars, copies of which are to be sent to the patron and incumbent of the parish. By sect. 9, the patronage shall, upon consecration, immediately vest in the patron already mentioned by the name and style specified in the sentence of consecration. By sect. 15, provision is

(*h*) *Vide supra*, p. 2148; *Williams* v. *Brown*, 1 Curt. 51.

(*i*) 3 & 4 Vict. c. 60, s. 11.

(*k*) Ibid. s. 9.

made for cases where the crown is the patron of the original parish.

Extension by 14 & 15 Vict. c. 97.

By 14 & 15 Vict. c. 97, s. 7, all restrictions as to population contained in 1 & 2 Will. 4, c. 38, are removed, and the commissioners (not the bishop) may in all cases where a church or chapel is built and endowed to their satisfaction and a competent repair fund is provided, declare the patronage to be in the persons so building and endowing or their nominees. Provision is made for the appointment of trustees by sects. 10, 11. Previous, however, to any such declaration being made by the commissioners, an application in writing must be made to them setting out certain particulars, and copies of such application must be sent to the patron and incumbent of the parish and of any other parish affected (*l*).

This act makes the following provision for the establishment of an endowment or repair fund.

Commissioners may accept, for the purpose of an endowment and a repair fund, lands, &c. and money.

Sect. 8. "The exemption from the provisions of the Mortmain Acts, and the restrictions applicable to such exemption contained in the said act of the third and fourth years of her Majesty, shall be applicable to any endowment or grant or conveyance for the purpose of a repair fund of any such church or building; and, subject as aforesaid, the said commissioners may accept, by way of endowment and for the purpose of a repair fund for such church or building, such permanent provision as they may consider satisfactory, consisting of all or any of the following descriptions of property, namely, land, tithes, rent-charges and other tenements or hereditaments, money charged on land or invested in the funds; and such endowment and repair fund shall be exclusive of and in addition to the pew rents (if any) of such church or building; and as regards any endowments to be made for the purpose of obtaining the patronage as aforesaid, the same may be vested in such trustees, not exceeding five, as the said commissioners direct; and such trusts thereof, and for the sale or conversion thereof, and reinvestment of the produce either in land or in government securities, with powers of granting building or other leases, and all other powers for the due administration of such endowments and repair fund, and appointment of new trustees, may be declared as the said commissioners think fit" (*m*).

6 & 7 Vict. c. 37.

The act 6 & 7 Vict. c. 37, is directed rather to the formation of new parishes, and to the endowment of the

(*l*) See also sects. 12—15.

(*m*) *Vide supra*, Part IX., Chap. IV., pp. 2135, 2136.

ministers thereof, than to the building of churches; but by sect. 24 it is expressly provided that the church building commissioners may make grants in aid of the erection of the church of any district formed under the act, and by sect. 22, power is given to private persons to give benefactions "for or towards providing any church or chapel for the purposes and subject to the provisions of this act" (*n*).

Patronage under 6 & 7 Vict. c. 37.

By sect. 20, the patronage of any new parish or district formed under the act may be assigned to any ecclesiastical corporation, the universities or any college therein, or any persons or their nominees, on the condition of contributing to an endowment for the minister or a church. Unless or until such an assignment of patronage is made, the patronage is to vest in the crown and the bishop alternately, the bishop first (*o*).

Extended by 19 & 20 Vict. c. 104.

By 19 & 20 Vict. c. 104, s. 16, the provisions of the foregoing act shall be extended so as to apply "to the case of the patronage of any church or chapel to which a district shall belong," and the patronage of which is *ex officio* vested in the incumbent of the original parish, and to any new parish made under this act, or any parish having neither incumbent nor patron, or to any benefice in the patronage of the crown or any corporation; provided that the permanent endowment does not exceed 100*l.* a year, or the income from all sources 250*l.* a year. This patronage may not, however, be assigned for any less consideration than the building of a church and endowing it with 45*l.* a year, or an endowment alone of 150*l.*; and the assignments may only be made with the consent of the patron, where the crown or any corporation is such patron, of the bishop in parishes where there is neither incumbent or patron, and, where the patronage is in the incumbent of a benefice itself in private patronage, with the consent of the bishop and after one month's notice to such patron, who may if he pleases require compensation for the diminished value of his advowson (*p*) Until any such provision is made the patronage may, if the commissioners think fit, be vested in the incumbent of the old parish during his incumbency (*q*). Where the commissioners under this last act, or 6 & 7 Vict. c. 37, vest the patronage

(*n*) *Vide supra*, Part IX., Chap. IV., p. 2137, and *Baldwin* v. *Baldwin*, 22 Beav. 419, there cited.

(*o*) Sect. 21; see 7 & 8 Vict. c. 94, ss. 1—3.

(*p*) 19 & 20 Vict. c. 104, ss. 17, 18; 32 & 33 Vict. c. 94, s. 10; see also 19 & 20 Vict. c. 104, ss. 19, 20.

(*q*) Ibid. s. 22.

in the nominees of any body or person, such nominees shall not exceed five, and shall be named in the deed, and shall sign declarations that they are members of the church; and provision is made for the appointment of new trustees (*r*).

Assignment of patronage for purposes of acts not illegal.

Inasmuch as the sale or assignment of ecclesiastical patronage holden by any spiritual person in virtue of his dignity or spiritual office was made illegal by 3 & 4 Vict. c. 113, s. 42, it is specially provided by 9 & 10 Vict. c. 88, that this provision shall not extend to make assignments or agreements to assign patronage under 1 Geo. 1, st. 2, c. 10, or 8 & 9 Vict. c. 70, or any act recited therein, illegal.

Patronage not to be sold.

By 19 & 20 Vict. c. 104, s. 21, "Whenever the right of patronage of any such before-mentioned benefice with cure of souls shall, pursuant to the foregoing provisions of this act, have become vested in perpetuity in any body or person by reason of such body or person having augmented the endowment of such benefice in such adequate manner as is hereinbefore mentioned, and whenever such benefice shall, at the time of such transfer of patronage, be already permanently endowed with an annual sum of not less than one hundred pounds, or whenever the annual income of such benefice from all sources shall, when calculated upon an average of the three years immediately preceding such augmentation, amount to one hundred and fifty pounds, no subsequent sale or assignment or other disposition of such patronage by any body or persons whatsoever, for any valuable consideration whatever, shall be made until thirty years next after such transfer, unless the entire proceeds be legally secured to the further permanent augmentation of such benefice, but every such sale, assignment, or other disposition of such patronage shall be illegal, and every presentation, collation, admission, institution or induction thereupon shall be void, and the right of patronage of such benefice shall thereupon for that turn lapse to the bishop; provided also, that when the patronage of any church or chapel to which a district shall have been assigned is vested in the incumbent of the original parish, district, or place out of which such district has been taken, the person holding the incumbency of such original parish, district or place at the time of the passing this act shall not be deprived of the patronage of such church or chapel by any assignment of the same during his incumbency without his consent."

Penalty of lapse for so doing.

(*r*) 19 & 20 Vict. c. 104, s. 24.

Contract for the assignment of patronage under the Church Building and New Parishes Acts not to be simoniacal.

By 32 & 33 Vict. c. 94, s. 12, "No contract, agreement, or arrangement under any of the provisions of the Church Building Acts or New Parishes Acts relative to the exercise by, or the vesting in, or the assignment to any body or person of the right of patronage of or presentation to any church or chapel, in consideration of such body or person erecting or enlarging or contributing towards or procuring or agreeing to procure the erecting or the enlarging of such church, or permanently endowing or contributing towards, or procuring or agreeing to procure the permanent endowment of such church, or of its incumbent or minister, shall be deemed corrupt or simoniacal."

Certain assignments of patronage under Church Building and New Parishes Acts to be valid, and none of the penalties against simony to attach.

Sect. 13. "Every instrument whereby any declaration or assignment, or other disposition of any right of patronage or of presentation to any church or chapel has already been made, or shall hereafter be made under any of the provisions of the said acts, or in pursuance of any such contract or agreement as aforesaid, shall be deemed to have been and shall be good; and every presentation, institution, or induction which has already taken place, or shall hereafter take place in pursuance thereof, or of any such contract, agreement, or arrangement as aforesaid, shall be deemed to have been and shall be good, and no penalty or disability under either the canon law or the common or statute law, shall be deemed to have been or shall be thereby incurred."

Declarations not to be questioned.

By 1 & 2 Vict. c. 107, s. 11, instruments declaring patronage under that act, or under 1 & 2 Will. 4, c. 38, are not to be questioned after they have been registered in the registry of the diocese for three years.

Substitution of new for old church.

With respect to the churches built under any of the acts which have been mentioned, provision is made by 3 Geo. 4, c. 72, s. 30, for the substitution of the new church thus built as the parish church in the place of the old parish church, in certain cases and under certain conditions. By 1 & 2 Vict. c. 107, ss. 16, 17, the commissioners, with the consent of the bishop, the patron of the parish church, and the vestry, may direct that any church or chapel in the parish shall become the parish church, and the old parish church a chapel of ease, so that the new church shall have all the rights and privileges of the old one, and be the church of the incumbent of the parish, and in the gift of the patrons of the old parish church. By 2 & 3 Vict. c. 49, s. 9, however, these powers shall not extend to enable the commissioners to make any chapel, built under 1 & 2 Will. 4, c. 38, or any church or chapel, the patronage of which is in other hands than that of the

old parish church, into the parish church without the consent of the patron and incumbent of such church or chapel.

By 8 & 9 Vict. c. 70, it is enacted, as follows:—

Explanation and extension of the provisions of 3 Geo. 4, c. 72, s. 30.

Sect. 1. "Notwithstanding any limitation or restriction or other thing contained in 3 Geo. 4, c. 72, where a new church has been already built or shall hereafter be built in any parish or district parish, or ancient or parochial chapelry, and where the bishop of the diocese and the patron and incumbent of such parish, district parish, or ancient or parochial chapelry shall at any time certify to her majesty's commissioners for building new churches that it will be for the convenience of such parish, district parish, or ancient or parochial chapelry that such new church, being duly consecrated, should be substituted for the old or existing church situate therein, it shall be lawful for the said commissioners, by an instrument under their common seal, with the consent of such bishop, patron, and incumbent, under their hands and seals, to declare that such new church, being duly consecrated, shall be substituted for such old or existing church, and to transfer the endowments, emoluments, or rights belonging to such old or existing church, or to the incumbent or minister thereof, to such new church, and to the incumbent or minister thereof, and his successors; and it shall be lawful in every such case for the trustees (if any) of such old or existing church, or of any rights, emoluments, or endowments belonging thereto, or to the incumbent or minister thereof, and they are hereby required, and indemnified for so doing, to transfer the same according to the direction of the said commissioners; and immediately from and after such transfer all glebe lands, tithes, and other endowments, emoluments, fees, and profits, and every matter or thing, whether real or personal, and all rights and privileges wherewith any such old or existing church is or was, at the time of such substitution, endowed, or to which the incumbent or minister thereof was or is entitled, shall be vested in and belong to the incumbent or minister for the time being of such new church, and his successors, in as ample a manner as the incumbent or minister of the old or existing church might have enjoyed the same if such transfer had not taken place, and the incumbent or minister of such old or existing church shall thereupon be, to all intents and purposes, the rector, vicar, perpetual curate, or minister, as the case may be, of such new church, instead of rector, vicar, perpetual curate, or minister of such old or existing church, without any presentation,

institution, induction, collation, or other form of law being had, observed, or required: and such new church shall thereupon have the same rights and privileges as such old or existing church, and such offices of the church as were performed and celebrated in such old or existing church shall be performed and celebrated in such new church, and such new church shall be to all intents and purposes in lieu of the old or existing church; and at any time within six months after the substitution of such new church for the old or existing church the bishop of the diocese may of his own mere motion issue, or, if thereunto required by any person claiming to hold a pew or seat free of rent in such old or existing church by faculty or prescription, shall issue, a commission under his hand and seal, directed to the archdeacon of the archdeaconry in which such old or existing church shall be situate, and to any two incumbents of parishes situate within such archdeaconry, and to any two laymen nominated by the churchwardens of such old or existing church, who are hereby required to nominate for such purpose two fit persons not claiming any such pew or seat as aforesaid; and such commission shall direct the commissioners thereby appointed to inquire into the rights of persons, if any, who claim to hold any such pews or seats as aforesaid; and the said commissioners, or any three or more of them, of whom the said archdeacon shall be one, shall, as soon as conveniently may be, proceed to examine into such claims, after giving fourteen days' previous notice thereof, by affixing a copy of such commission on the church door of such new church; and such notice, signed by such archdeacon, shall specify the day and time and place on which such examination is to be made; and after making an examination into such claims the commissioners so appointed, or the majority of them, shall under their hands transmit in writing to the said bishop the names and residences of the persons who have substantiated their claims to such pews or seats, and if the said bishop is satisfied therewith he shall assign, under his hand and seal, to such parties respectively, convenient pews or seats in such new church, and such seats so assigned shall be held and enjoyed by the parties entitled to the same in as free and ample a manner as the pews or seats to which they had or would have been entitled in such old or existing church: and if any party shall find himself aggrieved by the finding of such commission the bishop of the diocese shall have power to afford redress, by allotting to such party seats in such new church, if the

Claims of persons to pews in the old church to be investigated, and if proved such persons to have pews in the new church on the same terms as in the old one.

justice of the case shall in his judgment require it; and the old or existing church, if such bishop shall think fit, may thereupon be wholly or partly pulled down, under a faculty to be granted for that purpose; and the said bishop shall in that case take care that all tombstones, monuments, and monumental inscriptions in such church so pulled down are as far as may be preserved by the churchwardens, at the expense of the parish, or if it shall seem fit to the said bishop the same shall be transferred to the church so substituted as aforesaid, at the expense of the said parish or district parish, or ancient or parochial chapelry, as the case may be: Provided that in case such new church shall have been built wholly or in part out of the funds placed at the disposal of her Majesty's said commissioners under the provisions of the hereinbefore recited acts or any of them, and such transfer shall have been made, rents for the pews or seats in such new church shall only be fixed by her Majesty's said commissioners under the provisions of such acts for that number of seats therein which shall exceed the number of seats provided in such old or existing church: Provided always, that nothing herein contained shall authorize the substitution of any new church in lieu of the old or existing church as aforesaid, when the advowson of or right of nomination to such new church shall belong to any other body or person than to the patron of such old or existing church, without the consents in writing of the patron and incumbent or minister of such new church."

By sect. 2, the incumbent of the old church and his successors shall be incumbents of the new church, and the patronage shall be in the patrons of the old church.

By sect. 3, all former proceedings under 3 Geo. 4, c. 72, s. 30, are made valid.

Where any part of a cathedral church has been accustomed to be used as a parochial church, a transfer of the rights, endowments, &c. belonging to such parochial church may, with certain consents, be made by the church building commissioners to a

Sect. 4. "Where any part of the cathedral church has been accustomed to be used as a parochial church, it shall be lawful for her Majesty's said church building commissioners, with consent of the ecclesiastical commissioners for England, and with the consents of the bishop of the diocese and of the dean and chapter of such cathedral church, and with the consents also of the patron and of the incumbent or minister of such church, to transfer the rights, emoluments, tithes, and other endowments (if any) as hereinbefore particularly specified, belonging to the incumbent of such church, to any new church which has been or hereafter may be built, and which is situate in the parish where such part of such cathedral is, or is deemed to be, the parish church; and in case of such transfer the

new church; and the parochial church shall thenceforth be under the same control and subject to the same laws as to repairs as exist with respect to the cathedral church.

same provisions hereinbefore contained, touching the rights and privileges, succession and appointment of the incumbent or minister of such new church, and the performance of the offices therein, and the examination into the claims of parties claiming to hold pews or seats by faculty or prescription in the old parish church, and the assignment of pews or seats to those who have substantiated such claims as hereinbefore mentioned, shall apply to such new church, which after such transfer shall become the parish church in lieu of the former parish church so belonging to such cathedral; and such new church, and the incumbent or minister thereof, shall, from and immediately after such transfer, be and remain subject in all respects to the same ordinary and other ecclesiastical jurisdiction and superintendence as the old parochial church and the incumbent or minister thereof respectively were or otherwise would have been subject to; and the part of the cathedral church so vacated shall thenceforth remain and be deemed to be part of the cathedral church itself, in the same manner and as fully as if it had never been used as a parochial church, and shall thenceforth be subject to the same control and superintendence, and to the same laws as to repairs, as exist and are in force with respect to the cathedral church itself; and the parish shall thenceforth be exempt from all further liability (if any) to keep the same in repair: Provided always, that the party or parties liable to the repair of the said part of the said cathedral church, whilst it was so used as a parochial church, shall continue to be liable to the repairs of such new church."

Preservation of site.

By 32 & 33 Vict. c. 94, s. 8, the bishop in granting a faculty for pulling down a church under sect. 1 of this last act may make provision for the use or preservation of the site of the church.

Churchyards. Purchase of.

Attached to the churches and chapels for building which so much provision has been made by the legislature are churchyards and chapelyards. Provision for purchasing land for these latter purposes was made by 58 Geo. 3, c. 45, s. 33, 59 Geo. 3, c. 134, s. 22, and 3 Geo. 4, c. 72, ss. 1—4, already cited; also by sects. 37, 38 of 59 Geo. 3, c. 134, and sect. 26 of 3 Geo. 4, c. 72. Under the act of 59 Geo. 3, c. 134, the commissioners might grant money for purchasing cemeteries outside the bounds of the parish; and by 8 & 9 Vict. c. 70, s. 14, the commissioners were empowered to declare that any such cemeteries, whether purchased under grants from them or not, if conveyed to them, were part of the parish for the use of which they

were bought. This act was extended by 9 & 10 Vict. c. 68, s. 1, to all parishes and districts; and it was further provided that, where a cemetery was bought for more than one parish, the commissioners might order any chapel built thereon to be used for each of the parishes to which the cemetery belonged (*s*). The freehold of a chapel so built is by 14 & 15 Vict. c. 97, s. 28, to be in the bishop.

The provisions in 20 & 21 Vict. c. 81, s. 7, enabling cemeteries made under the Church Building Acts to be transferred to burial boards in certain cases, have been already mentioned (*t*).

Relation to Burial Acts.

It appears that burial grounds purchased and consecrated under the Church Building Acts are not "cemeteries established under the authority of any act of parliament" within the meaning of sect. 5 of 16 & 17 Vict. c. 134, which exempts such cemeteries from the usual provisions for closing burial grounds in towns by order in council (*u*).

Vaults.

It may be here mentioned that by 58 Geo. 3, c. 45, s. 80, no grave is allowed under or within twenty feet of any church built under that act; but this provision does not extend to vaults.

By 5 Geo. 4, c. 103, s. 15, the trustees or churchwardens may sell the vaults under chapels built in virtue of the provisions of this act.

Parish clerks, sextons.

As to the officers of new churches, 58 Geo. 3, c. 45, s. 64, provides that the commissioners may, out of the pew rents, assign a salary to the clerk; 59 Geo. 3, c. 134, s. 10, that where parishes are divided under this or the preceding act the clerk or sexton of each division may have and recover the fees in his division which would before have belonged to and been recoverable by the clerk or sexton of the parish, and that the commissioners may make compensation to the clerk or sextons of the parish.

But a district chapelry, created under sect. 16 of this act, is not within the provisions of sect. 10; and the clerk or sexton of the parish is entitled to all fees arising within the district chapelry (*x*). By the same act, sect. 29, the clerk in every church built or acquired under 58 Geo. 3, c. 45, or this act, shall be annually appointed by the minister of the church.

In the case of *Jackson* v. *Courtenay* (*y*) a consecrated

(*s*) See also sects. 2—4.

(*t*) *Vide supra*, Part III., Chap. X., Sect. 2, p. 851.

(*u*) Ibid. p. 849; *Reg.* v. *Maude & another, Justices of Manchester*, 2 Jur., N. S. 182; 5 El. & Bla. 702.

(*x*) *Roberts* v. *Aulton*, 2 H. & N. 432.

(*y*) 8 El. & Bla. 8; 3 Jur., N. S. 889.

Parish clerks, sextons.

chapel, under two local acts, was vested in trustees as a chapel of ease. By an order in council in 1854, made under 59 Geo. 3, c. 134, s. 16, and 2 & 3 Vict. c. 49, s. 3, a district was assigned to the chapel. By 8 & 9 Vict. c. 70, s. 17, such district chapelry became a perpetual curacy. The plaintiff was clerk before the order in council, and continued to be so without any further appointment till the defendant, in August 18, 1855, gave him notice to quit on the 26th. On September 26th he endeavoured to enter the vestry and was forcibly removed. In an action brought by him for assault, it was holden (1) that the appointment was an office from which he could not be dismissed without reason; but (2) that it was an annual office, and (3) that the possession of the vestry was in the minister, who could justify removing him.

By 19 & 20 Vict. c. 104, s. 9, the parish clerk or sexton of the church of any parish constituted under 6 & 7 Vict. c. 37, 7 & 8 Vict. c. 94, or this act, shall and may be appointed by the incumbent for the time being of such church, and be by him removable, with the consent of the bishop of the diocese, for any misconduct.

Church-wardens.

The church or chapel wardens will be more conveniently treated of in the next chapter.

Seats or pews.

The subject of seats or pews and pew rents still remains.

Pew rents were specially authorized to be taken by the older Church Building Acts, for certain purposes and with certain restrictions.

By 58 Geo. 3, c. 45, s. 62, the commissioners, with the consent of the bishop, may arrange such part of the church as they shall think fit in pews, and the remainder not so arranged shall be free seats; and by 59 Geo. 3, c. 134, s. 6, the same is to hold good of churches for consolidated chapelries built under that act (*z*).

Pews are to be set apart for the minister and church-wardens; and one-fifth at least of the sittings shall be free when the church is built or assisted out of the rates (*a*).

The commissioners are to fix the pew rents; which might, under the earlier acts (*b*), be altered with the consent of the incumbent, patron and bishop, and in some cases the vestry; now, however, by 3 & 4 Vict. c. 60, s. 5, this power is given to the commissioners and bishop.

The pews may be let to any parishioner, subscribers to the building of the church to have the first choice; and,

(*z*) See also 8 & 9 Vict. c. 70, s. 11.

(*a*) 58 Geo. 3, c. 45, s. 75; 59 Geo. 3, c. 134, s. 30.

(*b*) 58 Geo. 3, c. 45, ss. 63, 78; 59 Geo. 3, c. 134, s. 31.

where no parishioner is desirous of renting them, to non-parishioners. Subscribers towards building the church or procuring the site may be discharged from pew rents in consideration of their subscription (*c*). The rents are to be recoverable by the churchwardens (*d*).

Payments out of pew-rents.

Out of these rents the commissioners, with the consent of the bishop (in case of difference the matter to be settled by the archbishop), are to allot a stipend to "the spiritual person serving the church or chapel," and a salary to the clerk; or they may assign the pew rents to the churchwardens of the parish or district, who shall thereout pay the stipend and salary, so far as they are sufficient. The surplus of the pew rents is to be invested and accumulated to form a fund for building or purchasing a house for the minister, and after that is to be applied either to increase the minister's stipend, or to reduce the pew rents, or to increase the accommodation, as the bishop shall direct; or the commissioners may apply the surplus in payment of any loan raised for building the church, or in aid of the church rate in the parish (*e*).

Lloyd v. *Burrup.*

It seems from the case of *Lloyd* v. *Burrup* (*f*), that the minister can bring an action against the churchwardens for non-payment of his stipend when they have sufficient funds from the pew rents in their hands to pay it.

In this case the plaintiff was, as the minister of a district church, entitled to receive out of pew rents from the defendants, the churchwardens, a stipend of 550*l.* a year under a deed of assignment duly executed by the commissioners, whereby that sum was assigned to the minister of the church, and was ordered to be paid from Christmas, 1826, on the "four most usual feast days, viz., Michaelmas Day, Christmas Day, Lady Day, and Midsummer Day, in even and equal portions." The deed also provided that the stipend should in no case exceed the amount produced by the pew rents in any one year. At Michaelmas, 1867, two quarters were due, amounting to 275*l.*, which the plaintiff claimed of the defendants. They had in hand, at the commencement of the action, in October, 1867, only 199*l.* 10*s.* 10*d.*, of which 120*l.* 5*s.* 6*d.* was made up wholly of pew rents paid in advance for the occupation of pews after Michaelmas. They paid the

(*c*) 58 Geo. 3, c. 45, s. 76; 59 Geo. 3, c. 134, s. 33; 3 Geo. 4, c. 72, ss. 24, 25; 1 & 2 Will. 4, c. 38, s. 21.

(*d*) 58 Geo. 3, c. 45, ss. 73, 77, 79.

(*e*) 58 Geo. 3, c. 45, ss. 64, 72; 59 Geo. 3, c. 134, ss. 26, 27, 28.

(*f*) L. R., 4 Ex. 63.

79*l*. 9*s*. 4*d*., but this sum of 120*l*. 5*s*. 6*d*. being insufficient to meet the then accruing quarter's stipend, they refused to pay over to the plaintiff. And it was holden that under the terms of the assignment and the circumstances of the case, the plaintiff was not entitled to receive from the defendants, in respect of his stipend for the quarters previous to Michaelmas, money paid in advance for the occupation of pews after Michaelmas.

Endowment out of pew rents.

It should be noticed that, under 59 Geo. 3, c. 134, s. 15, corporations and persons possessing a limited interest or under disability "may endow or agree to the endowment "of any chapel heretofore built out of the pew rents "thereof."

Transfer of pews.

By 3 Geo. 4, c. 72, s. 23, the commissioners may transfer the right to any pews in an existing church belonging to any person residing in the district of a new church, with his consent *and in order to increase the free seats in the old church*, to such new church.

Proportion of free seats.

The acts for enabling private persons to build churches or chapels require that every application to the bishop for leave to build such a church "shall offer to set apart such "number or proportion of free seats as is required," by the previous Church Building Acts, "in cases in which "churches or chapels are built or purchased under the "provisions of the said recited acts with any money ad- "vanced by the commissioners under the said recited "acts" (*g*), and to provide out of the pew rents a competent salary for the minister; and no pew rents are to be taken till the chapel is consecrated (*h*).

Subject to this all the provisions of the previous Church Building Acts are to apply (*i*).

Pew rents of chapels.

By 1 & 2 Will. 4, c. 38, s. 4, the trustees may fix and alter the scale of pew rents. By 1 & 2 Vict. c. 107, s. 18, where a chapel is converted into a parish church, the commissioners, with consent of the bishop, may make provision for the minister and clerk of the old and new parish church out of the pew rents of either, so long as they do not touch the rights of any persons claiming by faculty or prescription.

When pew rents to cease.

By 14 & 15 Vict. c. 97, s. 1, where a permanent endowment in lieu of pew rents to the satisfaction of the commissioners is made for any church for which pew rents have been previously fixed under any of the previous

(*g*) See comment at p. 2147.
(*h*) 5 Geo. 4, c. 103, s. 10.
(*i*) Ibid. s. 18; see 1 & 2 Will. 4, c. 38, s. 22.

Church Building Acts, and where such pew rents have not been appropriated under any local act, the commissioners may, with the consent of the bishop, declare that pew rents shall cease for the whole or part of the church (according to the amount of the endowment), and the seats thus freed shall be at the disposal of the churchwardens like those in an "ancient parish church."

Right to pews in the old parish church not to be retained after occupation of sittings in the new.

By 19 & 20 Vict. c. 104, s. 5, "Every person resident within the limits of any new parish or district already formed under any of the Church Building Acts, or hereafter to be formed under the provisions of 6 & 7 Vict. c. 37, and 7 & 8 Vict. c. 94, or of this act, who shall have claimed and have had assigned to him sittings in the church of such new parish, shall thereby surrender, as to any right that he may have possessed, an equal number of sittings in the church of the original parish or other ecclesiastical district out of which such parish shall have been taken, unless such last-mentioned sittings be held by faculty or under an act of parliament."

Pew-rents may be taken according to scale, and applied towards repair of church and providing endowment.

Sect. 6. "It shall be lawful for the commissioners, if it shall appear to them that sufficient funds cannot be provided from other sources, but not otherwise, with the consent of the bishop of the diocese under his hand, to order and declare by an instrument in writing under their common seal that annual rents may be reserved and taken in respect of any pews or sittings in any church to or for which a district may hereafter be assigned under the provisions of the said recited acts or of this act, and such rents shall be charged, levied, and taken by the churchwardens for the time being of such church after a rate or scale which shall be specified in such instrument, and the proceeds not otherwise appropriated by law shall be applied towards the repair and maintenance of the same church, and the maintenance of the minister and the services thereof, and the endowment of such church, in such manner as shall be specified in such instrument, and to no other uses: Provided always, that one half part at least of the whole number of pews or sittings in such church shall be free sittings, and that it shall be shown to the satisfaction of the said commissioners that the said free sittings will, with respect to position and convenience, be as advantageously situated as those for which a rent may be fixed and reserved."

By sect. 8, the scale of pew rents may be altered from time to time.

Upon permanent endowment of any

Sect. 7. "Upon a permanent endowment being provided for any church in which pew rents have previously

church or chapel a proportionate number of sittings to be declared free, or scale of pew rents to be reduced.

been authorized to be taken, and upon such endowment being approved by the commissioners, they may thereupon, under such an instrument under their common seal as is hereinbefore mentioned, with the consent of the bishop of the diocese, make an equivalent reduction in the total amount of the rents authorized to be taken for the pews or sittings in such church, if the same shall not be appropriated by law for specific purposes, either by a reduction of the rate or scale, or by declaring certain specific pews or sittings theretofore chargeable with the rents to be absolutely free: Provided always, that if any sum or sums of money have been borrowed under the authority of any act of parliament or order in council upon the security of pew rents such instrument shall not take effect until after the repayment of all sums so charged or chargeable."

Pews or sittings may be surrendered to ecclesiastical commissioners.

By 32 & 33 Vict. c. 94, s. 2, "Whenever by virtue of any public or private act of parliament now or hereafter in force, or by virtue of any deed or instrument, the pews or sittings, or some or one of the pews or sittings, in any church or chapel, consecrated or unconsecrated, are or is or shall be subject to any trust as to the grant, demise, sale, or disposal of such pews or sittings, pew or sitting, or are, is, or shall be the private property for any estate whatsoever of any person or persons, then and in every such case it shall be lawful for the trustees of such church or chapel, or other the persons exercising powers of grant, demise, sale, or disposal as aforesaid, or for all or any persons possessing on their own behalf or on the behalf of others any rights, qualified or unqualified, of ownership, by reason of any such grant, demise, sale, or disposal as aforesaid, or for any person or persons to whom any pews or sittings, pew or sitting, in such church or chapel, shall belong, for any estate whatsoever, under or by virtue of such act of parliament, deed, or instrument as aforesaid, with or without consideration, to surrender and for ever yield up, either altogether or separately, and according to the nature and extent of their several rights and interests, to the bishop of the diocese wherein such church or chapel is situate, or to the Ecclesiastical Commissioners for England, who are hereby respectively authorized to accept every such surrender, all rights of ownership, grant,, demise, sale, disposal, or other right whatsoever which they the said trustees, persons or person, may have in, over, or in respect of such pews or sittings, pew or sitting."

Surrender to be by deed, executed by

Sect. 3. "Every such surrender shall be made by deed executed by all the parties to the same, amongst whom

shall be included the bishop of the diocese wherein the church or chapel to be affected by it is situate, and the patron or patrons of such church or chapel aforesaid; and such deed shall be registered in the registry of the said diocese."

the parties, including bishop of diocese.

Sect. 4. "So soon as all rights and powers over or in respect of the pews or sittings in any such church or chapel shall have been surrendered to the bishop of the diocese or to the said commissioners as aforesaid, the trusts or rights of ownership, and the obligations affecting such pews or sittings, or any of them, under such act of parliament, deed, or instrument as aforesaid, shall at once and *ipso facto* determine, and all the provisions of such act of parliament, deed, or instrument as to pews or sittings in such church or chapel shall thenceforth be void and of none effect."

Upon surrender all rights of ownership, &c. to cease.

Sect. 5. "From and after every such surrender to the said bishop or commissioners, the pews or sittings, pew or sitting, affected thereby shall, to the extent of the rights or powers expressed to be surrendered, be subject to the same laws as to all rights and property therein as the pews and sittings of ancient parish churches are now subject to: Provided that if the church or chapel be not consecrated such pews or sittings, pew or sitting, shall belong absolutely to the bishop and his successors or to the said commissioners, as the case may be, until the consecration of the said church or chapel, and from and after the consecration thereof the right of the said bishop or commissioners shall cease, and the said pews or sittings shall be subject to the same laws as to all rights and property therein as the pews and sittings of ancient parish churches."

And pews, &c. subject as pews of ancient parish churches.

Sect. 6. "The powers and provisions hereinbefore contained as to pews and sittings subject to trusts as aforesaid in any such church or chapel as aforesaid shall, *mutatis mutandis*, be held to apply to and shall be held to authorize the absolute transfer and conveyance to the said commissioners, by any deed or deeds, made without consideration and executed by all the parties thereto as aforesaid, of the freehold of any church or chapel, consecrated or unconsecrated, and of the vaults therein or thereunder, which, under or by virtue of any such act of parliament, deed, or instrument as aforesaid, is or are or shall be vested in any persons or person in their own right or as trustees or trustee of such church or chapel for an estate in perpetuity; and if such church or chapel be unconsecrated at the time of such transfer and conveyance, such

Powers hereinbefore contained to apply to and authorize absolute transfer to ecclesiastical commissioners.

freehold so transferred and conveyed shall remain in the said commissioners until the consecration of the same church or chapel, and shall then *ipso facto* become subject to the same laws as to all rights and property therein as the pews and sittings of ancient parishes churches."

Upon complete surrender, all rights created by act for building church to cease.

Sect. 7. "In every case in which a complete surrender and determination of the rights, powers, obligations, and trusts affecting the pews or sittings in a church or chapel shall have been carried out as aforesaid, and in every case in which such transfer and conveyance as aforesaid of the freehold of a church or chapel, and the vaults (if any) thereof, shall have been effected, all other rights, powers, obligations, and trusts created, conferred, or enforced as to such church or chapel by the act of parliament, deed, or instrument under which such church or chapel was built, shall upon such complete surrender and determination, or (as the case may be) such transfer and conveyance, absolutely cease and determine; Provided always, that such cesser and determination shall not diminish or in anywise affect any right or rights of patronage."

Lastly, by 35 & 36 Vict. c. 49, The Church Seats Act, 1872, it is enacted as follows:—

Ecclesiastical commissioners may accept a church site under a grant in which it is declared that pews or seats shall not be let.

Sect. 2. "It shall be lawful for the ecclesiastical commissioners, in the exercise and fulfilment of the powers and duties conferred or imposed upon them by the acts administered by them or any or either of the same acts, to accept a church site under a grant or conveyance in which it is declared that the pews or seats in the church erected or to be erected on the same site, or some specified portion of the same pews or seats, shall not be let for any payment of money, and thereupon it shall be unlawful to let the same pews or seats or portion of the same for payment of money."

Securing stipend to incumbent when seats are wholly or partially free.

Sect. 3. "In every case in which it is so declared that no portion of the pews or seats shall be let for any payment of money, a sufficient endowment or stipend of not less than one hundred pounds per annum shall be secured to the incumbent by or to the satisfaction of the ecclesiastical commissioners, and in every case in which a portion only of the pews or seats may not be so let, an endowment or stipend of such amount as the said commissioners may determine, regard being had to the proportion of pews or seats which may not be so let, shall be in like manner secured."

CHAPTER VI.

THE DIVISION OF PARISHES.

General law as to this division.

BEFORE 58 Geo. 3, c. 45, there was no legal machinery by which a parish could be divided. The 1 Geo. 1, stat. 2, c. 10, provided, it is true, for making curacies augmented by Queen Anne's Bounty into perpetual curacies (sect. 4); but it was especially provided (sect. 5), that this should not affect the cure of souls in the parish (*a*). Local or private acts for dividing parishes were occasionally passed. At one time fifty new churches with parishes were erected in the metropolis, by 9 Ann. c. 17; 10 Ann. c. 20, and 1 Geo. 1, c. 23. It was however a part of the scheme of church extension which occasioned the Church Building Acts to divide the old parishes where necessary into new and more manageable ecclesiastical divisions. Hence it happens that generally, though not universally, the same statutes treat of building churches and of new parishes, though the subjects are in reality very distinct, and much of the difficulty in which the old law of church extension is involved has arisen from confusing them.

Provided for in Church Building Acts.

Classification of acts.

There are three distinct groups of acts under which parishes may be divided:—(A.) The early Church Building Acts, 58 Geo. 3, c. 45, 59 Geo. 3, c. 134, and 3 Geo. 4, c. 72. (B.) The acts enabling private persons to build churches or chapels, 5 Geo. 4, c. 103; and 1 & 2 Will. 4, c. 38. (C.) The acts for making new parishes through the agency of the Ecclesiastical Commissioners, 6 & 7 Vict. c. 37; and 7 & 8 Vict. c. 94. Many of these acts received amendment or extension from other subsidiary acts, which have already been cited in the previous chapter, and will be again cited in this; but the three groups were only brought in any way into unity by (D.) 19 & 20 Vict. c. 104, and 32 & 33 Vict. c. 94.

Annexation of districts.

With reference to this subject the provisions as to the annexation of districts, hamlets, &c. to benefices, which have been already set forth, should be also referred to (*b*).

(*a*) *Vide supra*, Part IX., Chap. II.
(*b*) *Vide supra*, Part II., Chap. XIV., Sect. 3, pp. 553—555, et Addenda.

Ways of division under earlier acts.

(A.) The early Church Building Acts contemplated five ways in which the pastoral superintendence of the inhabitants in overgrown parishes might be increased: (1) by division of a parish into distinct parishes; (2) by division into district parishes: (3) by division into district chapelries: (4) by the creation of consolidated chapelries; (5) by the support of chapels without districts.

Support of chapels without districts.

(5). This last may be at once disposed of: by 58 Geo. 3, c. 45, s. 21, the Church Building Commissioners might, if they thought fit, make grants to chapels to be served by curates to the incumbent of the parish; by 59 Geo. 3, c. 134, s. 19, these chapels are not to become perpetual curacies; but by 3 Geo. 4, c. 72, s. 22, the commissioners, with the consent of the bishop and patron, may apportion glebe, tithes and other emoluments "for the benefit of the incumbent of a person serving any such chapel." By 8 & 9 Vict. c. 70, s. 18, the licence of the curate serving such chapel is not to be made void by the avoidance of the parish church.

Distinct parishes.

(1). As to this class, by 58 Geo. 3, c. 45, s. 16, the commissioners may with the consent of the bishop apply to the patron for his consent to a division of the parish into distinct parishes, and, on the consent of the patron being granted, may represent the whole matter to the Queen in council, setting forth the bounds by which it is proposed to divide the parish; and the Queen in council may make an order effecting such division, which shall not however take place till after the avoidance of his living by the existing incumbent of the parish. By sects. 17, 19, each distinct parish shall be a rectory, vicarage, donative or perpetual curacy like the old parish, and the incumbent of each distinct parish shall have the same power of recovering the fruits of his benefice as the incumbent of the old parish had; but by sect. 20 any donative or perpetual curacy shall be subject to the law of lapse, and the incumbent thereof shall not be removable at the pleasure of the patron.

By sect. 22, the boundaries of such distinct parishes are to be marked out: by sect. 23, and 3 & 4 Vict. c. 60, s. 6 (*c*), these boundaries may be altered from time to time by order in council. By 59 Geo. 3, c. 134, ss. 8, 9, the commissioners may, with the consent of the bishop and patron, apportion the glebe, tithes and other endowments between the distinct parishes, without regard to the fact of such glebe, tithes and endowments being locally situate

(*c*) See 3 & 4 Vict. c. 60, s. 7, and 8 & 9 Vict. c. 70, s. 16.

or arising within or without any of the new parishes; and they may at the same time apportion, with the consent of the bishop, the charges on the old parishes or the incumbents thereof.

Tenure of benefice.

By 58 Geo. 3, c. 45, s. 26, the church of any such distinct parish shall not be holden with the church of the parish out of which such distinct parish has been taken; and by 59 Geo. 3, c. 134, s. 12, the churches of such distinct parishes shall after consecration be distinct benefices and churches, but during the incumbency of the existing incumbent they shall be served by licensed stipendiary curates.

District chapelry made distinct parish.

By 3 Geo. 4, c. 72, s. 16, the commissioners may, with the consent of the ordinary and patron and incumbent, or in case of the refusal of the incumbent, upon the next avoidance, convert a "district chapelry" into a distinct parish, where a house of residence and competent maintenance is provided for the incumbent of such new distinct parish, and compensation is made for all fees, offerings and dues which by such conversion are lost to the incumbent of the old parish. Such conversion is to be under seal of the commissioners and registered in the diocesan registry, and enrolled in chancery.

Distinct parishes under other acts.

By 1 & 2 Will. 4, c. 38, s. 23, where there are chapels of ease having chapelries, townships or districts supposed to belong thereto, if an endowment be provided for the minister of such chapel, the bishop may, with consent of patron and incumbent, declare such chapel separate from the parish church, and the chapelry, township or district a distinct parish. By 1 & 2 Vict. c. 107, s. 7, this extends as well to chapels hereafter to be built as to chapels in existence before the act.

Parish heretofore united with another shall be disunited on new church being built therein.

By 8 & 9 Vict. c. 70, s. 5, "Where at the passing of this act there is not any consecrated church in one of two parishes which may have been for thirty years next before the passing of this act united, or reputed to have been united for ecclesiastical purposes, and where a new church has been or shall hereafter be built wholly or in part out of any funds at the disposal of the commissioners in the said parish in which there is not any such church as aforesaid, the whole of such parish may after the consecration of such new church be disunited for ecclesiastical purposes from the other parish, and may be formed into a separate and distinct parish, for such purposes, with the same consents, in the same manner, and under and subject to the same provisions and consequences as are mentioned and contained in the hereinbefore recited acts or any of

them or in this act, relative to the formation of a distinct and separate parish, when the same is formed out of one parish not united with another parish."

District parishes.

(2.) As to "district parishes." By 58 Geo. 3, c. 45, s. 21, the commissioners may, where they think it more expedient to divide a parish into ecclesiastical districts, with consent of the bishop, represent the matter to the Queen in council, and the Queen in council may order such division.

The provisions in 58 Geo. 3, c. 45, ss. 22, 23, and 3 & 4 Vict. c. 60, s. 6, as to boundaries of distinct parishes, apply equally to these districts.

By 58 Geo. 3, c. 45, s. 24, on the boundaries being marked out such districts become "district parishes," and the churches thereof "district parish churches," "for all purposes of ecclesiastical worship and performance of ecclesiastical duties." By sect. 25, these churches are perpetual curacies.

By 59 Geo. 3, c. 134, s. 19, no chapel situate in a district parish which shall not be made the church of such district parish shall be a perpetual curacy.

By 58 Geo. 3, c. 45, s. 30, the division of a parish into district parishes shall not affect any glebe, tithes or other endowments, which shall continue to belong to the incumbent of the old parish, and for all these purposes the old parish shall remain as if undivided.

The provisions of 58 Geo. 3, c. 45, s. 26, and 59 Geo. 3, c. 134, s. 12, as to the separation of the benefices, apply as well to district parish as to distinct parish churches.

Church of a district parish may be resigned by the incumbent of original parish; such resignation to operate in the same manner as avoidance of church of the original parish.

By 8 & 9 Vict. c. 70, s. 15, "When any district parish has been or shall hereafter be formed, under the provisions of 58 Geo. 3, c. 45, it shall be lawful for the incumbent of the parish out of which such district parish shall have been formed to resign voluntarily, with the consent of the bishop of the diocese, the church of such district parish, and such resignation shall have the same effect as the avoidance or resignation of the parish church, with respect to the performance of the offices of the church in the church of such district parish; and thereupon such district parish, and the church thereof, shall be a perpetual curacy and benefice, and shall be subject to the same laws as are in force with respect to district parishes where an avoidance or resignation of the church of the original parish shall have taken place."

Burial.

By 7 & 8 Geo. 4, c. 72, s. 2, till a burial ground is provided for the district parish, persons dying within it may be interred in the burial ground of the old parish.

By 1 & 2 Vict. c. 107, s. 10, whenever an endowed church or chapel has been augmented under Queen Anne's Bounty and the patronage thereof acquired in accordance with the acts relating thereto, the commissioners may, with consent of bishop, patron and incumbent, make it a district parish.

Queen Anne's Bounty.

(3.) As to "district chapelries." These were originally created under 59 Geo. 3, c. 134, s. 10; but the provisions contained in this section have been much altered by 2 & 3 Vict. c. 49, ss. 1—4, 3 & 4 Vict. c. 60, s. 1, and 8 & 9 Vict. c. 70, s. 17. The joint effect of these acts is that the commissioners may, in like manner and with the same consents as in the case of "district parishes," assign a district to any chapel built or to be built; and such district is to be under the care of the curate appointed to serve such chapel, who is to be nominated by the incumbent, except in cases where the patronage is otherwise vested (*d*). Such chapels may be augmented by the governors of Queen Anne's Bounty; district chapelries may be formed out of former district chapelries, or out of such district chapelries and other parts of the original parish or any extra-parochial place. The curate is now to be a perpetual curate, with perpetual succession and capacity to hold lands and tithes, with exclusive cure of souls, and not subject to the incumbent of the old parish; but the commissioners may, with consent of the bishop, determine what proportion of the fees for marriages, baptisms, churchings and burials shall be assigned to the curate; and it seems that the incumbent of the old parish receives the Easter offerings.

District chapelries.

By 11 & 12 Vict. c. 37, s. 3, the commissioners, with consent of the bishop, the patron and incumbent of the chapelry, and the patron and incumbent of any parish to be affected, may recommend the Queen in council to alter, and the Queen in council may alter, the bounds of such chapelry by adding to it portions of any adjacent parishes.

Boundaries.

District chapelries are not "districts or divisions" of parishes within the 10th section of 59 Geo. 3, c. 134, which gives the fees in such districts or divisions to the clerk and sexton thereof; and, on the contrary, the clerk of the old parish is entitled to the fees in a district chapelry (*e*).

Fees.

In the case of *Tuckness* v. *Alexander* (*f*) it was holden

Parochial chapels.

(*d*) By 14 & 15 Vict. c. 97, s. 26, in extra-parochial places the patronage is in the bishop.

(*e*) *Roberts* v. *Aulton*, 2 H. & N. 432.

(*f*) 9 Jur., N. S. 1026; 2 Dr. & Sm. 614.

that, under these provisions, an ancient parochial chapelry might be divided into district chapelries, and one of such chapelries assigned to the ancient parochial chapel itself, though the effect of such an assignment was to take away the vested rights of the incumbent of the parochial chapel throughout the old chapelry.

Fitzgerald v. Fitzpatrick.

In the case of *Fitzgerald v. Fitzpatrick* (*g*), the circumstances were these:—

By a deed of 1840 a certain chapel was vested in trustees, upon trust to permit the same to be used as a chapel-of-ease, dependent upon the parish church, and to permit the vicar for the time being or his curates to officiate as ministers thereof, and to allow the vicar and churchwardens to let the pews, and to permit the churchwardens to receive the pew rents and other emoluments for the benefit of the vicar, after paying the necessary expenses; and the vicar and churchwardens were authorized to appoint the clerk, pew-openers and other officers of the chapel. By an Order in Council, dated October, 1860, the chapel was constituted a district chapelry, and it was ordered that marriages, baptisms, &c. should be solemnized and performed in the chapel, and that the fees should belong to the minister of such chapel for the time being, subject to a proviso that so long as the existing vicar remained vicar the fees should be paid to him, but the order did not mention or affect to deal with the pew rents.

It was holden, that the effect of the order in council was to withdraw the chapel from all the purposes included in the trust deed; to constitute the district chapelry a benefice: and to deprive the vicar and churchwardens of the parish church of all right to receive the pew rents, or to nominate the officers of the church.

Whether after the creation of the district chapelry the pews of the chapel could lawfully be let, and the pew rents received for the benefit of the minister of the chapel, was said to be doubtful.

Consolidated chapelries.

(4.) As to "consolidated chapelries." The only difference between these chapelries and district chapelries in their origin is, that these chapelries are formed out of portions of many parishes, "where a population is "collected together at the extremities of and locally "situate in parishes or extra-parochial places contiguous "to each other." The manner in which these consolidated chapelries are to be formed is regulated by 59 Geo. 3, c. 134, s. 6, and 8 & 9 Vict. c. 70, s. 9. The commis-

(*g*) 33 L. J., Cha. 670; 10 Jur., N. S. 913.

sioners, with the consent of the bishop or bishops and the patrons of the various parishes or extra-parochial places (*h*), make a representation to the Queen in council, setting forth the proposed boundaries of the consolidated chapelry, and that there is or is about to be a church therein (*i*), and the Queen in council orders such consolidated chapelry to be formed. Either a chapel may be built for the consolidated chapelry, or a consecrated church already built within the limits of the district may be made the chapel thereof. Unless such church or chapel be already a rectory or vicarage, the benefice is to be a perpetual curacy—with exclusive cure of souls and a right to all fees and offerings—and subject to the jurisdiction of the bishop and archdeacon within whose diocese and archdeaconry the altar or communion table of the chapel is situate (*k*).

The patrons of the various parishes and extra-parochial places out of which the chapelry is taken are to agree as to the future patronage of the chapel and benefice.

By 14 & 15 Vict. c. 97, s. 19, consolidated chapelries may be formed out of new parishes or districts as out of old ones.

Boundaries.

59 Geo. 3, c. 134, s. 6, required the enrolment of the boundaries in chancery; but it was holden by the Court of Queen's Bench, in the case of *Regina* v. *Overseers of South Weald* (*l*), that this was repealed by 8 & 9 Vict. c. 70, s. 9.

Subdivision.

It should here be observed, that by 1 & 2 Vict. c. 107, s. 12, a "distinct parish" or "district parish" may be afterwards divided into other distinct or district parishes or into district chapelries.

Ways of division under 5 Geo. 4, c. 103, and 1 & 2 Will. 4, c. 38.

(B.) As to divisions of parishes formed under 5 Geo. 4, c. 103, and 1 & 2 Will. 4, c. 38, churches built under the former act may, by sects. 16, 17, be made into district churches at once by the commissioners with consent of the majority of the subscribers, the bishop, patron and incumbent; and become so in any case after forty years, if a district is assigned to them by order in council.

Assignment of district.

Sects. 10, 11 of the latter act, as amended by 14 & 15 Vict. c. 97, ss. 14, 15, provide that the commissioners,

(*h*) Or the major part, 14 & 15 Vict. c. 97, s. 20.

(*i*) It used to be necessary also to set forth the proposed patrons of the consolidated chapelry; but this is not so now; see 34 & 35 Vict. c. 82.

(*k*) Even though part of the district was in an exempt or peculiar jurisdiction, 2 & 3 Will. 4, c. 61.

(*l*) 10 Jur., N. S. 1099; 5 B. & S. 391.

Assignment of district.

with consent of the bishop, "and also with the consent of the patron and incumbent" (or patrons and incumbents, if more than one parish is affected) "in all other cases in "which additional churches or chapels shall have been "already built and endowed," shall proceed to assign, except in special circumstances, a district to every such church, and such district shall be under the care of the minister of the church "so far only as regards the visita-"tion of the sick and other pastoral duties, and shall not "be deemed a district for any other purpose whatsoever." Provision may, however, be made, if they think fit, for solemnizing baptisms, churchings, and burials. The boundaries of such district shall be registered in the registry of the diocese, and may, by 11 & 12 Vict. c. 37, s. 2, from time to time be altered.

By 1 & 2 Vict. c. 107, s. 10, such a district may be assigned and the same may be made a district parish, in all cases where a church has been built by subscription and has been subsequently augmented by Queen Anne's Bounty; and by 2 & 3 Vict. c. 49, s. 10, the minister of any chapel with a district has exclusive cure of souls within the district.

By 1 & 2 Will. 4, c. 38, ss. 12, 13, such a church is a perpetual curacy and may not be holden with the original church of the parish. By 11 & 12 Vict. c. 37, s. 1, a district formed under the preceding act may be considered as an original parish for the purpose of forming out of it a district parish, district chapelry or consolidated chapelry.

As to stipendiary curate.

By 1 & 2 Vict. c. 107, s. 13, the licence of the curate appointed to serve a district church or chapel is not to be rendered void by the avoidance of the parish church: and this is extended by 2 & 3 Vict. c. 49, s. 11, and 8 & 9 Vict. c. 70, s. 18, to all stipendiary curates of district chapelries, district parish churches, and new churches built or assisted out of funds belonging to the commissioners.

New parishes formed by ecclesiastical commissioners.

(C.) As to the acts for making new parishes through the agency of the ecclesiastical commissioners. By 6 & 7 Vict. c. 37, s. 9, amended by 19 & 20 Vict. c. 104, s. 1, these commissioners may frame a scheme, and the Queen in council upon such scheme may, with consent of the bishop, set apart any part or parts of any parishes, chapelries, districts or extra-parochial places, properly marked out, and constitute them a separate district.

Before, however, the scheme is laid before the Queen in council a draft of it must be sent to the incumbents and patrons affected, in order that they may have an oppor-

tunity of making objections to it. Provision is made by 7 & 8 Vict. c. 94, ss. 4, 5, 6, and 32 & 33 Vict. c. 94, s. 11, for the service of the scheme on the incumbents and patrons in peculiar cases. Such district need not contain within it any church or chapel at the time; or if it does contain one, it may, by 19 & 20 Vict. c. 104, s. 2, be constituted in the scheme the church of such district. The commissioners must provide an endowment for the minister, or, by 19 & 20 Vict. c. 104, s. 3, there must be reason to expect one from other sources, to the amount of 150*l.* a year. By 6 & 7 Vict. c. 37, s. 10, and 7 & 8 Vict. c. 94, s. 8, there must be a map of the district annexed to the scheme and registered.

Ministers.

By 6 & 7 Vict. c. 37, ss. 11, 12, upon such district being constituted, a minister is to be licensed (*m*) for the district, who shall have power to perform "all such pastoral "duties appertaining to the office of a minister, according to "the rites and usages of the Church of England, as shall be "specified and set forth in his licence," and where a building has been licensed for divine worship, "such services "and offices as shall be specified and set forth in the same "or any further licence;" and he shall so far have the cure of souls (*n*). The minister is to be styled "The minister of the district of ———," and shall have a perpetual succession (*o*). By sects. 13, 14, the bishop may license a temporary place of worship (*p*): but otherwise the old parish shall not be affected, until a church is consecrated for the district. Upon consecration of a church, however, by sects. 15, 16, the district becomes a new parish, and all the offices of the church may be celebrated in the church thereof, and the minister becomes a perpetual curate, with a right to all fees, dues and Easter offerings within his district.

Compensation.

By sect. 19, the ecclesiastical commissioners may, out of their funds, not only provide the endowments for these ministers, but also make compensation to the incumbents of the old parishes for the loss of fees and dues sustained by them.

Boundaries.

By the joint effect of 7 & 8 Vict. c. 94, s. 9, 13 & 14 Vict. c. 94, s. 27, and 32 & 33 Vict. c. 94, s. 1, the boundaries of these new parishes may be altered from time to time.

(*m*) The patronage of such ministers has been treated of in the previous chapter; *vide supra*, p. 2152.

(*n*) See 7 & 8 Vict. c. 94, s. 10.

(*o*) See 8 & 9 Vict. c. 70, s. 18.

(*p*) By 33 & 34 Vict. c. 97, schedule, tit. Licence, a stamp duty of ten shillings is imposed on such licence.

Subdivision.

By 14 & 15 Vict. c. 97, s. 16, a new parish created under the foregoing provisions may be treated as an original parish for the purpose of any of the Church Building Acts or of the act itself. By sect. 21 of the same act, where parishes cannot be brought under the provisions of any of the acts for dividing parishes by reason of local acts affecting the parish, the commissioners may override the local act, upon an application by the patron, incumbent and vestry.

New cures to form part of one diocese only.

By 35 & 36 Vict. c. 14, s. 3. "It shall be lawful for the ecclesiastical commissioners for England in recommending to her Majesty in council the formation of any new cure to be taken partly out of one diocese and partly out of another or others, to recommend also that such new cure shall form part of some one (to be specified by the said commissioners) of such dioceses; and such new cure shall, upon its formation, become and be a part of the diocese so specified, and of no other diocese."

(E.) An attempt has been made to bring the various divisions of parishes into one system by the following sections of 19 & 20 Vict. c. 104.

Districts may become separate and distinct parishes.

Sect. 14. "Wheresoever or as soon as banns of matrimony and the solemnization of marriages, churchings, and baptisms according to the laws and canons in force in this realm are authorized to be published and performed in any consecrated church or chapel to which a district shall belong (*q*), such district not being at the time of the passing of this act a separate and distinct parish for ecclesiastical purposes, and the incumbent of which is by such authority entitled for his own benefit to the entire fees arising from the performance of such offices without any reservation thereout, such district or place shall become and be a separate and distinct parish for ecclesiastical purposes, such as is contemplated in the fifteenth section of the first-recited act, and the church or chapel of such district shall be the church of such parish, and all and singular the provisions of the said firstly and secondly recited acts (as amended by this act) relative to new parishes, upon their becoming such, and to the matters and things consequent thereon, shall extend and apply to the said parish and church as fully and effectually as if the same had become a new parish under the provisions of the said last-mentioned acts."

Incumbents of new parishes to have exclusive

Sect. 15. "The incumbent of every new parish created or hereafter to be created pursuant to the provisions of

(*q*) *Vide infra*, pp. 2184, 2185.

6 & 7 Vict. c. 37, and 7 & 8 Vict. c. 94, or of this act, shall, saving the rights of the bishop of the diocese, have sole and exclusive cure of souls and the exclusive right of performing all ecclesiastical offices within the limits of the same, for the resident inhabitants therein, who shall for all ecclesiastical purposes be parishioners thereof, and of no other parish, and such new parish shall, for the like purposes, have and possess all and the same rights and privileges, and be affected with such and the same liabilities, as are incident or belong to a distinct and separate parish, and to no other liabilities: Provided always, that nothing herein contained shall be taken to affect the legal liabilities of any parish regulated by a local act of parliament, or the security for any loan of money legally borrowed under any act of parliament or otherwise."

cure of souls therein.

By 31 & 32 Vict. c. 117, s. 2, the incumbent of any such parish is a vicar.

Election of church-wardens.

The words "who shall for all ecclesiastical purposes be "parishioners thereof and of no other parish," do not take away from the parishioners of the new parish the right of voting for the election of churchwardens in the old parish (*r*).

In the case of *Reg.* v. *Perry* (*s*), a new church was built and endowed and had a district assigned to it and a fund provided for its repairs under 1 & 2 Will. 4, c. 38, and the bishop under 6 & 7 Will. 4, c. 85 (*t*), gave his licence for banns and marriages and for the fees being taken by the incumbent. It was holden that the district did not become a separate and distinct parish under 19 & 20 Vict. c. 104, s. 14, because the "authority" contemplated by that statute is not a licence by the bishop, which (by 6 & 7 Will. 4, c. 32) is revocable; but an authority under an order of the commissioners under 19 & 20 Vict. c. 104, s. 11, and that therefore the election of a churchwarden was in the renters of pews and not in the parishioners.

Parishes may be divided with certain consents.

By 19 & 20 Vict. c. 104, s. 25, "it shall be lawful for the commissioners, by the authority aforesaid (that is, by an order in council), and subject to such consents as are hereinafter mentioned, to divide any parish into two or more distinct and separate parishes for all ecclesiastical purposes whatsoever, and to fix and settle the respective proportion of tithes, glebe lands, and other endowments which shall arise, accrue, remain, and be within each of

(*r*) *Reg.* v. *Stephens*, 3 B. & S. 333; 32 L. J., Q. B. 90.

(*s*) 7 Jur., N. S. 655; 3 E. & E. 640.

(*t*) *Vide supra*, p. 763.

such respective divisions, according as by the like authority shall be deemed advisable: and the order made by her Majesty in council, ratifying the scheme for such division, shall be good and valid in law for the purpose of effecting the same; and such scheme shall set forth the particular expediency of such division, and how far it may be necessary in consequence thereof to make any alteration in ecclesiastical jurisdiction, and how the changes consequent upon such division in respect of patronage, rights of pew holders, and other rights and privileges, glebe lands, tithes, rentcharges, and other ecclesiastical dues, oblations, offerings, rates, and payments, may be made with justice to all parties interested: and such scheme shall also contain such directions and regulations relative to the duties and character of the incumbents of the respective divisions of such parish, and to the performance of the offices and services of the church in the respective churches thereof, and to the fees to be taken for the same respectively, and to any other matter or thing which may be necessary or expedient by reason or in consequence of such change: Provided always, that such division shall be made in the following cases with the following consents only; that is to say, in the case of a benefice in the patronage of the crown, or in the chancellor of the duchy of Lancaster for the time being, or of the Duke of Cornwall, or of any archbishop or bishop, or of any lay or ecclesiastical corporation aggregate, or of a benefice in private patronage, with the consent of the patrons thereof respectively, with the consent of the bishop of the diocese, such consents to be testified as aforesaid: and provided also, that no such provision shall take effect until after the first avoidance then next ensuing of the church of the parish to be so divided, unless with the consent in writing of the actual incumbent thereof."

In new parishes and parishes already divided, a division and resettlement of endowments may be made.

Sect. 26. "In cases where any parish shall have been divided into two or more distinct and separate parishes, or where any district or new parish shall have been constituted or formed out of any parish, district, or place, it shall be lawful, by the authority aforesaid, and with the consent of each of the respective patrons and incumbents of such distinct and separate parishes, or of such parish, district, or place, as the case may be, to make a separation and division of the glebe lands, tithes, rentcharges, and other endowments belonging to such distinct and separate parishes, or to such parish, district, or place, and to annex and re-settle the same to and for the benefit of such distinct and separate parishes, or of such parish, district, or place, and the district or new parish constituted or taken thereout,

as the case may be, in such manner and proportions as by the authority aforesaid may be deemed expedient, and to make such regulations and arrangements as may be requisite for effectually completing such division and settlement as aforesaid; and upon every such re-settlement of endowments, whenever the whole of the ecclesiastical dues arising within the limits of any parish, district, or place, consisting of any prædial or rectorial tithe shall become and be made payable to the incumbent of such parish, district, or place, such parish, district, or place, shall thereupon become and be a rectory, and such incumbent the rector thereof, anything hereinbefore contained to the contrary notwithstanding."

As to parish where there is no church and no patron.

By 32 & 33 Vict. c. 94, s. 11, "In the case of any parish or place wherein there is no parish church nor any person known to be or claiming to be patron of the ancient church or advowson, if any, of such parish or place, then for all purposes of forming an ecclesiastical district or ecclesiastical districts, either wholly or partly out of such parish or place under the powers of the Church Building Acts or New Parishes Acts, or any other act or acts of parliament now or hereafter in force, such parish or place shall be deemed to be and shall be treated for such purposes as an extra-parochial place, and in any case in which notice shall be required to be sent or given to a patron under the provisions of such acts or any of them it shall be sufficient with respect to such parish or place so to be treated as an extra-parochial place as aforesaid to send or give such notice to the bishop of the diocese alone, and such notice, when so sent or given, shall be held to be a full compliance with the requirements of the said acts or act in respect of such notice: Provided always, that nothing herein contained shall affect the rights of the crown, if any, with regard to any such parish or place."

Effect of division.

The division of parishes affects several of the ecclesiastical duties and privileges of the parishioners, more especially as to (1) church rates; (2) the appointment and powers of churchwardens; (3) the offices of the church; (4) the apportionment of the ecclesiastical and charitable endowments arising therein.

On church rates.

(1.) The power of recovering church rates having been now abolished, it is enough here to say that under 58 Geo. 3, c. 45, ss. 31, 70, 71, district and distinct parishes were to bear their own church rates, but were also for twenty years to contribute to the repair of the original parish church; and that by 3 Geo. 4, c. 72, ss. 20, 21, chapels, not being churches of distinct or district parishes, were,

unless specially excepted, to be repaired by the parish at large.

The following cases have been decided upon the construction of these sections:—*Varty and Mopsey* v. *Nunn* (*u*), *Reg.* v. *Official Principal of Consistory Court of London* (*x*), *Gough and Cartwright* v. *Jones* (*y*).

Church-wardens.

(2.) As to the appointment and power of churchwardens. By 58 Geo. 3, c. 45, s. 73, two fit and proper persons are to be appointed churchwardens for every church or chapel built under that act, one to be chosen by the incumbent, and the other by the inhabitant householders residing in the district who would usually be entitled to vote in the election of churchwardens. Several powers are given to the churchwardens, which also (by sect. 74) are given to the churchwardens of the old parish in cases under this act where there has been no division of the parish, for the recovery of pew rents and the payment of stipends. For these stipends they are liable to be sued at law when they have money in their hands from pew rents applicable to the payment. But succeeding churchwardens cannot be sued for money which came to the hands of their predecessors, and was not paid over to them (*z*).

It has been holden in the case of *Reg.* v. *Barrow* (*a*), that the vestry meeting for choosing a churchwarden under this act need not be convened with the formalities required by 58 Geo. 3, c. 69, s. 1, as the duties and powers of such a churchwarden are merely ecclesiastical.

By 1 & 2 Will. 4, c. 38, s. 25, two churchwardens are to be chosen for parishes separated by the annexing of districts to chapels of ease under sect. 23. One of these churchwardens is to be chosen by the incumbent, the other by "the persons exercising the powers of vestry."

By sect. 16, two churchwardens are to be chosen for "every church or chapel built or appropriated under the provisions of this act," one by the incumbent, and the other by the renters of pews (*b*).

By 6 & 7 Vict. c. 37, s. 17, two churchwardens are to be chosen for every "new parish" under that act, one by the perpetual curate, and the other by the inhabitants usually entitled to vote in the election of churchwardens.

(*u*) 5 Jur. 1138.

(*x*) 2 B. & S. 339; 31 L. J., Q. B. 106; 12 C. B., N. S. 220, 31 L. J., C. P. 237.

(*y*) 2 Moo. P. C., N. S. 1; 9 Jur., N. S. 82; 11 Jur., N. S. 251.

(*z*) *Lloyd* v. *Burrup*, L. R., 4 Ex. 63; *vide supra*, p. 2161.

(*a*) L. R., 4 Q. B. 577.

(*b*) See *Reg.* v. *Perry*, 3 El. & El. 640; 30 L. J., Q. B. 141; *supra*, p. 2177.

By 8 & 9 Vict. c. 70, s. 6, in all cases not otherwise expressly provided for, two churchwardens are to be chosen for every district chapelry or consolidated chapelry, one by the minister, and the other by the householders.

By the same act, sect. 7, in all cases not otherwise expressly provided for, two churchwardens are to be chosen for every new church without a district built or to be built upon a site of which the church building commissioners have accepted a conveyance under any of the previous acts, one to be chosen by the minister, and the other by the renters of pews, or, where there are no renters of pews, both to be chosen by the minister.

The churchwardens appointed under this and the preceding act are not to be overseers of the poor in virtue of their office (*c*).

Inhabitants of district have a right to vote for churchwardens of old parish.

It has been decided in the case of *Reg.* v. *Stephens* (*d*), that though a district of an old parish appropriated to a new church under 58 Geo. 3, c. 45, 6 & 7 Vict. c. 37, and 19 & 20 Vict. c. 104, becomes a separate parish for all ecclesiastical purposes, yet, as it remains part of the old parish as to poor and other parochial rates, the inhabitants of the district have a right to vote in vestry in the election of churchwardens for the old parish.

The contrary seems to have been previously holden in the case of *Varty and Mopsey* v. *Nunn* (*e*).

Must be members of the church.

It is provided by 1 & 2 Will. 4, c. 38, 6 & 7 Vict. c. 37, and 19 & 20 Vict. c. 104, that churchwardens appointed for parishes constituted under these acts must be members of the Church of England.

Offices of the church.

When to be performed in churches under earlier acts.

(3.) As to offices of the church. By 58 Geo. 3, c. 45, ss. 27, 28, 29 (*f*), marriages, christenings, churchings and burials are to be performed in the churches of distinct and district parishes, upon the first avoidance of the old parish by the incumbent thereof, as if they had been old parish churches, but not before.

At the same time provision is made in sect. 32 for compensating the incumbent of the old parish church for any loss of fees, oblations and offerings which he may sustain by the division of his parish. The fees for performing the offices of the church enumerated above after the avoidance of the old parish, go to the incumbents of the distinct or district parishes (*g*).

(*c*) 6 & 7 Vict. c. 37, s. 17; 8 & 9 Vict. c. 70, s. 8.

(*d*) 32 L. J., Q. B. 90; 3 B. & S. 333.

(*e*) 5 Jur. 1138.

(*f*) *Vide supra*, pp. 767, 768.

(*g*) See *Edgell* v. *Burnaby*, 8 Ex. 788.

When to be performed in churches under earlier acts.

By 59 Geo. 3. c. 134, s. 6, consolidated chapelries are to be treated as old parishes for these purposes from the time of their creation (*h*).

By the same act, sect. 16, the commissioners, with the bishop, may determine whether the offices enumerated above shall be solemnized in the churches of district chapelries or not; if they determine that they or any of them shall be celebrated, they are to determine what portion of fees shall be paid to the curate of the chapel, and what to the incumbent of the old parish.

In the case of *King* v. *Alston* (*i*), under this act, and by an order in council, a district, with a district church, was parted off from the parish of St. Matthew, Bethnal Green, and the order in council directed that during the incumbency of the then rector of St. Matthew, two-thirds of the fees to be received for marriages, baptisms, churchings and burials at the district church "should belong and be paid to the rector, and one-third to the district minister." It was holden that, where the minister had actually received the entire fees for marriages, &c., the rector might recover from him the two-thirds in an action for money had and received. But that the act and order in council did not oblige the minister to receive the fees or any part of them: and that the rector could not maintain assumpsit against him on a supposed duty to take the fees and pay the rector his two-thirds.

By 7 & 8 Vict. c. 56, s. 4, and 14 & 15 Vict. c. 97, s. 17, when the commissioners do not originally order the performance of all or any of these offices, they may do so afterwards by a supplemental order in council.

By 3 Geo. 4, c. 72, s. 12, in all cases of divisions of parishes the commissioners may reserve the whole of the fees, or any portion of them, to the incumbent of the old parish church, and may alter or rescind this reservation within five years from the first making thereof. By sect. 18, the provisions of the above-mentioned acts apply to cases of the division of extra-parochial places.

By sect. 19 (*k*), the bishop is to certify when the office of matrimony may be performed in any church under the provisions already set forth, and his certificate is to be conclusive evidence that marriages celebrated after the date thereof were lawfully celebrated therein.

By 8 & 9 Vict. c. 70, s. 10, the fees in consolidated

(*h*) See 8 & 9 Vict. c. 70, s. 10.

(*i*) 12 Ad. & El., N. S. 971. See also *Tuckniss* v. *Alexander*, 9 Jur. 1026, 2 Dr. & Sm. 614; *supra*, p. 2171.

(*k*) *Vide supra*, p. 769.

chapelries are to belong to the incumbents of the old parishes respectively till after the first avoidance of each parish.

Under 1 & 2 Will. 4, c. 38.

By 1 & 2 Will. 4, c. 38, s. 10, the commissioners, with consent of the bishop, or the bishop alone in certain cases, may determine whether baptisms, churchings and burials may be celebrated in churches or chapels built or appropriated under that act.

By sect. 14, all the fees and dues for these offices, except such as may, with the consent of patron and incumbent, be assigned to the minister of the church or chapel, shall belong to the incumbent or clerk of the "parish, chapelry or place in which such church or chapel "shall have been or shall be erected." In the case of *Carr* v. *Mostyn* (*l*), it was holden that the word "chapelry" here meant an ancient parochial chapelry only.

Marriages under 7 & 8 Vict. c. 56.

By 7 & 8 Vict. c. 56, provision was made for celebrating marriages, which had been omitted from the list of offices, authorized by the last act, in churches or chapels built under it (*m*).

By sects. 1, 2, the commissioners and bishop are given the same powers of authorizing marriages and of allotting the fees thereon, as they had in regard to the other offices (*n*). By sect. 2, the bishop's certificate that marriages are authorized is conclusive. By sect. 3, certain marriages already celebrated in such chapels are rendered valid.

Consents not necessary as to fees.

By 3 & 4 Vict. c. 60, s. 18, the necessity of the consent of the incumbent and patron of the old parish to the assignment of any portion of the fees under 1 & 2 Will. 4, c. 38, s. 14, to the minister of the chapel, is abrogated, and the commissioners and bishop, or the bishop alone in certain cases, may assign the whole or any portion of such fees to the minister.

Boundaries.

It should be mentioned that 7 & 8 Vict. c. 56, s. 6, takes away the necessity of enrolling the boundaries in chancery, and requires the registration of a map in the diocesan registry, in all cases where the offices of the church are to be performed in any church or chapel built under the previous acts; and that 14 & 15 Vict. c. 97, s. 25, validates all marriages performed by error in the church of any parish or district in which they could not legally be performed.

(*l*) 5 Ex. 69: 19 L. J., Ex. 249.

(*m*) *Vide supra*, pp. 771—773.

(*n*) By 14 & 15 Vict. c. 97, s. 18, the necessity of the consent of patron and incumbent is taken away.

Under 6 & 7 Vict. c. 37.

By 6 & 7 Vict. c. 37, s. 15, all the offices of the church may be performed in new parishes created under that act (*o*).

Compensation for fees.

By the provisions of 58 Geo. 3, c. 45, s. 32, 59 Geo. 3, c. 134, s. 6, 6 & 7 Vict. c. 37, s. 19 (extended by 19 & 20 Vict. c. 104, s. 13, to that act), 14 & 15 Vict. c. 97, ss. 2, 3, 4, compensation may be made to the incumbent of the original parish for the loss of fees which accrues to him on account of the division of his parish. By 14 & 15 Vict. c. 97, s. 5, where such compensation is made, all the fees and dues, in the cases of consolidated chapelries, district chapelries, or particular districts (*i. e.*, districts assigned under 1 & 2 Will. 4, c. 38), shall belong to the incumbent of such chapelry or district, even though originally reserved to the incumbent of the original parish by order in council. By sect. 6, where no express reservation has been made, the fees and dues in the same cases belong to the incumbent of the chapelry or district, even though no compensation has been made to the incumbent of the old parish.

Vaughan v. The South Metropolitan Cemetery Company.

In the case of *Vaughan* v. *The South Metropolitan Cemetery Company* (*p*), a Cemetery Act provided that certain fees should be paid by the company to the incumbent of the parish or other ecclesiastical district or division from which any body should be removed for interment in the cemetery, and also directed that a portion of such fees should be paid over to the churchwardens or chapelwardens, to be by them applied among the persons entitled by law or custom to share in the burial fees receivable in such parishes or districts by the churchwardens or chapelwardens. It was holden that the fees in respect of interments from a district which had been created since the passing of the Cemetery Act, under an order in council, conferring powers of marrying, churching and baptizing, but silent as to burials, were payable to the incumbent of such district, and not to the incumbent of the mother parish.

In metropolis.

15 & 16 Vict. c. 85, s. 35, contains special provisions as to the division of burial fees between the incumbents of old and new parishes in the metropolis (*q*).

Now by 19 & 20 Vict. c. 104, it is provided as follows:—

Offices of the church to be performed in all churches or

Sect. 11, "The commissioners may, if they shall think fit, upon application of the incumbent of any church or chapel to which a district shall belong, with the consent

(*o*) *Vide supra*, p. 773.

(*p*) 1 John. & Hemm. 256: 7 Jur., N. S. 159.

(*q*) *Vide supra*, p. 847.

in writing of the bishop of the diocese, make an order under their common seal, authorizing the publication of banns of matrimony and the solemnization therein of marriages, baptisms, churchings and burials, according to the laws and canons now in force in this realm; and all the fees payable for the performance of such offices, as well as all the mortuary and other ecclesiastical fees, dues, oblations or offerings arising within the limits of such district, shall be payable and be paid to the incumbent of such district."

chapels on application of the incumbent.

Sect. 12. "In every case in which all or any part of the fees or other ecclesiastical dues arising within the limits of any district, or payable in respect of marriages, baptisms, churchings and burials in the church or chapel thereof, or of such fees as are hereby made payable to the incumbent of any district, shall have been reserved, or if such last-mentioned order had not been made, would of right belong to the incumbent of the original parish, district or place out of which the district of such church or chapel shall have been taken or to the clerk thereof, an account of such fees shall be kept by the incumbent of such church or chapel, who is hereby required to receive and every three months pay over the same to the incumbent and clerk respectively who would have been entitled to them in case such districts had not been formed, and from and after the next avoidance of such incumbency, or the relinquishment of such fees by such incumbent, and after the situation of such clerk shall have become vacant, or after a compensation in lieu of fees has been awarded to such clerk by the bishop of the diocese, which he is hereby empowered to do, such reservation shall altogether cease and determine, and all such fees and dues shall belong to the incumbent of the district within which the same shall arise or to the clerk of the church thereof."

Reserved fees to belong to original incumbent until first avoidance, then to the incumbent of new parish.

(4.) As to the apportionment of endowments between divisions of old parishes. It has been already pointed out that the tithes, glebe and other *ecclesiastical* endowments may be, in many and now in all cases (r), apportioned by the commissioners among the divisions of the parishes. The ecclesiastical burdens on parishes may also be apportioned in many cases (s).

Apportionment of endowments.

As to other *charitable* endowments, by 3 Geo. 4, c. 72, s. 11, the commissioners might, on a division of a parish or place made by them under the provisions of that and

Parochial charities.

(r) By 58 Geo. 3, c. 45, s. 16; 59 Geo. 3, c. 134, ss. 8, 9, 18; 3 Geo. 4, c. 72, s. 22; 19 & 20 Vict. c. 104, s. 26.

(s) See the same sections and 3 Geo. 4, c. 72, s. 11.

the previous acts, apportion "any charitable bequests or "gifts which shall have been made or given to any such "parish or place, or the produce thereof, between the "divisions of the parish or place." Provision was to be made for the distribution of such apportioned part, and every apportionment was to be registered in the registry of the diocese.

8 & 9 Vict. c. 70.

Apportionment of bequests, &c. and also of charges to be made by the Court of Chancery.

Now, however, a new provision is made by 8 & 9 Vict. c. 70, which enacts, by sect. 22, that where the commissioners "shall have already formed or shall hereafter form any distinct and separate parish, district parish, or district chapelry, under the provisions of the hereinbefore recited acts or any of them, or this act, out of any parish or extra-parochial place, it shall be lawful for the Court of Chancery, anything in the hereinbefore recited acts to the contrary notwithstanding, on a petition being presented to the said court by any two persons resident in any such parish or extra-parochial place (such petition to be presented, heard and determined according to the provisions of 52 Geo. 3, c. 101), to apportion between the remaining part of such parish or place and the distinct and separate parish, or district parish, or district chapelry, any charitable devises, bequests or gifts which shall have been made or given to or for the use of any such parish or extra-parochial place, or the produce thereof, and in any such case to direct that the distribution of the proportions of such devises, bequests or gifts, or the produce thereof, as shall be so apportioned, shall be made and distributed by the incumbent or spiritual person serving the church, or by the churchwardens of any such distinct and separate parish, district parish, or district chapelry, either jointly or severally, as the said Court of Chancery may think expedient: and it shall also be lawful for the said Court of Chancery to apportion between the remaining part of such parish or place as aforesaid, and such separate divisions or districts, any debts or charges which may have been before the period of such apportionment contracted or charged upon the credit of any church rates in such parish or place; and all such apportionments shall be registered in the registry of the diocese in which such parish or place shall be locally situate, and duplicates thereof shall be deposited with the churchwardens of such parish or place, and of each such division or district as aforesaid, and in all such cases the costs shall be at the discretion of the said court; and such apportioned debts or charges shall be raised and paid by the parish or place in which they may be apportioned in such and the like manner as the

entirety was to be raised and paid, or in such manner and under such provisions and conditions as the said court shall direct, and when any securities may have been given for the same the court may order new securities to be given for the apportioned debts by such persons and bodies, and in all respects as the said court may direct, and all securities shall be valid and binding; and the powers and authorities given to the said commissioners by 3 Geo. 4, c. 72, s. 11, with respect to the apportionment by them of such devises, bequests, gifts, and charges, shall, after the passing of this act, with respect to the future exercise of such powers and authorities, cease and determine."

It has been decided that this provision does not apply to "new parishes" formed by the ecclesiastical commissioners under 6 & 7 Vict. c. 37 (*t*).

In *Re West Ham Charities* (*u*), it was holden that under this section the court is bound to act if called upon, although no complaint is made of the mode in which the distribution of the gifts has been made since the division of the districts; and that the court has jurisdiction to apportion gifts made specifically to a particular division of a parish, part of which has been formed into a chapelry district.

The principles on which the court will act in applying this provision are best laid down in *Re Church Estate Charity, Wandsworth.*

Re Church Estate Charity, Wandsworth.

In that case the churchwardens and overseers of the poor of a parish had from time immemorial been seised of certain plots of land, one of which was known as the Clock Acre, producing a small annual income, for the use and repairs of the parish church, known as the Church Estate. In 1820 a second church was erected, to which a district was assigned in 1846 under the provisions of the Church Building Acts, and other district churches had also been erected. Out of the income of the church estate ten shillings was annually paid to the minister for a sermon on St. Matthew's Day, and the rent of the Clock Acre was paid to the curate in augmentation of his stipend, subject to which the income had been constantly applied to the support of the fabric of the parish church, except from 1820 to 1846, when the income was applied to the support of both churches.

On an application by the parishioners of the district

(*t*) *Att.-Gen.* v. *Love*, 23 Beav. 499; 3 Jur., N. S. 918.

(*u*) 2 De Gex & Smale, 218.

parish, claiming a right to participate in the income of the above funds, it was holden by the Master of the Rolls that the inference to be drawn from the facts relating to the charity, so far as they were known, established that the estate was devoted to the repair of the particular church, and must be decided, in the absence of evidence to the contrary, to have been specifically given for that purpose; and, consequently, that the district church was not entitled to participate.

And this decision was affirmed on appeal (*x*).

(*x*) 6 L. R., Ch. App. 296; 18 W. R. 1101.

CHAPTER VII.

CHURCH SOCIETIES.

THE societies which have been formed from time to time for the purpose of evangelizing, on the principles of the church, the people at home and abroad, must be distinguished for legal purposes into societies confirmed by royal charter or recognized by statute, and those which are without the recognition of the state.

Some voluntary.

Some formally constituted.

It is almost exclusively with the former category that this chapter is concerned.

The Church Building Society is incorporated by a public act, 9 Geo. 4, c. 42.

Church Building Society.

The constitution and government of the society are thus settled by it:—

"I. After reciting 'that it is expedient to provide for the better collection and application of voluntary contributions for enlarging, building, rebuilding, and repairing churches and chapels in England and Wales,' it is enacted by the second section, that 'The Society for Promoting the Enlargement and Building of Churches and Chapels' (which is therein mentioned to have been instituted in the year 1818), is, both as to its then and future members, declared to be a body corporate by the name of 'The Incorporated Society for Promoting the Enlargement, Building, and Repairing of Churches and Chapels' (*a*).

"II. The Archbishop of Canterbury, for the time being, is declared to be the president of the society, and the Archbishop of York, for the time being, and the bishops of the two provinces, for the time being, together with twenty-five lay peers and commoners, the vice-presidents thereof. All vacancies which may from time to time occur in the number of the lay vice-presidents are to be filled up from the lay members of the society by the committee.

The committee.

"III. The society is to be governed by a committee, consisting of the president, vice-presidents and treasurer,

(*a*) This account is taken from the publications of the society.

and of thirty-six members elected from the society, one-half at least of whom are to be laymen. The treasurer, and one-fourth of the thirty-six elected members of the committee (in rotation) are to vacate their offices at the annual general court, but are to be capable of immediate re-election.

Qualification of members.

"IV. All persons who contribute ten guineas in one donation, or one guinea annually, are declared to be members of the society, and to have a right to vote at general courts, and to be eligible to the committee, provided their annual subscriptions be not in arrear.

General court.

"V. A general court is to be holden annually in May, and oftener if the committee shall think it expedient. At the annual general court three auditors are to be appointed for the year ensuing, a treasurer elected, and the vacancies in the committee filled up. All such elections are to be by ballot, from a double list prepared by the president and vice-presidents.

Orders, acts, powers, and duties of the committee.

"VI. Every order made and act done by the committee, for the time being, of the society, is to be made and done with the consent of the majority of the members present at any meeting of the committee, such meeting to consist of not less than five; and the committee, or the major part of them at any such meeting, are to have full power and authority to make all such laws and regulations, not being repugnant to the laws of the kingdom or the express provisions of the act (9 Geo. 4, c. 42), as to them shall from time to time seem expedient, for the management and government of the society, and for carrying its designs into effect. The committee are to have the sole management, control and disposal of the estates, funds, revenues and other property belonging to the society; and also the power of affixing the common seal of the society, or directing it to be affixed, to such instruments as the committee, or such major part of them, shall think fit. The committee are to have also the sole control over, and appointment of, all officers, agents, or servants whom it may be thought expedient to employ in the service of the society, or in any of the concerns relating thereto. But it is provided that no laws or regulations made by the committee shall be of any force or effect, unless the same shall be confirmed by the members of the committee, or the major part of them, who shall be present at the next meeting of the said committee after the same shall have been first made, such next meeting to consist of not less than five.

"VII. In the selection of parishes, or extra-parochial places to which the committee shall grant any part of the society's funds towards the *enlarging or building* of any churches or chapels, they are to have regard to the amount of the population, and also to the disproportion between the number of inhabitants and accommodation for attendance upon divine service according to the rites of the United Church of England and Ireland; and, in giving preference among such parishes and extra-parochial places, are also to have regard to the proportion of the expense which shall be offered to be contributed or raised by such respective parishes or places towards the enlargement or building of churches or chapels therein, and to the pecuniary ability of the inhabitants thereof.

The enlargement or building of churches and chapels. Rules to be observed in selecting parishes.

"VIII. The committee are at liberty to grant aid towards the *repairs* of churches and chapels which have fallen into a state of great dilapidation *without neglect or fault of the existing parishioners, and the entire expense of repairing which the parishioners shall be proved, to the satisfaction of the committee, to be unable to defray*; but in all such cases reference is to be had to the amount of money raised by the parishioners by rates or subscription, and to the improvement which it may be proposed to effect in the accommodation for the poor.

The repairs of churches and chapels. Rules to be observed in selecting parishes.

"IX. The committee are annually to present to her Majesty an account of the progress made by the society in the execution of its designs, stating the number of churches or chapels enlarged, built, rebuilt, or repaired, or in the course of being so; the money expended, and for what purposes; and such other particulars as shall be necessary for explaining the progress made by the society, together with a list of all officers, agents and servants employed by the society, and a statement of their respective salaries."

Annual report to her Majesty.

By sect. 1 of 9 Geo. 4, c. 42, the act "for the better collecting charity money on briefs by letters patent," &c. (4 Ann. c. 14), is repealed. But by sect. 10, if the crown is at any time pleased to issue royal letters authorizing contributions, the same when received shall be paid to the treasurer of this society.

Abolition of briefs, &c.

By sect. 12, the society may send and receive letters free of postage.

In *Incorporated Church Building Society* v. *Barrow* (*b*), it was holden, that the society having no power to pur-

(*b*) 3 De G., M. & G. 120. See *Incorporated Church Building Society* v. *Coles*, 1 K. & J. 145; 5 De G., M. & G. 324.

chase land, but only to build churches or chapels on land already purchased, could take a bequest of pure personalty by will, without being obnoxious to 9 Geo. 2, c. 36.

Society for the Propagation of the Gospel.

The Society for the Propagation of the Gospel in Foreign Parts was incorporated by royal charter on the 10th of June, 1701, "for the receiving, managing and disposing of funds contributed for the religious instruction of the Queen's subjects beyond the seas; for the maintenance of clergymen in the plantations, colonies and factories of Great Britain, and for the Propagation of the Gospel in those parts."

The following is the constitution of the society as contained in the material extracts from the charter, published in the annual report:—

Election of officers.

"That the said Society for the Propagation of the Gospell in Forreigne Parts, and their successors for ever, shall, upon the third Friday in February, yearely, meet at some convenient place to be appointed by the said society, or the major part of them, who shall be present at any generall meeting, betweene the houres of eight and twelve in the morning; and that they, or the major part of such of them that shall then be present shall choose one president, one or more vice-president or vice-presidents, one or more treasurer or treasurers, two or more audittors, one secretary, and such other officers, ministers and servants, as shall be thought convenient to serve in the said offices for the yeare ensueing. That the said president and vice-presidents, and all officers then elected, shall, before they act in their respective offices, take an oath, to be to them administered by the president, or in his absence by one of the vice-presidents, of the yeare preceeding, who are hereby authorized to administer the same, for the faithfull and due execucon of their respective offices and places dureing the said yeare.

"That if it shall happen, that any of the persons at any time chosen into any of the said offices shall dye, or on any account be removed from such office at any time between the said yearly dayes of election, that in such case it shall be lawfull for the surviving and continueing president, or any one of the vice-presidents, to issue summons to the severall members of the body corporate, to meet at the usuall place of the annuall meeting of the said society, at such time as shall be specified in the said summons; and that such members of the said body corporate, who shall meet upon such summons, or the major part of them, shall and may choose an officer or officers into the roome

or place of such person or persons, soe dead or removed, as to them shall seem meet.

Meetings.

"That the said Society for the Propagation of the Gospell in Forreigne Parts, and their successors, shall and may, on the third Friday in every month, yearely, for ever hereafter, and oftener if occasion require, meet at some convenient place to be appointed for that purpose, to transact the businesse of the said society.

"That they, and their successors, or the major part of them who shall be present at any meeting on the third Friday in the months of November, February, May, and August, yearely for ever, and at noe other meetings of the said society, shall and may consult, determine, constitute, ordain, and make any constitutions, lawes, ordinances and statutes whatsoever; as alsoe to execute leases for yeares, as aforesaid, which to them, or the major part of them then present, shall seem reasonable, profitable, or requisite, for, touching or concerning the good estate, rule, order and government of the said corporation, and the more effectuall promoteing the said charitable designes: all which lawes, ordinances, and constitucons, soe to be made, ordained and established, as aforesaid, wee will, command, and ordaine, by these presents, for us, our heires, and successors, to be from time to time, and at all times hereafter, kept and performed in all things as the same ought to be, or the penalties and amercements in the same to be imposed and limited, soe as the same lawes, constitucons, ordinances, penalties, and amercements, be reasonable, and not repugnant or contrary to the laws and statutes of this our realme of England.

"That noe act done in any assembly of the said society shall be effectuall and valid, unlesse the president or some one of the vice-presidents, and seaven other members of the said company at the least, be present, and the major part of them consenting thereunto.

Members *ex officio*.

"The Lords Archbishops of Canterbury and York; the Bishops of London and Ely; the Lord Almoner and Dean of Westminster; the Dean of St. Paul's, and Archdeacon of London; and the two Regius and two Margaret Professors of Divinity of both our Universities for the time being.

Election of members.

"That the said society and their succesors shall and may at any meeting on such third Friday in the month, elect such persons to be members of the said corporation, as they, or the major part of them then present, shall think beneficiall to the charitable designes of the said corporation.

Subscriptions.

"That the said Society for Propagation of the Gospell in Forreigne Parts, and their successors, or the major part of such of them as shall be present at any meeting of the said society, shall have power from time to time, and all times hereafter, to depute such persons as they shall think fitt to take subscriptions, and to gather and collect such moneys as shall be by any person or persons contributed for the purposes aforesaid. And shall and may remove and displace such deputyes as often as they shall see cause soe to doe.

Accounts.

"That the said society shall yearely, and every yeare, give an account in writing to our Lord Chancellor, or Lord Keeper of the Great Seale of England for the time being, the Lord Cheife Justice of the King's Bench, and the Lord Cheife Justice of the Common Pleas, or any two of them, of the severall summe or summes of money by them received and laid out by vertue of these presents, or any authority hereby given, and of the management and disposicon of the revenues and charityes aforesaid."

Bye-laws.

The society is further governed by the following bye-laws:—

Standing committee. General management.

"1. That before the society or standing committee enter upon business one or more of the following prayers, or of the prayers sanctioned by the president in 1866, always concluding with the Lord's Prayer, be said."

[Then follow certain collects and prayers.]

"2. That there shall be a standing committee (three of whom shall be a quorum) to prepare matters for the consideration of the society at its monthly meetings.

"3. That the president, vice-presidents, treasurers, and secretary, shall be *ex officio* members of the standing committee.

"4. That the assistant secretaries be entitled to seats at the standing committee, but without votes.

"5. That the other members of the standing committee, not exceeding twenty-four in number, shall be elected by the society out of its incorporated members. It shall be the duty of the standing committee, when recommending the names of persons for election as non-official members, to frame their recommendations, so far as they shall find practicable, with a view to one-third of the non-official members being qualified, by actual or recent residence out of the metropolis and services on behalf of the society, to promote the interests of the society in the country; and also, with a view to one other third of the non-official members being qualified, by personal acquaintance with

some colony or dependency, to aid the society with counsel and advice concerning its foreign work.

"6. That of the non-official members of the standing committee, the three who have served longest upon the committee, and of the remainder the three who, having been members of the committee for one complete year previous to the monthly meeting in November, have, during that period, attended the fewest meetings of the board, and of the standing committee and sub-committees thereof, or of any special committee, shall retire at the annual meeting in February. If any doubt shall arise under this rule which member of those who have served longest shall retire, it shall be the one who has attended the fewest meetings; and if any doubt shall arise which of those who have attended the fewest meetings shall retire, it shall be the one who, during the year previous to the November meeting, has served the shortest time on the committee. Of the six retiring members three only shall be eligible to supply the vacancies caused by their retirement.

"7. That the names of the retiring members, together with the names of the candidates intended to be proposed by the standing committee to fill the vacancies caused by their retirement, be declared at the monthly meeting in December in each year; and that all candidates, whether proposed by the standing committee or by individual members, be proposed at the January meeting for election at the February meeting, provided that any individual member proposing any candidate or candidates be required to give a notice thereof, signed by himself and one other member, to the secretary, at or before the proposal of such candidate or candidates.

"8. That at the annual meeting in February the new members be elected by open voting.

"9. That any vacancy which may occur in the committee otherwise than by retirement under bye-law 6 shall be notified at the meeting next ensuing, and shall be filled up at the meeting, not being the February meeting, two months after such notification, the like notice being given as is required by bye-law 7.

"10. That any persons, being members of the Church of England, may be elected into the corporation at any of the monthly meetings; notice of the intention to propose them for election having been given at the monthly meeting next but one before that at which they are to be balloted for, and the names of all persons so notified shall be

Standing committee.
General management.

published in some publication of the society to be approved by the standing committee.

"The following shall be eligible for election:—First, any person who shall be recommended by the standing committee. Secondly, any person who shall be recommended by a member, provided that (1) he shall have subscribed to the general fund of the society not less than one guinea per annum for a period of two years last past; or (2) shall have contributed ten guineas in a single payment; or (3) shall have acted for the year preceding as secretary or treasurer of any district or parochial association: or (4) being a clergyman, shall have in his parish an association in aid of the society, or an annual sermon, with a collection, in its behalf. Provided also, that the individual recommending any person shall certify that he is desirous of being incorporated.

"11. That it be the duty of every organizing, district, or parochial secretary, to transmit to the secretary of the society, within the month of January in each year, a list of all persons within his district, deanery, or parish, qualified under the preceding bye-law to be elected.

"12. That at the ballot for the election of incorporated members no discussion shall be allowed, and it shall suffice that any persons proposed shall be balloted for together, provided that on the requirement of any two members any particular name or names shall be put up separately.

"13. That the society may nominate and elect to be associates of the society any persons who may have promoted or whose co-operation and support may be deemed to promote the designs of the society, whether they be British subjects or not. The associates will not be members of the corporation, but will hold an honorary position, with liberty to attend the board meetings, but without the right of voting. Associates of the society will hold their position until the general meeting in the February following their election, and are in every February to be proposed for re-election.

"14. That the president, or the standing committee, have power to call a special meeting of the society.

Officers.

"15. That the treasurers manage the financial concerns of the society, under the direction of the standing committee.

"16. That the secretary conduct the foreign correspondence, and superintend the general business of the society.

"17. That the assistant secretaries conduct the home correspondence of the society, under the direction of the

secretary, take minutes of the proceedings of the general meetings and committees, and assist the secretary generally in the duties of his office.

"18. That all officers of the society, engaged in the management of the society's funds, give such security as shall be required by the standing committee, before admission to their respective offices.

"19. That a board of examiners, consisting of five clergymen, be appointed annually by the Archbishops of Canterbury and York and the Bishop of London for the time being, to inquire into the fitness and sufficiency of all candidates who may present themselves in this country for missionary appointments; and that no candidate, so appearing, be accepted by the society without a recommendation in writing from the said board. Missionaries.

"20. That no missionary be placed on the society's list, without an express vote of the society sanctioning his appointment, and specifying the terms on which he is engaged.

"21. That every missionary selected in England proceed without delay to the country in which he is to be employed; and be subject, when there, to the bishop or other ecclesiastical authority.

"22. That all pensions chargeable on the general fund of the society be annually brought under review at the general audit.

"23. That no part of the society's general fund be applied to the erection of buildings, except at the commencement of new missions to the heathen.

"24. That all regulations of the society concerning missionaries, or grants, or applications for grants, or incidental matters, be collected and printed, and that a revised copy of these be annually laid before the board at the meeting in February.

"25. That the accounts of the society be closed on the thirty-first day of December in each year, and audited within one month from that time. Accounts.

"26. That an annual sermon be preached before the society, and that the preacher, time, and place, be appointed by the president. Sermon, report, &c.

"27. That the annual report and other publications of the society be circulated among the members and subscribers, under the direction of the standing committee.

"28. That no new bye-law be added, or existing bye-law altered, without notice having been given at least one month previous to the quarterly meeting at which the pro- Bye-laws.

posed addition or alteration shall be submitted for the approval of the board."

In *Chester* v. *Chester* it was holden, that the purposes of the society were "charitable" within the meaning of 9 Geo. 2, c. 36 (*c*).

National Society.

"*The National Society for Promoting the Education of the Poor in the Principles of the Established Church*" was originally founded in 1811, and was incorporated by royal charter in May 23, 1817. The following is a summary of its constitution as fixed by the charter, taken from the society's publications.

Charter.

"That there shall and may be a society to be called 'The National Society for Promoting the Education of the Poor in the Principles of the Established Church throughout England and Wales,' and that the presidents and vice-presidents of the said society, and their successors for ever, and every person paying one guinea annually to the funds of the society, or ten guineas in one donation, shall be a corporation with perpetual succession, common seal, power to hold property to the value of 10,000*l.* per annum, and any other property and effects.

"That the Archbishop of Canterbury be president; that the Archbishop of York and all the bishops and ten other persons, being either temporal peers or privy councillors, be vice-presidents.

"That any vacancies in the number of such last-mentioned vice-presidents be filled up by the nomination of the president and the remaining vice-presidents, or the major part of them, at a meeting to be holden for that purpose as soon as conveniently may be after the occurrence of such vacancy, or by the nomination of the major part of such of them as shall be present at the said meeting.

"That for the managing and conducting the affairs of the said incorporated society there shall be a standing committee, and that such committee shall consist of the president and of the vice-presidents, and of sixteen other members of the society, together with such one other member of the society as shall, for the time being, be appointed to fill the office of treasurer of the said society.

"That one-fourth part in number of the said sixteen committee-men shall annually vacate their offices in regular rotation, unless by death, or voluntary resignations, any other vacancies shall have been occasioned since the last general annual meeting; in which case so many only of

(*c*) L. R., Weekly Notes (1871), 158; *vide supra*, p. 1968.

the four persons next in rotation shall be required to resign, or vacate their said offices, as shall be sufficient, with the vacancies occasioned by death or voluntary resignation, to create or make four vacancies in the whole in the said committee of sixteen; and that any of the said committee-men so vacating their offices by rotation shall be capable of being immediately re-elected as committee-men by the society at large, in manner hereinafter mentioned; and accordingly, for the purpose of such election, that lists shall be formed by the president and vice-presidents for the time being, or the major part of them, of persons in their opinions fit to be elected members of such committee; which last-mentioned lists shall contain twice as many names as shall be then vacancies to be filled, whether such vacancies shall be occasioned by members of the committee vacating their offices in the manner hereinbefore mentioned, or by deaths, or voluntary resignations, since the last election; and that out of such lists so many persons as shall be necessary to supply the vacancies then existing in the said committee shall be elected and chosen by the members of the said society, present at their annual general meeting, or the major part of them, by such mode of voting or ballot as the said committee for the time being, or the major part of them, shall prescribe.

"That for the purpose of such election, and for the election of auditors of the accounts, and for receiving the reports, and for other the affairs of the said society, a general meeting of the said society shall be holden at such place as the committee, or the major part of them, shall appoint in the month of May or June in every year, and that due notice shall be given of the time and place of such meeting, at least fourteen days previous to the day of meeting, by advertising in some or one of the public newspapers published daily in the cities of London and Westminster.

"That the treasurer of the said society shall be chosen and appointed by such of the members of the committee for the time being as shall be present at a meeting to be holden for that purpose, or the major part of them; and that such treasurer for the time being shall, by virtue of his office, be a member of the said committee.

"That the said committee for the time being, or the major part of them, shall have full power and authority to frame, appoint, order, and make all such laws, rules, regulations, constitutions and ordinances, not being repugnant to the laws of this kingdom, or to the express provisions of this charter, as to the said committee, or the

major part of them, shall from time to time seem expedient for the management and government of the said society, and for carrying into effect the designs thereof; and shall have the sole management, control, and disposition of the estates, funds, revenues, and other property belonging to the said society; and shall have the power of affixing the common seal of the said society, or directing it to be affixed, to such instruments as the said committee, or the major part of them, shall think fit; and shall have the sole control over and appointment of all officers, agents, or servants whom it may be thought expedient to employ in the service of the said society, or in any of the concerns relating thereto: provided, that such laws, rules, regulations, constitutions, and ordinances so to be made by the said committee, or the major part of them, shall not be of any force or effect unless the same shall be approved, ratified, and confirmed by the members of the said committee, or the major part of them, who shall be present at the next meeting of the said committee after the same shall have first been made."

The following laws and regulations have been framed under the charter.

Standing committee.

"1. The standing committee shall be summoned to meet on the first Wednesday in February, March, April, May, June, July, August, November, and December, except when such Wednesday shall fall in the week before Easter, or in Whitsun week, and then it shall be summoned to meet in the previous week: or in Easter week, when it shall be summoned to meet in the subsequent week; and at such other times as occasion may require—five shall be a quorum.

"2. A special meeting of the standing committee may be summoned at seven days' notice, upon direction of the president, or two vice-presidents, or any three members of the standing committee.

"3. At each meeting of the standing committee the chair shall be taken by the president, or in his absence by a vice-president, or, in the absence of the president and vice-presidents, by any other member elected by the members present.

"4. Each meeting shall be opened with prayer.

"5. The first business of each meeting not being a special meeting shall be to read the fair minutes of the preceding meeting, and compare them with the rough minutes, and the correctness of the same shall be verified by the signature of the chairman.

"6. After reading the minutes, any business arising

thereout shall be first taken into consideration, unless upon motion and for special cause priority be granted to any other business.

"7. The business on the agenda paper shall be next taken into consideration in order.

"8. If objection be taken by any member present to the discussion of matter not named in the agenda paper, the consideration thereof shall not be proceeded with unless by consent of two-thirds of the members present.

"9. Every motion shall be presented to the chairman in writing, in order that on being seconded it may be put from the chair.

"10. The standing committee, at their first meeting after the annual general meeting, shall appoint from their own number a sub-committee, to be called a 'committee 'of finance and correspondence,' and to consist of the president, vice-presidents, treasurer, and seven others—two shall be a quorum. In the event of a vacancy the standing committee shall, at their meeting next following, fill up the same.

Sub-committee.

"11. The sub-committee shall meet in the course of the week preceding the monthly meeting of the standing committee, and at such other times as may be necessary, to consider applications for grants and other business; and their recommendations as entered in their minutes shall be laid before the standing committee for adoption.

"12. All questions brought forward at general meetings of the society and at meetings of the committees shall be determined by the vote of the members present; and in case of equality of votes the chairman shall have a second or casting vote.

Treasurer.

"13. The treasurer shall act under the instructions of the committee as their representative in money matters; his receipt shall be a sufficient discharge, and his signature, countersigned by the secretary, shall be a sufficient authority for payment of cheques and drafts. At each meeting of the standing committee he shall present an account of the financial condition of the society, an abstract of which shall be entered on the minutes.

"14. The accounts shall be audited by the auditors quarterly, or more frequently if specially ordered.

Secretary.

"15. The secretary shall attend all meetings of committees and sub-committees, shall enter in a book a rough minute of their proceedings, to be authenticated by the signature of the chairman, and shall enter them before the next meeting in the minute book, which shall be kept in

Secretary.

the manner prescribed by the committee. He shall attend to the execution of instructions given by the committee and sub-committees.

"16. He shall give to the members of the standing committee seven days' notice of all their meetings, and shall prepare an agenda paper in duplicate for each meeting, an abstract of which shall be sent with each notice of such meeting.

"17. He shall enter on the agenda paper first the treasurer's financial statement and his motions relating thereto, and then all notices of motion in the order in which they are received.

"18. He shall keep all letters received by him, and all documents of importance, and also copies of all his letters and of all advertisements.

"19. He shall examine all claims and accounts, and satisfy himself as to their correctness, to which end he shall require the initials of the person more immediately responsible in each case to be previously affixed to each.

"20. He shall see that copies of the charter of the society, of the laws and regulations, and of the last annual report, be laid upon the table at each meeting.

"21. He shall not permit any books or papers belonging to the society to be removed from his custody or to be lent to any person without the express permission of the committee; nor permit any person not being a member of the committee to inspect the same without similar permission.

Organizing secretary.

"22. A second secretary, to be called the 'organizing secretary,' shall be appointed by the standing committee. His duty shall be to organize and conduct, under the general direction of the secretary, all matters relating to the collection and extension of the ordinary and special funds of the society, including arrangements for church services and collections and for public meetings. He shall, in the absence of the secretary, represent him at the office.

Common seal.

"23. The common seal shall be kept in the custody of the treasurer and secretary, and shall not be affixed to any instrument without the order of the standing committee."

Trust deed.

In all schools united to the society the following clause is required to be inserted in the trust deed thereof.

"And it is hereby declared that the said school shall always be in union with and conducted accordingly to the principles and in furtherance of the ends and designs of the incorporated national society for promoting the educa-

tion of the poor in the principles of the established church throughout England and Wales" (*d*).

Society for Promoting Christian Knowledge.

The Society for Promoting Christian Knowledge has never been incorporated. It is, however, one of the oldest church societies, having been founded in A.D. 1698; and the members thereof contributed largely to the foundation and incorporation of the Society for the Propagation of the Gospel and of the National Society.

The original preamble to which all members subscribed their names was as follows:—" Whereas the growth of vice " and immorality is greatly owing to gross ignorance of the " principles of the Christian religion, we, whose names " are under written, do agree to meet together as often as " we can conveniently, to consult (under the conduct of " divine providence and assistance) how we may be able, " by due and lawful methods, to promote Christian know- " ledge."

(*d*) *Vide supra*, p. 2049.

PART X.

CHURCH OF ENGLAND IN RELATION TO OTHER CHURCHES.

CHAPTER I.

CHURCH IN IRELAND.

The churches of England and Ireland to be united into one church.

The fifth article of the Act for the Union of Ireland with Great Britain (*a*) enacts, "That it be the fifth article of union, that the churches of *England* and *Ireland*, as now by law established, be united into one protestant episcopal church, to be called, *The United Church of England and Ireland;* and that the doctrine, worship, discipline, and government of the said united church shall be, and shall remain in full force for ever, as the same are now by law established for the church of *England;* and that the continuance and preservation of the said united church, as the established church of *England* and *Ireland*, shall be deemed and taken to be an essential and fundamental part of the union; and that in like manner the doctrine, worship, discipline, and government of the church of *Scotland* shall remain and be preserved as the same are now established by law, and by the acts for the union of the two kingdoms of *England* and *Scotland*."

Acts of parliament affecting the Irish church.

3 & 4 Vict. c. 52, appointing His Royal Highness Prince Albert regent of these realms, in the event of the crown descending to any issue of her Majesty, whilst such issue should be under the age of eighteen years, enacted, among other provisions, that his royal highness should swear that he will maintain inviolably the Established Churches of England, Ireland and Scotland; and also

(*a*) 39 & 40 Geo. 3, c. 67.

that, in the event of his being reconciled to the Church of Rome, or professing, or marrying a person professing, the Roman Catholic religion, his royal highness should cease to be regent of these realms.

In the first year of George II., an act was passed to enable archbishops, bishops, and other ecclesiastical persons, to grant their patronage or right of presentation to small livings to such persons as shall augment the same. In 1836, an act was passed to amend the foregoing statute and to encourage the building of chapels of ease in Ireland (*b*).

In 1812, an act was passed to enable coadjutors to archbishops and bishops in Ireland to execute the powers of archbishops and bishops respectively, for all purposes but that of presenting and collating to benefices, and in all cases except such as concerned royal privileges or prerogatives (*c*).

On the 21st June, 1824, an act was passed to consolidate and amend the laws for enforcing the residence of spiritual persons on their benefices; to restrain spiritual persons from carrying on trade or merchandise; and for the support and maintenance of stipendiary curates in Ireland (*d*).

On the 14th August, 1833, an act was passed, effecting a very extensive alteration in the temporalities of the Irish Church (*e*). This act was subsequently amended by one which passed on the 15th August in the ensuing year (*f*).

Irish Church Temporalities' Bill.

Archbishops and bishops.

The Church of Ireland was, until the passing of the Irish Church Temporalities Bill, under the control of four archbishops, one for each of the four provinces, and named from the cities of Armagh, Dublin, Cashel, and Tuam, in which the archiepiscopal sees are situated. The Archbishop of Armagh, now universally recognized as first in rank, though his right to that station was long disputed by the Archbishop of Dublin, is styled Primate and Metropolitan of all Ireland; the Archbishop of Cashel, Primate and Metropolitan of Munster; and the Archbishop of Tuam, Primate and Metropolitan of Connaught. The four archiepiscopal provinces were subdivided into thirty-two dioceses, which were consolidated and united under eighteen

(*b*) 6 & 7 Will. 4, c. 31.

(*c*) 52 Geo. 3, c. 62.

(*d*) See 5 Geo. 4, c. 91: this answers to the English act 1 & 2 Vict. c. 106.

(*e*) 3 & 4 Will. 4, c. 37.

(*f*) 4 & 5 Will. 4, c. 90.

Irish Church Temporalities' Bill.

Archbishops and bishops.

bishops. The dioceses in Armagh province were those of Armagh (holden by the archbishop), Clogher, Meath, Down and Connor united, Derry, Raphoe, Kilmore, Dromore, and Ardagh united to Tuam. There were, therefore, seven bishops in this province, suffragan to the Archbishop of Armagh. The province of Dublin was subdivided into the dioceses of Dublin and Glandelagh united, Kildare, Ossory, and Leighlin and Ferns united. The Archbishop of Dublin had, therefore, three suffragan bishops under him. The province of Cashel contained the dioceses of Cashel and Emly united, Limerick united with Ardfert and Aghadoe, Waterford united with Lismore, Cork united with Ross, Cloyne, and Killaloe united with Kilfenora. The number of suffragan bishops in this province was five. The province of Tuam comprehended the dioceses of Tuam, Elphin, Clonfert united with Kilmacduagh, and Killala united with Achonry. There were, therefore, three bishops in this province suffragan to the Archbishop of Tuam.

This arrangement was considerably altered by the 3 & 4 Will. 4, c. 37, and 4 & 5 Will. 4, c. 90, cited above; according to the provisions of which, the hierarchy was to consist of two archbishops only, those of Armagh and Dublin; the two others being reduced to the rank of bishops. The eighteen suffragan bishops were to be reduced by the consolidation of the dioceses to ten, five under each archbishop. The new arrangement was to be effected gradually on the demise of the several bishops whose sees were to be united to others. When completed, the ecclesiastical division of Ireland was to be as follows:—The province of Armagh, containing the bishoprics of Meath, Derry united with Raphoe, Down united with Connor and Dromore, Kilmore united with Ardagh and Elphin, and Tuam united with Killala and Achonry: the province of Dublin, containing the bishoprics of Ossory united with Leighlin and Ferns; Cashel united with Emly, Waterford and Lismore; Cloyne united with Cork and Ross; Killaloe united with Kilfenora, Clonfert, and Kilmacduagh; and Limerick united with Ardfert and Aghadoe.

The income of the archbishops and bishops was derived chiefly from lands let upon lease of twenty-one years, and renewed from time to time, at the original rent, on payment of a fine on renewal, fluctuating according to the altered value of land, and the period to which the renewal was to extend.

Rotation of

According to 3 & 4 Will. 4, c. 37, s. 51, the archiepis-

copal seas of Cashel and Tuam having become void, the Archbishops of Armagh and Dublin were to succeed each other, in future, in parliament, from session to session; and arrangements were made for episcopal rotation as to seats in parliament.

Irish representative bishops.

The ecclesiastical dignitaries subordinate to the bishops were the deans, thirty-three in number; all were presentative by the crown, except those of St. Patrick's, Dublin, and of Kildare,—who were elective by their respective chapters,—and of Clonmacnois, collative by the Bishop of Meath. Twenty-six deans had cure of souls, and seven had not. The deans of St. Patrick's, Dublin, Christ Church, Dublin, St. Canice, Kilkenny, and Lismore, exercised peculiar jurisdictions, varying in each, within their respective deanries. Three dioceses—Meath, Kilmore, and Ardagh—were without chapters; in lieu of which there was a synod, consisting of all the beneficed clergymen, in which the archdeacon presided. The chapters and synods were corporate bodies, and used a common seal. The chapters were thirty in number; and though all had a general similarity of constitution, each was marked by some special peculiarity. Their component members were as follows—the precentors or chanters, originally intended to have charge over the singing men: their number was twenty-six—seventeen with cure of souls, and nine without cure; they were all appointed by their respective bishops, except the precentor of Christ Church, Dublin, who was nominated by the crown. The next members were the chancellors, who had no special duty; they were twenty-two—fifteen having cure of souls, and seven being without cure; all appointed by the bishops, except that of Christ Church, Dublin, who was nominated by the crown. The treasurers were also twenty-two—sixteen with cure of souls, and six without cure; the right of appointment was the same as that of the precentors and chancellors. The archdeacons were thirty-four in number—all appointed by the bishops. There were two provosts belonging to cathedral churches; but they had no official duties, cure of souls, or spiritual jurisdiction. Besides the subordinate dignitaries now recited, the chapters had prebendaries, 180 in number. There were also in twelve of the cathedral churches certain subordinate bodies, consisting of five canons, fifty-nine vicars choral, and fifteen choristers.

Deans and chapters.

There was but one instance of a territorial exemption from episcopal jurisdiction,—the lordship of Newry; the proprietor of which held his spiritual court, and granted

One peculiar.

marriage licences and probates of wills, under the seal of the religious house to which the lordship belonged before the Reformation.

Parochial clergy.

The dioceses were divided into parishes, which were in the spiritual charge of clergymen in full orders, called rectors and vicars, and perpetual curates. They derived their incomes chiefly from tithe, of which there were two kinds,—great and small; the former derived from corn of every kind, hay and wool; the latter from flax, hemp, garden produce, and in some cases potatoes; but by another and more general explanation of these terms, two-thirds of the tithe of corn, hay and wool constituted the great tithe, and the remaining third the small tithe of a parish: the former was considered the property of the rector, the latter of the vicar. Latterly, a new order of parochial clergy had been introduced into the church, under the name of perpetual curates, who had charge of a portion of a parish specially allotted to them, the tithe of which they received, and were not subject to the incumbent of the remaining portion of the parish, but held their situations for life.

The parochial clergy derived part of their income from glebe land attached to their respective benefices. The total quantity of glebe land amounted to 91,137 acres, from which, if a twentieth part be deducted as unprofitable, there remained 86,581 acres of profitable land; it is said that if equally apportioned among the benefices, it would have given an average of 62 acres to each incumbent. It was, however, very unequally distributed, by much the greater quantity of it lying in the northern province of Armagh. Most of the glebes were furnished with manses or glebe houses, built partly by a donation of money from the board of first fruits, partly by loan from the same source, and partly at the cost of the incumbent, repayable by instalments from his successors. In cities and towns the parochial clergy were paid, in lieu of tithe, by minister's money, which was an assessment on every house of a certain value, estimated according to the amount of rent paid.

The incomes of the parochial clergy were subject to certain deductions. These were, first fruits, payments towards diocesan and parochial schools, repairs of certain parts of the churches, and repairs of glebe houses. The first fruits were designed to be the amount of the first year's income of every benefice, payable by the new incumbent in four annual instalments, and intended to be applied to ecclesiastical purposes, especially the building

and repairing of churches and glebe houses, and the purchase of glebe land. But as the amount on each parish was rated according to assessments made in the time of Henry VIII., Elizabeth, and James I., which had never since been altered, notwithstanding the extraordinary increase in the value of agricultural produce, the impost was little more than nominal, and was suppressed by the last acts for regulating church property. The diocesan schools were to be maintained by annual contributions from the bishop and the beneficed clergy; but the levy drawn from this source was little more than nominal. The parochial schools were supposed to be maintained by an annual stipend from the incumbent, estimated by custom at two pounds per annum. In many cases this was not paid. Every incumbent was bound to keep his glebe house in tenantable order; to enforce which regulation, the bishop appointed a certain number of rural deans, whose duty it was to visit the several parishes within their respective districts, and to report to him upon the state of the churches and of the glebe houses. The churches were at one time kept in repair at the expense of the inhabitants of the parish. But modern ecclesiastical regulations transferred this duty to the ecclesiastical commissioners, who were authorized to appropriate to this purpose a sufficient portion of the incomes of the extinguished sees, and other revenues in their hands.

Disestablishment of Irish Church.

In 1869, the Irish Church Act, 1869, 32 & 33 Vict. c. 42, was passed; it was entitled "An Act to put an end to the Establishment of the Church of Ireland, and to make provision in respect of the Temporalities thereof, and in respect of the Royal College of Maynooth." It recited:

"Whereas it is expedient that the union created by act of parliament between the Churches of England and Ireland, as by law established, should be dissolved, and that the Church of Ireland, as so separated, should cease to be established by law, and that after satisfying, so far as possible, upon principles of equality as between the several religious denominations in Ireland, all just and equitable claims, the property of the said Church of Ireland, or the proceeds thereof, should be applied in such manner as parliament shall hereafter direct:

"And whereas her Majesty has been graciously pleased to signify that she has placed at the disposal of parliament her interest in the several archbishoprics, bishoprics, benefices, cathedral preferments, and other ecclesiastical dignities and offices in Ireland:"

And it enacted as follows:—

Dissolution of legislative union between Churches of England and Ireland.

Sect. 2. "On and after the first day of January, 1871, the said union created by act of parliament between the Churches of England and Ireland shall be dissolved, and the said Church of Ireland, hereinafter referred to as 'the said church,' shall cease to be established by law."

It proceeded to appoint commissioners to execute the provisions of the act: they were styled "The Commissioners of Church Temporalities in Ireland."

It dealt with the transfer of property and dissolution of ecclesiastical corporations as follows:—

Prohibition of future appointments.

Sect. 10. "Save as hereinafter mentioned, no person shall, after the passing of this act, be appointed by her Majesty or any other person or corporation by virtue of any right of patronage or power of appointment now existing to any archbishopric, bishopric, benefice, or cathedral preferment in or connected with the said church."

Property of ecclesiastical commissioners vested in commissioners under this act.

Sect. 11. "From and after the passing of this act all property, real and personal, at the date of such passing vested in or belonging to the Ecclesiastical Commissioners for Ireland, is transferred to and vested in the commissioners appointed under this act, subject to all tenancies, charges, incumbrances, rights (including tenants' rights of renewal), or liabilities affecting the same, and the corporation of the Ecclesiastical Commissioners for Ireland is hereby dissolved."

Church property vested in commissioners under this act.

Sect. 12. "On the first of January, 1871, save as hereinafter provided, all property, real and personal, belonging or in anywise appertaining to or appropriated to the use of any archbishopric, bishopric, benefice, or cathedral preferment in or connected with the said church, or belonging or in anywise appertaining to or appropriated to the use of any person as holding any such archbishopric, bishopric, benefice, or cathedral preferment, or belonging or in anywise appertaining to or appropriated to the use of any cathedral corporation in Ireland, as defined by this act, shall vest in the commissioners, subject as hereinafter mentioned."

The section then provides, that (1) and (3) the property so to be vested shall remain subject to the same rents, charges, leases, and rights of renewal of leases as before; and also (2) "In the case of any houses, buildings, farms, lands, churches, burial grounds, or other corporeal hereditaments to which, or to the rent and profits of which, any archbishop, bishop, or person holding any such benefice or cathedral preferment as aforesaid may be entitled, subject to the life interests of such archbishop,

bishop, or person respectively; and such last-mentioned corporeal hereditaments shall, subject to the provision for commutation hereinafter contained, continue in such archbishop, bishop, or person respectively for their respective lives, with the same powers, rights, and authorities and in the same manner as if this act had not passed."

Dissolution of ecclesiastical corporations, and cessation of right of bishops to sit in House of Lords.

Sect. 13. "On the said first of January, 1871, every ecclesiastical corporation in Ireland, whether sole or aggregate, and every cathedral corporation in Ireland, as defined by this act, shall be dissolved, and on and after that day no archbishop or bishop of the said church shall be summoned to or be qualified to sit in the House of Lords as such; provided that every present archbishop, bishop, dean, and archdeacon of the said church shall during his life enjoy the same title and precedence as if this act had not passed."

It provided compensation to persons deprived of income and to lay patrons.

And it enacted, with respect to the powers of the church after passing of the act, as follows:—

Repeal of laws prohibiting holding of synods, &c.

Sect. 19. "From and after the passing of this act there shall be repealed and determined any act of parliament, law, or custom whereby the archbishops, bishops, clergy, or laity of the said church are prohibited from holding assemblies, synods, or conventions, or electing representatives thereto, for the purpose of making rules for the well-being and ordering of the said church; and nothing in any act, law, or custom shall prevent the bishops, the clergy, and laity of the said church, by such representatives, lay and clerical, and to be elected as they the said bishops, clergy, and laity shall appoint, from meeting in general synod or convention, and in such synod or convention framing constitutions and regulations for the general management and good government of the said church, and property and affairs thereof, and the future representation of the members thereof in diocesan synods, general convention, or otherwise."

Existing law to subsist by contract.

Sect. 20. "The present ecclesiastical law of Ireland, and the present articles, doctrines, rites, rules, discipline, and ordinances of the said church, with and subject to such (if any) modification or alteration as after the first day of January, 1871, may be duly made therein according to the constitution of the said church for the time being, shall be deemed to be binding on the members for the time being thereof in the same manner as if such members had mutually contracted and agreed to abide by and observe the same, and shall be capable of being enforced

in the temporal courts in relation to any property which under and by virtue of this act is reserved or given to or taken and enjoyed by the said church or any members thereof, in the same manner and to the same extent as if such property had been expressly given, granted, or conveyed upon trust to be held, occupied, and enjoyed by persons who should observe and keep and be in all respects bound by the said ecclesiastical law, and the said articles, doctrines, rites, rules, discipline, and ordinances of the said church, subject as aforesaid; but nothing herein contained shall be construed to confer on any archbishop, bishop, or other ecclesiastical person any coercive jurisdiction whatsoever: Provided always, that no alteration in the articles, doctrines, rites, or, save in so far as may be rendered necessary by the passing of this act, in the formularies of the said church, shall be binding on any ecclesiastical person now licensed as a curate or holding any archbishopric, bishopric, benefice, or cathedral preferment in Ireland, being an annuitant or person entitled to compensation under this act, who shall within one month after the making of such alteration signify in writing to the church body hereafter mentioned his dissent therefrom, so as to deprive such person of any annuity or other compensation to which under this act he may be entitled."

Abolition of ecclesiastical courts and ecclesiastical law.

Sect. 21. "On and after the first day of January, 1871, all jurisdiction, whether contentious or otherwise, of all the ecclesiastical, peculiar, exempt, and other courts and persons in Ireland at the time of the passing of this act having any jurisdiction whatsoever exerciseable in any cause, suit, or matter, matrimonial, spiritual, or ecclesiastical, or in any way connected with or arising out of the ecclesiastical law of Ireland, shall cease; and on and after the said first day of January, 1871, the act 27 & 28 Vict. c. 54, shall be repealed, and on and after the last-mentioned day the ecclesiastical law of Ireland, except in so far as relates to matrimonial causes and matters, shall cease to exist as law."

Incorporation of church body.

Sect. 22. "If at any time it be shown to the satisfaction of her Majesty that the bishops, clergy, and laity of the said church in Ireland, or the persons who, for the time being, may succeed to the exercise and discharge of the episcopal functions of such bishops, and the clergy and laity in communion with such persons, have appointed any persons or body to represent the said church, and to hold property for any of the uses or purposes thereof, it shall be lawful for her Majesty by charter to incorporate

such body, with power, notwithstanding the statutes of mortmain, to hold lands to such extent as is in this act provided, but not further or otherwise."

Commutation.

It provided for dealings between the commissioners and the representative church body, with respect to redemption of annuities and life interest of ecclesiastical persons, by a process of commutation where the parties interested desired it.

Provisions with respect to churches.

By sect. 25, provisions are made for the churches as follows:—

(1.) Churches not used for divine worship, but deserving preservation as national monuments, are to be vested in and preserved by the commissioners of public works.

(2.) Churches in actual use, for which the representative body apply, stating that they mean to use the same or to build another in lieu of the present fabric, are, subject to the life interest of the incumbent, to be vested in the representative body.

(3.) Churches in actual use, for which no application is made, may, when erected by a private founder, be vested in him or his representatives if he have died since the year 1800.

(4.) Any other churches may be disposed of as the commissioners think fit.

Rights to vaults and of sepulture are to remain as before.

Where churches are vested in the representative body, schoolhouses belonging to such churches may be so vested also.

Provisions with respect to burial grounds.

Sect. 26 contains provisions as to burial grounds to the following effect:—

(1.) Where a church vested in the representative body has a burial ground that is annexed to it and not separated by any carriage highway, or "that has been granted by a "private donor to or exclusively used by the parishioners "attending the said church," the commissioners, at the option of the representative body, shall (a) either vest it in the body, subject to any life interest and without prejudice to any such right of burial "as may be subsisting therein "or may be thereafter declared to subsist therein by act "of parliament," or (b) vest it in the guardians of the poor, subject to a right of way to the church, in which case the guardians are to take care that funerals do not take place during the time of ordinary church service and generally for the freedom of the clergy and congregation of the church from interference by those attending funerals, and shall preserve the burial ground in good order.

(2.) In other cases the burial ground is simply to be

vested in the guardians of the poor, to be by them holden as a ground purchased by a burial board, with an exception for burial grounds situate in private parks or grounds.

Residence houses and glebes.

Sects. 27, 28, contain provisions as to residence houses and glebes as follows:—

Any residence house used by a clergyman performing or aiding in the services of any church vested in the representative body or in any building temporarily used for a church or any see house used by an archbishop or bishop shall, on application of the representative body, be, with the garden and curtilage thereto, vested in the body, subject to any life interest, upon payment by the body "of "a sum equal to ten times the amount of the annual value "of the site of such ecclesiastical residence estimated as "land and of the said garden and curtilage;" or, where there is a building charge on the residence, of the smaller of these two sums, the amount of the ten years' annual value or the amount of such building charge. The payments are to be made either upon the vesting order, or, where there is a life interest, on the determination of the life interest.

Where these residences are so vested, the commissioners may further on the application of the representative body vest in the body, on payment of the price thereof to be fixed by arbitration, land not exceeding thirty acres with every see house, and not exceeding ten acres with any other residence, or more if the commissioners shall think it necessary for the convenient enjoyment of the see house or residence.

Payment of £500,000.

By sect. 29, a lump sum of 500,000*l.* is to be paid to the representative body in lieu of all claims in respect of private benefactions or the produce thereof: and any particular private endowment may within twelve months substantiate its claim to a share in this lump sum.

Moveable chattels belonging to see or church.

By sect. 30. "All plate, furniture, and other moveable chattels belonging to any church or chapel, or used in connexion with the celebration of divine worship therein, shall vest in the representative church body when incorporated; and, subject to the life enjoyment of same by the existing incumbents, all moveable chattels held and enjoyed by the incumbent for the time being of any see, cathedral preferment, and benefice in his corporate right, together with or as incident to the occupation of any ecclesiastical residence, shall also vest in the same body when incorporated; and where any property is vested in any ecclesiastical or cathedral corporation in Ireland in trust for the poor or any other charitable purpose, the dissolution of

such corporation shall not affect the continuance of the trust, but such property shall immediately upon such dissolution vest in the representative body of the said church, or, in default of and until the same shall be constituted, in the commissioners for the execution of this act, but subject always to the trusts affecting the same, and under the same supervision, local or otherwise, as theretofore, or as near thereto as the circumstances of the case will admit; and in all cases where ecclesiastical persons are at present in right of their dignities or offices entitled to be members of any lay corporations constituted for the management of any private endowment, or are trustees for the management of property belonging to institutions of private foundation for purposes not ecclesiastical, then the persons (if any) who shall hereafter at any time discharge duties similar or analogous to those now discharged by such ecclesiastical persons shall be entitled to succeed in their room, and be members of such lay corporations, and to act as such trustees."

The act made various provisions with respect to the management of property by the commissioners, and with respect to the *Regium Donum* of dissenters and the college of Maynooth.

It enacted the following among other temporary provisions:—

Regulation as to vacancies.

Sect. 66. "If any vacancy occur in any archbishopric, bishopric, benefice, or cathedral preferment in or connected with the said church between the date of the passing of this act and the first day of January, 1871, the following enactments shall be made with respect to such vacancy:

(1.) All property, real and personal, belonging or in anywise appertaining to or appropriated to the use of any such vacant archbishopric, bishopric, benefice, or cathedral preferment, or belonging or in anywise appertaining to or appropriated to the use of any person as holding any such archbishopric, bishopric, benefice, or cathedral preferment, shall vest in the commissioners, subject to any quitrents, head rents, leases, and other tenancies, charges, and incumbrances affecting the same:

(2.) Her Majesty may in the case of a vacant archbishopric, on the requisition of any three bishops of the province, and in the case of a bishop on the requisition of the archbishop of the province in which such bishopric is situate, or of any three

bishops of the same province, fill up the vacancy; but no archbishop or bishop so appointed shall be summoned to or be qualified to sit in the House of Lords, and he shall be subject to the provisions herein-after mentioned:

(3.) In the case of any vacant benefice or cathedral preferment, such vacancy may be filled up by the same person or persons who would have been qualified to fill up the same if this act had not passed, but the person so appointed shall be subject to the provisions herein-after mentioned."

These provisions deprive him of all claim to compensation except in respect of any benefice or preferment previously holden by him, but give him the ordinary income of his new preferment till January 1st, 1871.

The act disposed of the surplus of church property as follows:—

Ultimate trust of surplus.

Sect. 68. "And whereas it is further expedient that the proceeds of the said property should be appropriated mainly to the relief of unavoidable calamity and suffering, yet not so as to cancel or impair the obligations now attached to property under the acts for the relief of the poor: be it further enacted, that the said proceeds shall be so applied accordingly in the manner parliament shall hereafter direct."

And contains these saving clauses.

Provision as to acts relating to United Church of England and Ireland.

Sect. 69. "In all enactments, deeds, and other documents in which mention is made of the United Church of England and Ireland, the enactments and provisions relating thereto shall be read distributively in respect of the Church of England and the Church of Ireland, but, as to the last-mentioned church, subject to the provisions of this act."

Saving rights as to proprietary chapels and chapels of ease.

Sect. 70. "Nothing in this act contained shall affect the patronage or right of presentation to any proprietary or district parochial church or endowed chapel of ease which has been endowed out of private funds, or affect the property in any such church or chapel, or the property held for the purposes of or appropriated to the use of the same, or affect the continuance of the trust relating thereto as originally constituted."

Saving of act of 39 & 40 Geo. 3, c. 67, &c.

Sect. 71. "Nothing herein contained shall affect the act 39 & 40 Geo. 3, c. 67, intituled 'An Act for the Union of Great Britain and Ireland,' or an act of the Irish Parliament passed in the fortieth year of the reign of King George the Third, and also intituled 'An Act for the Union of Great Britain and Ireland,' or anything

done thereby, except in so far as relates to the union of the churches of England and Ireland, and except as expressly hereinbefore provided."

Sect. 72 contains a series of definitions of words used in the act, amongst which the following is to be noted:— "Jurisdiction shall mean legal and coercive power and shall not extend to or include any power or authority which may be exercised in a voluntary religious association upon the footing of mutual contract or agreement" (*g*).

(*g*) See "The Constitution of the Church of Ireland, &c., 1870." Dublin: Hodges, Foster & Co.

CHAPTER II.

CHURCH IN SCOTLAND.

In 1706 the act 6 Anne, c. 11, passed for the union of England and Scotland (*a*).

By sect. 2, it "ratifies, approves, and for ever confirms the fifth act of the first parliament of King William and Queen Mary, intituled 'Act ratifying the confession of faith, and settling presbyterian church government,' with all other acts of parliament relating thereto, in prosecution of the declaration of the estates of this kingdom, containing the claim of right, bearing date the eleventh of April, one thousand six hundred and eighty-nine; and expressly provides and declares, that the foresaid true protestant religion, contained in the above-mentioned confession of faith, with the form and purity of worship presently in use within this church, and its presbyterian church government and discipline, (that is to say), the government of the church by kirk sessions, presbyteries, provincial synods, and general assemblies, all established by the foresaid acts of parliament, pursuant to the claim of right, shall remain and continue unalterable, and that the said presbyterian government shall be the only government of the church within the kingdom of Scotland."

The same statute enacted as follows:

6 Ann. c. 8.

Act for securing the Church of England, recited.

Sect. 3. "And whereas an act hath passed in this present session of parliament, intituled, 'An Act for securing the Church of England as by Law established;' the tenor whereof follows: Whereas by an act made in the session of parliament held in the third and fourth year of her majesty's reign, whereby her majesty was empowered to appoint commissioners, under the great seal of England, to treat with commissioners to be authorized by the parliament of Scotland, concerning an union of the kingdoms of England and Scotland, it is provided and enacted, that the commissioners to be named in pursuance of the said act should not treat of or concerning any alteration of the liturgy, rites, ceremonies, discipline, or government of the church as by law established within this realm: and whereas

(*a*) See Grub's Ecclesiastical History of Scotland, 1861; Keith's Historical Catalogue of the Scottish Bishops, &c., 1824.

certain commissioners appointed by her majesty in pursuance of the said act, and also other commissioners nominated by her majesty by the authority of the parliament of Scotland, have met and agreed upon a treaty of union of the said kingdoms; which treaty is now under the consideration of this present parliament: and whereas the said treaty (with some alterations therein made) is ratified and approved by act of parliament in Scotland; and the said act of ratification is, by her majesty's royal command, laid before the parliament of this kingdom: and whereas it is reasonable and necessary, that the true protestant religion professed and established by law in the church of England, and the doctrine, worship, discipline, and government thereof should be effectually and unalterably secured; be it enacted, that an act made in the thirteenth year of the reign of Queen Elizabeth, of famous memory, intituled, 'An Act for the ministers of the church to be of sound religion;' and also another act made in the thirteenth year of the reign of the late King Charles the Second, intituled, 'An Act for the uniformity of the public prayers and administration of sacraments, and other rites and ceremonies, and for establishing the form of making, ordaining and consecrating bishops, priests, and deacons in the church of England,' (other than such clauses in the said acts, or either of them, as have been repealed or altered by any subsequent act or acts of parliament) and all and singular other acts of parliament now in force for the establishment and preservation of the church of England, and the doctrine, worship, discipline, and government thereof, shall remain and be in full force for ever."

13 Eliz. c. 12.

14 Car. 2, c. 4.

"After the demise of her majesty (whom God long preserve) the sovereign next succeeding to her majesty in the royal government of the kingdom of Great Britain, and so for ever hereafter, every king or queen succeeding and coming to the royal government of the kingdom of Great Britain, at his or her coronation, shall, in the presence of all persons who shall be attending, assisting, or otherwise then and there present, take, and subscribe an oath to maintain and preserve inviolably the said settlement of the church of England, and the doctrine, worship, discipline, and government thereof, as by law established within the kingdoms of England and Ireland, the dominion of Wales, and town of Berwick-upon-Tweed, and the territories thereunto belonging."

Queen's successors to take an oath to maintain the Church of England.

"This act, and all and every the matters and things therein contained, be and shall for ever be holden and adjudged to be a fundamental and essential part of any treaty

Act to be an essential part of any treaty, &c.

of union to be concluded between the said two kingdoms; and also that this act shall be inserted in express terms in any act of parliament which shall be made for settling and ratifying any such treaty of union, and shall be therein declared to be an essential and fundamental part thereof."

Articles of Union and the Act for establishing Presbyterian Church Government, &c. ratified and confirmed.

Sect. 10. "All and every the said articles of union as ratified and approved by the said act of parliament of Scotland, as aforesaid, and hereinbefore particularly mentioned and inserted; and also the said act of parliament of Scotland for establishing the protestant religion and presbyterian church government within that kingdom, intituled, 'An Act for securing the Protestant Religion and Presbyterian Church Government,' and every clause, matter and thing in the said articles and act contained, shall be, and the said articles and act are hereby for ever ratified, approved and confirmed."

5 Ann. c. 5.

Acts for settling the Church Governments in England and Scotland, &c., declared essential parts of the Union.

Sect. 11. "The said act passed in this present session of parliament, intituled, 'An Act for securing the Church of England as by Law established,' and all and every the matters and things therein contained, and also the said act of parliament of Scotland, intituled, 'An Act for securing the Protestant Religion, and Presbyterian Church Government,' with the establishment in the said act contained, be and shall for ever be held and adjudged to be and observed as fundamental and essential conditions of the said union, and shall in all times coming be taken to be, and are hereby declared to be essential and fundamental parts of the said articles of union; and the said articles of union so as aforesaid ratified, approved and confirmed by act of parliament of Scotland, and by this present act, and the said act passed in this present session of parliament, intituled, 'An Act for securing the Church of England as by Law established,' and also the said act passed in the parliament of Scotland, intituled, 'An Act for securing the Protestant Religion, and Presbyterian Church Government,' are hereby enacted and ordained to be and continue in all times coming the complete and entire union of the two kingdoms of England and Scotland."

5 Ann. c. 5.

Episcopal Church. Statutes affecting the Episcopal Church in Scotland.

In 1711 an act was passed (*b*) "To prevent the disturbing those of the *episcopal communion* in Scotland in the exercise of their religious worship, and in the use of the liturgy of the church of England, and for repealing an act passed in the *parliament of Scotland*, intituled, 'An Act against irregular baptisms and marriages.'" This statute of the Scotch parliament was made in 1695, and framed in a spirit of persecution, similar to that which inflamed

(*b*) 10 Ann. c. 10.

the most bigoted period of the Roman church. For it inflicted perpetual imprisonment or exile on all members of the Episcopalian Church, who, being expelled from their churches, should presume to baptise a child or solemnize a marriage. The next act affecting the Episcopal Church was passed in 1718 (*c*); its object was to secure the House of Brunswick against the Pretender; it therefore prescribed an oath of allegiance to King George and of abjuration to the Pretender, to be taken by all ministers of the Episcopal Church, and it required every episcopal congregation "to pray in express words" for the king and the royal family. This act was followed by 19 Geo. 2, c. 38, and 21 Geo. 2, c. 34, passed in 1748. These statutes had the same purpose as that of George the First, namely, of securing the reigning family against political disaffection. But 21 Geo. 2 contained a clause (s. 13), which, in order to remove any doubt as to the qualification required by the former act for episcopal ministers, expressly enacted that any other letters of orders than those granted by some bishop of the *Church of England or Ireland* should be an insufficient qualification. The next act (32 Geo. 3, c. 63), relieved the members of the episcopal communion from many of the penalties and restrictions imposed upon them by former statutes, but it rendered ministers of that communion in Scotland incapable of taking any benefice in England unless ordained by an English or Irish bishop.

3 & 4 Vict. c. 33.

In 1840 an act, 3 & 4 Vict. c. 33, very important in its bearing upon the civil status of the Episcopal Church of Scotland, was passed.

This act, as regards Scotland, has since been repealed by the following statute, which contains the existing law:—

27 & 28 Vict. c. 94.

In 1864, 27 & 28 Vict. c. 94 was passed, entitled "An Act to remove disabilities affecting the bishops and clergy of the Protestant Episcopal Church in Scotland." It recited 32 Geo. 3, c. 63; 3 & 4 Vict. c. 33, and 59 Geo. 3, c. 60 (*d*), and proceeded to state as follows:—"And whereas doubts may arise after the passing of this act whether the provisions of the said last-recited act would apply to persons admitted into holy orders by bishops of the Protestant Episcopal Church in Scotland, and it is expedient that such doubts should be removed;" and then enacted as follows:—

Sect. 9 of 32 Geo. 3, c. 63, repealed.

Sect. 1. "The said ninth section of the said first-recited act is hereby repealed."

Definition of "Protestant

Sect. 2. "The words 'Protestant Episcopal Church in Scotland' shall, for the purposes of this act, mean the

(*c*) 1 Geo. 1, c. 29.

(*d*) *Vide infra*. Part X., Chap. VI., pp. 2276, 2282.

Episcopal Church in Scotland."

episcopal communion in Scotland as mentioned in the said first-recited act."

3 & 4 Vict. c. 33, in part repealed.

Sect. 3. "The said second-recited act, so far only as it relates to the Protestant Episcopal Church in Scotland, or the bishops and clergy thereof, is hereby repealed."

As to application of provisions of 59 Geo. 3, c. 60.

Sect. 4. "The provisions and enactments of the said last-recited act shall not be or be held to be applicable to any person admitted into holy orders by a bishop of the Protestant Episcopal Church in Scotland."

Persons admitted into holy orders by bishops in Scotland not to be admitted to benefices, &c. in England or Ireland without consent of bishop of the diocese.

Sect. 5. "No person admitted into holy orders by any bishop of the Protestant Episcopal Church in Scotland shall be entitled to be admitted or instituted to any benefice or other ecclesiastical preferment in England or Ireland, without the consent and approbation of the bishop of the diocese in which such benefice or other ecclesiastical preferment may be situated; and any such bishop shall be entitled to refuse such consent and approbation without assigning reason for such refusal, any law or practice to the contrary notwithstanding; and every such person seeking to be admitted or instituted to such benefice or other ecclesiastical preferment, or to be licensed to any curacy, shall, before being admitted, instituted, or licensed, make and subscribe before such bishop every such declaration and subscription as he would by law have been required to make and subscribe at his ordination if he had been ordained by a bishop of the united Church of England and Ireland: Provided always, that the provisions of this section shall not apply to any such person who shall hold or shall have held any benefice or ecclesiastical preferment in England or Ireland."

Penalty on such persons officiating in certain cases without consent of bishop.

Sect. 6. "Any person admitted into holy orders by any bishop of the Protestant Episcopal Church in Scotland, and who does not hold or who has not held any benefice or ecclesiastical preferment in England or Ireland, who shall knowingly officiate on more than one day within three months in any church or chapel in any diocese in England or Ireland, without notifying the same to the bishop of the diocese in which such church or chapel is situate, or who shall officiate contrary to any injunction of the bishop of the diocese under his hand and seal, shall for every such offence forfeit and pay the sum of ten pounds to the governor (*sic*) of Queen Anne's Bounty, to be recovered by action of debt, brought in the name of the treasurer of the said bounty, in any of her Majesty's courts of record at Westminster, or in the court of session in Scotland, at the suit of the public prosecutor, or in Ireland in any court of common law in the name of the ecclesiastical commissioners."

Discipline of the Episcopalian Church.

The history of the external discipline and government of the Church in Scotland is very concisely and perspicuously stated in the preface to the revision of their canons in 1839 (*d*).

After a brief exposition of the doctrine of apostolical succession, it proceeds as follows:—

"Such is the form, in which has been regularly handed down the ecclesiastical authority of the Episcopal Church in Scotland; a Church in itself completely constituted and organized, in respect of spiritual power and sacred ministrations, by its own bishops, priests, and deacons. In this character, being in full communion with the United Church of England and Ireland, and adopting as the standard of her faith the thirty-nine articles of religion, as received in that Church, she claims the authority which, according to the thirty-fourth of those articles, belongs to 'every particular or national church, to ordain, change, or abolish ceremonies or rites of the Church ordained only by man's authority, so that all things be done to edifying.'

"The doctrine of the Church, as founded on the authority of the Scripture, being fixed and immutable, ought to be uniformly received and adhered to, at all times and in all places. The same is to be said of its government, in all those essential parts of its constitution, which were prescribed by its adorable Head. But in the discipline, which may be adopted for furthering the purposes of ecclesiastical government, regulating the solemnities of public worship, as to time, place, and form, and restraining and rectifying the evils, occasioned by human depravity, this character of immutability is not to be looked for. The discipline of the Church is to be determined by Christian wisdom, prudence, and charity; and when any particular Church has drawn up a body of canons for its own use, regard has always been had to its peculiar situation at the time when its discipline was thus regulated. In one country, a pure Apostolic Church is found to be legally established, amply endowed, and closely incorporated with the State; while in another, forming a part of the same empire, it is only tolerated by the State, and as to all matters of spiritual concern, derives no support from the civil government.

"Such is precisely the difference of situation between the Established Church of England and Ireland (*e*), and the unestablished, the merely tolerated Episcopal Church in Scotland. In things of a purely ecclesiastical nature,

(*d*) See the Code of Canons of the Episcopal Church in Scotland, printed at Edinburgh, 1838.

(*e*) This was before the Irish Church was disestablished by 32 & 33 Vict. c. 42, in 1869.

Discipline of the Episcopalian Church.

embracing the doctrine and government of the Church, the faith peculiar to Christianity, and the mode of transmitting an apostolic episcopacy—in these respects the Reformed Episcopal Church is the same in every part of the British empire. That system of religious faith and ecclesiastical order, by which it is distinguished in every district of England and Ireland, is also its mark of distinction to the remotest corner of Scotland; and although in this country it is wholly unconnected with the State in the exercise of its spiritual authority, yet does it still depend, under God, on the civil power for peace and protection, in the enjoyment of all its rights and privileges, as a society purely spiritual, and constituted for the purpose of affording the means of grace and salvation to the members of Christ's mystical body.

"Viewing it in this light, the clergy of the Episcopal Church in Scotland declare, in the most sincere and unequivocal manner, that the ecclesiastical commission handed down to them has no relation to such secular powers and privileges as are peculiar to a national establishment; nor does it in the least interfere with the rights of the temporal estate, or the jurisdiction of the supreme civil magistrate. On the contrary, the clergy of this Church, of every rank and order, feel no hesitation in asserting and maintaining that the king's majesty, to whom they sincerely promise to bear true allegiance, is the only 'supreme governor within his dominions, whose prerogative it is to rule all estates and degrees committed to his charge by God; and to restrain, with the civil sword, the stubborn and evil doers of every denomination, clergymen as well as laymen. They further 'declare, that no foreign prince, person, prelate, state, or potentate, hath, or ought to have, any jurisdiction, power, superiority, pre-eminence, or authority, ecclesiastical or spiritual, within this realm;' and they do, from their hearts, 'abhor, detest, and abjure, as impious and heretical, that damnable doctrine and position, that princes excommunicated or deprived by the Pope, or any authority of the see of Rome, may be deposed or murdered by their subjects, or any other whatsoever.'

"Such are the solemn acknowledgments of the king's sovereignty required from candidates for holy orders in the United Church of England and Ireland. A similar obligation, as extended to all ecclesiastical persons, was enforced in a code of canons intended for the Established Church of Scotland in the reign of Charles the First. But the attempt to introduce a proper system of discipline, conjoined to the uniform use of a Liturgy, was completely frustrated by the events of that disastrous period; and the

troublesome state of affairs in the two succeeding reigns was equally unfavourable to the establishment of order and unity in the Church. The Revolution in 1688 set aside the legally established episcopacy of Scotland; and for several years after the shock which our Church received by the termination of that national struggle, the bishops had enough to do in keeping up a pure episcopal succession, till it should be seen what, in the course of Providence, might be further effected towards the preservation, though not of an Established, yet of a purely primitive Episcopal Church, in this part of the kingdom. For this purpose a few canons were drawn up, and sanctioned by the bishops, in the year 1743, which, though very well calculated to answer the purposes intended by them, while the Church was under legal restraint and threatened with persecution, have yet left room for considerable enlargement, and require to have embodied with them, or added to them, several regulations suited to the now happily tolerated and protected state of the Episcopal Church in this country.

"In accomplishing this good work, some aid might be expected from the canons appointed for the Church of England in the year 1603, for the Church of Ireland in 1634, and for the Church of Scotland in 1636. For the purpose of collecting from these and other sources a system of ecclesiastical discipline proper for the Church under their episcopal charge, the Protestant bishops in Scotland came to the resolution of holding a general ecclesiastical synod; and being duly convocated by the primus, did accordingly meet at Aberdeen, on Wednesday, the 19th day of June, in the year of our Lord 1811, together with the deans of their several dioceses, and a representative of the clergy from each diocese containing more than four presbyters, when a code of canons for preserving and regulating order and discipline in the Protestant Episcopal Church in Scotland was adopted and sanctioned. A second general synod met at Laurencekirk, in the county of Kincardine, on Wednesday, the 18th day of June, 1828, when the canons of 1811 were revised and altered. A third was held in Edinburgh, on Wednesday, 17th of June, 1829, when some enactments in the sixteenth canon of 1828 were repealed. A very general desire being expressed throughout the Church, especially in the year 1837, that a further revision of the whole code should be made, another general synod was in consequence duly summoned, and met accordingly in Edinburgh, on Wednesday, the 29th August, 1838, and being then and there duly and solemnly constituted with prayer, after full deliberation and

Discipline of the Episcopalian Church.

discussion during several successive days, the synod so assembled and constituted did, and hereby do, adopt and sanction the following revised and amended code of canons, and declare them to be in future the stated rules and regulations for preserving order and discipline in the said Church in Scotland. In testimony whereof, we, the members of the said synod, have hereunto annexed our names and designations in the register-book of the Episcopal College, and we have, moreover, entrusted to a committee in Edinburgh the duty of causing the revised and amended canons now approved and sanctioned to be faithfully inserted in the foresaid register, and together with this introduction, to be carefully printed for the general use of the Church. For these purposes, an authentic copy, verified by the primus, the clerk of the Episcopal College, and by the prolocutor of the second chamber, in the presence of the synod, has been given to the committee, which they are required to preserve when these purposes are attained, along with the register-book aforesaid; committing the custody thereof to the clerk of the Episcopal College, whose duty it is to preserve the said register, and the general records of the Church."

Primus of the Episcopalian Church.

Before the distinction of archbishop was introduced into Scotland, one of the bishops had a precedency under the title of *Primus Scotorum Episcopus;* and the Synod of 1838, in compliance with the practice of the Episcopal College for the last century, decreed that the bishops should choose a *primus* without respect to seniority of consecration or precedency of diocese, who should enjoy no other privilege among the bishops but the right, under particular restrictions, "of convocating" and presiding. But he is empowered, with the advice and consent of his colleagues, to determine any case relating to discipline in a vacant diocese, and to provide for the performance of any episcopal office that may be necessary. To the *primus* also the decease of every bishop must be notified by the dean of the diocese. This dean is chosen from the presbyters, and his appointment is imperative on every bishop. The synod consists of two chambers: the first, of the bishops only; the second, of the deans and a representative of the clergy elected by each diocese. There are six sees.—1. Edinburgh. 2. St. Andrews, Dunkeld and Dunblane. 3. Aberdeen. 4. Argyle and The Isles. 5. Brechin. 6. Glasgow and Galloway. 7. Moray and Ross (*f*).

(*f*) The case of *Forbes* v. *Eden*, L. R., 1 Sc. & Div. 568, will be mentioned hereafter.

In the year 1863, Dr. Trower, a priest by ordination of an English bishop, a bishop by consecration of the Scotch bishops, was appointed by the crown to the episcopal see of Gibraltar. In this case the Archbishop of Canterbury, to whose metropolitan see the bishopric of Gibraltar is subject, gave "due and canonical mission" to the Bishop of Gibraltar so appointed by letters patent.

Bishopric of Gibraltar—Scotch Bishop.

The letters patent were as follows:—

Letters patent.

"Victoria by the grace of God of the United Kingdom of Great Britain and Ireland queen, defender of the faith, To all to whom these presents shall come greeting: Whereas, by our letters patent under the great seal of our United Kingdom of Great Britain and Ireland, bearing date the 21st day of August in the year of our Lord 1842, we did found and create a bishop's see within our town and territory of Gibraltar, and did constitute the church of the 'Holy Trinity' within our said town of Gibraltar to be the cathedral church of the said see, and did ordain that the whole town of Gibraltar should henceforth be a city and be called the 'city of Gibraltar,' and did ordain, make, constitute and declare the said city and all the territory comprised in our said possession of Gibraltar and its dependencies to be the diocese of the Bishop of Gibraltar and of his successors, and did likewise place under the spiritual and ecclesiastical jurisdiction of the said bishop and his successors and of his officers named in the said letters patent all churches, chapels and other places within our island of Malta and its dependencies which then were or might thereafter be founded, set apart or used for the service of Almighty God according to the ritual of the united Church of England and Ireland, and more especially the church founded by the pious munificence of our dearly-beloved aunt Adelaide, the queen dowager, in the city of Valetta, and did name and appoint our well-beloved George Tomlinson, doctor in divinity, to be ordained and consecrated bishop of the said see: and whereas the said George Tomlinson was duly ordained and consecrated bishop of the said see: and whereas the said George Tomlinson is now dead and the said see of Gibraltar has thereby become and now is vacant; now we, having great confidence in the learning, morals and probity of our well-beloved The Right Reverend Walter John Trower, doctor in divinity and bishop, do name and appoint him to be bishop of the said see of Gibraltar for the term of his natural life, subject nevertheless to the right of resignation in the aforesaid letters patent expressed: and do hereby signify to The

Letters patent

Most Reverend Father in God Charles Thomas by Divine Providence Archbishop of Canterbury, Primate of all England and Metropolitan, our nomination of the said Walter John Trower to be the bishop of the said see and diocese: and whereas the said Right Reverend Walter John Trower has been already duly canonically ordained and consecrated a bishop, and cannot therefore be ordained and consecrated by the Archbishop of Canterbury, we do hereby expressly declare that so much of our said letters patent as require the Bishop of Gibraltar to be consecrated and ordained by the said Archbishop of Canterbury shall be and are hereby revoked, abrogated and of none effect so far as they would or might otherwise in any way affect the appointment of the said Right Reverend Walter John Trower to the bishopric of Gibraltar: and we do require and by the faith and love whereby he is bound to us command the said Most Reverend Father in God the Lord Archbishop of Canterbury to administer to the said Right Reverend Walter John Trower the usual oaths of allegiance and supremacy and the oath of due and canonical obedience to the Archbishop of Canterbury for the time being as his metropolitan: and we do direct that after the said oaths shall have been so administered and taken the same shall be recorded in the Registry of the Court of the Vicar General together with the due and canonical mission from the said archbishop to the said Right Reverend Walter John Trower to be the bishop of the said see and diocese, and diligently to do and perform all other things appertaining to his office in this behalf with effect: and we do ordain and declare that the said Right Reverend Walter John Trower, so by us nominated and appointed, may by virtue of such nomination, appointment and mission enter into and possess the said bishop's see as bishop thereof without let or impediment from us, our heirs or successors, and in as full and ample a manner in every respect, and with the same rights, titles, powers, privileges and obligations as his predecessor enjoyed and was subject to, as upon reference to our said letters patent founding the see of Gibraltar (dated the 21st day of August, 1842) will more particularly appear: and we do by these presents give and grant to the said Right Reverend Walter John Trower, aforesaid, full power and authority to perform all the functions peculiar and appropriate to the office of bishop within the said diocese of Gibraltar. Now we do declare our pleasure to be, that all provisions whatever contained in the before-recited letters patent, so far as they relate to the said George Tomlinson and his successors,

bishops of Gibraltar, shall (except so far as they are as aforesaid revoked) apply to the said Walter John Trower so long as he shall be and remain bishop of the said diocese: And to the end that all things aforesaid may be firmly holden and done, we will and grant to the aforesaid Walter John Trower that he shall have our letters patent under our great seal of our united kingdom duly made and sealed. In witness whereof we have caused these our letters to be made patent. Witness ourself, at Westminster, the 12th day of September in the 27th year of our reign.

"By warrant under the queen's sign manual.

"C. ROMILLY."

The form of giving due and canonical mission by the archbishop was as follows:—

Mission.

"We, Charles Thomas, by divine providence Archbishop of Canterbury, primate of all England and metropolitan, in obedience to the command contained in certain letters-patent of her most gracious Majesty Victoria by the grace of God of the United Kingdom of Great Britain and Ireland queen, defender of the faith, bearing date the 12th day of September in the 27th year of her reign, appointing you the Right Reverend Walter John Trower, doctor in divinity and bishop, to be bishop of the see and diocese of Gibraltar, having duly administered to you the usual oaths of allegiance and supremacy, and also the oath of due and canonical obedience to the Archbishop of Canterbury, for the time being, as your metropolitan, and you the said right reverend the bishop having taken the oaths so as aforesaid prescribed: Now we, the archbishop aforesaid, as your metropolitan, do give you the Right Reverend Walter John Trower the bishop aforesaid due and canonical mission to be bishop of the said see and diocese of Gibraltar; and do direct the said oaths, together with the due and canonical mission from us as aforesaid, to be recorded in the registry of the court of our vicar-general.

"C. T. CANTUAR."

Notarial act.

The notarial act which recorded the proceedings is to be found in the registry of the vicar-general.

CHAPTER III.

CHURCH IN THE COLONIES.

SECT. 1.—*History of the Establishment and Organization of the Church in the Colonies.*
2.—*General Status of the Church in the Colonies.*
3.—*Church in the West Indies.*
4.—*Church in Canada and other Colonies.*

SECT. 1.—*History of the Establishment and Organization of the Church in the Colonies* (*g*).

In North America.

THE extension of the Church of England beyond the seas began in the early age of English colonization. Virginia was the first land which it reached; and Thomas Hariot, a graduate of Oxford, who, as a mathematician and astronomer, accompanied Sir W. Raleigh, in 1584, has been called the first English missionary to the New World. The charters granted by James the First to the Virginia Company were accompanied by orders for preaching the word of God according to the rites and doctrines of the Church of England, both "in the colonies and among the savages bordering upon them." At Jamestown, in Virginia, the first English church was built by the Rev. R. Hunt about 1607. Tithes, glebes and other provision for the clergy were made in Virginia by the local legislature. There it was that King William and Queen Mary erected the college which was called after them, and thither an ecclesiastical commissary, the Rev. J. Blair, was sent in their reign.

In Maryland, in 1692, the local assembly provided a legal maintenance for parochial clergymen, and the Rev. T. Bray was sent thither as Bishop Compton's commissary at that time.

(*g*) For this sketch I am, with very slight alterations, indebted to the Rev. W. T. Bullock, the present secretary of the S. P. G. See also "Historical Notices of the Missions of the Church of England in the North American Colonies previous to the Independence of the United States." Rev. E. Hawkins, London, 1845.

Early organization.

These two colonies were not, however, the only places in which clergymen of the Church of England went to minister to congregations of their fellow-countrymen in foreign parts: but there only and in some of the West Indian Islands they were found in sufficient numbers to lead to any local attempt at organization. All British subjects in foreign parts were declared by an order in council in the time of Charles I. to be under the jurisdiction of the Bishop of London as their diocesan. When the office for the ministry of baptism to adults was inserted in the Prayer Book in 1662, one of the reasons assigned in the preface for it was that it may be always useful for the baptising of natives in our plantations (*h*). The credit of the first attempt to organize effectually the Church abroad is due to Archbishop Laud, who proposed, in 1638, to send a bishop to New England; and the next to Lord Clarendon, who obtained the sanction of Charles II. to a proposal for a bishop of Virginia. These and many subsequent efforts to supply the first necessity for church organization were frustrated by the opposition of parties acting upon mixed political and religious grounds. The multiplication of ministers went on in the colonies. The merely casual supply from home was unequal to the demand. The "New England Company," as it is now called, was founded by an Act of the Long Parliament in 1649 for the propagation of the gospel in New England: an endowment was provided for it by parochial collections in England and Wales. After the Restoration it was incorporated by charter 14 Charles II. 1662-3, when Clarendon and R. Boyle were appointed among its governors. Its endowments, which are very considerable, are regulated by three decrees in Chancery (1792, 1808, 1836), and are now applicable to two objects: to promoting and propagating the Gospel of Christ among the heathen nations in what was formerly called New England (between 40° and 48° N. L.) and parts adjacent in America, and to advancing the Christian religion among Indians, Blacks and Pagans in some or one of the British plantations and colonies. The ministers supported by this Company have

(*h*) "Together with an office for the baptism of such as are of riper years; which, although not so necessary when the former book was compiled, yet by the growth of anabaptism, through the licentiousness of the late times crept in amongst us, is now become necessary, and may be always useful for the baptizing of natives in our plantations and others converted to the faith."—Preface to the Book of Common Prayer.

always been chiefly though not exclusively selected from other denominations than the Church of England.

S. P. G.

After some discussion in the Convocation of Canterbury, and without parliamentary sanction, the Society for the Propagation of the Gospel in Foreign Parts (*i*) was founded by charter from William III. in 1701. The charter constituted some ninety persons, chiefly bishops and clergymen, a body corporate, with perpetual succession, and the object for which they were appointed is thus stated in the charter:

"Wee are credibly informed, that in many of our plan-
"tacons, colonies and factories beyond the seas, belonging
"to our kingdome of England, the provision for ministers
"is very mean; and many others of our said plantacons,
"colonies and factories are wholly destitute, and unpro-
"vided of a mainteynance for ministers, and the publick
"worshipp of God; and for lack of support and maintey-
"nance for such, many of our loveing subjects doe want
"the administration of God's Word and Sacraments, and
"seem to be abandoned to atheism and infidelity; and
"alsoe for want of learned and orthodox ministers to
"instruct our said loving subjects to popish superstition
"and idolatry.

"And wee think it our duty, as much as in us lyes, to
"promote the glory of God, by the instruccon of our people
"in the Christian religion; and that it will be highly con-
"ducive to accomplishing those ends, that a sufficient
"mainteynance be provided for an orthodox clergy to live
"amongst them, and that such other provision be made,
"as may be necessary for the propagation of the gospell
"in those parts.

"And wee have been well assured, that if wee would be
"gratiously pleased to erect and settle a corporacon for
"the receiving, manageing and disposeing of the charity of
"our loveing subjects, divers persons would be induced to
"extend their charity to the uses and purposes afore-
"said" (*k*).

Besides supplying an increasing number of clergy to all the British colonies, &c., the Society for the Propaga-

(*i*) In 1840 the 3 & 4 Vict. c. 78, An Act to provide for the sale and distribution of the clergy reserves in Canada, ordered, by s. 5, that the share of the Church of England should be expended under the authority of this society. *Vide supra*, Part IX., Chap. VII., pp. 2192—2198.

(*k*) Nearly a century afterwards (in 1799) the Church Missionary Society was constituted as a purely voluntary association. The chief scenes of its operations appear to have been Africa and the East.

tion of the Gospel continued for the first eighty years of its existence, in conjunction with clergy and laity abroad and persons of distinction at home, to represent to the British government the necessity of establishing the episcopate in foreign parts. All efforts were in vain. The statute and common law of England were supposed to forbid English bishops to communicate the power and authority of their order to any person without the sanction of the crown, and that sanction was constantly withholden. At length, after the United States had severed their political connection with England, and after Bishop Seabury of Connecticut had been consecrated in 1784 by Scotch bishops, the consecration of bishops White of Pennsylvania and Provost of New York by the Archbishop of Canterbury in 1787 was permitted by an act (now repealed), 26 Geo. 3, c. 84. In the same year letters patent were issued for the erection of the see of Nova Scotia, and Dr. Charles Inglis, the first colonial bishop, was consecrated for that diocese. The second colonial diocese, Quebec, was founded in 1793.

The episcopate thus obtained in America was extended in 1814 to the East Indies under the severe restrictions of the act 53 Geo. 3, c. 155, and in 1824 to the West Indies, by act 6 Geo. 4, c. 88.

Colonial Bishoprics' Council.

Its further extension was due mainly to the Colonial Bishoprics' Council, a voluntary association constituted in 1841.

First declaration.

This council has put forth two declarations, the first in 1841, the second in 1872.

The erection and endowment by subscription of new bishoprics in the colonies, had been for some time in contemplation; when a meeting of archbishops and bishops was holden at Lambeth on the Tuesday in Whitsun week, 1841, and the following declaration was agreed to by all present:—

"We, the undersigned archbishops and bishops of the united Church of England and Ireland, contemplate with deep concern the insufficient provision which has been hitherto made for the spiritual care of the members of our national church residing in the British colonies and in distant parts of the world, especially as it regards the want of a systematic superintendence of the clergy, and the absence of those ordinances, the administration of which is committed to the episcopal order. We therefore hold it to be our duty, in compliance with the resolutions of a meeting convened by the Archbishop of Canterbury on the 27th of April last, to undertake the charge of the fund

Colonial Bishoprics' Council.

First declaration.

for the endowment of additional bishoprics in the colonies and to become responsible for its application.

"On due consideration of the relative claims of those dependencies of the empire which require our assistance, we are of opinion that the intermediate erection of bishoprics is much to be desired in the following places:—New Zealand, the British possessions in the Mediterranean, New Brunswick, Cape of Good Hope, Van Diemen's Land, and Ceylon.

"When competent provision shall have been made for the endowment of these bishoprics, regard must be had to the claims of Sierra Leone, British Guiana, South Australia, Port Phillip, Western Australia, Northern India, and Southern India.

"In the first instance, we propose that an episcopal see be established at the seat of government in New Zealand, offers having been already made which appear to obviate all difficulty as to endowment.

"Our next object will be to make a similar provision for the congregations of our own communion established in the islands of the Mediterranean, and in the countries bordering upon that sea; and it is evident that the position of Malta is such as will render it the most convenient point of communication with them, as well as with the bishops of the ancient churches of the East, to whom our church has been for centuries known only by name (*l*).

"We propose, therefore, that a see be fixed at Valetta, the residence of the English government, and that its jurisdiction extend to all the clergy of our church residing within the limits above specified. In this city, through the munificence of her Majesty the Queen Dowager, a church is in course of erection, which, when completed, will form a suitable cathedral.

"Our attention will then be directed to the countries named in the foregoing lists, without binding ourselves to the exact order therein followed, or precluding ourselves from granting assistance to any place where means may be found for the earlier endowment of a bishopric.

"In no case shall we proceed without the concurrence of her Majesty's government (*m*); and we think it expedient

(*l*) Gibraltar was ultimately fixed upon for this See.

(*m*) This provision, however proper at the time when it was made, and while the practice of issuing letters patent by the crown, now discontinued, was still in force, has been rendered unnecessary by the subsequent unforeseen decision of the Privy Council, hereinafter adverted to. Moreover the churches in Jamaica and Ireland have both been disestablished by statute since this statement.

to appoint a standing committee, consisting of the Archbishop of Canterbury, the Archbishop of York, the Archbishop of Armagh, the Archbishop of Dublin, the Bishop of London, the Bishop of Durham, the Bishop of Winchester, the Bishop of Lincoln, and the Bishop of Rochester, with full powers to confer with the ministers of the crown, and to arrange measures, in concert with them, for the erection of bishoprics in the places above enumerated."

(Then follow the names of the bishops.)

Second declaration.

The second declaration of the council was issued from Lambeth Palace in July, 1872. It was as follows:—

" The first declaration of the archbishops and bishops to whose management the Colonial Bishoprics' Fund is committed was set forth in 1841. It was subscribed with the names of four archbishops and thirty-nine bishops; and it proposed the erection of bishoprics in New Zealand, the British possessions in the Mediterranean, New Brunswick, Cape of Good Hope, Van Diemen's Land, Ceylon, Sierra Leone, Guiana, South Australia, Port Phillip, West Australia, North India, and South India. In thirty-one years which have elapsed since then, the council have received and administered a capital sum of 237,893*l.*, which, with the liberality it has stirred up in others, has provided for the endowment or expenses of the bishops of thirty new sees. All the places above-mentioned, with the great exception of North and South India, became, within sixteen years from the date of the declaration, the seats of new bishoprics.

" In again appealing to the liberality of the church, we point to the work already done, and to the manifest blessing from Almighty God which has rested upon it. Mainly through the aid of the fund, struggling missions have grown into fully-organized branches of the church, breaking forth from the English stem, and promising to spread throughout the heathen world the primitive doctrine and discipline maintained by the Mother Church.

" Still the vast needs of the unconverted countries which God's providence has connected with Great Britain call for fresh efforts. To name but the most pressing—

" *North America.*—The enormous diocese of Rupertsland, stretching from Labrador to the Rocky Mountains, over a surface of 2,700,000 square miles, urgently requires division. The Pacific Railway is now attracting multitudes of emigrants into the fertile south-west of Rupertsland, and a new diocese of (1) *Saskatchewan* should be established for their spiritual benefit. The missions among

Colonial Bishoprics' Council.

Second declaration.

the Indians have now become so extensive and remote, that they ought to be superintended by two new bishops, to whom the districts of (2) *Moose* and (3) *Athabasca*, or Mackenzie River, could be assigned; the Church Missionary Society is willing to have two of its missionaries consecrated, and to allow them, for the present, suitable stipends.

"The Bishop of Columbia long ago proposed a division of his diocese, which now includes a part of the continent as well as Vancouver's and Queen Charlotte's Islands; and a small fund has been collected towards an endowment for a diocese of (4) *New Westminster.*

"*West Indies.*—The disendowment of the West Indian Church renders it desirable in the lifetime of the present bishops to collect an endowment fund for each diocese, excepting any which may perhaps be endowed by the local legislatures. The old dioceses are (5) *Jamaica,* (6) *Barbados,* (7) *Antigua,* (8) *Nassau,* and (9) *Guiana,* and to these must be added the new diocese of (10) *Trinidad,* and possibly (11) *Honduras.* Some grants in aid, in proportion to the need of each case, should be given to encourage these dioceses to provide endowments for their bishops. The case of the diocese of Jamaica is distinguished by the fact that the Bishop of Kingston, by whom it is now administered, has lost his episcopal income of 1,200*l.* since the death of the Bishop of Jamaica.

"*Africa.*—The missionary bishopric of the (12) *Niger Territory* has no endowment. The Church Missionary Society has hitherto supported Bishop Crowther, whose ministrations are carried on in the region adjoining the colony of Lagos, including the Niger and its tributary the Bonny.

"A bishopric in connection with the West Indian Mission to West Africa was long ago projected. If this is to be effected, the (13) *Isle de Los,* now a station of the Society for the Propagation of the Gospel, would form a healthy and convenient site for a bishopric.

"A small endowment has already been provided for the archdeaconry of (14) *George,* in the hope that it will be separated at no distant time from the diocese of Capetown and constituted a separate bishopric. This is indeed an urgent claim. The Bishop of Capetown has expressed, to those to whom he has spoken in confidence, his conviction that, unless some such effectual aid is afforded him, he must ere long sink under his labours (*n*).

(*n*) He has so sunk and is dead.

" The extensive missionary diocese of (15) *Bloemfontein*, which is now burdened with the additional care of the African Diamond Fields, requires help to complete its endowment. The bishop is at present entirely supported by an annual grant from the Society for the Propagation of the Gospel, and the people of the Orange River Territory are trying to collect part of an endowment.

" In the (16) *Transvaal* Republic, there are not only multitudes of unconverted Baralongs and Matabele, but also a large number of English residents in the towns and settlements for whom a bishop is required.

" The large district of (17) *Kaffraria* and (18) *Alfredia*, between the dioceses of Grahamstown and Natal, will at no distant time afford a field for two bishops: the support of one would be undertaken by the Scottish Episcopal Church.

" An endowment for at least one missionary bishop in (19) *Madagascar* should be at once provided.

" *Asia.*—The diocese of Calcutta (72,000,000 population) still remains under one bishop. (20) *Lahore* or *Agra*, (21) *Burmah*, British or Independent, and (22) *Singapore* in the Straits, now a separate colony, have been suggested by local authorities as the sees of future bishops. (23) *Tinnevelly*, with its 40,000 native christians, 18,000 catechumens, and 80 native clergy, distant 330 miles from Madras, was long ago pointed out as needing a resident bishop. These, and other cases in India which are most urgent, might be the object of a general collection for Indian bishoprics, to be applied by the Colonial Bishoprics' Council as opportunities are afforded in that vast heathen dependency and the missionary districts near it.

" The Church Missionary Society has expressed its readiness to pay, for the present, the salary of an additional bishop in (24) *China*, and steps have been taken with a view to an appointment. Ultimately his salary should be provided for by a permanent endowment.

" *Australasia.*—The endowment of a new bishopric in (25) *North Australia* has already been commenced. A division of the large diocese of Melbourne by making (26) *Ballarat* the site of a new bishopric has been proposed, and it seems to be called for both for the relief of the overburdened bishop and by the increasing population of the colony. The diocese of (27) *Honolulu* is without endowment, and it is desirable that some assistance towards it should be given from this country, which has supplied Hawaii with its first two bishops.

Colonial Bishoprics' Council.

Second declaration.

"Of the above twenty-seven bishoprics, eight are already in existence and nineteen are new. It is not proposed by the council that the entire endowment of these sees should be raised in England, but that the christians in each country (specially those which are already under a colonial bishop), and the merchants who derive wealth from thence, should unite according to their ability with the Colonial Bishoprics' Council, with the Church Societies, and others in England, in providing the necessary funds.

"Such is but a portion of the work now before us. Will the Church of England, in the sight of these needs, and in gratitude to God for the unequalled mercies it has itself received, enable us to undertake the discharge of so urgent and so blessed a duty as to plant the church in its integrity in those wide districts? We appeal to it earnestly to grant us the funds we require. Never was it more true, never perhaps was it more needful to repeat the truth: '*The Harvest truly is plenteous, but the labourers are few.*'"

(Here follow the signatures of most of the English and Irish prelates).

Organization and synods.

The establishment of bishops in the colonies was not the only step required for the organization of a Church whose members, scattered over forty colonies, are ministered to by more than 2,000 clergymen. Diocesan and provincial synods became a matter of necessity to insure harmonious action, and these were constituted in the course of a few years by independent and almost simultaneous efforts in America, Australia, New Zealand and Africa. Only the most important of these efforts can be recorded here.

In America.

The clergy and laity present at the triennial visitation of the diocese of Toronto in 1851, determined that it was expedient and desirable to apply to the crown for the establishment of a diocesan synod or convocation, consisting of the laity as well as the clergy. And at the next triennial visitation, in 1853, it was resolved that this meeting, composed of the bishop, clergy and lay representatives, are the diocesan synod of this diocese. On their petition an act (19 & 20 Vict. c. 21, Canadian) was passed in Canada in June, 1856, and assented to by her Majesty in May, 1857, to enable members of the united Church of England and Ireland in Canada to meet in synod, both in their several dioceses, and in general assembly. This act was afterwards explained by 22 Vict. c. 139, Canadian.

The act which incorporates the Diocesan Church Society is 7 Vict. c. 28, Canadian.

The synod of the united Church of England and Ireland in the diocese of Toronto consists of the bishop, the priests and deacons licensed by the bishop, or holding office in any college or school under his jurisdiction, and not under ecclesiastical censure; and lay representatives, not more than three from each parish. The representatives must be male communicants of at least one year's standing, elected annually by the laymen of twenty-one years of age and upwards within the parish, who have declared themselves in writing in a book to be members of the united Church of England and Ireland, and to belong to no other religious denomination. The synod meets annually. No act is valid without the concurrence of the bishop and of the majority both of the clergy and the laity present; and when a division takes place, the lay representatives vote by parishes, the majority being considered as the vote of the parish.

The provincial synod of the united Church of England and Ireland in Canada held its first meeting on 10th September, 1861. It consists of the bishops having sees or assisting within the province, and of delegates chosen from the clergy and laity, twelve of each order from each diocese. The bishops deliberate in one house, the delegates in another. The second Wednesday of September in every third year is the ordinary time of meeting; and a majority of the bishops, with one-fourth of the clerical and one-fourth of the lay delegates, constitutes a quorum. The metropolitan presides in the upper house, and an elected prolocutor in the lower. No proposition is valid until it has received the separate sanction of both houses, which must be declared by the president in writing. Among its canons are some on the nomination and election of a metropolitan, on his powers, on the constitution of his court of appeal, on the trial of a bishop, on the submission of clergy to the canons of the provincial and diocesan synods, &c.

In Australia.

On October 1st, 1850, Bishop Broughton of Sydney, with his suffragan bishops of New Zealand, Tasmania, Adelaide, Melbourne, and Newcastle, held a memorable conference at Sydney, and published their decisions and opinions on various doctrinal and ecclesiastical matters in a report. They stated the necessity for duly constituted provincial and diocesan synods composed of bishops and clergy, and meeting simultaneously with provincial and diocesan con-

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ventions composed of elected laymen: and they organized the Australian Board of Missions.

In April, 1866, at a conference holden in Sydney, certain constitutions were agreed to for the management of the united Church of England and Ireland in the colony of New South Wales. Synods are to be holden annually in each diocese under the presidency of its bishop, who does not vote. The number of lay representatives must not exceed in Sydney and Goulburn thrice, and in Newcastle twice, the number of clergy summoned. One-fourth of the members of each order constitute a quorum. Votes are not taken by orders unless desired in Sydney and Goulburn by five members, or in Newcastle by the bishop or five members. If the bishop withholds his assent to any ordinance, it may be referred for determination to a provincial synod. In Sydney and Goulburn all clergymen licensed to a separate cure of souls, and in Newcastle all licensed clergymen, are summoned to the diocesan synod. Representatives are elected in each separate cure of souls by the male occupiers of seats who are twenty-one years old or more, and declare themselves in writing to be members of the united Church of England and Ireland. The representatives in Sydney and Goulburn must be male communicants of full age; two from each cure, unless more than fifty qualified electors meet, when there may be three; and in Sydney a clergyman not licensed to a separate cure may be chosen a representative; in Newcastle, the representatives must be lay communicants of full age, one from each cure, unless more than thirty qualified electors meet, when they may choose two. A colonial or provincial synod of the united Church of England and Ireland within the colony shall be holden once in every three years under the presidency of the metropolitan bishop of Sydney; there shall be two houses, viz. of bishops and diocesan representatives: in the latter house the voting is by dioceses, three clerical and three lay representatives being a quorum for each diocese. The colonial synod by its decisions binds all members of the Church within the colony. No synod shall make any alteration in the articles, liturgy, or formularies of the Church, except in conformity with any alteration made by competent authority of the Church in the United Kingdom. All ordinances passed by any synod are to be sent to the Archbishop of Canterbury.

An act afterwards passed the colonial legislature giving binding force to the synodal constitutions in connexion with the holding of property.

The first diocesan conference in Melbourne was holden in 1851; and some unsuccessful attempts were made to carry a bill through the local legislature. After a second diocesan conference in 1854, the legislature passed an act to enable the bishops, clergy and laity of the united Church of England and Ireland in Victoria to provide for the regulation of the affairs of the said Church. The royal assent was given to this act in 1856. It enacts that it shall be lawful for any bishop of the united Church of England and Ireland in Victoria to convene an assembly of the licensed clergy and the laity of the Church in his diocese. Their regulations bind only the bishop, clergy and laity of the Church, and are not valid without the concurrence of the three orders voting separately. The assembly may establish a commission for the trial of ecclesiastical offences. The right of appeal to the Queen in council, to the Archbishop of Canterbury, and to the metropolitan, is preserved. One or more (not exceeding four) lay representatives are elected in each cure of souls by the laymen therein, who are of the age of twenty-one years, and have declared in writing that they are members of the united Church of England and Ireland, and belong to no other religious denomination. The representatives (one for every fifty electors) must be communicants of at least a year's standing. Regulations passed by the assembly must be sent to the Archbishop of Canterbury, to the metropolitan, and to the Queen, and may be disallowed by her Majesty. So soon as a province shall have been constituted in Victoria, it may convene the bishops thereof, and require them to convene representatives of their diocesan assemblies to meet in provincial assembly.

On October 9th, 1855, the bishop, clergy and lay representatives of the diocese of Adelaide in synod assembled, signed and sealed certain fundamental provisions and regulations for the government of that diocesan church, which were declared to be a consensual compact between the subscribing parties. The diocese is declared to be a part of the united Church of England and Ireland, and to maintain the doctrine and sacraments of Christ as that Church receives them, together with the Book of Common Prayer. The synod consists of the bishop, licensed clergy (deacons having no vote), and synodsmen (four for each city church, and two for each country church) being in full communion, and elected annually, in the respective congregations, by the stated attendants at the church who have signed a declaration that they are members of the united Church of England and Ireland, and belong to no other religious

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denomination. The synod meets annually in Adelaide under the presidency of the bishop. Clergy and synodsmen speak and vote on equal terms. A fourth of the whole body is a quorum. All questions respecting the appropriation of the funds are decided by a majority of the synod not voting by orders. No fundamental provisions can be altered without the consent of the bishop, and at least two-thirds of the clergy and synodsmen present, respectively voting by orders.

In New Zealand.

On June 15th, 1857, the bishops and certain clergy and laity representing a numerous body of the members of the united Church of England and Ireland in New Zealand met at Auckland and agreed to a constitution, associating themselves together by voluntary compact as a branch of the said Church. The fundamental provisions declare entire agreement in doctrine with the Church of England, and ordain a general synod of the branch of the united Church of England and Ireland in the colony of New Zealand, which shall consist of three orders, bishops, clergy and laity, the consent of all which orders is necessary to all binding acts. The general synod meets every third year, each diocese being entitled to an equal number of clerical representatives and an equal number of lay representatives (communicants of full age). This synod is entrusted with power to declare persons incompetent to take part in a general or diocesan synod, power to determine how and by whom patronage shall be exercised, to frame regulations for the management of the property holden in trust for the synod, and to depose from his appointment any person receiving income out of such trust property, power to establish tribunals for doctrine and discipline, and to associate with itself missionary dioceses in the islands of the Pacific. The diocesan synods must be similar in constitution to the general synod, and persons aggrieved by them may appeal to it, and it may alter or supersede any regulation of a diocesan synod. The nomination of a bishop is made by a diocesan synod, and sanctioned by the general synod, subject to his declaring in writing his assent to this constitution. Every clergyman, trustee and catechist under the authority of the general synod, must sign a declaration of his submission to its authority, and consent to resign his appointments and emoluments whenever called upon by the general synod to do so. The Trusts Act passed the New Zealand parliament in 1858.

The first provincial synod of New Zealand was holden at

Wellington in March, 1859; the first diocesan synod of New Zealand at Auckland in 1860.

In Africa.

In 1857, on January 21st and following days, the Church of the diocese of Capetown in synod assembled agreed upon certain constitutions and acts. In a preliminary declaration of principles they declared themselves in union and full communion with the united Church of England and Ireland,—an integral portion of that Church; also that they received the authorized version of the Bible and the Book of Common Prayer, and maintained the doctrine and sacraments of Christ as the Church of England receives them. They disclaimed the right to alter the standards of faith and doctrine, the formularies in use in the Church. The synod consists of the bishop, the clergy inducted or licensed by the bishop (deacons having no vote), and lay delegates, one (except in the case of the cathedral church, which may send two) from each parish, chapelry or separate congregation, elected after notice has been given of the meeting of the synod; the delegates must be of the full age of twenty-one years, and on the list of communicants for the twelve months preceding the election. Every adult male parishioner is entitled to vote at that election if he be on the list of communicants or have signed a declaration that he is a member of the church of the diocese of Capetown in union and full communion with the united Church of England and Ireland, and belongs to no other religious body. The clergy and delegates ordinarily sit and vote as one body; but any member may demand a vote by orders. A quorum consists of not less than one-fourth of the qualified presbyters of the diocese, and one-fourth of the elected delegates. The synod meets at intervals of not less than two and not more than four years.

In the event of a provincial assembly being convened, the diocese of Capetown is to be represented by four clergy and four lay delegates of the synod, elected by the synod: a deacon-representative may be elected by the deacons. A conference of the bishops of the province was holden on 26th December, 1860, at Capetown.

In February, 1870, the Church of the province of South Africa, otherwise known as the Church of England in those parts, met by representation as a provincial synod in Capetown. They agreed upon a constitution in twenty-four articles and upon twenty-seven canons, and passed twenty resolutions. The synod consists of the bishops of five dioceses, one clerical representative for every ten (or fraction of ten) clergymen in each diocese, and the

same number of lay representatives as clerical. Lay representatives must be communicants of at least twenty-one years old. The next ordinary meeting of the synod is fixed for January, 1875.

Provinces and dioceses.

The present organization of the Church in foreign parts consists of five provinces, viz., Canada, Australia, New Zealand, South Africa, and Calcutta under metropolitans; and fifty-three dioceses, viz., Montreal, Quebec, Toronto, Huron, Ontario, Fredericton, Nova Scotia, Newfoundland, Rupertsland, Columbia* +, Jamaica +, Nassau +, Barbados* +, Trinidad +, Antigua* +, Guiana +, Falkland Islands* +, Sierra Leone +, Niger Territory +, Capetown, Grahamstown, Natal, Zululand*, St. Helena, Bloemfontein*, Central Africa*, Mauritius +, Jerusalem* +, Calcutta* +, Madras* +, Bombay* +, Colombo +, Victoria* +, Labuan +, Sydney, Goulburn, Newcastle, Grafton and Armidale, Bathurst, Brisbane, Melbourne, Adelaide, Perth, Tasmania, Christchurch, Auckland, Wellington, Nelson, Waiapa, Dunedin, Melanesia*, Honolulu +, Gibraltar* +.

The dioceses marked with an asterisk (*) have no diocesan synod; those marked with a cross (+) no provincial synod. It will be seen that one important group, the West Indian dioceses, have (in 1872) no metropolitan, no provincial synod, and, in the case of two dioceses, no diocesan synod. Another—the province of Calcutta—has no provincial synod, and, except in the cases of Colombo and Labuan, no diocesan synod.

SECT. 2.—*General Status of the Church in the Colonies.*

The question as to the legal *status* of the Church in the colonies has undergone much discussion during the last quarter of a century. It is unnecessary here to consider whether the different steps of legal reasoning which have led to the conclusions which I am about to state were consistently and wisely taken or not.

Classification of colonies.

The colonies of the crown admit relatively to the present purpose of this classification, viz.:—

1. Colonies which have a parliamentary representation.
2. Colonies which have not, usually called crown colonies.

Decisions on this subject.

A series of comparatively recent judgments, chiefly

those of the privy council, must be consulted upon this subject; from them the following extracts are taken:—

Re Bishop of Natal.

The privy council, in 1864, said (*m*):—"We therefore arrive at the conclusion, that although in a crown colony, properly so called, or in cases where the letters patent are made in pursuance of the authority of an act of parliament (such, for example, as the act of the 6 & 7 Vict. c. 13), a bishopric may be constituted and ecclesiastical jurisdiction conferred by the sole authority of the crown, yet that the letters patent of the crown will not have any such effect or operation in a colony or settlement which is possessed of an independent legislature" . . . "let it be granted or assumed that the letters patent are sufficient in law to confer on Dr. Gray the ecclesiastical *status* of metropolitan, and to create between him and the Bishops of Natal and Graham's Town the personal relation of metropolitan and suffragan as ecclesiastics, yet it is quite clear that the crown had no power to confer any jurisdiction or coercive legal authority upon the metropolitan over the suffragan bishops, or over any other person" (*n*).

Long v. Bishop of Capetown.

In an earlier case, in 1863, the same high tribunal expressed itself as follows:—

"The Church of England, in places where there is no church established by law, is in the same situation with any other religious body,—in no better, but in no worse position; and the members may adopt, as the members of any other communion may adopt, rules for enforcing discipline within their body which will be binding on those who expressly or by implication have assented to them.

"It may be further laid down, where any religious or other lawful association has not only agreed on the terms of its union, but has also constituted a tribunal to determine whether the rules of the association have been violated by any of its members or not, and what shall be the consequence of such violation, the decision of such tribunal will be binding when it has acted within the scope of its authority, has observed such forms as the rules require, if any forms be prescribed, and, if not, has proceeded in a manner consonant with the principles of justice.

"In such cases the tribunals so constituted are not in any sense courts; they derive no authority from the crown; they have no power of their own to enforce their sentences; they must apply for that purpose to the courts established

(*m*) See "Remarks on some late Decisions respecting the Colonial Church," by M. Bernard, M.A., Oxford and London, 1866.

(*n*) *Re Bishop of Natal*, 3 Moo. P. C., N. S. 152.

by law, and such courts will give effect to their decision, as they give effect to the decisions of arbitrators, whose jurisdiction rests entirely upon the agreement of the parties.

"These are the principles upon which the courts in this country have always acted in the disputes which have arisen between members of the same religious body, not being members of the Church of England. They were laid down most distinctly and acted upon by Vice-Chancellor Shadwell and Lord Lyndhurst in the case of Dr. Warren, so much relied on at the bar, and the report of which in Mr. Grindwood's book seems to bear every mark of accuracy.

"To these principles, which are founded in good sense and justice, and established by the highest authority, we desire strictly to adhere" (*o*).

Reg. v. *Eton College.*

In the Eton College case (*p*), the Court of Queen's Bench, in 1857, then presided over by Lord Campbell, had said—

"We do not question the power of the Queen to create a bishopric in any part of her dominions except where, as in Scotland, such an exercise of prerogative is forbidden. In a newly settled colony such an exercise of prerogative is lawful; but we must bear in mind that in such a colony there is no established church, and that the ministers of religion in communion with the Church of England, with the Church of Scotland, and with the Church of Rome, in the absence of any imperial or colonial legislation on the subject, are all upon an equal footing. If, by legislative enactment, there were a fund created for the support of 'the Protestant clergy in New Zealand,' according to the opinion given by the judges in the house of lords upon the *Canada Reserves*, the Episcopalian and Presbyterian clergy in the colony would be entitled to share it in equal proportions. It has likewise been held that the crown may create an ecclesiastical Roman Catholic corporation in an English colony, as well as a Protestant bishopric."

This judgment decided that the crown had no right of nomination to a benefice vacated by the appointment of the holder of it to a bishopric in the colonies.

"There can be no doubt," the judges said, "that, on the promotion of the incumbent of a benefice in England to a bishoprick in England, the benefice is avoided, and it belongs to the Queen to present to the benefice so

(*o*) *Long* v. *Bishop of Cape Town*, 1 Moo. P. C., N. S. 461.

(*p*) *Reg.* v. *Eton College*, 8 El. & Bl. 635 (1857).

avoided. This is clearly a prerogative of the crown, whatever may have been the reason for it, and however it may have been acquired. It rests upon uniform usage, and is supported by so many dicta of our text writers, and decisions of our courts of justice, that it cannot now for a moment be questioned.

"The prerogative is stated likewise to extend to the bishopric of Sodor and Man, not within the realm of England, although held under the crown of England, that see having been immemorially a see of the Church of England, anciently attached to the province of Canterbury, and more recently to the province of York.

"Whether the prerogative likewise extends to the case of an English incumbent promoted to a bishopric in Ireland has been considered a question of grave doubt."

The privy council having decided that the metropolitan Bishop of Capetown had no coercive jurisdiction over the Bishop of Natal, and, therefore, that deprivation of that prelate by him was civilly null and void, another form of the question came, in 1866, before the Master of the Rolls, which may be stated as follows:—

Bishop of Natal v. Gladstone.

"Funds were subscribed and vested in trustees in England for the creation and endowment of a bishop of the united Church of England and Ireland in Natal—a colony having an independent legislature,—and the crown, on the application of the trustees, appointed the plaintiff bishop of the see or diocese of Natal by letters patent, purporting to give him coercive jurisdiction over his clergy, and to make him subject to the Bishop of Capetown as his metropolitan. The plaintiff was consecrated in 1853. A suit was instituted by the plaintiff to obtain payment of the income of the endowment. The trustees alleged by their answer that the effect of the judgment of the judicial committee in *Re Bishop of Natal* (*q*) was that, inasmuch as no coercive jurisdiction could be given to a bishop in a colony possessed of an independent legislature, the letters patent had failed to create a legal see or diocese, and thus the objects of the subscribers had *failed*." Upon this state of facts it was, in substance, decided: "That the plaintiff retained his legal *status* as Bishop of Natal, notwithstanding the said judgment; that though the letters patent had failed to confer upon him any effective coercive jurisdiction over his clergy, he could still enforce obedience by having recourse to the civil courts; and that, as no allegation was raised in the pleadings against the plain-

(*q*) 3 Moo., P. C., N. S. 152.

tiff's character or doctrine, he was entitled to the income of the endowment" (q).

This case again came before the privy council on the following facts:—

Bishop of Capetown v. Bishop of Natal.

In 1850 a grant was made in the name and on behalf of her Majesty of a piece of land in the town of Pietermaritzburg and district of Natal in the colony to the appellant, the Bishop of Cape Town, and his successors, in trust for the English Church. In October, 1853, the appellant, in pursuance of the power given him in his letters patent, resigned the office and dignity of Bishop of Cape Town. In November, 1853, letters patent were issued for erecting the district of Natal into a separate see or diocese, subject and subordinate with the see of Graham's Town, thereby also created a separate see, to the metropolitan see of Cape Town; and the respondent was appointed Bishop of Natal. The respondent was, as in the original letters patent creating the appellant Bishop of Cape Town, constituted a corporation sole, with the like power to hold and enjoy lands; and the church then building on the ground granted in 1850 was declared to be thenceforth the cathedral church and see of the respondent as such Bishop of Natal. Soon after the respondent's consecration, the appellant appointed him by power of attorney to act as trustee of certain lands and churches in the colony and see of Natal, including the land and cathedral church thereon in the city of Pietermaritzburg, granted in 1850, and which had then been entered on the colonial register in the name of the appellant. In 1864 the appellant revoked this power of attorney. In consequence of this and other proceedings taken at the instance of the appellant to prevent the respondent from having the free use of the cathedral church at Pietermaritzburg, the respondent brought an action of ejectment against the appellant for possession of the land and church, claiming nominal damages, and for the substitution of his own for the appellant's name as trustee thereof. The supreme court gave judgment in favour of the respondent, and decreed the land and the buildings thereon to stand vested in the respondent and his successors as bishops of Natal.

On appeal, the judicial committee held, first, that though the suit was not properly framed so as to allow the substitution of the respondent as trustee in the place of the appellant, yet that, having regard to the terms of the grant and the successive letters patent appointing the appellant

(q) *Bishop of Natal* v. *Gladstone*, L. R., 3 Eq. 1 (1866).

and respondent respectively Bishops of Cape Town and Natal, and that the respondent's patent was subsequent to the appellant's resignation, but prior to his second patent as metropolitan, the appellant had ceased on such resignation to be a trustee of the land and the cathedral church, or to have any estate or right to interfere with the respondent's free access to and use of such church; and,

Second, that it was competent to the crown at the date of the letters patent to the respondent, to "ordain and declare that the church in the city of Pietermaritzburg shall thenceforth be the cathedral church and see of the respondent and his successors, Bishops of Natal."

And the decree of the court below was varied by its being declared, that the respondent, as Bishop of Natal, should have free and uninterrupted access to the land and premises in the grant of 1850, for the purpose of enjoying and exercising all rights, privileges and immunities which had hitherto been enjoyed and exercised, or ought to be enjoyed and exercised, by the Bishop of Natal, as such bishop or otherwise, in reference to or within the cathedral thereon, and its appurtenances; and that the appellant, the Bishop of Cape Town, and his agents, be restrained from in any manner interfering with such access, enjoyment, or exercise; saving, however, to any, except the appellant, any rights in reference to the cathedral church which they also enjoyed (*r*).

Letters patent.

Since the decisions in *Long* v. *Bishop of Capetown* and *Re Bishop of Natal*, the government has discontinued the issue of letters patent to bishops in colonies possessing an independent legislation.

Ex parte Jenkins.

In 1867, the court of chancery of the Bermuda Islands made certain orders, the effect of which was to refuse an application by a clerk in holy orders for a writ *de vi laicâ removendâ*, to remove an opposition to his being inducted into a parish church in the island under a mandate from the commissary of the Bishop of Newfoundland. In explaining the reasons for refusing the writ, *de vi laicâ removendâ*, the chief justice, after stating that it was not competent to the crown to alter the constitution of the church in the colony by conferring by patent upon a bishop any coercive or judicial powers not granted by the imperial parliament or the local legislature, added, "Although the institution of a clergyman to a benefice is not an act of coercive or contentious jurisdiction, yet it is not a mere ministerial act, but is of a judicial nature."

(*r*) *Bishop of Cape Town* v. *Bishop of Natal*, 6 Moo. P. C., N. S. 203 (1869).

Ex parte Jenkins.

There was an appeal from this sentence to the privy council in 1868. The judgment of that tribunal, referring to this language of the chief justice, observed, "Strictly speaking, however, it is not so much the institution which is judicial, as the previous examination of the fitness of the clerk presented; for if the clerk be really *idonea persona*, the bishop would be bound to institute him. But whether institution is to be regarded as a judicial or a ministerial act is wholly immaterial; the question is, whether the crown has conferred an authority which was not within its competency.

"Now, it is a fact, which cannot be disputed, that for more than a century the crown possessed the power of collating to all the vacant benefices in the Bermudas by direct nomination, a power which it exercised by delegation to the successive governors, who were usually described as ordinaries in their patents, and who, to a certain extent, exercised the powers of that ecclesiastical officer. But when a bishop or ecclesiastical ordinary was duly appointed, with spiritual oversight of the church in the Bermudas, the crown, as patron, thought proper to leave to the governor the power of nominating the clerk, but recognized, by the letters patent granted to the bishop, the power of institution belonging to his office. The bishop, as has been said, is bound, if the clerk be *idonea persona*, to institute him.

"It cannot be supposed that when the crown gave a clergyman a title to a living by one act of collation, the appointment was made without previous inquiry as to his qualifications. The whole effect of the alteration of the system of conferring benefices in the Bermudas is to transfer this inquiry from the governor to the bishop.

"It seems to have been supposed, however, that the cases of *Long* v. *The Bishop of Cape Town* (*s*) and *In re The Lord Bishop of Natal* (*t*), are authorities for the proposition that the Bishop of Newfoundland has no legal *status*, and cannot lawfully exercise any episcopal function, within the Bermudas. The first case certainly does not go the length of that proposition, for it decided only that the crown cannot confer coercive authority on a bishop in a colony possessing a constitutional form of government without the consent of the legislature. The judicial committee, in deciding the case of the *Bishop of Natal*, has certainly used expressions which would restrain the power of the crown in the creation of bishops within even narrower limits.

(*s*) 1 Moo. P. C., N. S. 411. (*t*) 2 Ibid. 115.

"It has been argued that the master of the rolls, in his judgment in *The Bishop of Natal* v. *Gladstone* (*u*), has greatly qualified the effect of the former judgment of the privy council.

"Their lordships think that in the present case they are not called upon to express an opinion, whether these two decisions can be reconciled. For they are clearly of opinion that the question, whether the Bishop of Newfoundland has any lawful status, or can exercise any episcopal function, and particularly that of institution, in the Bermudas, has been set at rest conclusively by the repeated recognition of his *status* and functions by the colonial legislature. The Acts of 1843, of 1864, of 1865 and 1866, mentioned in the memorandum of the Attorney-General of the Bermudas, all recognize the legal *status* of the bishop of the diocese" (*x*).

Law as to voluntary associations.

The *status* of the Church in the colonies being thus placed for the most part on the footing of voluntary religious societies, it is important to record the careful language of the House of Lords on this subject in the case of *Forbes* v. *Eden* (*y*). In this case, which was a suit instituted in a civil court by a clergyman of the Scotch Episcopal Church, to set aside canons passed in 1863, for the purpose of cementing the union between the Scotch Episcopal Church and the Church of England and Ireland, the suit was dismissed with costs.

Lord Cranworth in this case said, "Save for the due disposal and administration of property, there is no authority in the courts either of England or of Scotland to take cognizance of the rules of a voluntary society entered into merely for the regulation of its own affairs. But if funds are settled to be disposed of amongst members of a voluntary association, according to their rules and regulations, the court must necessarily take cognizance of these rules and regulations, for the purpose of satisfying itself as to who is entitled to the funds."

And Lord Colonsay said, "A court of law will not interfere with the rules of a voluntary association, unless to protect some civil right or interest which is said to be infringed by their operation."

(*u*) L. R., 3 Eq. 1.
(*x*) *Ex parte Jenkins*, L. R., 2 P. C. 269.
(*y*) L. R., 1 Sc. & Div. 568.

SECT. 3.—*Church in the West Indies.*

Jamaica had belonged to Great Britain ever since its conquest and acquisition by Oliver Cromwell, and many of our possessions in the West Indies since the Treaty of Utrecht: it was not, however, till the 5th of July, 1825, that any provision was made by the government of this country for the proper discipline of the church then established in these colonies. 6 Geo. 4, c. 88, enacted the first provisions. Its preamble is as follows:—

6 Geo. 4, c. 88.

Letters patent appointing bishops, archdeacons and ministers for the dioceses of Jamaica;

"Whereas his Majesty, by his several royal letters patent, has been graciously pleased to direct and appoint that the island of Jamaica, the Bahama Islands, and the settlements in the bay of Honduras, and their respective dependencies, should be and become a bishopric, and the diocese and see of a bishop of the united Church of England and Ireland as established by law, to be called 'The Bishopric of Jamaica;' and that there should be one bishop of the said diocese, and that there should also be one archdeacon and seven ministers of the Gospel in and for the said diocese; and in like manner that the islands of Barbadoes, Grenada, St. Vincent's, Dominica, Antigua and Mountserrat, St. Christopher's, Nevis and the Virgin Islands, Trinidad, Tobago and St. Lucie, and their respective dependencies, should be and become a bishopric, and the diocese and see of a bishop, to be called 'The Bishopric of Barbadoes and the Leeward Islands,' and that there shall be one bishop of the said last-mentioned diocese, and that there should also be one archdeacon in and for the island of Barbadoes, and one archdeacon in and for the island of Antigua, and that there should be thirteen ministers of the Gospel and three catechists within the said last-mentioned diocese: and it is expedient that provision should be made for the payment of yearly salaries to such bishops, archdeacons, ministers and catechists respectively, and also to enable his Majesty to grant to such bishops respectively yearly pensions or annuities on their retiring from their dioceses."

and of Barbadoes and the Leeward Islands.

Extensions.

This act was amended and extended by 7 Geo. 4, c. 4, and 5 Vict. sess. 2, c. 4. But the Church in the West Indies has since, like the Church in Ireland, been disestablished, as far at least as the imperial legislature is concerned.

31 & 32 Vict. c. 120.

This was in 1868 by virtue of 31 & 32 Vict. c. 120, entitled "An Act to relieve the Consolidated Fund from the Charge of the Salaries of future Bishops, Archdeacons, Ministers and other Persons in the West Indies." This

statute, after reciting the acts above mentioned, proceeds as follows:—

Sect. 1. "No person who, after the passing of this act, shall be appointed bishop of any diocese in her Majesty's West Indian possessions, or who, after the passing of this act, shall be appointed archdeacon, minister, catechist, or schoolmaster in any such diocese, shall receive under the provisions of said acts, in respect of any such appointment, any salary or other sum whatsoever out of the growing produce of the consolidated fund of the United Kingdom; and all the powers, provisions and clauses in the said recited acts, or any of them, or in any other act contained, so far as they are inconsistent with this enactment, are hereby repealed.

No person hereafter appointed bishop, archdeacon, minister, or catechist under recited acts, or under any letters patent granted in pursuance thereof, to receive salary out of consolidated fund.

"Provided always, that nothing herein contained shall authorize any diminution during the life and incumbency of any bishop or archdeacon of any salary of which he is now in the receipt; and that every minister, catechist and schoolmaster in the said dioceses to whom at the time of the passing of this act any sum has been appropriated and made payable as aforesaid under the said act of the fifth year of the reign of her present Majesty shall continue to receive the same, but no larger sum thereunder, so long as he shall hold the appointment, and, subject to any leave of absence which may be granted to him by the officer administering the government of the colony, perform the duties in respect of which such sum was so appropriated and made payable to him, or, subject as aforesaid, so long as he shall perform within the said colony such other duties as may be imposed on him by the bishop of the diocese in addition to, or in lieu of, the duties attached to the appointment which he now holds."

Sect. 2. "In the event of a vacancy of the said see or diocese of Jamaica the present coadjutor bishop shall, so long as he administers the said diocese as such coadjutor, continue to act in the same manner as at present as archdeacon of Middlesex."

Coadjutor bishop to act as at present in case of vacancy of see of Jamaica.

The third section provides for an annual return to parliament of money paid out of the consolidated fund for ecclesiastical purposes in the West Indies.

Sect. 4.—*Church in Canada and other Colonies.*

The conquest of the province of Quebec was completed in the year 1759. The rights, privileges, lands or seig-

Roman Church in Lower Canada.

nories holden by the Roman Church previous to the conquest were secured by the articles of capitulation, and subsequently guaranteed by an act of the British parliament in 1774 (z). This act must be holden to recognize the Church of Rome as an, if not the, Established Church of Lower Canada, but in this legislative measure the Church of England was not altogether neglected, it being therein expressly provided, "That it should be lawful for his Majesty, his heirs or successors, to make such provision out of the rest of the said accustomed dues and rights, for the encouragement of the protestant religion, and for the maintenance and support of a protestant clergy, within the said province, as should, from time to time, be thought necessary and expedient."

31 Geo. 3, c. 31.

In the year 1791, in consequence of a message from the crown to the parliament, the 31 Geo. 3, c. 31, commonly called the Constitutional Act of the Canadas, was passed. This statute contained provisions for the maintenance of "a protestant clergy." It has since been repealed.

Certain king's instructions were sent to the Governor of the Canadas in 1818; but they have ceased to be legally binding on the Church. A doubt having arisen whether rectors and parsons duly instituted did not become possessed of rights in all respects similar to those enjoyed by incumbents in England, and were entitled to tithes, etc., was set at rest by an act passed in 1823 by the colonial legislature.

Claim of Presbyterians.

About thirty years after the passing of the 31 Geo. 3, c. 31, a claim was preferred by the Scotch Presbyterian clergy to a share in the provision made for the *protestant clergy* under the 36th and 42nd sections of that act. Various denominations of dissenters afterwards asserted a similar right; their claims, as well as the state of the church in Canada in 1827, were set forth in a Report of the Committee of the House of Commons.

Opinion of the judges as to the clergy reserves.

In 1840 the subject of the clergy reserves underwent frequent and vehement discussion in both houses of parliament. The House of Lords finally resolved that certain questions should be put to the judges upon this subject, as well as upon an act of the colonial legislature with respect to them; and on the 4th of May, Chief Justice Tindal stated, "that, on the part of her Majesty's judges, he had the honour to represent to their lordships that all the judges of England, with the exception of Lord Denman and Lord Abinger, had met together in Serjeants' Inn,

(z) 14 Geo. 3, c. 83.

for the purpose of taking into consideration the several questions which their lordships had been pleased to propose to them; and that, after due discussion and consideration of the several subjects involved in these questions, they had agreed unanimously to the answers to be returned to them. Their lordships' questions were as follow:—

"'1. Whether the words "a protestant clergy" in the 31 Geo. 3, c. 31, (ss. 35—42,) include any other than clergy of the Church of England, and protestant bishops and priests and deacons, who have received episcopal ordination? And if any other, what other? 2. Whether the effect of the 41st section of the 31 Geo. 3, c. 31, be not entirely prospective, giving power to the legislative council and assembly of either of the provinces of Upper or Lower Canada as to future allotments and appropriations; or whether it can be extended to affect lands which have been already allotted and appropriated under former grants? 3. Whether the legislative council and assembly of the province of Upper Canada, having in an act "to provide for the sale of the clergy reserves, and for the distribution of the proceeds thereof," enacted that it should be lawful for the governor, by and with the advice of the executive council, to sell, alienate, and convey in fee simple, all or any of the said clergy reserves; and having further enacted, in the same act, that the proceeds of all past sales of such reserves which have been or may be invested under the authority of the act of the imperial parliament passed in the seventh and eighth years of the reign of his late Majesty king George IV. intituled "An Act to authorize the Sale of part of the Clergy Reserves in the Provinces of Upper and Lower Canada" (*a*), shall be subject to such orders and directions as the governor in council shall make and establish for investing in any securities within the province of Upper Canada the amount now funded in England, together with the proceeds hereafter to be received from the sales of all or any of the said reserves, or any part thereof, did, in making such enactments, or either of them, exceed their lawful authority?'

"To the first question, the judges answered,—

"'We are all of opinion that the words "a protestant clergy" in the 31 Geo. 3, c. 31, are large enough to include, and that they do include, other clergy than the clergy of the Church of England.'

"And when their lordships asked, 'If any other, what

(*a*) 7 & 8 Geo. 4, c. 62.

other?' the judges answered, 'The clergy of the Church of Scotland.'

"To the second question, the judges said,—

"'We are all of opinion, that the effect of the 41st section of the statute is prospective only; and that the power thereby given to the legislative council and assembly of either province cannot be extended to affect lands which have been already allotted and appropriated under former grants.'

"In answer to the last question, the judges said,—

"'We all agree in opinion that the legislative council and assembly in Upper Canada have exceeded their authority in passing an act "to provide for the sale of the clergy reserves, and for the distribution of the proceeds thereof," in respect of both the enactments specified in your lordships' question; and that the sales which have been, or may be, effected in consequence, are contrary to the provisions of the statute of Geo. 1st, and are therefore void'" (*b*).

This opinion of the judges was followed by the imperial statute 3 & 4 Vict. c. 78. It was intituled "An Act to provide for the Sale of the Clergy Reserves in the Province of Canada, and for the Distribution of the Proceeds thereof." By it the reserves were sold and the Scotch Presbyterians were admitted to a share in them. The 5th section enacts thus:—

"The share allotted and appropriated to each of the said Churches shall be expended for the support and maintenance of public worship and the propagation of religious knowledge, the share of the said Church of England being so expended under the authority of the 'Society for the Propagation of the Gospel in Foreign Parts'" (*c*).

Acts of colonial legislatures.

In this chapter, the only acts which have been noticed are statutes of the imperial legislature.

There are, however, as matter of fact, many statutes framed by the local legislatures in the colonies on ecclesiastical matters; and this, it is believed, not only in colonies where the Church is or has been formally established by the imperial legislature, but also in colonies where the Church has never been so established.

Norfolk Island.

It should be noticed here, that Norfolk Island was, by a special imperial act, 6 & 7 Vict. c. 34, at one time made part of the diocese of Tasmania, this act being afterwards formally repealed by another act, 32 & 33 Vict. c. 15.

(*b*) Hans. Parl. Deb. vol. liii. pp. 1156—1158.

(*c*) *Vide supra*, p. 2192.

CHAPTER IV.

CHURCH IN THE EAST INDIES.

THE territories of British India are said to cover an area of one million one hundred thousand square miles; to contain a population of one hundred millions.

The first bishopric in these immense and daily increasing possessions was created by letters patent in 1814; and in the fifty-third year of George the Third its revenues and jurisdiction were settled by act of parliament.

53 Geo. 3, c. 155.

If a bishop and three archdeacons shall be established in India by his Majesty's letters patent, their salaries to be paid by company.

Sect. 49. "And whereas no sufficient provision hath hitherto been made for the maintenance and support of a church establishment in the British territories in the East Indies and other parts within the limits of the said company's charter, be it therefore enacted, That in case it shall please his Majesty, by his royal letters patent under the great seal of the said United Kingdom, to erect, found and constitute, one bishoprick for the whole of the said British territories in the East Indies, and parts aforesaid; one archdeaconry for the presidency of Fort William in Bengal; one archdeaconry for the presidency of Fort St. George on the coast of Coromandel; and one archdeaconry for the presidency and island of Bombay, on the coast of Malabar; and from time to time to nominate and appoint a bishop and archdeacons to such bishopric and archdeaconries respectively; the court of directors of the said company, during such time as the said territorial acquisitions shall remain in the possession of the said company, shall, and they are hereby required to direct and cause to be paid, certain established salaries to such bishop and archdeacons respectively; that is to say, from and out of the revenues of the said presidency of Fort William in Bengal to the said bishop, five thousand pounds by the year, at an exchange of two shillings for the Bengal current rupee; and to the said archdeacon of the said presidency of Fort William, two thousand pounds by the year, at the like exchange; and from and out of the revenues of the presidency of Fort St. George, on the coast of Coromandel, to the archdeacon of the said presidency of Fort St. George, two thousand pounds by the year, at an exchange of eight shillings for the pagoda at Madras; and

from and out of the revenues of the presidency and island of Bombay, on the coast of Malabar, to the archdeacon of the said presidency and island of Bombay, two thousand pounds by the year, at an exchange of two shillings and threepence for the Bombay rupee."

Salaries to commence on taking office, and to cease when functions cease.

Sect. 50. "The said salaries shall take place and commence from and after the time at which such persons as shall be appointed to the said offices respectively, shall take upon them the execution of their respective offices: and that all such salaries shall be in lieu of all fees of office, perquisites, emoluments and advantages whatsoever; and that no fees of office, perquisites, emoluments or advantages whatsoever, shall be accepted, received or taken, in any manner or on any account or pretence whatsoever, other than the salaries aforesaid, and that such bishop and archdeacons respectively shall be entitled to such salaries so long as they shall respectively exercise the functions of their several offices in the East Indies, or parts aforesaid, and no longer."

Bishop to have no jurisdiction or functions, except such as may be limited by letters patent.

Sect. 51. "Such bishop shall not have or use any jurisdiction, or exercise any episcopal functions whatsoever, either in the East Indies or elsewhere, but only such jurisdiction and functions as shall or may from time to time be limited to him by his Majesty by letters patent under the great seal of the United Kingdom" (*a*).

His Majesty may grant to bishop by letters patent such ecclesiastical jurisdiction as he may think necessary.

Sect. 52. "That it shall and may be lawful for his Majesty, from time to time, if he shall think fit, by his letters patent under the great seal of the said United Kingdom, to grant to such bishop so to be nominated and appointed as aforesaid, such ecclesiastical jurisdiction, and the exercise of such episcopal functions, within the East Indies and parts aforesaid, as his Majesty shall think necessary for the administering holy ceremonies, and for the superintendence and good government of the ministers of the church establishment within the East Indies and parts aforesaid; any law, charter or other matter or thing to the contrary notwithstanding."

Warrant for letters patent countersigned by president of board.

Sect. 53. "That when and as often it shall please his Majesty to issue any letters patent respecting any such bishopric or archdeaconry as aforesaid, or for the nomination or appointment of any person thereto, the warrant for the bill in every such case shall be countersigned by the president of the board of commissioners for the affairs of India."

(*a*) By the patent of the Bishop of Calcutta, an appeal is given from any sentence he may pronounce, by virtue of his ecclesiastical authority, to the Archbishop of Canterbury.

The 89th section allows to the bishop the sum of 1,200*l.*, and to each of the archdeacons 500*l.*, for outfit.

This act was amended by 4 Geo. 4, c. 71.

4 Geo. 4, c. 71.

Sect. 2 of this act repealed so much of the former act as related to pensions.

53 Geo. 3, c. 155, s. 54, repealed.

By sect. 3, "It shall and may be lawful for his Majesty, his heirs and successors, in manner in the said act mentioned, to grant to any such bishop who shall have exercised in the East Indies or parts aforesaid, for ten years, the office of bishop or archdeacon, and to any such archdeacon who shall have exercised in the East Indies or parts aforesaid, for ten years, the office of archdeacon, pensions not exceeding such sums respectively as his Majesty, by the said act 53 Geo. 3, c. 155, is empowered to grant to any such bishop or archdeacon."

Pensions to bishop and archdeacons.

Sect. 4. "If any person residing any time in the East Indies or parts aforesaid, as one of the chaplains of the said united company, shall have been or shall be appointed to the office of such archdeacon as aforesaid, and shall have resided in the East Indies or parts aforesaid as such archdeacon seven years, the period of residence of such person as chaplain shall be accounted and taken as and for a residence as such archdeacon, in the proportion of three years' residence as such chaplain to two years' residence as such archdeacon: Provided also, that nothing herein contained shall extend or be construed to extend to prejudice the right of any person being or having been a chaplain of the said united company, to any benefit he may be entitled to as under or by virtue of any regulation now in force or hereafter to be made by the said united company or their court of directors, nor to prejudice or affect the right of the said united company or their court of directors, to make, repeal, vary, or alter any regulation or regulations respecting the chaplains of the said united company, or the pay or allowances, pensions or retirements of such chaplains which the said united company or their court of directors may now lawfully make, repeal, vary, or alter."

Chaplains appointed archdeacons to be entitled to pension in a certain proportion.

Further provision as to chaplains.

Sect. 5. "It shall and may be lawful for the said company, and they are hereby required to provide a suitable house at Calcutta for the residence of the said bishop, and that the expense of the visitations to be made by the said bishop from time to time shall be defrayed by the said company, out of the revenues of the British territories in India: Provided always, that no greater sum on account of providing such house, or of such visitations, be at any time issued, than shall from time to time be defined and settled by the court of directors of the said company with

Residence and expense of visitations of bishop to be defrayed by company.

Proviso.

the approbation of the commissioners for the affairs of India, any law or statute to the contrary notwithstanding."

Sect. 6. "'And whereas doubts have arisen whether the Bishop of Calcutta, in conferring holy orders, is subject to the several provisions and limitations established by the laws of this realm or canons ecclesiastical, as to the titles of the persons to be ordained, and as to the oaths and subscriptions to be by such persons taken and made;' Be it further declared and enacted, That it shall and may be lawful for the Bishop of Calcutta for the time being, to admit into the holy orders of deacon and priest respectively any person whom he shall, upon examination, deem duly qualified specially for the purpose of taking upon himself the cure of souls or officiating in any spiritual capacity within the limits of the said diocese of Calcutta and residing therein; and that a declaration of such purpose, and a written engagement to perform the same, under the hand of such person, being deposited in the hands of such bishop, shall be held to be a sufficient title with a view to such ordination; and that in every such case, it shall be distinctly stated in the letters of ordination of every person so admitted to holy orders, that he has been ordained for the cure of souls within the limits of the said diocese of Calcutta only; and that unless such person shall be a British subject of or belonging to the United Kingdom of Great Britain and Ireland, he shall not be required to take and make the oaths and subscriptions which persons ordained in England are required to take and make: Provided always, that nothing herein contained shall be construed to repeal or affect the provisions of 53 Geo. 3, c. 155, or any letters patent issued by his late Majesty, or by his present Majesty, their heirs and successors, in virtue of the said act or of their lawful prerogative."

Bishop of Calcutta may admit persons to holy orders without canonical qualifications.

Proviso for 53 Geo. 3, c. 155, and for letters patent.

By 6 Geo. 4, c. 85, s. 5, when any Bishop of Calcutta dies on his voyage out to India, or within six months after his arrival, his representatives shall have a whole year's salary; and if he dies after having been six months in India, they shall have six months' salary over and above what was then due to him.

In cases of death on voyage out, &c.

After a lapse of twenty-two years since the erection of this see, two new bishoprics were created, that of Madras in 1836, and of Bombay in 1837, and fresh provisions enacted relative to the discipline of the Church in India, as will be seen by the following extracts from the voluminous statute 3 & 4 Will. 4, c. 85:—

Further bishoprics.

3 & 4 Will. 4, c. 85.

Sect. 89. "'And whereas the present diocese of the bishopric of Calcutta is of too great an extent for the in-

Respecting the inconvenient extent of the

cumbent thereof to perform efficiently all the duties of the office without endangering his health and life, and it is therefore expedient to diminish the labours of the bishop of the said diocese, and for that purpose to make provision for assigning new limits to the diocese of the said bishop, and for founding and constituting two separate and distinct bishoprics, but nevertheless the bishops thereof to be subordinate and subject to the Bishop of Calcutta for the time being, and his successors, as their metropolitan;' be it therefore enacted, That in case it shall please his Majesty to erect, found and constitute two bishoprics, one to be styled the bishopric of Madras and the other the bishopric of Bombay, and from time to time to nominate and appoint bishops to such bishoprics under the style and title of Bishops of Madras and Bombay respectively, there shall be paid from and out of the revenues of the said territories to such bishops respectively the sum of 24,000 Sicca rupees by the year."

diocese of Calcutta.

If the king erects bishoprics of Madras and Bombay, certain salaries to be paid to the bishops.

Sect. 90. "The said salaries shall commence from the time at which such persons as shall be appointed to the said office of bishop shall take upon them the execution of their respective offices; and that such salaries shall be in lieu of all fees of office, perquisites, emoluments or advantages whatsoever, and that no fees of office, perquisites, emoluments or advantages whatsoever shall be accepted, received or taken by such bishop or either of them, in any manner or on any account or pretence whatsoever, other than the salaries aforesaid; and that such bishops respectively shall be entitled to such salaries so long as they shall respectively exercise the functions of their several offices in the British territories aforesaid."

Such salaries to commence from time of taking office, and to be in lieu of all fees, &c.

Sect. 91. "The said court of directors shall and they are required to pay to the bishops so from time to time to be appointed to the said bishoprics of Madras and Bombay, in case they shall be resident in the United Kingdom at the time of their respective appointments, the sum of 500*l.* each, for the purpose of defraying the expenses of their equipments and voyage."

Passage money for each such bishop.

Sect. 92. "Such bishops shall not have or use any jurisdiction, or exercise any episcopal functions whatsoever, either in the said territories or elsewhere, but only such jurisdiction and functions as shall or may from time to time be limited to them respectively by his Majesty by his royal letters patent under the great seal of the said United Kingdom."

As to jurisdiction of such bishops.

Sect. 93. "It shall and may be lawful for his Majesty from time to time, if he shall think fit, by his royal letters-

The king empowered by

letters patent to limit jurisdiction and functions.

patent under the great seal of the said United Kingdom, to assign limits to the diocese of the bishopric of Calcutta and to the dioceses of the said bishoprics of Madras and Bombay respectively, and from time to time to alter and vary the same limits respectively, as to his Majesty shall seem fit, and to grant to such bishops respectively within the limits of their respective dioceses the exercise of episcopal functions, and of such ecclesiastical jurisdiction as his Majesty shall think necessary for the superintendence and good government of the ministers of the United Church of England and Ireland therein."

The Bishop of Calcutta to be metropolitan in India.

Sect. 94. "The bishop of Calcutta for the time being shall be deemed and taken to be the metropolitan bishop in India, and as such shall have, enjoy, and exercise all such ecclesiastical jurisdiction and episcopal functions, for the purposes aforesaid, as his Majesty shall by his royal letters patent under the great seal of the said United Kingdom think necessary to direct, subject nevertheless to the general superintendence and revision of the Archbishop of Canterbury for the time being; and that the bishops of Madras and Bombay for the time being respectively shall be subject to the bishop of Calcutta for the time being as such metropolitan, and shall, at the time of their respective appointments to such bishoprics, or at the time of their respective consecrations as bishop, take an oath of obedience to the said bishop of Calcutta in such manner as his Majesty by his said royal letters patent shall be pleased to direct."

Warrants for bills on letters patent appointing bishops.

Sect. 95. "When and as often as it shall please his Majesty to issue any letters patent respecting the bishopric of Calcutta, Madras or Bombay, or for the nomination or appointment of any person thereto respectively, the warrant for the bill in every such case shall be countersigned by the president of the board of commissioners for the affairs of India, and by no other person."

The king may grant pensions to bishops of Madras or Bombay.

Sect. 96. "It shall and may be lawful for his Majesty, his heirs and successors, by warrant under his royal sign manual, countersigned by the chancellor of the exchequer for the time being, to grant to any such bishop of Madras or Bombay respectively who shall have exercised in the British territories aforesaid for fifteen years the office of such bishop a pension not exceeding 800*l.* per annum, to be paid quarterly by the said company."

Sect. 97 makes similar provisions as to the bishops of Madras and Bombay to those made for the bishop of Calcutta by 6 Geo. 4, c. 85, s. 5.

As to residence

Sect. 98. "If it shall happen that either of the bishops

of Madras or Bombay shall be translated to the bishopric of Calcutta, the period of residence of such person as bishop of Madras or Bombay shall be accounted for and taken as a residence as bishop of Calcutta; and if any person now an archdeacon in the said territories shall be appointed bishop of Madras or Bombay, the period of his residence in India as such archdeacon shall, for all the purposes of this act, be accounted for and taken as a residence as such bishop."

of bishop of Madras or Bombay if translated to Calcutta.

Sect. 99. "If any person under the degree of a bishop shall be appointed to either of the bishoprics of Calcutta, Madras or Bombay, who at the time of such appointment shall be resident in India, then and in such case it shall and may be lawful for the Archbishop of Canterbury, when and as he shall be required so to do by his Majesty by his royal letters patent under the great seal of the said United Kingdom, to issue a commission under his hand and seal, to be directed to the two remaining bishops, authorizing and charging them to perform all such requisite ceremonies for the consecration of the person so to be appointed to the degree and office of a bishop."

As to consecration of any person under the degree of a bishop, if resident in India, appointed to a bishopric.

Sect. 100. "The expenses of visitations to be made from time to time by the said bishops of Madras and Bombay respectively shall be paid by the said company out of the revenues of the said territories; provided that no greater sum on account of such visitations be at any time issued than shall from time to time be defined and settled by the court of directors of the said company, with the approbation of the commissioners for the affairs of India."

Provision for expenses of visitations.

Sect. 101. "No archdeacon hereafter to be appointed for the archdeaconry of the presidency of Fort William in Bengal, or the archdeaconry of the presidency of Fort Saint George, or the archdeaconry of the presidency and island of Bombay, shall receive in respect of his archdeaconry any salary exceeding 3,000 sicca rupees per annum. Provided always, that the whole expense incurred in respect of the said bishops and archdeacons shall not exceed 120,000 sicca rupees per annum."

No archdeacon in India to have a salary exceeding 3,000 sicca rupees.

By 5 & 6 Vict. c. 109, the following provisions are made as to furlough allowances.

Furlough allowances.

By sect. 1, in case the crown shall grant permission to any bishop of Calcutta who has resided in India ten years, or any bishop of Madras or Bombay who has so resided fifteen years, to return to Europe for not more than eighteen months, reckoning from the departure from India, a furlough allowance not exceeding the amount

Furlough allowances.

which might be granted for a pension may, in the same manner in which a pension may be granted to the bishop of Calcutta under 53 Geo. 3, c. 155, be granted to such bishop.

By sects. 2 and 3 a second furlough allowance may be granted after five years; but not more than one bishop is to have a furlough allowance at any one time.

By sect. 4, if the crown enable the bishop of Madras or Bombay to perform the duties of the bishop of Calcutta during his absence on furlough, such bishop so performing the duties shall have an additional allowance of 10,000 company's rupees.

Power to make rules for leave of absence for bishops, and as to expenses.

By 34 & 35 Vict. c. 62, s. 1, "It shall be lawful for her Majesty to make such rules as to the leave of absence of Indian bishops on furlough or medical certificate as may seem to her expedient: Provided that no farther expenditure of the revenues of India be incurred thereby than is already authorized under existing acts of parliament; and provided also, that the provisions of existing acts of parliament are not interfered with by such rules so far as regards the present bishop of Calcutta."

Development of Indian episcopate.

These three bishoprics only are, as has been seen, the subject of parliamentary enactment,—an episcopate lamentably inadequate to the wants of India. The stipends and *status* of these bishops are indeed secured by statute; but if the peculiar legal *status* of these bishoprics had been holden to prevent (whether by the appointment of suffragans or coadjutors or otherwise) the extension in India of the episcopate on the voluntary principle, now generally prevalent in the foreign dependencies of the crown, the advantage would have been very dearly bought. But, as has been stated, according to the second declaration of the colonial bishoprics' council, bishoprics at Tinnevelly, Lahore or Agra, Burmah and Singapore, are in contemplation. It has been observed that a bishopric of Colombo has been founded in Ceylon.

A special act (32 & 33 Vict. c. 88) was passed to separate the Straits Settlements from the diocese of Calcutta.

CHAPTER V.

CHURCHES ATTACHED TO CONSULSHIPS.

6 Geo. 4, c. 87, which regulates the payments of salaries and allowances to British consuls at foreign ports, and the disbursements at such ports for certain public purposes, contains various provisions relating to churches and chaplains attached to *consulships*. For by this act the whole management of the funds and the regulation of the expenditure is under the control of the consul, and not of the ambassador; and, by a strange anomaly, in those foreign courts where there is an ambassador and not a consul, there is no legislative provision for any chaplain at all. After reciting in sect. 10 as follows: "'And whereas churches and chapels for the performance of divine service, according to the rites and ceremonies of the united church of England and Ireland, or of the church of Scotland, have been erected, and proper grounds have been appropriated and set apart for the interment of the dead, in divers foreign ports and places, and chaplains have been appointed for the performance of divine service in the said churches and chapels, and are now resident in such foreign ports and places;'" and then declaring the expediency of encouraging this practice, it enacts "That at any foreign port or place in which a chaplain is now, or shall at any future time be, resident and regularly employed in the celebration of divine service, according to the rites and ceremonies of the united church of England and Ireland, or of the church of Scotland, and maintained by any voluntary subscription or rate, levied among or upon his majesty's subjects resorting to or residing at such foreign port or place, or by any rate or duty levied under the authority of any of the acts hereinafter repealed, it shall and may be lawful for any consul-general or consul, in obedience to any order for that purpose issued by his majesty through one of his principal secretaries of state, to advance and pay from time to time, for and towards the maintenance and support of any such chaplain as aforesaid, or for and towards defraying the expenses incident to the due celebration of divine service in any such

6 Geo. 4, c. 87

Provision for support of churches, &c. in foreign places where chaplain appointed; consuls may advance a sum equal to amount subscribed.

churches and chapels, or for and towards the maintaining any such burial grounds as aforesaid, or for and towards the interment of any of his majesty's subjects in any such burial grounds, any sum or sums of money, not exceeding in any one year the amount of the sum or sums of money, which during that year may have been raised at such port or place for the said several purposes or any of them, by any such voluntary subscription or rate as aforesaid; and every such consul-general or consul shall, once in each year, transmit to one of his majesty's principal secretaries of state an account, made up to the thirty-first day of December in the year next preceding, of all the sums of money actually raised at any such port or place as aforesaid, for the several purposes aforesaid, or any of them, by any such voluntary subscription or rate as aforesaid, and of all sums of money by him actually paid and expended for such purposes, or any of them, in obedience to any such orders as aforesaid, and which accounts shall by such principal secretary of state be transmitted to the lord high treasurer, or the commissioners of his majesty's treasury of the united kingdom of Great Britain and Ireland, for the time being, who shall give to any such consul-general or consul as aforesaid credit for all sums of money not exceeding the amount aforesaid, by them disbursed and expended in pursuance of any such order as aforesaid, for the purposes before mentioned, or any of them."

Consuls to transmit to secretary of state annual accounts of money raised.

Where voluntary contributions towards erecting churches, hospitals, or providing burial grounds, in any place where consuls are resident, such consuls may advance a sum equal to amount of such contributions.

Sect. 11. "In case any of his majesty's subjects shall by voluntary subscriptions among themselves raise and contribute such a sum of money as shall be requisite for defraying one-half part of the expense of erecting, purchasing or hiring any church or chapel or building, to be appropriated for the celebration of divine service according to the rites and ceremonies of the united church of England and Ireland, or of the church of Scotland, or for defraying one-half part of the expense of erecting, purchasing or hiring any building to be used as a hospital for the reception of his majesty's subjects, or for defraying one-half of the expense of purchasing or hiring any ground to be used as a place of interment for his majesty's subjects at any foreign port or place wherein any consul-general or consul appointed by his majesty shall be resident, then and in any such case it shall and may be lawful for such consul-general or consul, in obedience to any order to be for that purpose issued by his majesty through one of his principal secretaries of state, to advance and pay, for and towards the purposes aforesaid, or any of

them, any sum or sums of money not exceeding in the whole in any one year the amount of the money raised in that year by any such voluntary contribution as aforesaid; and every such consul-general or consul as aforesaid shall in like manner once in every year transmit to one of his majesty's principal secretaries of state an account, made up to the thirty-first day of December in the year next preceding, of all the sums of money actually raised at any such port or place as aforesaid, for the several purposes aforesaid, or any of them, by any such voluntary subscription as aforesaid, and of all sums of money by him actually paid and expended for such purposes or any of them, in obedience to any such orders as aforesaid, and which accounts shall by such principal secretary of state be transmitted to the lord high treasurer, or to the lords commissioners of his majesty's treasury, for the time being, who shall give to such consuls-general or consuls credit for all sums of money not exceeding the amount aforesaid, by him disbursed and expended in pursuance of any such order as aforesaid, for the purposes before mentioned or any of them."

Annual accounts transmitted to secretary of state.

Sect. 12. "No such order shall be issued as aforesaid through any of his majesty's principal secretaries of state, authorizing the expenditure of money for the erection, purchase or hiring of any such new church or chapel or hospital as aforesaid, or for the purchase or hiring of any such new burial ground as aforesaid, unless and until such consul-general or consul shall first have transmitted to his majesty, through one of his majesty's principal secretaries of state, the plan of such intended church or chapel, hospital or burial ground, with an estimate, upon the oath of some one or more competent person or persons, stating the probable expense of and incident to the erection, purchase or hiring of any such church, chapel, hospital or burying ground as aforesaid, and unless and until his majesty shall have signified, through one of his said principal secretaries of state, his approbation of the said plan and estimate: Provided also, that no money shall actually be disbursed by any such consul-general or consul as aforesaid, for any of the purposes aforesaid, unless and until the money to be raised by any such voluntary subscription as aforesaid be actually paid up and invested in some public or other sufficient security, in the joint names of such consul-general or consuls and two trustees appointed for that purpose by the persons subscribing the same, or unless and until two or more of such subscribers

His majesty's approbation to be first obtained.

Proviso as to an actual disbursement of money by consul.

shall enter into good and sufficient security to his majesty, by bond or otherwise, that the amount of such subscriptions shall actually be paid for the purposes aforesaid, by a certain day to be specified in every such bond or security, and which bond or security shall be preserved in the office of such consul-general or consul, and shall by him be cancelled and delivered back to the parties entering into the same, their heirs, executors or administrators, when and so soon as the condition thereof shall be fully performed and satisfied."

Salaries to chaplains not to exceed sums herein mentioned.

Sect. 13. "The whole salary of any chaplain heretofore appointed or to be appointed to officiate in any church or chapel in any foreign port or place in Europe, shall not exceed in the whole five hundred pounds by the year; or in any foreign port or place not in Europe, eight hundred pounds by the year: Provided also, that all such chaplains shall be appointed to officiate as aforesaid, by his majesty, through one of his principal secretaries of state, and shall hold such their offices for and during his majesty's pleasure, and no longer."

Regulations for meetings of subscribers to churches, chapels, &c.

Sect. 14. "All consuls-general and consuls appointed by his majesty to reside and being resident at any foreign port or place wherein any such church or chapel, or other place appropriated for the celebration of divine worship, or hospital, or any such burial ground as aforesaid, hath heretofore been or shall hereafter be erected, purchased or hired, by the aid of any voluntary subscription or rates collected by or imposed upon his majesty's subjects, or some person or persons for that purpose duly authorized by any writing under the hand and seal of any such consul-general or consul, shall, once at the least in every year, and more frequently if occasion shall require, by public advertisement, or in such other manner as may be best adapted for insuring publicity, convene and summon a meeting of all his majesty's subjects residing at such foreign port or place as aforesaid, to be holden at the public office of such consul-general or consul, at some time, not more than fourteen days nor less than seven days next after the publication of any such summons; and it shall and may be lawful for all his majesty's subjects residing or being at any such foreign port or place as aforesaid, at the time of any such meeting, and who shall have subscribed any sum or sums of money not less than twenty pounds in the whole, nor less than three pounds by the year, for or towards the purposes before mentioned or any of them, and have paid up the amount of such their subscriptions,

to be present and vote at any such meetings; and such consuls-general or consuls shall preside at all such meetings; and in the event of the absence of any such consuls-general or consuls, the subscribers present at any such meeting shall, before proceeding to the despatch of business, nominate one of their number to preside at such meeting; and all questions proposed by the consul-general, consul or person so nominated as aforesaid to preside in his absence, to any such meeting, shall be decided by the votes of the majority in number of the persons attending and being present thereat: and in the event of the number of such votes being equally divided, the consul-general, consul or person so presiding in his absence, shall give a casting vote."

General meetings may establish rules for management of churches, &c. subject to sanction of consul, who shall transmit same for his majesty's approbation.

Sect. 15. "It shall and may be lawful for any such general meeting as aforesaid to make and establish, and from time to time, as occasion may require, to revoke, alter and render such general rules, orders and regulations, as may appear to them to be necessary for the due and proper use and management of such churches, chapels, hospitals and burial grounds as aforesaid, or for the proper control over and expenditure of the money raised by any such subscription as aforesaid, or otherwise in relation to the matters aforesaid, as may be necessary for carrying into execution the objects of this act, so far as relates to those matters, or any of them: Provided always, that no such rule, order or regulation as aforesaid shall be of any force or effect, unless or until the same shall be sanctioned and approved by the consul-general or consul for the time being, appointed by his majesty to reside and actually resident at such foreign port or place; and provided also, that the same shall, by such consul-general or consul, be transmitted by the first convenient opportunity for his majesty's approbation; and that it shall and may be lawful for his majesty, by any order to be by him issued through one of his principal secretaries of state, either to confirm or disallow any such rules, orders and regulations, either in the whole or in part, and to make such amendments and alterations in or additions to the same, or any of them, as to his majesty shall seem meet, or to suspend for any period of time the execution thereof, or any of them, or otherwise to direct or prevent the execution thereof, or any of them, in such manner as to his majesty shall seem meet; and all orders so to be issued by his majesty, in relation to the matters aforesaid, through one of his principal secretaries of state,

His majesty's order thereon to be recorded

in consul's office.

shall be recorded in the office of the said consul-general or consul at the foreign port or place to which the same may refer, and shall be of full force, effect and authority upon and over all his majesty's subjects there resident" (*a*).

(*a*) As to consular marriages, *vide supra*, p. 810.

CHAPTER VI.

COLONIAL AND FOREIGN ORDERS.

THE statute law respecting the effect of the ordination of ministers by Scotch and Irish bishops has been already inquired into (*a*).

In this chapter are considered—

Divisions of subject.

1. The statutable restrictions on the exercise within these dominions of the power of consecration by English bishops and ordination by them of foreign subjects.

2. The statutable restrictions on persons so consecrated and ordained to officiate in the Church of England in this country. This portion of ecclesiastical legislation is of a most confused and entangled character. The crudeness and illiberality of the provisions in statutes heaped one upon another, in consequence apparently of a jealousy of the spiritual acts of the colonial and foreign episcopate, is, independently of theoretical objection, productive of great practical difficulty and embarrassment.

First, with regard to the consecration of bishops.

Consecration of bishops.

Two propositions of law were enunciated in the preamble of 26 Geo. 3, c. 84.

1. That the consecration of a bishop required the licence and mandate of the crown.

2. That every person consecrated must take the oath of allegiance.

Whether in reality this statute recited propositions of constitutional law, or whether the law relating to bishops of the church established in England was not erroneously applied, on a new and sudden emergency, to bishops destined to exercise their functions beyond seas, it is perhaps not worth while now to inquire. The statute which originally contained the recital has been since repealed. But the English bishop is still supposed to be subject to civil penalties if he exercise his purely spiritual function of consecration without licence from the crown. It always was and is quite clear, without the recital in the recent statute (34 & 35 Vict. c. 53), that no "ecclesiastical title

(*a*) *Vide supra*, Part X., Chaps. I., II.

"of honour or dignity" taken from any place within this realm, and no "pre-eminence or coercive power, can be "validly conferred otherwise than under the authority and "by the favour of her Majesty;" but these propositions do not concern the exercise of purely spiritual functions.

American subjects seek Anglican ordination.

In the year 1784, not long after the establishment of the independence of the North American Republics, the citizens of this newly-erected state, who had been, while it was subject to this country, members of the Church of England, were anxious to obtain ordination for their clergymen at the hands of the English bishops; but whereas (to borrow the words of the preamble of 24 Geo. 3, c. 35) "by the laws of this realm, every person who shall be admitted to holy orders is to take the oath of allegiance in manner thereby provided," an application was made to the legislature of Great Britain to remove this obstacle, which produced the statute of 24 Geo. 3, c. 35 (*b*), reciting as follows: "Whereas there are divers persons, subjects or citizens of countries out of his majesty's dominions, inhabiting and residing within the said countries, who profess the public worship of Almighty God according to the liturgy of the Church of England, and are desirous that the word of God and the sacraments should continue to be administered unto them according to the said liturgy, by subjects or citizens of the said countries, ordained according to the form of ordination in the Church of England;" and enacting as follows:—

24 Geo. 3, c. 35, enabling them to obtain it.

The Bishop of London, or any other bishop by him appointed, may admit aliens to the order of deacon or priest.

Sect. 1. "It shall and may be lawful to and for the Bishop of London for the time being, or any other bishop by him to be appointed, to admit to the order of deacon or priest, for the purposes aforesaid, persons being subjects or citizens of countries out of his majesty's dominions, without requiring them to take the oath of allegiance."

Persons so ordained not to exercise their office in his majesty's dominions.

Sect. 2. "No person, ordained in the manner hereinbefore provided only, shall be thereby enabled to exercise the office of deacon or priest within his majesty's dominions."

The name and country, &c. of

Sect. 3. "In the letters testimonial of such orders there shall be inserted the name of the person so ordained, with the addition of the country whereof he is a subject or citizen, and the further description of his not having

(*b*) This act was intituled "An Act to empower the Bishop of London for the time being, or any other Bishop to be by him appointed, to admit to the Order of Deacon or Priest Persons being Subjects or Citizens of Countries out of his Majesty's Dominions, without requiring them to take the Oath of Allegiance as appointed by Law."

taken the said oath of allegiance, being exempted from the obligation of so doing by virtue of this act."

the person ordained to be inserted in the letters testimonial.

Those subjects of the North American Republics who adhered to the doctrine and discipline of the Anglican Church were further desirous of procuring the due consecration of their bishops, and for some time resorted to the Scotch bishops for this purpose. But in 1786 (*c*) they had again recourse to the parliament of Great Britian, and obtained the 26 Geo. 3, c. 84 (*d*), which has been since superseded, and is now repealed.

Jerusalem bishopric.

The following account is taken from "A Statement of Proceedings relating to the Establishment of a Bishopric of the United Church of England and Ireland in Jerusalem; published by authority:"—

King of Prussia's mission to England on the subject of a bishop at Jerusalem.

In the year 1841, the appointment of a bishop for Jerusalem was proposed by his majesty the King of Prussia, by a special mission to the Queen of England, and a particular communication to the Archbishop of Canterbury. His majesty had in view the conversion of the Jews, and also the spiritual care of such of his own subjects in Palestine, who might wish to join themselves to the church so formed in Jerusalem. His majesty undertook to give fifteen thousand pounds towards that object, the annual interest of which, amounting to six hundred pounds, is to

Funds for bishopric.

(*c*) In October, 1789, at Philadelphia, nine articles were drawn up at a general convention of the bishops, clergy, and laity of the church, which are termed the "Constitution of the Protestant Episcopal Church in the United States of America." In October, 1832, fifty-six canons were passed in general convention at New York for the government of the church; six canons in general convention at Philadelphia, in August, 1835; eleven canons at the same place, September, 1838. See "Journal of the Proceedings of the Bishops, Clergy and Laity of the Protestant Episcopal Church in the United States of America, &c. &c." Published by Swords, Stanford & Co., 152, Broadway, New York, 1838. The 22nd Canon is as follows: "No bishop of this church shall ordain any person to officiate in any congregation or church destitute of a bishop, situated without the jurisdiction of these United States, until the usual testimony from the Standing Committee, founded upon sufficient evidence of his soundness in the faith, and of his pious and moral character, has been obtained; nor until the candidate has been examined on the studies prescribed by the canons of this church. And should any such clergymen so ordained wish to settle in any congregation of this church, he must obtain a special licence therefor from the bishop, and officiate as a probationer for at least one year."

(*d*) This act was intituled "An Act to empower the Archbishop of Canterbury or the Archbishop of York for the time being, to consecrate to the Office of a Bishop Persons being Subjects or Citizens of Countries out of his Majesty's Dominions."

be paid yearly in advance, till the capital sum (together with that which is to be raised by subscription for the purpose of completing the bishop's annual income of twelve hundred pounds) can be advantageously invested in land situate in Palestine (e).

Nomination, title and authority of bishop at Jerusalem.

The bishop of the United Church of England and Ireland at Jerusalem is to be nominated alternately by the crowns of England and Prussia, the archbishop having the absolute right of veto with respect to those nominated by the Prussian crown.

The bishop will be subject to the Archbishop of Canterbury as his metropolitan, until the local circumstances of his bishopric shall be such as to make it expedient, in the opinion of the bishops of that United Church, to establish some other relation.

His spiritual jurisdiction will extend over the English clergy and congregations, and over those who may join his church and place themselves under his episcopal authority in Palestine, and for the present in the rest of Syria, in Chaldea, Egypt, and Abyssinia; such jurisdiction being exercised, as nearly as may be, according to the laws, canons, and customs of the Church of England; the bishop having power to frame, with the consent of the metropolitan, particular rules and orders for the peculiar wants of his people.

College at Jerusalem to receive Druses, &c. and members of orthodox Greek church under certain conditions.

A college was to be established at Jerusalem, under the bishop, whose chaplain will be its first principal. Its primary object will be the education of Jewish converts; but the bishop will be authorized to receive into it Druses and other Gentile converts; and if the funds of the college should be sufficient, Oriental Christians may be admitted; but clerical members of the orthodox Greek Church will be received into the college, only with the express consent of their spiritual superiors, and for a subsidiary purpose. The religious instruction given in the college will be in strict conformity with the doctrines of the United Church of England and Ireland, and under the superintendence and direction of the bishop.

German congregations and clergymen.

Congregations, consisting of Protestants of the German tongue, residing within the limits of the bishop's jurisdiction, and willing to submit to it, will be under the care of German clergymen ordained by him for that purpose,

(e) In chap. 29 (pt. i. lib. 1, Vetus et Nov. Eccles. Discip., Thomassinus) will be found some examples of two bishops in one diocese, which contained inhabitants speaking two different languages. But on examination they will be chiefly found to be encroachments by the pope on the Greek church.

who will officiate in the German language, according to the forms of their national liturgy, compiled from the ancient liturgies, agreeing in all points of doctrine with the liturgy of the English Church, and sanctioned by the bishop with consent of the metropolitan, for the special use of those congregations; such liturgy to be used in the German language only. Germans intended for the charge of such congregations are to be ordained according to the ritual of the English Church, and to sign the articles of that church: and in order that they may not be disqualified by the laws of Germany from officiating to German congregations, they are, before ordination, to exhibit to the bishop a certificate of their having subscribed, before some competent authority, the Confession of Augsburg (*f*).

Confession of Augsburg.

The rite of confirmation will be administered by the bishop to the catechumens of the German congregations according to the form used in the English Church.

Rite of confirmation.

The statute passed to forward the object of this statement is 5 Vict. c. 6, entitled "An Act to amend an Act made in the Twenty-sixth year of the Reign of his Majesty King George the Third, intituled An Act to empower the Archbishop of Canterbury or the Archbishop of York for the time being to consecrate to the Office of a Bishop Persons being Subjects or Citizens of Countries out of his Majesty's Dominions." It recited part of the provisions of 26 Geo. 3, c. 84, and enacted as follows:—

5 Vict. c. 6.

Sect. 1. "It shall and may be lawful to and for the Archbishop of Canterbury or the Archbishop of York for the time being, together with such other bishops as they shall call to their assistance, to consecrate British subjects, or the subjects or citizens of any foreign kingdom or state, to be bishops in any foreign country, whether such foreign subjects or citizens be or be not subjects or citizens of the country in which they are to act, *and without the queen's licence for their election, or the royal mandate under the*

Archbishops may consecrate British subjects or foreigners to be bishops in foreign countries, without the royal licence for election, &c.

(*f*) See note to the Life of Grabe, Biographia Britannica, 1766, vol. vii., for a plan for uniting all the Protestant churches of the Continent under an Episcopalian government. *Vide supra*, p. 693. The reader should further consult, on the subject of the bishopric at Jerusalem, "A Statement by Authority, &c. &c.," a pamphlet by Dr. Hook, Rector of Leeds; and a very learned and able letter by Mr. James Hope Scott, then Chancellor of Salisbury. The Archbishop of Canterbury wrote a letter commendatory, which was translated into Greek, to the Bishops of the Ancient and Apostolic Churches in Syria; and the King of Prussia published a statement to his subjects in Germany.

great seal for their confirmation and consecration, and without requiring such of them as may be subjects or citizens of any foreign kingdom or state to take the oaths of allegiance and supremacy, and the oath of due obedience to the archbishop for the time being."

Spiritual jurisdiction of such bishops. Civil limits.

Sect. 2. "Such bishop or bishops so consecrated may exercise, within such limits as may from time to time be assigned for that purpose in such foreign countries by her majesty, spiritual jurisdiction over the ministers of British congregations of the United Church of England and Ireland, and over such other Protestant congregations as may be desirous of placing themselves under his or their authority."

Archbishops to obtain her Majesty's licence for consecration, and to ascertain the fitness of persons to be consecrated.

Sect. 3. "No person shall be consecrated a bishop in the manner herein provided until the Archbishop of Canterbury or the Archbishop of York for the time being shall have first applied for and shall have obtained *her majesty's licence, by warrant under her royal signet and sign manual, authorizing and empowering him to perform such consecration*, and expressing the name of the person so to be consecrated, nor until the said archbishop has been fully ascertained of the sufficiency of such person in good learning, of the soundness of his faith, and of the purity of his manners."

Such bishops, and the persons consecrated or ordained by them, not to act within England or Ireland, otherwise than according to 3 & 4 Vict. c. 33.

Sect. 4. "No person consecrated to the office of a bishop in the manner aforesaid, nor any person deriving his consecration from or under any bishop so consecrated, nor any person admitted to the order of deacon or priest by any bishop or bishops so consecrated, or by the successor or successors of any bishop or bishops so consecrated, shall be thereby enabled to exercise his office, within her majesty's dominions in England or Ireland, otherwise than according to the provisions of 3 & 4 Vict. c. 33 (*g*)."

Archbishop to give a certificate of consecration.

Sect. 5. "The archbishop who so consecrates shall give to the person consecrated a certificate under his hand and seal, containing the name of the country whereof he is a subject or citizen, and the name of the church in which he is appointed bishop; and in case of such person being the subject or citizen of any foreign kingdom or state, then such certificate shall further mention that he has not taken the said oaths, he being exempted by virtue of this act from taking them."

Secondly, with regard to ordination.

59 Geo. 3, c. 60.

In July, 1819, was passed 59 Geo. 3, c. 60, entitled "An Act to permit the Archbishops of Canterbury and

(*g*) *Vide infra*, p. 2279.

York, and the Bishop of London, for the Time being, to admit Persons into Holy Orders specially for the Colonies." It recited, "Whereas it is expedient that the archbishops and bishops of this realm should from time to time admit into holy orders persons specially destined for the cure of souls in his majesty's foreign possessions, although such persons may not be provided with the title required by the canon of the Church of England, of such as are to be made ministers: And whereas it will greatly tend to the advancement of religion within the same, that due provision shall be regularly made for a supply of persons properly qualified to serve as parsons, vicars, curates, or chaplains;" and enacted as follows:—

Archbishop of Canterbury or York, or Bishop of London, or any bishop specially authorized by any of them, may ordain specially for the colonies.

Sect. 1. "It shall be lawful for the Archbishop of Canterbury, the Archbishop of York, or the Bishop of London, for the time being, or any bishop specially authorized and empowered by any or either of them, to admit into the holy orders of deacon or priest any person whom he shall upon examination deem duly qualified specially for the purpose of taking upon himself the cure of souls, or officiating in any spiritual capacity in his majesty's colonies or foreign possessions and residing therein, and that a declaration of such purpose and a written engagement to perform the same under the hand of such person, being deposited in the hands of such archbishop or bishop, shall be held to be a sufficient title with a view to such ordination; and that in every such case it shall be distinctly stated in the letters of ordination of every person so admitted to holy orders, that he has been ordained for the cure of souls in his majesty's foreign possessions."

The fact to be stated in the letters of ordination.

No person so ordained capable of holding a living in Great Britain or Ireland without the consent of the bishop of the diocese, &c.

Sect. 2. "No person so admitted into the holy orders of deacon or priest, for the purpose of taking upon himself the cure of souls, or officiating in any spiritual capacity in his majesty's foreign possessions, shall be capable of having, holding, or enjoying, or of being admitted to any parsonage, vicarage, benefice, or other ecclesiastical promotion or dignity whatsoever, within the United Kingdom of Great Britain and Ireland, or of acting as curate therein, without the previous consent and approbation in writing of the bishop of the diocese under his hand and seal in which any such parsonage, vicarage, benefice, or other ecclesiastical promotion or dignity shall be locally situated, nor without the like consent and approbation of such one of the said archbishops, or Bishop of London, by whom, or by whose authority such person shall have been originally ordained, or in case of the demise or translation of such archbishop or bishop, of his successor in the same see:

Certificate of good behaviour to be produced.

Provided always, that no such consent and approbation shall be given by any such archbishop or Bishop of London, unless the party applying for the same shall first produce a testimony of his good behaviour during the time of his residence abroad, from the bishop in whose diocese he may have officiated, or in case there be no bishop, from the governor in council of the colony in which he may have been resident, or from his majesty's principal secretary of state for the colonial department."

Persons ordained by the bishops of Quebec, Nova Scotia or Calcutta equally restrained.

Sect. 3. " No person who shall have been admitted into holy orders by the bishops of Quebec, Nova Scotia, or Calcutta, or by any other bishop or archbishop than those of England or Ireland, shall be capable of officiating in any church or chapel of England or Ireland without special permission from the archbishop of the province in which he proposes to officiate, or of having, holding, or enjoying, or of being admitted to any parsonage or other ecclesiastical preferment in England or Ireland, or of acting as curate therein, without the consent and approbation of the archbishop of the province, and also of the bishop of the diocese in which any such parsonage or ecclesiastical preferment or curacy may be situated."

Persons ordained by a colonial bishop not possessing or residing in a diocese, &c. not to be capable of holding preferment, or acting as a minister of the Established Church.

Sect. 4. " No person who after the passing of this act shall have been ordained a deacon or priest by a colonial bishop, who at the time of such ordination did not actually possess an episcopal jurisdiction over some diocese, district, or place, or (*h*) was not actually residing within such division, district, or place, shall be capable in any way, or on any pretence whatever, of at any time holding any parsonage or other ecclesiastical preferment within his majesty's dominions, or of being a stipendiary curate or chaplain, or of officiating at any place, or in any manner, as a minister of the Established Church of England and Ireland."

Admissions to benefices, and appointments to curacies, contrary hereto, void.

Sect. 5. " All admissions, institutions, and inductions to benefices in the Church of England, or Church of Ireland, and all appointments to act as curates therein, which shall be made contrary to the provisions of this act, shall be to all intents and purposes null and void: Provided always, that nothing herein shall be construed to make void any admission, institution, or induction to any benefice, or any appointment as curate, which shall have been made previous to the passing of this act."

(*h*) "Or" must be read as "and." *Vide* partial repeal of this statute by 15 & 16 Vict. c. 52, and 16 & 17 Vict. c. 49; *infra*, pp. 2282, 2283.

In July, 1840, was passed 3 & 4 Vict. c. 33, entitled "An Act to make certain Provisions and Regulations in respect to the Exercise, within England and Ireland, of their Office, by the Bishops and Clergy of the Protestant Episcopal Church in Scotland; and also to extend such Provisions and Regulations to the Bishops and Clergy of the Protestant Episcopal Church in the United States of America; and also to make further Regulations in respect to Bishops and Clergy other than those of the United Church of England and Ireland." It recited 32 Geo. 3, c. 63, and declared it expedient to alter and amend the same, and enacted as follows:—

3 & 4 Vict. c. 33.

Sect. 1. "It shall be lawful for the bishop of any diocese in England or Ireland, if he shall think fit, on the application of any bishop of the protestant episcopal church in Scotland, or of any priest of such church canonically ordained by any bishop thereof residing and exercising at the time of such ordination episcopal functions within some district or place in Scotland, to grant permission under his hand, and from time to time also under his hand to renew such permission, to any such bishop or priest to perform divine service, and to preach and administer the sacrament, according to the rites and ceremonies of the United Church of England and Ireland, for any one day or any two days, and no more, in any church or chapel within the diocese of the said bishop where the liturgy of the said united church is used, such day or days and church or chapel to be specified in such permission or renewed permission; and thereupon it shall be lawful for the party mentioned in such permission or renewed permission, with the consent of the incumbent or officiating minister of such church or chapel, to perform divine service, and to preach, and administer the sacraments therein, according to the rites and ceremonies of the United Church of England and Ireland, on the day or days specified in such written permission or renewed permission, and on no other" (*i*).

Bishops of England or Ireland may permit clergy of the protestant episcopal church in Scotland to officiate in their dioceses under certain restrictions.

Sect. 2. "No such written permission or renewed permission shall be granted unless the party applying for the same shall first produce to the bishop of the diocese letters commendatory given within six months before the production thereof, in the case of a bishop under the hand and seal of two other bishops of the church to which he belongs, and in the case of a priest under the hand and seal of the bishop

Certain letters commendatory to be produced to the bishop before permission granted.

(*i*) So far as relates to the Scotch church this act has been repealed by 27 & 28 Vict. c. 94. *Vide supra*, pp. 2221, 2222.

exercising episcopal functions within the district or place in which such priest usually officiates, and also a testimonial given within six months before the production thereof, under the hand and seal of such last-mentioned bishops or bishop, that the party applying is a person of honest life and godly conversation, and professeth the doctrines of the United Church of England and Ireland."

Provisions of this act as to the clergy of the episcopal church in Scotland extended to the clergy of the episcopal church in the United States.

Sect. 3 recited 26 Geo. 3, c. 84, and proceeded: "Whereas it is expedient to alter and amend the said act, and to enable the bishops and priests of the protestant episcopal church in the United States of America to officiate in England and Ireland, under restrictions and limitations similar to those hereinbefore enacted and provided with respect to the bishops and priests of the protestant episcopal church in Scotland; be it therefore enacted, that all the several provisions hereinbefore contained with respect to the bishops and priests canonically ordained of the protestant episcopal church in Scotland shall respectively extend to the bishops of the protestant episcopal church in the United States of America, and to the priests canonically ordained by a bishop of such church residing and exercising at the time of such ordination episcopal functions within some district or place in the United States of America."

Penalty on allowing clergy of the protestant episcopal church in Scotland or in the United States of America to officiate without such permission, or on allowing other clergy to officiate.

Sect. 4. "Any incumbent or stipendiary curate who, without the production of such written permission or renewed permission as aforesaid, shall allow any bishop or priest of the protestant episcopal church in Scotland or in the United States of America, or who shall allow any deacon of either of such churches, or any other bishop (*k*), priest, or deacon, not being a bishop, priest, or deacon of the United Church of England and Ireland, or of any of her majesty's foreign possessions, to officiate in any church or chapel of which he is incumbent or curate, shall for the first offence be liable to be called to appear before the bishop of the diocese in person, and, if he show no sufficient cause to the contrary, to be publicly or privately monished, at the discretion of the said bishop; and for the second and every subsequent offence, if a curate, he shall, after having been in like manner called

(*k*) "Any other bishop, &c." This most arbitrary and illiberal clause was passed before the Clergy Discipline Act, 3 & 4 Vict. c. 86; and these words may probably be construed as referring to a bishop, priest or deacon actually recognized as such by the civil power of the foreign country of which he is a subject; but it is very difficult to predict what the judicial construction of this language may be.

to appear, and showing no sufficient cause to the contrary, be liable to be removed, or to be temporarily suspended from his curacy, at the discretion of the said bishop; and if an incumbent, he shall, on proof of the offence in due course of law, be suspended from his office and benefice for any time not exceeding three months, or be subject to other ecclesiastical censures; and the said bishop shall, during any such suspension, provide for the performance of the spiritual duties of such benefice, by sequestration or otherwise, as in the case of non-residence."

Penalty on officiating contrary to recited acts or this act, save as herein mentioned.

Sect. 5. "If any bishop or priest of the protestant episcopal church in Scotland or in the United States of America shall, save as hereinbefore mentioned, or if any deacon of either of such churches shall, officiate, contrary to the provisions of the said recited acts, in any church or chapel in England or Ireland where the liturgy of the said united church is used, or if any bishop (*l*), priest, or deacon, not being a bishop, priest, or deacon of the United Church of England or Ireland, or of any of her Majesty's foreign possessions, or of the protestant episcopal church in Scotland or in the United States of America, shall officiate in any such church or chapel, he shall for every such offence forfeit and pay the sum of fifty pounds to the governors of Queen Anne's Bounty, to be recovered, by action of debt brought in the name of the treasurer of the said bounty in any of her Majesty's courts of record at Westminster, or in the courts of session in Scotland at the suit of the public prosecutor."

Deacons ordained out of England or Ireland, and afterwards ordained priests in England or Ireland.

Sect. 6. "No person who has been or shall be ordained a deacon by any protestant bishop other than an archbishop or bishop of the United Church of England and Ireland, and who shall after the passing of this act be ordained a priest by any archbishop or bishop of the United Church of England and Ireland, shall be thereby enabled, save as in this act is provided, to exercise his office within England or Ireland."

Admissions, &c. to benefices and curacies contrary hereto void.

Sect. 7. "All admissions, institutions, and inductions to benefices in the church of England or church of Ireland, and all appointments to act as curates therein, which shall be made contrary to the provisions of this act, shall be to all intents and purposes null and void: Provided always, that nothing herein contained shall be construed to affect any admission, institution, or induction to any benefice or any appointment as curate which shall have been made previous to the passing of this act."

Proviso.

(*l*) Cf. preceding note.

Not to affect the act 59 Geo. 3, c. 60.

Sect. 8. "Nothing in this act contained shall be construed to affect or to repeal any of the provisions of 59 Geo. 3, c. 60."

15 & 16 Vict. c. 52.

In June, 1852, was passed 15 & 16 Vict. c. 52, entitled "An Act to enable Colonial and other Bishops to perform certain Episcopal Functions, under Commission from Bishops of England and Ireland." It recited 53 Geo. 3, c. 155 (*l*), and 3 & 4 Will. 4, c. 85 (*m*), and enacted as follows:—

East Indian bishops, under commission from bishops in England and Ireland, to perform all episcopal functions.

Sect. 1. "Notwithstanding anything in the said acts or in any letters patent as aforesaid contained, it shall be lawful for any bishop who by virtue of such royal letters patent under the great seal of the said united kingdom shall exercise or have exercised in the British territories aforesaid the office of bishop of Calcutta, or Madras, or Bombay respectively, upon the request and by the commission in writing under the hand and seal of the bishop of any diocese in England or Ireland, and with the consent and licence in writing of the archbishop of the province within which such diocese shall be situated, to ordain any persons, provided such persons shall be presented to him under the direction and authority of the bishop of such diocese, and to perform all other functions peculiar and appropriate to the order of bishops within the limits of such diocese."

The statute proceeded to repeal certain provisions in 59 Geo. 3, c. 60, and 3 & 4 Vict. c. 33, so far as they relate to persons admitted into holy orders specially for the colonies, or ordained by colonial bishops, as follows:— "Nothing in the said recited acts contained shall extend or be held to extend to any person who, in pursuance of such request and commission as aforesaid from the bishop of any diocese in England or Ireland, shall have been or may hereafter be ordained a deacon or priest within the limits of such diocese *by any bishop who by virtue of her Majesty's royal letters patent* (*n*) under the great seal of the united kingdom of Great Britain and Ireland, shall exercise or have exercised the office of bishop within the British territories in India, or in any of her Majesty's colonies or foreign possessions, and that all admissions, institutions, and inductions to benefices in the United Church of England and Ireland, and all appointments to act as curates and chaplains therein, of persons so admitted into holy orders by any such bishop, shall, notwithstanding any-

(*l*) *Vide supra*, p. 2257.

(*m*) *Vide supra*, p. 2260.

(*n*) At this time the crown had not ceased to grant letters patent to colonial bishops. *Vide supra*, p. 2249.

thing in the said recited acts contained, be to all intents and purposes good and valid in law."

Proviso subjecting colonial bishops to the laws of the realm and canons ecclesiastical as to the titles, &c. of persons ordained.

Sect. 3. "All and every of such bishops, who, in accordance with the provisions of this act, shall officiate in behalf of the bishop of any diocese in England or Ireland, in conferring holy orders, shall be subject to the several provisions and limitations established by the laws of this realm, or canons ecclesiastical, as to the titles of the persons to be ordained, and as to the oaths and subscriptions to be by such persons taken and made."

Letters of orders to be signed by the colonial bishop as commissary of the bishop for whom he officiates.

Sect. 4. "All letters of orders of persons ordained by any such bishop, in accordance with the provisions of this act, shall be issued in the name and be subscribed with the signature of such bishop, as commissary of the bishop of the diocese at whose request and by whose commission he shall officiate in conferring such orders, and shall be sealed with the seal of the bishop of such diocese; and all such acts of ordination by any such bishop shall be recorded and registered in like manner as if they had been performed by the bishop of such diocese."

Colonial bishop not to have jurisdiction in united kingdom.

Sect. 5. "Nothing in this act contained shall be construed to authorize any such bishop to use or exercise any jurisdiction whatsoever within the united kingdom of Great Britain and Ireland."

16 & 17 Vict. c. 49.

This statute was followed in August, 1853, by 16 & 17 Vict. c. 49, entitled "An Act to extend the Provisions of an Act of the Fifteenth and Sixteenth Years of her present Majesty, intituled 'An Act to enable Colonial and other Bishops to perform certain Episcopal Functions, under Commission from Bishops of England and Ireland.'" This statute recited 15 & 16 Vict. c. 52; and having declared it expedient to extend the provisions of the said act to dioceses in her Majesty's foreign and colonial possessions, enacted as follows: "Notwithstanding anything in the said recited acts or either of them contained to the contrary, all persons who have been or hereafter shall be ordained deacon or priest by any of the said bishops in or for the diocese of the bishop of any other of her Majesty's foreign or colonial possessions, upon his request in writing, shall be entitled to all the same rights, privileges, and advantages, as if he had been ordained by such bishop within the limits of a diocese over which he was at the time himself actually exercising jurisdiction, and residing therein" (*o*).

Ordination of persons by colonial bishop other than the bishop of the diocese valid.

(*o*) *Vide supra.* 59 Geo. 3, c. 60, s. 4, at p. 2278. 26 & 27 Vict. c. 121, referred to at p. 146, related only to the repealed act

Greek church.

The relations (*p*) of the church of England with the orthodox Greek church, formerly injured by the rash conduct of the non-jurors (*q*), have of late years been much strengthened.

It has been seen, that when the bishopric of Jerusalem was founded it was carefully expressed by the authorities of the church that there was no intention of encroaching upon the rights, or injuring the position of the Greek church. A letter from the Archbishop of Canterbury was sent to the patriarch explanatory of the limited powers conferred on the English bishop.

In 1868, the Archbishop of Canterbury furnished the Bishop of Gibraltar with a letter commendatory or systatical, written in Greek, to the Greek patriarch, who received it and the bishop with courtesy. The letter is rightly translated as follows:—

"In the name of the Father, and the Son, and the Holy Ghost. Amen.

Letter commendatory.

"To the most holy and blessed patriarch of Constantinople, new Rome, and to the most holy metropolitans, archbishops and bishops of the Orthodox Eastern Church, and to the holy synod of Greece, Charles Thomas, by divine providence Archbishop of Canterbury, primate of all England and metropolitan, sendeth greeting in the Lord:

"We make known unto you, brethren beloved in Christ, by these letters, that we have elected, confirmed and consecrated as bishop of the holy catholic and apostolic church, planted in England, Charles Amyand Harris, our honoured and well-beloved brother, approved in orthodoxy of faith and gravity of life; whom also we have sent to the East, that he being established in the episcopal seat of the ancient Calpe, now Gibraltar, an English colony in the Mediterranean Sea, may be overseer and shepherd of the subjects of the British sceptre who are scattered throughout the regions of the East; and that he may pay to your Blessedness due respect and courtesy.

"Most willingly therefore we commend unto you, revered and beloved in the Lord, this our brother; and earnestly do we entreat you to receive him with kindness and to assist him whensoever he shall have need of you,

26 Geo. 3. c. 84, and has ceased to be of any importance since the repeal of that statute.

(*p*) *Vide supra*, Part I., Chap. II., p. 3.

(*q*) See account by Rev. G. Williams (Rivington's), 1868.

for such are his deserts. We salute you in the Lord. Amen.

"Given in our palace at Lambeth, and sealed with an archiepiscopal seal, the 21st day of the month of July, in the year of our redemption 1868."

Archbishop of Syra and Tenos.

In 1870, the Archbishop of Syra and Tenos, who came to England for the purpose of consecrating a Greek church, was very cordially received by the authorities of the English church, and attended the consecration of some English bishops (*r*).

Some difficulties, however, still prevent a perfect union of the English with the Greek church.

Church of Rome.

The position of the church of Rome, on the other hand, towards the English church has become of late years extremely hostile. The revived extravagances of the Ultramontanist and Jesuit party, their present influence over the councils of the papacy, and the novel doctrines which they have promulgated, have naturally widened the distance which separates the Roman from the Greek and Anglican churches (*s*). The *curia* of Rome in fact still continues the disunion of Christendom which it first created.

34 & 35 Vict. c. 52.

In connection with this subject should be mentioned the statute 34 & 35 Vict. c. 52, passed in 1871, and entitled "An Act to repeal an Act for preventing the Assumption of certain Ecclesiastical Titles in respect of Places in the United Kingdom."

The preamble, enunciating as it does a principle of constitutional law, and at the same time tempering the practical application of it by a wise and liberal policy, is very important. It recites as follows: "Whereas by an act passed in the session of parliament held in the fourteenth and fifteenth year of the reign of her Majesty, chapter sixty, intituled 'An Act to prevent the Assumption of certain Ecclesiastical Titles in respect of Places in the United Kingdom,' certain enactments were made prohibiting under penalties the assumption of the title of archbishop or bishop of a pretended province or diocese, or archbishop or bishop of a city, place, or territory, or dean

(*r*) Report of the Archbishop of Syra and Tenos of his Journey to England, in Greek and English, London (Cartwright), 1871; Colonial Church Chronicle, March 1 and April 1, 1871; Account of the Pan-Anglican Synod in an Encyclic from the English Bishops to the Greek Patriarch, &c., 1867; Papers of the (American) Russo-Greek Committee, Trons & Co., New York; Phillimore's International Law, Vol. II., App. XI.

(*s*) *Vide supra*, p. 2.

34 & 35 Vict. c. 52.

of any pretended deanery in England or Ireland, not being the see, province, or diocese of an archbishop or bishop or deanery of any dean recognized by law:

"And whereas no ecclesiastical title of honour or dignity derived from any see, province, diocese or deanery recognized by law, or from any city, town, place, or territory within this realm, can be validly created, nor can any such see, province, diocese, or deanery be validly created, nor can any pre-eminence or coercive power be conferred otherwise than under the authority and by the favour of her Majesty, her heirs and successors, and according to the laws of this realm; but it is not expedient to impose penalties upon those ministers of religion who may, as among the members of the several religious bodies to which they respectively belong, be designated by distinctions regarded as titles of office, although such designation may be connected with the name of some town or place within the realm."

After this preamble, the statute proceeds to enact that,

14 & 15 Vict. c. 60, repealed.

Sect. 1. "The said act of the session of parliament held in the fourteenth and fifteenth years of the reign of her Majesty, chapter sixty, shall be and the same is hereby repealed: Provided that such repeal shall not nor shall anything in this act contained be deemed in any way to authorize or sanction the conferring or attempting to confer any rank, title, or precedence, authority, or jurisdiction on or over any subject of this realm by any person or persons in or out of this realm, other than the sovereign thereof."

Documents prepared by convocation.

Among the documents prepared by convocation, but never formally promulgated, was a form for admitting converts from the Roman to the English church. It is a document of weight and interest. It appears to have been drawn up by Archbishop Wake in 1714 (*u*). It is as follows:—

Form of admitting converts from church of Rome, &c.

A Form for admitting Converts from the Church of Rome, and such as shall renounce their Errors (*June* 18) (*x*).

The bishop, or some priest appointed by him for that purpose, being at the communion table, and the person to be reconciled standing without the rails, the bishop, or

(*u*) Lathbury, History of Convocation, 426.

(*x*) Concilia (Wilkins') Magnæ Britann. et Hiberniæ, tom. iv, pp. 660—662.

such priest as is appointed, shall speak to the congregation as followeth:—

"Dearly beloved,

"We are here met together for the reconciling of a penitent (lately of the church of Rome, or lately of the separation) to the established church of England, as to a true and sound part of Christ's holy Catholic Church. Now that this weighty affair may have its due effect, let us in the first place humbly and devoutly pray to Almighty God for his blessing upon us in that pious and charitable office we are going about.

"Prevent us, O Lord, in all our doings with thy most gracious favour, and further us with thy continual help, that in this, and all other our works begun, continued, and ended in thee, we may glorify thy holy name, and finally by thy mercy obtain everlasting life, through Jesus Christ our Lord. Amen.

"Almighty God, who showeth to them, that be in error, the light of thy truth, to the intent that they may return into the way of righteousness; grant unto all them, that are or shall be admitted into the fellowship of Christ's religion, that they may eschew those things that are contrary to their profession, and follow all such things, as are agreeable to the same, through our Lord Jesus Christ. Amen."

(Then followed Psalm cxix. v. 161.)

"Let my complaint come before thee, O Lord, &c.

"Glory be to the Father, &c.

"As it was in the beginning, &c."

The Lesson. Luke xv. to v. 8.

"Then drew near unto him the publicans and sinners, for to hear him. And the pharisees and scribes murmured, saying: This man receiveth sinners, and eateth with them. And he spake this parable unto them, saying: What man of you having an hundred sheep, if he lose one of them, doth not leave the ninety and nine in the wilderness, and go after that which is lost, until he find it? and when he hath found it, he layeth it on his shoulders, rejoicing; and when he cometh home, he calleth together his friends and his neighbours, saying unto them, Rejoice with me, for I have found my sheep which was lost. I say unto you, that likewise joy shall be in heaven over one sinner, that repenteth, more than over ninety and nine just persons, which need no repentance."

The hymn to be used, when the penitent comes from the church of Rome.

Form of admitting converts from church of Rome, &c.

Psalm cxv. to v. 10.

"Not unto us, O Lord, &c.
"Glory be to the Father, &c.
"As it was in the beginning, &c."

If the penitent comes from the separation, then this is to be used.

Psalm cxxii.

"I was glad when they said unto me, &c.
"Glory be to the Father, &c.
"As it was in the beginning, &c."

Then the bishop sitting in a chair, or the priest standing, shall speak to the penitent, who is to be kneeling, as follows:—

"Dear brother (or sister),

"I have good hope, that you have well weighed and considered with yourself the great work, you are come about, before this time; but in as much as with the heart man believeth unto righteousness, and with the mouth confession is made unto salvation; that you may give the more honour to God, and that this present congregation of Christ here assembled may also understand your mind and will in these things, and that this your declaration may the more confirm you in your good resolutions, you shall answer plainly to these questions, which we in the name of God and of his church shall propose to you touching the same.

"Art thou thoroughly persuaded, that those books of the Old and New Testament, which are received as canonical scriptures by this church, contain sufficiently all doctrine requisite and necessary to eternal salvation through faith in Jesus Christ?

"*Answer.*—I am so persuaded.

"Dost thou believe in God the Father almighty, maker of heaven and earth, and in Jesus Christ his only begotten Son our Lord, and that he was conceived of the Holy Ghost, born of the Virgin Mary, that he suffered under Pontius Pilate, was crucified, dead and buried, that he went down into hell, and also did rise again the third day; that he ascended into heaven, and sitteth at the right hand of God the Father almighty, and from thence shall come again at the end of the world to judge the quick and the dead?

"And dost thou believe in the Holy Ghost, the holy Catholic Church, the communion of saints, the remission of sins, the resurrection of the flesh, and everlasting life after death?

"*Answer.*—All this I steadfastly believe.

"Art thou truly sorrowful, that thou hast not followed the way prescribed in these scriptures for the directing of the faith and practice of a true disciple of Christ Jesus?

"*Answer.*—I am heartily sorry, and I hope for mercy through Jesus Christ.

"Dost thou embrace the truth of the Gospel in the love of it, and steadfastly resolve to live godly, righteously, and soberly in this present world all the days of thy life?

"*Answer.*—I do embrace it, and do so resolve, God being my helper.

"Dost thou earnestly desire to be received into the communion of this church, as into a true and sound part of Christ's holy catholic church?

"*Answer.*—This I earnestly desire."

If the penitent come from the church of Rome, this question is to follow:

"Dost thou renounce all the errors and superstitions of the present Romish church, so far as they are come to thy knowledge?

"*Answer.*—I do from my heart renounce them all."

If the penitent from the church of Rome be in holy orders, let these further questions be asked:

"Dost thou in particular renounce the twelve last articles added in the confession, commonly called 'The Creed of Pope Pius IV.,' after having read them, and duly considered them?

"*Answer.*—I do upon mature deliberation reject them all, as grounded upon no warrant of scripture, but rather repugnant to the word of God?

"Dost thou acknowledge the supremacy of the kings and queens of this realm, as by law established and declared in the thirty-seventh article of religion?

"*Answer.*—I do sincerely acknowledge it.

"Wilt thou then give thy faithful diligence always so to minister the doctrine and sacraments, and the discipline of Christ, as the Lord hath commanded, and as this church and realm hath received the same, according to the commandments of God, so that thou mayst teach the people with all diligence to keep and observe the same?

"*Answer.*—I will do so by the help of the Lord.

"Wilt thou conform thyself to the liturgy of the Church of England as by law established?

"*Answer.* I will."

If the penitent comes from the separation, these questions are to be asked:

Form of admitting converts from church of Rome, &c.

"Dost thou allow and approve of the orders of bishops, priests, and deacons [as what have been in the Church of Christ from the time of the apostles (*y*)], and wilt thou, as much as in thee lieth, promote all due regard to the same good order and government in the Church of Christ?

"*Answer.*—I do approve it, and will endeavour, that it may be so regarded, as much as in me lieth.

"Wilt thou conform thyself to the liturgy of the Church of England, as by law established, and be diligent in attending the prayers and other offices of the church?

"*Answer.*—I will do so by the help of God."

If the penitent be one who has relapsed, the following question is to be asked:

"Art thou heartily sorry, that when thou wast in the way of truth, thou didst so little watch over thy own heart, as to suffer thyself to be led away with the shows of vain doctrine? and dost thou steadfastly purpose to be more careful for the future, and to persevere in that holy profession, which thou hast now made?

"*Answer.*—I am truly grieved for my former unsteadfastness, and am fully determined by God's grace to walk more circumspectly for the time to come, and to continue in this my profession to my life's end."

Then the bishop or priest standing up shall say:

"Almighty God, who hath given you a sense of your errors, and a will to do all these things, grant also unto you strength and power to perform the same, that he may accomplish his work, which he hath begun in you, through Jesus Christ. Amen."

The Absolution.

"Almighty God, our heavenly Father, who of his great mercy hath promised forgiveness of sins to all them that with hearty repentance and true faith turn unto him, have mercy upon you, pardon and deliver you from all your sins, confirm and strengthen you in all goodness, and bring you to everlasting life, through Jesus Christ our Lord. Amen."

Then the bishop or priest, taking the penitent by the right hand, shall say unto him:

"I, N., bishop of —— (or I, A. B.), do upon this thy solemn profession and earnest request receive thee into the holy communion of the Church of England, in the name of the Father, and of the Son, and of the Holy Ghost.

(*y*) That within the crotchets is to be used only when the penitent hath been a teacher in some separate congregation.

People. "Amen."

Then the bishop or priest shall say the Lord's prayer, with that which follows, all kneeling.

"Let us pray.

"Our Father which art in heaven, &c.

"O God of truth and love, we bless and magnify thy holy name for thy great mercy and goodness in bringing this thy servant into the communion of this church; give him (or her), we beseech thee, stability and perseverance in that faith, of which he (or she) hath in the presence of God and of this congregation witnessed a good confession. Suffer him (or her) not to be moved from it by any temptations of Satan, enticements of the world, the scoffs of irreligious men, or the revilings of those who are still in error; but guard him (or her) by thy grace against all these snares, and make him (or her) instrumental in turning others from the errors of their ways, to the saving of their souls from death, and the covering a multitude of sins. And in thy good time, O Lord, bring, we pray thee, into the way of truth all such as have erred and are deceived; and so fetch them home, blessed Lord, to thy flock, that there may be one fold under one Shepherd, the Lord Jesus Christ; to whom with the Father and the Holy Spirit be all honour and glory, world without end. Amen."

Then the bishop or priest, standing up (if there be no communion at that time), shall turn himself to the person newly admitted, and say:

"Dear brother (or sister),

"Seeing that you have by the goodness of God proceeded thus far, I must put you in mind that you take care to go on in that good way into which you are entered; and for your establishment, and furtherance therein, that, if you have not been confirmed, you endeavour to be so the next opportunity, and receive the holy sacrament of the Lord's Supper. And may God's holy Spirit ever be with you. Amen.

"The peace of God, which passeth all understanding, keep your heart and mind by Christ Jesus. Amen" (z).

(z) Similarly a form of penance and reconciliation of a renegade or apostate from the Christian church to "Turcism" (Reg. Laud. fol. 240 a) will be found in Wilkins, tom. iv. at pp. 522—524.

APPENDIX I.

CANONS OF THE FIRST FOUR GENERAL COUNCILS.

Canones Concilii Niceni (*a*).

Canon I. "Si quis à medicis in morbo excisus, vel à Barbaris exectus est, is in Clero maneat. Si quis autem cùm esset sanus, seipsum execuit, eum etiam in Clero recensitum cessare convenit, et deinceps nullum talem oportet promoveri. Quemadmodum autem hoc manifestum est, quòd de iis qui de industria hoc agunt, et seipsos audent excindere, dictum est: ita si aliqui à Barbaris vel dominis castrati sint, inveniantur autem et ii alioqui digni, tales in Clerum admittit Canon."

Canon II. "Quoniam multa, vel necessitate vel urgentibus alioqui hominibus, præter Canonem ecclesiasticum facta sunt, ut homines qui è vita gentili ad fidem nuper accesserunt, et exiguo tempore catechumeni (id est initiati) fuere statim ad lavacrum spirituale deducant, et simul ac baptizati fuerint, ad Episcopatum vel Presbyteratum provehant, rectè habere visum est, ut nihil deinceps tale fiat. Nam et catechumeno tempore opus est, et post baptismum, probatione majore. Apertum enim est scriptum Apostolicum quod dicit, Non neophytum, ne inflatus in judicium incidat et diaboli laqueum. Si autem procedente tempore, animale aliquod peccatum circa personam inventum fuerit, et à duobus vel tribus testibus convincatur, cesset qui talis est à Clero. Qui autem præter hæc facit, ut qui magnæ Synodo adversus esse audeat, ipse de clericatu in periculum veniet."

Canon III. "Vetuit magna Synodus omnino, ne liceat Episcopo, nec Presbytero, nec Diacono, nec ulli penitus eorum qui sunt in Clero, introductam habere mulierem, præterquam utique matrem vel sororem, vel amitam, vel eas solas personas quæ suspicionem effugiunt."

Canon IV. "Episcopum oportet, maximè quidem ab omnibus qui sunt in provincia, constitui. Si autem sit hoc difficile, vel propter urgentem necessitatem, vel propter viæ longitudinem, tres omnino eundem in locum congregatos, absentibus quoque suffragium ferentibus, scriptisque assentientibus, tunc ordinationem facere: eorum autem quæ fiunt confirmationem, in unaquaque provincia à Metropolitano fieri."

(*a*) See Synodicon sive Pandectæ Canonum S.S. Apostolorum et Conciliorum ab Ecclesiâ Græcâ receptorum. Gulielmus Beveregius, Oxon. 1672.

Canon V. "De iis qui à communione segregati sunt, sive clericorum, sive laicorum sint ordinis, ab Episcopis qui sunt in unaquaque provincia, valeat sententia secundùm canonem qui pronuntiat, eos qui ab aliis ejecti sunt non ab aliis admittendos. Examinetur autem, nunquid vel simultate, vel contentione, vel aliqua ejusmodi Episcopi acerbitate, congregatione pulsi sint. Ut hoc ergo convenientem examinationem accipiat, rectè habere visum est, ut singulis annis, in unaquaque provincia bis in anno Synodi fiant: ut cum omnes provinciæ Episcopi in eundem locum communiter conveniant, ejusmodi quæstiones examinentur: et sic, quos Episcopum offendisse, constiterit, justè esse à congregatione separati apud omnes videantur, donec Episcoporum congregationi videatur pro iis humaniorem proferre sententiam. Synodi autem fiant, una quidem ante quadragesimam, ut omnibus animi sordibus sublatis, purum munus Deo offeratur. Secunda autem circiter autumni tempus."

Canon VI. "Antiqui mores serventur qui sunt in Ægypto, Lybia et Pentapoli, ut Alexandrinus Episcopus horum omnium potestatem habeat, quandoquidem et Episcopo Romano hoc est consuetum. Similiter et in Antiochia, et in aliis provinciis, sua privilegia Ecclesiis serventur. Illud autem est omnino manifestum, quòd si quis absque Metropolitani sententia factus sit Episcopus, eum magna Synodus definivit non esse Episcopum. Quòd si quidem communi omnium electioni, quæ et rationi consentanea, et ex regula Ecclesiastica facta est, duo vel tres propter suam qua delectantur contentionem contradicant, vincant plurium suffragia."

Canon VII. "Quoniam obtinuit consuetudo et antiqua traditio, ut qui est in Ælia (*b*) Episcopus, honoretur, habeat honoris consequentiam, Metropoli propria dignitate servata."

Canon VIII. "De iis, qui seipsos καθαρὰς, id est, puros, quandoque neminant, ad Catholicam autem et Apostolicam Ecclesiam accedunt, sanctæ Synodo visum est, ut impositis eis manibus sic in Clero maneant: ante omnia autem hoc in scriptis ipsos profeteri convenit, quod adhærebunt et sequentur Catholicæ Ecclesiæ decreta: id est, quod et cum digamis communicabunt, et cum iis qui in persecutione lapsi sunt, in quibus et tempus constitutum est, et opportunitas præfinita, ut ipsi sequantur in omnibus Catholicæ Ecclesiæ decreta. Ubi ergo omnes, sive in vicis, sive in urbibus, ipsi soli inveniuntur ordinati, qui inveniuntur in Clero, erunt in eodem ordine. Si autem Catholicæ Ecclesiæ Episcopo vel Presbytero existente, accedunt aliqui, clarum est quòd Ecclesiæ quidem Episcopus, Episcopi dignitatem habebit: qui autem apud eos qui Cathari dicuntur, nominatur Episcopus, Presbyteri honorem habebit, nisi utique Episcopo placeat ipsum nominis honorem impertire. Si autem hoc illi non placeat, vel Chorepiscopi vel Presbyteri locum excogitabit, ut esse omnino in Clero videatur, ne in civitate duo sint Episcopi."

Canon IX. "Quicunque citra examinationem promoti sunt Presbyteri, vel examinati sua peccata confessi sunt, eisque confessis, præter Canonem moti homines manus imposuerunt, eos Canon non admittit. Quod est enim à reprehensione alienum, defendit Ecclesia."

Canon X. "Quicumque ex iis qui lapsi sunt, vel per ignorantiam,

(*b*) *Jerusalem*—cf. Justin. Novellæ, cxxiii.

vel scientibus iis qui promoverunt, ordinati sunt, hoc Ecclesiastico Canoni non præjudicat. Ii enim cogniti deponuntur."

Canon XI. "De iis qui sine necessitate, vel sine facultatum suarum ablatione, vel sine ullo periculo, vel aliquo ejusmodi, transgressi sunt, quod sub Licinii tyrannide factum est, Synodo visum est, et si humanitate indigni sunt, clementia tamen in eos uti. Quicunque ergo germanè pœnitentia ducuntur, tres annos inter auditores exigent, ut fideles, et septem annis prosternentur: duobus autem annis, absque oblatione, erunt orationum cum populo participes."

Canon XII. "Qui autem à gratia quidem evocati, et primum suum ardorem ostenderunt, et cingula deposuerunt, postea autem ut canes ad suum vomitum reversi sunt, ut nonnulli etiam pecuniam profunderent, et beneficiis militiam assequerentur, hi decem annis prosternantur supplices, etiam post triennii auditionis tempus. In his autem omnibus examinare convenit consilium et speciem pœnitentiæ. Quicunque enim, et metu, et lacrymis, et tolerantia, et bonis operibus, conversionem opere et non tantùm habitu ostendunt, hi impleto auditionis tempore quod præfinitum est, merito orationum communionem habebunt, cum eo quod etiam liceat Episcopo humanius aliquid de eis statuere. Quicunque autem non adeo graviter tulerunt, satisque sibi esse putarunt in Ecclesias ingredi ad conversionem, tempus omnino impleant."

Canon XIII. "De iis autem qui excedunt, antiqua et canonica lex nunc quoque servabitur, ut si quis vita excedat, ultimo et maximè necessario viatico ne privetur. Si autem deploratus et communionem assecutus, rursus in vivos relatus sit, cum iis sit qui orationum sunt tantùm communionis participes. In summa autem, de quolibet excedente, et Eucharistiæ participationem petente, Episcopus cum examinatione cum oblatione impertiat."

Canon XIV. "De catechumenis, et qui lapsi sunt, visum est sanctæ et magnæ Synodo, ut ii tribus annis tantùm audientes, postea orent, cum catechumenis."

Canon XV. "Propter multum tumultum, et seditiones quæ fiunt, omnino visum est ut consuetudo quæ præter Canonem in nonnullis partibus invenitur, tollatur, ut à civitate in civitatem nec Episcopus, nec Presbyter, nec Diaconus transeat. Si quis autem post sanctæ et magnæ Synodi definitionem tale quippiam adgressus fuerit, vel si rei ejusmodi dederit, quod factum erit omnino infirmabitur, et Ecclesiæ restituetur cui Episcopus vel Presbyter ordinatus fuerit."

Canon XVI. "Quicunque temerè et inconsideratè, nec Dei timorem præ oculis habentes, nec Ecclesiasticum Canonem scientes, Presbyteri vel Diaconi, vel quicunque omnino in Canone recensentur, ab Ecclesiis secesserint, ii in aliena Ecclesia nullo modo recipi debent, sed omnino cogendi sunt in suas ipsorum parochias redire. Vel si perseverent, eos à communione separatos esse oportet. Sin autem etiam ausus fuerit quispiam eum qui ad alium pertinet, surripere, et in Ecclesià suâ ordinare, non consentiente proprio Episcopo, à quo recessit qui in Canone censetur, irrita sit ordinatio."

Canon XVII. "Quoniam multi qui in Canone recensentur, plura habendi studium et turpe lucrum persequentes, divinæ scripturæ obliti

sunt: qui dicit, Argentum suum non dedit ad usuram: et fœnerantes, centesimas exigunt: æquum censuit sancta et magna Synodus, ut si quis inventus fuerit post statutum usuras ex mutuo sumere, vel eam rem aliter persequi, sesquialteras exigens, vel aliquid aliud excogitare turpis quæstus gratia, è Clero deponatur, et sit alienus à Canone."

Canon XVIII. "Pervenit ad sanctam Synodum, quod in nonnullis locis et civitatibus Diaconi dant Presbyteris Eucharistiam, quod neque Canon, neque consuetudo tradidit, ut qui offerendi potestatem non habent, iis qui offerunt, dent Corpus Christi. Jam verò illud etiam cognitum est, quod quidam ex Diaconis etiam ante Episcopos Eucharistiam attingunt. Hæc ergo omnia auferantur, et Diaconi intra suas mensuras permaneant, scientes quòd sunt quidem Episcopi ministri, Presbyteris vero minores. Accipiant autem suo ordine Eucharistiam post Presbyteros, eis præbente Episcopo vel Presbytero. Sed nec in medio quidem Presbyterorum liceat Diaconis sedere. Id fit enim præter Canonem et ordinem. Si quis autem non vult obedire, etiam post has constitutiones, à diaconatu desistat."

Canon XIX. "De Paulianistis, qui deinde ad Catholicam Ecclesiam confugerunt, statutum est, ut ii omnino rebaptizentur. Si qui verò tempore præterito in Clericorum numero erant, siquidem à culpa et reprehensione alieni visi fuerint, rebaptizati ordinentur à Catholicæ Ecclesiæ Episcopo. Si verò examinatio eos non esse aptos deprehendit, deponi eos oportet. Similiter autem et Diaconissis, et omnino de omnibus qui inter Clericos annumerantur, eadem forma servabitur. Diaconissarum autem meminimus, quæ in habitu quidem censentur, quoniam nec ullam habent manuum impositionem, ut omnino inter laicos ipsæ connumerentur."

Canon XX. "Quoniam sunt quidam, qui in die dominico genuflectunt, et ipsis diebus Pentecostes: ut omnia similiter in omni parochia serventur, visum est sanctæ Synodo, instantes, Deo orationes effundant."

Canones Concilii Constantinopolitani.

Synod. Constantinopolitanæ Œcumenicæ secundæ.

Canon I. "Statuerunt, qui Constantinopoli convenerunt sancti Patres, cccxviii. Patrum qui Nicææ convenerunt, fidem non abrogari, sed firmam manere, et omnem hæresin anathematizari: et specialiter Eunomianorum seu Eudoxianorum; et Semiarrianorum, sive Spiritus sancti adversariorum, et Sabellianorum, et Marcellianorum, et Photianorum, et Apollinaristarum."

Canon II. "Episcopi ultra diœcesin in Ecclesias extra suos terminos ne accedant, nec Ecclesias confundant, sed secundùm Canones. Alexandriæ quidem Episcopus Ægyptum solam regat, orientis autem Episcopi, orientem solum administrent, servatis privilegiis et præeminentiis, quæ sunt in Nicæni concilii Canonibus Antiochenæ Ecclesiæ. Et Asianæ diœcesis Episcopi, quæ sunt in sola Asiana administrent, et Ponticæ Episcopi Ponticam tantùm regant, et Thraciæ Thraciam. Non vocati autem Episcopi ultra diœcesin ne transeant, ad ordinationes, vel aliquas alias administrationes Ecclesiasticas. Servato autem præscripto de diœcesibus

Canone, clarum est quòd unamquamque provinciam provinciæ Synodus administrabit, secundùm ea quæ fuerunt Nicææ definita. Quæ autem in barbaris sunt gentibus, Dei Ecclesias, administrare oportet, secundùm patrum, quæ servata est, consuetudinem."

Canon III. "Constantinopolitanus Episcopus habeat prioris honoris partes post Romanum Episcopum, eo quòd sit ipsa nova Roma."

Canon IV. "Statuerunt etiam de Maximo Cynico, et ejus petulantia et insolentia, quæ fuit Constantinopoli; ut nec Maximus Episcopus factus fuerit, vel sit, nec qui ab eo ordinati fuerunt, in ullo, quicunque sit, gradu Cleri: omnibus, et quæ circa ipsum fuerunt, et quæ ab illo facta sunt, infirmatis."

Canon V. "Quod ad volumen attinet Occidentalium, etiam eos suscipimus qui Antiochiæ unam Patris et Filii et sancti Spiritus Deitatem confitentur."

Canon VI. "Quoniam multi Ecclesiasticum ordinem confundere et subvertere volentes, inimicè et sycophanticè adversus orthodoxos Episcopos, qui Ecclesias administrant, accusationes quasdam confingunt, nihil aliud quam sacerdotum bonam famam lædere, et in pace degentium populorum tumultus concitare conantes: ea de causa decrevit sancta Synodus Episcoporum, qui Constantinopoli convenerunt, non sine examine accusatores admittere, nec omnibus, eorum qui Ecclesias administrant accusationes permittere, nec omnes excludere. Sed si quis propriam quidem querelam, id est, privatam, intendat Episcopo, ut oppressus, vel aliàs injuria ab ipso affectus, in ejusmodi accusationibus, nec accusatoris personam, nec religionem examinari. Omnino enim oportet, et Episcopi conscientiam esse liberam, et eum, qui injuriam sibi factam esse conqueritur, cujuscunque tandem sit religionis, jus obtinere. Si autem sit crimen Ecclesiasticum, quod Episcopo intenditur, tunc examinare oportet personas accusatorum. Ut primùm quidem hæreticis non liceat orthodoxos Episcopos de rebus ecclesiasticis accusare. Hæreticos autem dicimus, et qui olim ab Ecclesia ejecti sunt, et qui sunt postea à nobis anathematizati. Ad hæc autem, et eos qui sanam quidem fidem confiteri præ se ferunt, in Schisma autem abeunt, et adversus Canonicos nostros Episcopos congregationem faciunt. Præterea autem, et si aliqui eorum ab ecclesia ob aliquas causas priùs condemnati et ejecti, vel excommunicati fuerint, sive ex Clero, sive ex laicorum ordine sint; nec iis licere Episcopum accusare priusquam proprium crimen absterserint. Similiter autem et eos, qui sub priore accusatione laborant, non priùs ad Episcopi vel aliorum clericorum accusationem admitti, quàm se objectorum sibi criminum insontes ostenderint. Sed si nonnulli, nec hæretici, nec excommunicati fuerint, nec priùs damnati, vel aliquorum criminum accusati, dicant autem se habere Ecclesiasticas aliquas adversus Episcopum criminationes, eos jubet sancta Synodus primùm quidem apud provinciæ Episcopos accusationem intendere, et coram eis probare crimina Episcopo objecta. Quòd si evenerit, ut provinciales Episcopi crimina, quæ Episcopo intentata sunt, corrigere non possint, tunc ipsos accedere ad majorem Synodum diœcesis illius Episcoporum pro hac causa convocatorum, et accusationem non priùs intendere, quàm æquale sibi periculum scriptis statuant, siquidem in rebus examinandis, accusatum Episcopum calumniari convicti fuerint. Si quis

autem iis, quæ (ut priùs declaratum est) decreta fuerunt, contemptis, ausus fuerit vel Imperatoris aures molestia afficere, vel secularium principum judicia, vel universalem Synodum perturbare, neglectis omnibus diœcesis Episcopis, eum nullo modo esse ad accusationem admittendum, ut qui Canonibus injuriam fecerit, et Ecclesiasticum ordinem everterit."

Canon VII. "Eos qui rectæ fidei se adjungunt, et parti eorum, qui ex Hæreticis servantur, recipimus, secundum subjectam hic consequentiam et consuetudinem. Arrianos quidem et Macedonianos, et Sabbatianos, et Novatianos, qui seipsos vocant Catharos et Sinistros; et Quartadecimanos sive Tetraditas, et Apollinaristas, recipimus, dantes quidem libellos, et omnem hæresin anathematizantes, quæ non sentit ut sancta Dei Catholica et Apostolica Ecclesia: et signatos sive unctos primùm sancto chrismate, et frontem, et oculos, et nares, et os, et aures; et eos signantes dicimus, Signaculum doni Spiritus sancti. Atqui Eunomianos, qui una demersione baptizantur, et Montanistas, qui hic dicuntur Phryges, et Sabellianos, qui idem esse patrem et filium docent, et alia quædam perniciosa faciunt. Et alias omnes hæreses (quoniam hic multi sunt, et maximè qui ex Galatarum regione prodierunt) quicunque ex his rectæ fidei adscribi volunt, ut Græcos admittimus, et primo quidem die ipsos Christianos facimus; secundo, catechumenos; deinde tertio, exorcizamus ipsos, ter in faciem eorum et aures insufflando. Et sic eos in Religionis fundamentis instituimus, et curamus ut diu in Ecclesia versentur, et audiant scripturas, et tunc ipsos baptizamus."

Canon VIII. "Eunomiani, unâ mersione baptizati, Sabelliani, et Phryges, tanquam Gentiles accipiantur."

Canones Concilii Ephesini.

Canones Sanctæ et Œcumenicæ tertiæ Synodi.

Canon I. "Quoniam oportet etiam eos qui sanctæ Synodo non interfuerunt, propter aliquam causam, vel ecclesiasticam, vel corporalem, non ignorare ea quæ in ipsa statuta sunt, vestræ sanctitati et dilectioni notum facimus, quòd si quis provinciæ Metropolitanus à sancta et universali Synodo deficiens, apostasiæ seu defectionis consessui ac conventiculo adhæsit, vel post hac adhæserit, vel cum Celestio sensit aut senserit, is adversus suæ provinciæ Episcopos nihil penitus agere potest, omni Ecclesiastica Communione abhinc jam à Synodo ejectus, et ad nullum exercendum munus officiumque idoneus existens. Sed et ipsis provinciæ Episcopis, et, qui sunt circumcirca, Metropolitanis orthodoxè sentientibus, omnino subjicietur, et de episcopatus gradu dijicietur."

Canon II. "Si autem nonnulli provinciales Episcopi sanctæ Synodo non interfuerunt et apostasiæ accesserunt, vel accedere conati fuerunt, vel cùm etiam Nestorii depositioni subscripsissent, ad apostasiæ confessum recurrerunt, ii omnino, ut sanctæ Synodo visum est, sint à sacerdotio alieni, et gradu excidant."

Canon III. "Si qui autem in unaquaque urbe, vel regione Clerici sub Nestorio et iis qui cum ipso, sacerdotio sunt interdicti, eo quod rectè sentiant, ut ii quoque proprium gradum recipiant, justum cen-

suimus. Communiter autem omnibus, qui cum orthodoxa et universali Synodo consentiunt, Clericis jubemus, iis, qui desciverunt vel desciscunt, Episcopis nullo penitus modo subjici."

Canon IV. "Si qui autem Clerici defecerint, et ausi sint, vel privatim vel publicè, cum Nestorio aut Celestio sentire, eos quoque depositos esse sanctæ Synodo justum visum est."

Canon V. "Quicunque autem propter indigna sua facta à sancta Synodo, vel à propriis Episcopis condemnati sunt, et iis non Canonicè, prout omnia facit indiscriminatim, Nestorius, vel qui idem cum eo sentiunt, restituere tentaverint communionem, vel gradum, id nihil eis prodesse, et depositos nihilo secius manere justum putarunt."

Canon VI. "Similiter autem, si qui voluerint, quæ in sancta Ephesina Synodo de singulis acta sunt, quovis modo labefactare: decrevit sancta Synodus, si sint quidèm Episcopi vel Clerici, à proprio gradu omnino excidere, si autem laici, excommunicatos manere."

Canon VII. "His lectis, decrevit sancta Synodus, non licere cuiquam aliam fidem afferre, vel scribere, vel componere, quàm quæ à sanctis patribus, qui Niceæ congregati sunt in sancto Spiritu, definita est. Qui autem aliam audent fidem componere, vel adducere, vel offerre iis qui se ad veritatis agnitionem volunt convertere, vel ex gentilitate, vel ex Judaismo, vel ex quacunque secta; eos, si sint quidem Episcopi, vel Clerici, ab episcopatu esse alienos Episcopos, et a Clero clericos; si autem sint laici, anathematizari. Eodem autem modo si deprehensi fuerint aliqui, sive Episcopi, sive Clerici, sive laici, vel sentire, vel docere ea quæ sunt in allata à Charisio Presbytero expositione de humanæ naturæ susceptione unigeniti filii Dei, sive scelerata et perversa Nestorii dogmata, quæ etiam subjecta sunt; subjiciantur sententiæ hujus sanctæ et universalis Synodi, ut scilicet Episcopus quidem sit ab Episcopatu alienus et depositus: clericus autem Clero similiter excidat. Si sit verò quis laicus, anathematizetur et ipse, ut priùs dictum est."

Canon VIII. "Rem præter leges ecclesiasticas et sanctorum patrum Canones innovatam, et omnium libertatem attingentem, renunciavit nobis in primis pius Episcopus Riginus, et qui cum eo sunt Cypriorum provinciæ religiosissimi Episcopi, Zeno et Euagrius. Quamobrem quoniam communes morbi majori medicina opus habent, ut qui majus etiam damnum afferant, et maximè si neque antiqua consuetudo consecuta est, ut Antiochenæ civitatis Episcopus in Cypro ordinationes faciat, quemadmodum et libellis et propriis vocibus nos docuerunt viri religiosissimi, qui ad sanctam Synodum accesserunt; iis, qui sacrosanctis Cypri exclesiis præsunt, fraudi ac probro non erit, nec ulla vis aut impedimentum eis afferetur, si secundùm sanctorum patrum Canones et antiquam consuetudinem, per se religiosissimorum Episcoporum electiones faciant. Idem autem et in aliis diœcesibus, et, quæ sunt ubique, provinciis servabitur: ut nullus religiosissimorum Episcoporum, provinciam aliam, quæ non multis retrò annis et ab initio sub sua, vel eorum, qui illum præcesserunt, manu fuerit, invadat. Sed et si quis invaserit, et sibi per vim submiserit, eam reddat, ne patrum Canones transiliantur, nec sub sacerdotalis muneris prætextu secularis potestatis fastus subeat, nec libertatem paulatim imprudentes amittamus, quam nobis proprio sanguine dedit dominus Jesus Christus, omnium hominum liberator.

Sanctæ et universali Synodo visum est, ut unicuique provinciæ pura et inviolata serventur jura, quæ ab initio et multis retro annis habet, secundum consuetudinem quæ jam olim servata, potestatem habente unoquoque Metropolitano, actorum exemplaria ad suam securitatem accipere. Si quis autem constitutionem aliquam iis, quæ nunc definita sunt, repugnantem attulerit, eam quoque esse irritam visum est toti sanctæ et universali Synodo."

Canones Concilii Chalcedonensis.

Canones XXX.

Sanctæ et Œcumenicæ quartæ Synodi Chalcedonensis.

Canon I. "Qui à sanctis patribus in unaquaque Synodo hucusque expositi sunt, observari Canones æquum censuimus."

Canon II. "Si quis Episcopus propter pecunias ordinationem fecerit, et non venalem gratiam in venditionem deduxerit, et propter pecunias ordinaverit Episcopum, vel Chorepiscopum, vel Presbyterum, vel aliquem eorum qui in Clero annumerantur, vel propter pecunias promoverit œconomum vel Defensorem, vel Paramonarium (seu Monasterii Administrum), vel omnino aliquem ex Canone, turpis quæstus gratia; qui hoc tentasse convictus fuerit, de proprio gradu in periculum veniat; et qui est ordinatus, ex ordinatione vel promotione quæ instar mercatorum venundatur, nihil juvetur: sed sit à dignitate vel curatione, quam pecuniis adeptus est, alienus. Si quis autem adeò turpibus et nefariis lucris intercessor apparuerit, hic quoque, si sit quidem Clericus, proprio gradu excidat; sin verò Laicus sit vel Monachus, anathematizetur."

Canon III. "Pervenit ad sanctam Synodum, quòd eorum qui in Clerum cooptati sunt, quidam propter turpe lucrum alienas possessiones conducunt, et secularia negotia exercent, divinum ministerium negligentes, secularium vero domos subeuntes, et eorum facultatum administrationes propter avaritiam suscipientes. Definiit ergo sancta et magna Synodus neminem deinceps, nec Episcopum, nec Clericum, nec Monachum, vel possessiones vel res conducere, vel secularibus possessionum administrationibus seipsum ingerere: nisi utique ex lege ad inexcusabilem impuberum tutelam vocetur, vel civitatis Episcopus eum rerum Ecclesiasticarum curam gerere permittat, vel orphanorum, vel viduarum, quibus non providetur, et personarum, quæ Ecclesiastico auxilio maximè indigent, propter timorem Dei. Si quis autem quæ statuta sunt deinceps transgredi aggressus fuerit, is pœnis Ecclesiasticis subjiciatur."

Canon IV. "Qui verè et sincerè monasticam vitam aggrediuntur, digni convenienti honore habeantur. Quoniam autem nonnulli monachio prætextu utentes, et Ecclestiastica et civilia perturbant negotia, temere et citra ullam discriminis rationem in urbibus circumcursantes, quinetiam monasteria sibi constituere studentes; visum est nullum usquam ædificare nec construere posse monasterium, vel oratoriam domum, præter sententiam ipsius civitatis Episcopi; Monachos autem, qui sunt in unaquaque regione et civitate, Episcopo subjectos esse, et quietem amplecti, et soli jejunio et orationi vacare, in quibus ordinati sunt locis fortiter perseverantes, nec Ecclesiasticis

nec secularibus negotiis se ingerere vel communicare, propria relinquentes monasteria, nisi quandoque à civitatis Episcopo propter usum necessarium eis permissum fuerit, nullum autem in monasteriis servum recipi, ad hoc ut sit Monachus, præter voluntatem sui domini. Eum autem, qui hanc nostram definitionem transgreditur, definivimus esse excommunicatum, ne nomen Dei blasphemetur: civitatis autem Episcopum oportet eam quam par est monasteriorum curam gerere."

Canon V. "De Episcopis, vel Clericis, qui à civitate in civitatem transeunt, placuit eos qui editi sunt à sanctis patribus Canones, vires obtinere."

Canon VI. "Nullum absolutè ordinari, nec Presbyterum, nec Diaconum, nec omnino aliquem eorum qui sunt in ordine Ecclesiastico, nisi specialiter in Ecclesia civitatis vel pagi, vel martyrio, vel monasterio, is qui ordinatur, designetur. Eos autem qui absolutè ordinantur, decrevit sancta Synodus irritam ac invalidam habere ejusmodi manuum impositionem, et nusquam exercere ac operari posse ad ejus, qui ordinavit, contumeliam."

Canon VII. "Eos qui in Clero semel ordinati sunt, et itidem Monachos, statuimus nec ad militarem expeditionem, nec ad secularem dignitatem posse venire. Qui autem hoc audent, et non pœnitentia ducti ad id revertuntur, quod propter Deum priùs elegerant, anathematizari."

Canon VIII. "Clerici ptochotrophiorum, monasteriorum, et templorum martyrum, sub potestate Episcoporum, qui sunt in unaquaque civitate, ex sanctorum patrum traditione permaneant, et non per arrogantiam se à proprio Episcopo subducant. Qui hanc autem constitutionem evertere ausi fuerint; si sint quidem Clerici, Canonum pœnis subjiciantur; si autem Monachi vel laici, sint excommunicati."

Canon IX. "Si quis Clericus habeat cum Clerico litem, proprium Episcopum ne relinquat, et ad secularia judicia ne excurrat; sed causam prius apud proprium Episcopum agat; vel Episcopi voluntate apud eos, quos utraque pars elegerit, judicium agitetur. Si quis autem præter hæc fecerit, Canonicis pœnis subjiciatur. Si Clericus autem cum proprio vel etiam alio Episcopo litem habeat, à provinciæ Synodo judicetur. Si autem cum ipsius provinciæ metropolitano Episcopus vel Clericus controversiam habeat, diœcesis exarchum adeat, vel Imperialis urbis Constantinopolis thronum, et apud eum litiget."

Canon X. "Non licere Clerico in duarum civitatum Ecclesiis eodem tempore in catalogum referri, et in ea, in qua à principio ordinatus est, et in ea, in quam tanquam ad majorem confugit, propter inanis gloriæ cupiditatem: eos autem, qui hoc faciunt, propriæ Ecclesiæ restitui, in qua ab initio ordinati sunt, ut illic solum ministrent. Sed si jam quispiam ex alia in aliam Ecclesiam translatus est, nihil prioris Ecclesiæ vel eorum quæ sub ea sunt martyriorum, vel ptochotrophiorum, vel xenodochiorum rebus communicare. Eos autem qui ausi fuerint, post magnæ hujus et universalis Synodi definitionem, aliquid eorum, quæ nunc sunt prohibita, facere, statuit sancta Synodus eos proprio gradu excidere."

Canon XI. "Omnes pauperes, et qui auxilio indigent, cum examinatione, cum epistolis seu pacificis Ecclesiasticis solis viam ingredi statuimus, et non cum commendatitiis; quoniam literas commendatitias iis solis personis, quæ sunt suspectæ, præberi oportet."

Canon XII. "Pervenit ad nos, quod quidam, cum præter ritus Ecclesiasticos ad potentatus accessissent, per pragmaticas unam provinciam in duas diviserunt; ut ex eo duo essent Metropolitani in eadem provincia. Statuit ergo sancta Synodus, ne Episcopus deinceps tale quid audeat; quoniam is, qui hoc aggreditur, à suo gradu excidit. Quæcunque autem civitates per literas Imp. Metropolis nomine honoratæ sunt, solo honore fruantur, et qui ejus Ecclesiam administrat Episcopus, servatis scilicet veræ Metropoli suis juribus."

Canon XIII. "Externos Clericos et ignotos in alia civitate sine proprii Episcopi commendatitiis literis nusquam ullo modo ministrare."

Canon XIV. "Quoniam in nonnullis provinciis concessum est Lectoribus et Cantoribus uxores ducere, decrevit sancta Synodus nulli eorum licere diversæ à recta opinionis uxorem ducere; eos autem qui ex ejusmodi matrimonio liberos susceperunt, si eos quidem baptizare apud hæreticos prævenerint, ad catholicæ Ecclesiæ communionem adducere. Si autem non baptizaverint, non posse eos apud hæreticos baptizare, sed neque hæretico, vel Judæo, vel Gentili matrimonio conjungere, nisi utique persona, quæ orthodoxæ conjungitur, se ad orthodoxam fidem convertendam spondeat. Si quis autem hoc sanctæ Synodi decretum transgressus fuerit, Canonicis pœnis subjiciatur."

Canon XV. "Diaconissam non esse mulierem ordinandam ante annum quadragesimum, et eam cum accurata examinatione. Si autem post quam ordinatione suscepta ministerio aliquo tempore permansit, seipsam matrimonio tradiderit, Dei gratiæ injuriam faciens, ea, unà cum illo qui ei conjunctus est, anathematizetur."

Canon XVI. "Virginem, quæ se domino Deo dedicavit, similiter et monachas non licere matrimonio conjungi. Sin autem hoc fecisse inventi fuerint, sint excommunicati. Ostendendæ autem in eos humanitatis auctoritatem habere statuimus Episcopum ejus loci."

Canon XVII. "Quæ sunt in unaquaque provincia, rurales vicanasque parochias, firmas et inconcussas manere apud eos qui illas tenent Episcopos: et maximè si xxx annorum tempore eas sine vi detinentes administraverint. Si autem intra xxx annos fuit aliqua vel fuerit de iis controversia, licere iis qui injuriam sibi fieri dicunt, de iis litem movere apud Synodum provinciæ. Si quis autem injuria afficiatur à proprio Metropolitano, apud exarchum diœcesis, vel Constantinopolitanam sedem litiget, sicut prius dictum est. Sin autem etiam civitas aliqua ab imperatoria auctoritate innovata est vel etiam deinceps innovata fuerit, civiles et publicas formas Ecclesiasticarum quoque parochiarum ordo consequatur."

Canon XVIII. "Conjurationis vel sodalitatis crimen ab externis etiam legibus est omnino prohibitum; multo autem magis hoc in Dei Ecclesia fieri prohibere oportet. Si qui ergo Clerici vel Monachi inventi fuerint, vel conjurati, vel sodalitates comparantes, vel

aliquid struentes adversus Episcopos aut Conclericos proprio gradu omnino excident."

Canon XIX. "Pervenit ad aures nostras, quod in provinciis Canonibus constitutæ Episcoporum Synodi non fiant, et ex eo multa Ecclesiastica negliguntur, quæ correctione indigent. Statuit ergo sancta Synodus secundum sanctorum patrum Canones, ut bis in anno eundem in locum conveniant uniuscujusque provinciæ Episcopi, ubi Metropolis Episcopo melius esse videbitur, et singula emergentia corrigant; Episcopi autem, qui non conveniunt, sed in propriis urbibus domi manent, si quidem sani sunt, et ab omni inexcusabili et necessario negotio liberi, fraternè reprehendantur."

Canon XX. "Clericos in Ecclesiis ministerio fungentes, quemadmodum jam statuimus, non licere in alius civitatis Ecclesia ordinari, sed illa esse contentos, in qua ab initio ut ministrarent digni habiti sunt; præter illos, qui amissa sua patria in aliam Ecclesiam necessario transierunt. Si quis autem Episcopus post hoc decretum Clerum, qui ad alium Episcopum pertinet, susceperit, placuit esse excommunicatos, eumque qui susceptus est, et eum qui suscepit, donec Clericus qui migravit in suam Ecclesiam redeat."

Canon XXI. "Clericos vel Laicos, Episcopos aut Clericos accusantes, non indiscriminatim, ac citra inquisitionem admittere ad accusationem, nisi eorum existimatio prius examinata fuerit."

Canon XXII. "Non licere Clericis post mortem proprii Episcopi res, quæ ad ipsum pertinent, rapere, quemadmodum et adsumentibus, prohibitum est: aut qui hoc fecerint, de proprio gradu in periculum venire."

Canon XXIII. "Pervenit ad aures sanctæ Synodi, quòd Clerici quidam et Monachi, quibus nihil à proprio Episcopo mandatum est, et sunt etiam nonnunquam ab ipso communione segregati, ad Imp. Constantinopolis urbem se conferunt, et in ea diu morantur, turbas excitantes, statumque Ecclesiasticum perturbantes, et aliquarum domos subvertunt. Statuit ergo sancta Synodus, ut ii priùs à sanctissimæ Constantinopolitanæ Ecclesiæ defensore admoneantur, ut Imp. urbe excedant. Si autem in iisdem negotiis impudenter perseverent, ut per ipsum defensorem vel inviti ejiciantur, et in propria loca revertantur."

Canon XXIV. "Quæ semel voluntate Episcopi consecrata sunt monasteria, perpetuo manere monasteria, et res quæ ad ea pertinent servari, eaque non amplius fieri secularia habitacula. Eos autem, qui hoc fieri permittunt, Canonum pœnis subjici."

Canon XXV. "Quoniam nonnulli Metropolitani, ut sæpe à nobis auditum est, et greges sibi commissos negligunt, et Episcoporum ordinationes differunt: sanctæ Synodo placuit, ut intra tres menses ordinationes fiant, nisi inexorabilis utique necessitas effecerit ut dilationis tempus prorogetur. Si autem hoc non fecerint, eos Ecclesiasticæ pœnæ subjici. Viduæ vero Ecclesiæ reditum apud Ecclesiæ œconomum salvum custodiri."

Canon XXVI. "Quoniam in nonnullis Ecclesiis, ut sæpe à nobis auditum est, Episcopi absque œconomis tractant res Ecclesiasticas,

placuit omnem Ecclesiam Episcopum habentem, ex proprio Clero œconomum quoque habere, qui ex Episcopi sui sententiâ res Ecclesiasticas dispenset: ut nec sine testibus sit Ecclesiæ administratio, atque ideo res ejus dissipentur, et probrum ac dedecus sacerdotio inuratur. Si autem hoc non fecerit, eum Divinis etiam Canonibus subjici."

Canon XXVII. "Eos qui nomine conjugii mulieres rapiunt, vel opem ferunt, vel consentiunt iis qui rapiunt, statuit Synodus, si sint quidem Clerici, proprio gradu excidere; sin autem Laici, anathematizari."

Canon XXVIII. "Sanctorum patrum decreta ubique sequentes, et Canonem, qui nuper lectus est, centum et quinquaginta Dei amantissimorum Episcoporum agnoscentes, eadem quoque et nos decernimus ac statuimus de privilegiis sanctissimæ Ecclesiæ Constantinopolis novæ Romæ. Etenim antiquæ Romæ throno, quòd urbs illa imperaret, jure patres privilegia tribuêre. Et eadem consideratione moti centum quinquaginta Dei amantissimi Episcopi, sanctissimo novæ Romæ throno æqualia privilegia addixerunt, rectè judicantes, urbem, quæ et imperio et senatu honorata sit, et æqualibus cum antiquiori regina Roma privilegiis fruatur, etiam in rebus Ecclesiasticis, non secus ac illam, extolli ac magni fieri, secundam post illam existentem. Ut et Ponticæ, et Asianæ et Thraciæ diœcesis Metropolitani soli, præterea et Episcopi prædictarum diœcesium, quæ sunt inter barbaros, à prædicto throno sanctissimæ Constantinop. Ecclesiæ ordinentur; unoquoq' scilicet prædictarum diœcesium Metropolitano cum provinciæ Episcopis provinciæ Episcopos ordinante, quemadmodum Divinis Canonibus est traditum: Ordinari autem, sicut dictum est, prædictarum diœcesium Metropolitanos à Constantinop. Archiepiscopo, convenientibus de more factis electionibus et ad ipsum relatis."

Canon XXIX. "Episcopum in Presbyteri gradum deducere est sacrilegium. Si qua autem justa causa illos ab Episcopali actione removet, nec Presbyteri debent locum obtinere. Sin autem absque ullo crimine dignitate moti sunt, ad Episcopalem dignitatem redibunt. Anatolius religiosissimus Constantinopolitanus Archiepiscopus dixit: Ii qui dicuntur ab Episcopali dignitate ad Presbyteri ordinem descendisse, si justis quidem aliquibus de causis condemnantur, jure nec Presbyteri quidem honore digni sunt. Sin autem sine aliqua probabili causa ad inferiorem gradum depressi sint, jure, si quidem nulli crimini obnoxii deprehendantur, Episcopatus auctoritatem et sacerdotium recipient."

Canon XXX. "Quoniam religiosissimi Ægypti Episcopi, non ut catholicæ fidei adversantes, sanctissimi Archiepiscopi Leonis epistola subscribere differebant, sed dicentes in Ægyptiaca diœcesi hanc esse consuetudinem, ut præter voluntatem et mandatum Episcopi nihil tale faciunt, et petunt concedi sibi usque ad ordinationem futuri magnæ civitatis Alexandrinorum Episcopi: justum nobis et humanum visum est, ut ipsis in eodem habitu in imperiali urbe manentibus remissio concedatur, donec ordinatus fuerit magnæ Alexandrinorum civitatis Archiepiscopus. Unde in proprio habitu manentes, vel fidejussores dabunt, si hoc ab eis fieri potest, vel eorum jurejurando fides habebitur."

APPENDIX II.

CONSTITUTIONS AND CANONS ECCLESIASTICAL OF THE CHURCH OF ENGLAND.

JAMES, by the Grace of God King of England, Scotland, France, and Ireland, Defender of the Faith, &c. To all to whom these Presents shall come, Greeting. Whereas our Bishops, Deans of Our Cathedral Churches, Archdeacons, Chapters and Colleges, and the other Clergy of every Diocese within the Province of Canterbury, being summoned and called by Virtue of Our Writ directed to the most Reverend Father in God, John, late Archbishop of Canterbury, and bearing date the 31st day of January, in the first year of Our Reign of England, France, and Ireland, and of Scotland the thirty-seventh, to have appeared before him in Our Cathedral Church of St. Paul in London, the 20th day of March then next ensuing, or elsewhere, as he should have thought it most convenient, to treat, consent, and conclude upon certain difficult and urgent Affairs mentioned in the said Writ, Did thereupon at the time appointed, and within the Cathedral Church of St. Paul aforesaid, assemble themselves, and appear in Convocation for that purpose, according to Our said Writ, before the Right Reverend Father in God, Richard, Bishop of London, duly (upon a second Writ of Ours, dated the 9th day of March, aforesaid) authorized, appointed and constituted, by reason of the said Archbishop of Canterbury his death, President of the said Convocation, to execute those things which, by virtue of Our first Writ, did appertain to him the said Archbishop to have executed if he had lived: We for divers urgent and weighty Causes and Considerations Us thereunto especially moving, of Our especial grace, certain knowledge and mere motion, did by virtue of our Prerogative Royal, and Supreme Authority in Causes Ecclesiastical, give and grant by Our Several Letters Patents under our great Seal of England, the one dated the 12th day of April last past, and the other the 25th day of June then next following, full, free, and lawful liberty, licence, power, and authority unto the said Bishop of London, President of the said Convocation, and to the other Bishops, Deans, Archdeacons, Chapters, and Colleges, and the rest of the Clergy before mentioned of the said Province; That they, from time to time, during our first Parliament now Prorogued, might confer, treat, debate, consider, consult, and agree of and upon such Canons, Orders, Ordinances and Constitutions, as they should think necessary, fit and convenient for the Honour and Service of Almighty God, the good and quiet of the Church, and the better Government thereof, to be from time to time observed, performed, fulfilled, and kept, as well by the Archbishops of Canterbury, the Bishops and their Successors, and the rest of the whole Clergy of the said Province of Canterbury in their several Callings, Offices, Functions, Ministeries, Degrees, and

Administrations, as also by all and every Dean of the Arches, and other judge of the said Archbishop's Courts, Guardians of Spiritualties, Chancellors, Deans and Chapters, Archdeacons, Commissaries, Officials, Registers, and all and every other Ecclesiastical Officers, and their inferior Ministers whatsoever, of the same Province of Canterbury, in their and every of their distinct Courts, and in the order and manner of their and every of their Proceedings: and by all other Persons within this Realm, as far as lawfully, being Members of the Church, it may concern them, as in Our said Letters Patents amongst other Clauses more at large doth appear. Forasmuch as the Bishop of London, President of the said Convocation, and others the said Bishops, Deans, Archdeacons, Chapters and Colleges, with the rest of the Clergy, having met together at the time and place beforementioned, and then and there, by virtue of Our said Authority granted unto them, treated of, concluded and agreed upon certain Canons, Orders, Ordinances, and Constitutions, to the end and purpose by Us limited and prescribed unto them, and have thereupon offered and presented the same unto Us, most humbly desiring Us to give Our Royal Assent unto their said Canons, Orders, Ordinances, and Constitutions, according to the Form of a certain Statute or Act of Parliament made in that behalf, in the twenty-fifth Year of the Reign of King Henry the Eighth, and by Our said Prerogative Royal and Supreme Authority in Causes Ecclesiastical, to ratify by Our Letters Patents under Our Great Seal of England, and to confirm the same; the Title and Tenour of them being word for word as ensueth.

CONSTITUTIONS and CANONS ECCLESIASTICAL, Treated upon by the Bishop of London, President of the Convocation for the Province of Canterbury, and the rest of the Bishops and Clergy of the said Province: and agreed upon with the King's Majesties Licence in their Synod begun at London, Anno Dom. 1603. *And in the Year of the Reign of our Sovereign Lord James, by the Grace of God King of England, France, and Ireland, the First, and of Scotland the Thirty-seventh.*

OF THE CHURCH OF ENGLAND.

1. *The King's Supremacy over the Church of England, in Causes Ecclesiastical, to be maintained.*

2. *Impugners of the King's Supremacy censured.*

These canons will be found at p. 8.

3. *The Church of England a true and apostolical Church.*

4. *Impugners of the Public Worship of God established in the Church of England censured.*

5. *Impugners of the Articles of Religion established in the Church of England censured.*

6. *Impugners of the Rites and Ceremonies established in the Church of England censured.*

7. *Impugners of the Government of the Church of England by Archbishops, Bishops, &c., censured.*

8. *Impugners of the Form of Consecrating and Ordering Archbishops, Bishops, &c., in the Church of England, censured.*

9. *Authors of Schism in the Church of England censured.*

10. *Maintainers of Schismatics in the Church of England censured.*

11. *Maintainers of Conventicles censured.*

12. *Maintainers of Constitutions made in Conventicles censured.*

These canons will be found at pp. 1077—1079.

OF DIVINE SERVICE, AND ADMINISTRATION OF THE SACRAMENTS.

13. *Due Celebration of Sundays and Holydays.*

At p. 1033.

14. *The Prescript Form of Divine Service to be used on Sundays and Holydays.*

15. *The Litany to be read on Wednesdays and Fridays.*

These canons will be found at p. 962.

16. *Colleges to use the Prescript Form of Divine Service.*

In the whole Divine Service, and Administration of the Holy Communion, in all Colleges and Halls in both Universities, the Order, Form and Ceremonies shall be duly observed as they are set down and prescribed in the Book of Common Prayer, without any omission or alteration.

17. *Students in Colleges to wear Surplices in time of Divine Service.*

All Masters and Fellows of Colleges or Halls, and all the Scholars and Students in either of the Universities, shall in their Churches and Chapels, upon all Sundays, Holydays, and their Eves, at the time of Divine Service, wear Surplices according to the Order of the Church of England: and such as are Graduates, shall agreeably wear with their Surplices such Hoods as do severally appertain unto their Degrees.

18. *A Reverence and Attention to be used within the Church in time of Divine Service.*

In the time of Divine Service, and of every part thereof, all due Reverence is to be used; for it is according to the Apostle's rule, "Let all things be done decently, and according to order." . . . .

The rest of this canon will be found at p. 935.

19. *Loiterers not to be suffered near the Church in time of Divine Service.*

At p. 936.

20. *Bread and Wine to be provided against every Communion.*

At p. 680.

21. *The Communion to be Thrice a year received.*

In part, p. 684. The rest is thus: Provided, that every Minister, as oft as he administereth the Communion, shall first receive that

Sacrament himself. Furthermore, no Bread or Wine newly brought shall be used: but first the Words of Institution shall be rehearsed when the said Bread and Wine be present upon the Communion Table. Likewise the Minister shall deliver both the Bread and the Wine to every Communicant severally.

22. *Warning to be given beforehand for the Communion.*

Whereas every Lay person is bound to receive the Holy Communion thrice every year, and many notwithstanding do not receive that Sacrament once in a year. . . . .

The order contained in this canon will be found at p. 679.

23. *Students in Colleges to receive the Communion Four times a year.*

At p. 684.

24. *Copes to be worn in Cathedral Churches by those that administer the Communion.*

At p. 164.

25. *Surplices and Hoods to be worn in Cathedral Churches when there is no Communion.*

In the time of Divine Service and Prayers in all Cathedral and Collegiate Churches, when there is no communion, it shall be sufficient to wear Surplices: Saving that all Deans, Masters and Heads of Collegiate Churches, Canons and Prebendaries, being Graduates, shall daily at the times both of Prayer and Preaching, wear with their Surplices such Hoods as are agreeable to their Degrees.

26. *Notorious Offenders not to be admitted to the Communion.*

The first part of this canon will be found at p. 678. The rest is as follows:—Nor any Churchwardens or Sidemen, who, having taken their oaths to present to their Ordinaries all such public offences as they are particularly charged to inquire of in their several parishes shall notwithstanding their said oaths and that their faithful discharging of them is the chief means whereby public sins and offences may be reformed and punished, wittingly and willingly, desperately and irreligiously, incur the horrible crime of perjury, either in neglecting or in refusing to present such of the said enormities and public offences, as they know themselves to be committed in their said parishes, or are notoriously offensive to the congregation there; although they be urged by some of their neighbours, or by their minister, or by their Ordinary himself, to discharge their consciences by presenting of them and not to incur so desperately the said horrible sin of perjury.

27. *Schismatics not to be admitted to the Communion.*

At p. 678.

28. *Strangers not to be admitted to the Communion.*

At p. 677.

29. *Fathers not to be Godfathers in Baptism and Children not Communicants.*

At p. 641.

30. *The lawful use of the Cross in Baptism explained.*

We are sorry that His Majesties most Princely care and pains taken in the Conference at Hampton Court, amongst many other

points, touching this one of the Cross in Baptism, hath taken no better effect with many, but that still the Use of it in Baptism is so greatly stuck at and impugned. For the further declaration therefore of the true use of this Ceremony, and for the removing of all such scruple as might any ways trouble the Consciences of them who are indeed rightly Religious, following the Royal Steps of our most worthy King, because he therein followeth the Rules of the Scriptures, and the Practice of the Primitive Church; we do commend to all the true Members of the Church of England, these our Directions and Observations ensuing.

First. It is to be Observed, That although the Jews and Ethnics derided both the Apostles, and the rest of the Christians, for preaching and believing in him who was crucified upon the Cross; yet all, both Apostles and Christians, were so far from being discouraged from their profession by the ignominy of the Cross, as they rather rejoiced and triumphed in it. Yea, the Holy Ghost by the mouths of the Apostles, did honour the name of the Cross, (being hateful among the Jews), so far, that under it he comprehended not only Christ crucified, but the force, effects, and merits of his Death and Passion, with all the comforts, fruits and promises, which we receive or expect thereby.

Secondly. The honour and dignity of the Name of the Cross, begat a reverend estimation even in the Apostles' times (for aught that is known to the contrary) of the sign of the Cross, which the Christians shortly after used in all their actions, thereby making an outward show and profession even to the astonishment of the Jews, That they were not ashamed to acknowledge him for their Lord and Saviour, who died for them upon the Cross. And this Sign they did not only use themselves with a kind of glory, when they met with any Jews, but Signed therewith their Children when they were Christened, to dedicate them by that badge to his Service, whose benefits bestowed upon them in Baptism, the Name of the Cross did represent. And this use of the Sign of the Cross in Baptism was held in the Primitive Church, as well by the Greeks as the Latins, with one consent and great applause. At what time, if any had opposed themselves against it, they would certainly have been censured as Enemies of the Name of the Cross, and consequently of Christ's Merits, the Sign whereof they could no better endure. This continual and general use of the Sign of the Cross, is evident by many testimonies of the ancient Fathers.

Thirdly. It must be confessed, that in process of time the Sign of the Cross was greatly abused in the Church of Rome, especially after that corruption of Popery had once possessed it. But the abuse of a thing doth not take away the lawful use of it. Nay, so far was it from the purpose of the Church of England to forsake and reject the Churches of Italy, France, Spain, Germany, or any such like Churches, in all things which they held and practised, that, as the Apology of the Church of England confesseth, it doth with reverence retain those Ceremonies, which do neither endamage the Church of God, nor offend the minds of sober men: and only departed from them in those particular points, wherein they were fallen both from themselves in their ancient integrity, and from the Apostolical Churches which were their first Founders. In which respect, amongst some other very ancient Ceremonies, the Sign of the Cross in Baptism hath been retained in this Church, both by the judgment and practice of those reverend Fathers and great Divines in the days of King Edward the Sixth, of whom some constantly suffered for the profession of the

truth; and others being exiled in the time of Queen Mary, did after their return in the beginning of the Reign of our late dread Sovereign, continually defend and use the same. This resolution and practice of our Church hath been allowed and approved by the censure upon the Communion Book in King Edward the Sixth his days, and by the Harmony of Confessions of latter years; because indeed the use of this Sign in Baptism, was ever accompanied here with such sufficient cautions and exceptions against all Popish Superstition and Error, as in the like cases are either fit or convenient.

First, the Church of England since the abolishing of Popery hath ever held and taught, and so doth hold and teach still, that the Sign of the Cross used in Baptism, is no part of the substance of that Sacrament: For when the Minister dipping the Infant in Water, or laying Water upon the face of it (as the manner also is) hath pronounced these words, "I baptize thee in the Name of the Father, and of the Son, and of the Holy Ghost," the Infant is fully and perfectly Baptized. So as the Sign of the Cross being afterwards used, doth neither add any thing to the virtue and perfection of Baptism, nor being omitted doth detract any thing from the effect and substance of it.

Secondly. It is apparent in the Communion-Book, that the Infant Baptized is, by virtue of Baptism, before it be Signed with the Sign of the Cross, received into the Congregation of Christ's Flock as a perfect Member thereof, and not by any power ascribed unto the Sign of the Cross, so that for the very remembrance of the Cross, which is very precious to all them that rightly believe in Jesu Christ, and in the other respects mentioned, the Church of England hath retained still the Sign of it in Baptism: following therein the Primitive and Apostolical Churches, and accounting it a lawful outward Ceremony and honourable Badge, whereby the Infant is dedicated to the service of Him that died upon the Cross, as by the words used in the Book of Common Prayer it may appear.

Lastly, The use of the Sign of the Cross in Baptism, being thus purged from all Popish Superstition and Error, and reduced in the Church of England to the primary Institution of it, upon those true Rules of Doctrine concerning things indifferent, which are consonant to the Word of God, and the judgments of all the ancient Fathers, we hold it the part of every private man, both Minister and other, reverently to retain the true use of it prescribed by public Authority, considering that things of themselves indifferent, do in some sort alter their natures, when they are either commanded or forbidden by a lawful Magistrate, and may not be omitted at every man's pleasure contrary to the Law, when they be commanded, nor used when they are prohibited.

MINISTERS, THEIR ORDINATION, FUNCTION AND CHARGE.

31. *Four solemn times appointed for the making of Ministers.*

In part at pp. 113, 114. The rest is as follows: And that this be done in the Cathedral or Parish Church where the Bishop resideth, and in the time of Divine Service, in the presence not only of the Archdeacon, but of the Dean and two Prebendaries at the least, or (if they shall happen by any lawful cause to be let or hindered) in the

presence of four other grave Persons, being Masters of Arts at the least, and allowed for Public Preachers.

32. *None to be made Deacon and Minister both in one Day.*
At p. 128.

33. *The Titles of such as are to be made Ministers.*
At p. 119.

34. *The Quality of such as are to be made Ministers.*
Part at p. 123, part at p. 117, part at p. 116, and the rest at p. 121.

35. *The Examination of such as are to be made Ministers.*
At p. 122.

36. *Declaration and Subscription required of such as are to be made Ministers.*
At pp. 469, 470.

37. *Subscription before the Diocesan.*
At p. 315.

38. *Revolters after Declaration and Subscription censured.*
At p. 956.

39. *Cautions for Institution of Ministers into Benefices.*
At p. 414.

40. *Declaration against Simony at Institution into Benefices.*
At pp. 467, 468.

41. *Licences for Plurality of Benefices limited and Residence enjoined.*
At p. 1165.

42. *Residence of Deans in their Churches.*
At p. 164.

43. *Deans and Prebendaries to Preach during their Residence.*
At p. 165.

44. *Prebendaries to be resident upon their Benefices.*
At pp. 170, 171.

45. *Beneficed Preachers, being resident upon their Livings, to Preach every Sunday.*
At p. 1024.

46. *Beneficed Men, not Preachers, to procure Monthly Sermons.*

47. *Absence of Beneficed Men to be supplied by Curates that are allowed Preachers.*

48. *None to be Curates but allowed by the Bishop.*
These canons are to be found at p. 560.

49. *Ministers, not allowed Preachers, may not expound.*
At p. 1028.

50. *Strangers not admitted to Preach without showing their Licence.*

51. *Strangers not admitted to Preach in Cathedral Churches without sufficient authority.*

52. *The Names of Strange Preachers to be noted in a Book.*

53. *No public Opposition between Preachers.*

These canons are to be found at pp. 1024, 1025.

54. *The Licences of Preachers refusing Conformity, to be void.*

If any man Licensed heretofore to Preach, by any Archbishop, Bishop, or by either of the Universities, shall at any time from henceforth refuse to conform himself to the Laws, Ordinances, and Rites Ecclesiastical established in the Church of England, he shall be admonished by the Bishop of the Diocese or Ordinary of the Place, to submit himself to the use and due exercise of the same. And if after such admonition, he do not conform himself within the space of one Month, We determine and decree, That the Licence of every such Preacher shall thereupon be utterly void and of none effect.

55. *The Form of a Prayer to be used by all Preachers before their Sermons.*

At p. 1025.

56. *Preachers and Lecturers to read Divine Service, and administer the Sacrament, twice a year at the least.*

At pp. 946, 947.

57. *The Sacraments not to be refused at the hands of Unpreaching Ministers.*

Whereas divers persons, seduced by false Teachers, do refuse to have their children Baptized by a Minister that is no Preacher, and to receive the Holy Communion at his hands in the same respect, as though the virtue of those Sacraments did depend upon his ability to Preach: Forasmuch as the Doctrine both of Baptism and of the Lord's Supper is so sufficiently set down in the Book of Common Prayer to be used at the Administration of the said Sacraments, as nothing can be added unto it that is material and necessary: We do require and charge every such person seduced as aforesaid, to reform that their wilfulness, and to submit himself to the Order of the Church in that behalf, both the said Sacraments being equally effectual, whether they be ministered by a Minister that is no Preacher, or by one that is a Preacher. And if any hereafter shall offend herein, or leave their own Parish Churches in that respect, and communicate, or cause their Children to be Baptized in other Parishes abroad, and will not be moved thereby to reform that their Error and unlawful course: Let them be presented to the Ordinary of the place by the Minister, Churchwardens, and Sidemen or Questmen of the Parishes where they dwell, and there receive such punishment by Ecclesiastical Censures, as such Obstinacy doth worthily deserve: that is, Let them (persisting in their wilfulness) be Suspended, and then after a Month's further Obstinacy Excommunicated. And likewise, if any Parson, Vicar or Curate, shall after the publishing hereof, either receive to the Communion any such persons which are not of his own Church and Parish, or shall Baptize any of their Children, thereby strengthening them in their said Errors: Let him be suspended, and not released thereof, until he do faithfully promise that he will not afterwards offend therein.

58. *Ministers reading Divine Service, and Administering the Sacraments, to wear Surplices, and Graduates therewithal Hoods.*

Every Minister saying the Public Prayers, or ministering the Sacraments, or other Rites of the Church, shall wear a comely Surplice with sleeves, to be provided at the charge of the Parish. And if any Question arise touching the Matter, Decency or Comeliness thereof, the same shall be decided by the discretion of the Ordinary. Furthermore, such Ministers, as are Graduates, shall wear upon their Surplices at such times, such Hoods as by the Orders of the Universities are agreeable to their Degrees, which no Minister shall wear (being no Graduate) under Pain of Suspension. Notwithstanding it shall be lawful for such Ministers as are not Graduates to wear upon their Surplices, instead of Hoods, some decent Tippet of Black, so it be not Silk.

59. *Ministers to Catechize every Sunday.*
At p. 669.

60. *Confirmation to be performed once in three Years.*

61. *Ministers to prepare Children for Confirmation.*
These canons are to be found at pp. 672, 673.

62. *Ministers not to Marry any Person without Banns or Licence.*

No Minister, upon pain of suspension *per triennium ipso facto*, shall celebrate Matrimony between any Persons without a Faculty or Licence granted by some of the Persons in these our Constitutions expressed, except the Banns of Matrimony have been first Published three several Sundays or Holydays in the time of Divine Service in the Parish Churches and Chapels where the said Parties dwell, according to the Book of Common Prayer. Neither shall any Minister upon the like pain, under any pretence whatsoever, join any Persons so Licensed in Marriage at any unseasonable times, but only between the hours of eight and twelve in the Forenoon, nor in any private place, but either in the said Churches or Chapels where one of them dwelleth, and likewise in time of Divine Service, nor when Banns are thrice asked, and no Licence in that respect necessary before the parents or governors of the parties to be married, being under the age of twenty and one years, shall either personally, or by sufficient testimony, signify to him their consents given to the said Marriage.

63. *Ministers of exempt Churches not to marry without Banns or Licence.*
At pp. 805, 806.

64. *Ministers solemnly to bid Holydays.*
At p. 1049.

65. *Ministers solemnly to denounce Recusants & Excommunicates.*

66. *Ministers to confer with Recusants.*
These canons are to be found at p. 1080.

67. *Ministers to visit the sick.*
Part at p. 836. Rest at p. 838.

68. *Ministers not to refuse to Christen or Bury.*

No Minister shall refuse or delay to Christen any Child according to the Form of the Book of Common Prayer, that is brought to the

Church to him upon Sundays or Holydays, to be Christened, or to Bury any Corpse that is brought to the Church or Churchyard (convenient warning being given him thereof before) in such manner and form as is prescribed in the said Book of Common Prayer. And if he shall refuse to Christen the one or Bury the other, except the party deceased were denounced Excommunicated *Majori Excommunicatione*, for some grievous and notorious crime (and no man able to testify of his repentance), he shall be suspended by the Bishop of the Diocese from his Ministry by the space of three Months.

69. *Ministers not to defer Christening, if the Child be in Danger.*
At p. 641.

70. *Ministers to keep a Register of Christenings, Weddings and Burials.*
At pp. 649, 650.

71. *Ministers not to preach or Administer the Communion in private Houses.*
At p. 679.

72. *Ministers not to appoint Public or Private Fasts or Prophecies, or to Exorcise, but by Authority.*

In part at p. 1047. The rest is as follows: Neither shall any Minister not Licensed, as is aforesaid, presume to appoint or hold any Meetings for Sermons, commonly termed by some Prophecies or Exercises, in Market towns or other Places, under the said pains: nor without such Licence to attempt upon any pretence whatsoever, either of Possession or Obsession, by Fasting and Prayer to cast out any Devil or Devils, under pain of the imputation of Imposture or Cosenage, and Deposition from the Ministry.

73. *Ministers not to hold private Conventicles.*

Forasmuch as all Conventicles and secret Meetings of Priests and Ministers, have been ever justly accounted very hurtful to the State of the Church wherein they live: We do now ordain and constitute, That no Priests or Ministers of the Word of God, nor any other persons, shall meet together in any Private House or elsewhere, to consult upon any matter or course to be taken by them, or upon their motion or direction by any other, which may any way tend to the impeaching or depraving of the Doctrine of the Church of England, or of the Book of Common Prayer, or of any part of the Government and Discipline now established in the Church of England, under pain of Excommunication *ipso facto*.

74. *Decency in Apparel enjoined to Ministers.*

The true, ancient and flourishing Churches of Christ being ever desirous that their Prelacy and Clergy might be had as well in outward Reverence, as otherwise regarded for the Worthiness of their Ministry, did think it fit by a prescript Form of decent and comely Apparel, to have them known to the people, and thereby to receive the Honour and Estimation due to the special Messengers and Ministers of Almighty God: We therefore following their grave Judgment, and the ancient custom of the Church of England, and hoping that in time new-fangleness of Apparel in some factious persons will die of itself, do constitute and appoint, that the Archbishops and Bishops shall not intermit to use the accustomed Apparel of their Degrees. Likewise all Deans, Masters of Colleges, Archdeacons and

Prebendaries in Cathedral and Collegiate Churches (being Priests or Deacons), Doctors in Divinity, Law and Physic, Batchelors in Divinity, Masters of Arts and Batchelors of Law having any Ecclesiastical Living, shall usually wear Gowns with standing Collars and Sleeves strait at the Hands, or wide Sleeves as is used in the Universities, with Hoods or Tippets of Silk or Sarcenet, and square Caps, and that all other Ministers admitted or to be admitted into that Function, shall also usually wear the like Apparel, as is aforesaid, except Tippets only. We do further in like manner ordain, That all the said Ecclesiastical Persons above mentioned, shall usually wear in their journies Cloaks with Sleaves, commonly called Priests Cloaks, without Gards, Welts, long Buttons or Cuts. And no Ecclesiastical Person shall wear any Coif or Wrought Night-cap, but only plain Night-caps of Black Silk, Satin or Velvet. In all which particulars concerning the Apparel here prescribed, our meaning is not to attribute any Holiness or Special Worthiness to the said Garments, but for decency, gravity and order as is before specified. In Private Houses and in their Studies, the said Persons Ecclesiastical may use any comely and Scholar-like apparel provided that it is not cut or pinckt, and that in Public they go not in their Doublet and Hose without Coats or Cassocks, and that they wear not any light Coloured Stockings. Likewise poor beneficed Men and Curates (not being able to provide themselves long Gowns) may go in short Gowns, of the fashion aforesaid.

75. *Sober Conversation required in Ministers.*
At p. 1090.

76. *Ministers at no time to forsake their calling.*

In part at p. 1185. The rest is as follows :—And the names of all such men so forsaking their calling, the Churchwardens of the Parish where they dwell shall present to the Bishop of the Diocese or to the Ordinary of the place having episcopal jurisdiction.

SCHOOLMASTERS.

77. *None to teach School without Licence.*
At p. 2040.

78. *Curates desirous to teach to be licensed before others.*
At p. 2045.

79. *The Duty of Schoolmasters.*
At p. 2046.

THINGS APPERTAINING TO CHURCHES.

80. *The Great Bible and Book of Common Prayers to be had in every Church.*
At p. 926.

81. *A Font of Stone for Baptism in every Church.*
At p. 924.

82. *A Decent Communion Table in every Church.*
Part at p. 923, part at p. 924, and the rest at p. 927.

83. *A Pulpit to be provided in every Church.*
At p. 924.

84. *A Chest for Alms in every Church.*
At pp. 924, 925.

85. *Churches to be kept in sufficient Reparations.*
Part at p. 1791, part at p. 922, part at p. 1780, part at p. 936, and the rest at p. 1402.

86. *Churches to be surveyed and the Decays certified to the High Commissioners.*
At p. 1348.

87. *A Terrier of Glebe Lands and other Possessions belonging to Churches.*
At p. 1458.

88. *Churches not to be Prophaned.*

The Churchwardens or Questmen, and their Assistants, shall suffer no Plays, Feasts, Banquets, Suppers, Church-ales, Drinkings, Temporal Courts or Leets, Lay-juries, Musters, or any other profane Usage to be kept in the Church, Chapel or Churchyard.
The rest at p. 1756.

CHURCHWARDENS OR QUESTMEN, AND SIDEMEN OR ASSISTANTS.

89. *The Choice of Churchwardens, and their Account.*
Part at p. 1842, part at p. 1859, the rest at p. 1860.

90. *The Choice of Sidemen, and their joint Office with Churchwardens.*

Part at p. 934, part at p. 936, and the rest as follows:—The Choice of which persons, viz. Churchwardens or Questmen, Sidemen or Assistants, shall be yearly made in Easter-week.

91. *Parish Clerks to be chosen by the Minister.*
Part at p. 1901, part at p. 1900, the rest at p. 1903.

ECCLESIASICAL COURTS BELONGING TO THE ARCHBISHOP'S JURISDICTION.

Canons 92 and 93 relate to the now abrogated jurisdiction of the Ecclesiastical Courts in testamentary causes.

Their titles are as follow:—

92. *None to be cited into divers Courts for Probate of the same Will.*

93. *The Rate of bona notabilia liable to the Prerogative Court.*

94. *None to be cited into the Arches or Audience but Dwellers within the Archbishop's Diocese or Peculiars.*

At p. 1288.

95. *The Restraint of Double Quarrels.*

At p. 413.

96. *Inhibitions not to be granted without the Subscription of an Advocate.*

That the Jurisdictions of Bishops may be preserved (as near as may be) entire and free from Prejudice, and that for the behoof of the Subjects of this Land, better Provision be made, that henceforward they be not grieved with frivolous and wrongful Suits and Molestations: It is Ordained and Provided that . . .

The rest of this Canon containing the order is to be found at p. 1217.

97. *Inhibitions not to be granted until the Appeal be exhibited to the Judge.*

At p. 1275.

98. *Inhibitions not to be granted to Factious Appellants, unless they first Subscribe.*

Forasmuch as they who break the Laws cannot in reason claim any benefit or protection by the same: We decree and appoint, that after any Judge Ecclesiastical hath proceeded judicially against obstinate and factious persons, and Contemners of Ceremonies, for not observing the Rites and Orders of the Church of England, or for contempt of Public Prayer, no Judge *ad quem* shall admit or allow any his or their appeals, unless he having first seen the Original Appeal, the party Appellant do first personally promise and avow, that he will faithfully keep and observe all the Rites and Ceremonies of the Church of England, as also the prescript Form of Common Prayer, and do likewise Subscribe to the three Articles formerly by us specified and declared.

99. *None to marry within the Degrees prohibited.*

At pp. 729, 730.

100. *None to marry under twenty-one years without their Parents' Consent.*

No Children, under the Age of One and twenty years complete, shall Contract themselves or Marry without the Consent of their Parents, or of their Guardians and Governors, if their Parents be deceased.

101. *By whom Licences to marry without Banns shall be granted, and to what sort of Persons.*

102. *Security to be taken at the granting of such Licences and under what Conditions.*

103. *Oaths to be taken for the Conditions.*

104. *An Exception for those that are in Widowhood.*

These canons are to be found at pp. 787, 788.

Canons 105 and 106 relate to the now abrogated jurisdiction of the Ecclesiastical Courts in matrimonial causes. Their titles are as follow:—

105. *No Sentence for Divorce to be given upon the sole Confession of the Parties.*

106. *No Sentence for Divorce to be given but in open Court.*

107. *In all Sentences for Divorce Bonds are to be taken for not marrying during each other's Life.*

108. *The Penalty for Judges offending in the Premises.*
These canons are to be found at pp. 827, 828.

ECCLESIASTICAL COURTS BELONGING TO THE JURISDICTION OF BISHOPS AND ARCHDEACONS, AND THE PROCEEDINGS IN THEM.

109. *Notorious Crimes and Scandals to be certified into Ecclesiastical Courts by Presentments.*
At p. 1081.

110. *Schismatics to be presented.*
At p. 1079.

111. *Disturbers of Divine Service to be presented.*
At p. 1083.

112. *Non-Communicants at Easter to be presented.*
At p. 1082.

113. *Ministers may present.*
At pp. 1351, 1352.

114. *Ministers shall present Recusants.*

Every Parson, Vicar, or Curate, shall carefully inform themselves every year hereafter, how many Popish Recusants, Men, Women and Children above the age of thirteen years; and how many being Popishly given (who though they come to the Church, yet do refuse to receive the Communion) are Inhabitants, or make their abode either as Sojourners or common Guests in any of their several Parishes, and shall set down their true Names in Writing (if they can learn them) or otherwise such Names as for the time they carry, distinguishing the absolute Recusants from half Recusants: and the same, so far as they know or believe, so distinguished and set down under their hands, shall truly present to their Ordinaries before the Feast of the Nativity next ensuing, under pain of Suspension to be inflicted upon them by their said Ordinaries, and so every year hereafter upon the like pain, before the Feast of St. John Baptist. Also we Ordain, That all such Ordinaries, Chancellors, Commissaries, Archdeacons, Officials, and all other Ecclesiastical Officers, to whom the said Presentments shall be exhibited, shall likewise within one Month after the receipt of the same, under pain of Suspension by the Bishop from the execution of their Offices for the space of half a year (as often as they shall offend therein) deliver them, or cause to be delivered to the Bishop respectively; who shall also exhibit them to the Archbishop within six Weeks, and the Archbishop to his Majesty within other six Weeks after he hath received the said presentments.

115. *Ministers and Churchwardens not to be sued for Presenting.*
At pp. 1353, 1354.

116. *Churchwardens not bound to present oftener than twice a year.*
Part at p. 1354, part at p. 1355, and the rest at p. 1352.

117. *Churchwardens not to be troubled for not presenting oftener than twice a year.*

118. *The old Churchwardens to make their presentments before the new be sworn.*
These canons are to be found at pp. 1354, 1355.

119. *Convenient time to be assigned for framing Presentments.*
At pp. 1352, 1353.

120. *None to be cited into Ecclesiastical Courts by Process of quorum nomina.*
At p. 1280.

121. *None to be cited into several Courts for one Crime.*
At pp. 1357, 1358.

122. *No Sentence of Deprivation or Deposition to be pronounced against a Minister but by the Bishop.*
At pp. 1398, 1399.

123. *No Act to be sped but in open Court.*
At p. 1225.

124. *No Court to have more than one Seal.*
At p. 1201.

125. *Convenient places to be chosen for the keeping of Courts.*
At p. 1200.

Canon 126 relates to the now abrogated jurisdiction of the Ecclesiastical Courts in testamentary causes. Its title is as follows:—

Peculiar and Inferior Courts to exhibit the original Copies of Wills into the Bishops' Registry.

JUDGES ECCLESIASTICAL AND THEIR SURROGATES.

127. *The Quality and Oath of Judges.*

In part at pp. 1190, 1191. The rest of the Canon is as follows:—And likewise all Chancellors, Commissaries, Officials, Registers, and all other that do now Possess or Execute any Places of Ecclesiastical Jurisdiction, or Service, shall before Christmas next, in the presence of the Archbishop or Bishop, or in open Court, under whom or where they exercise their Offices, take the same Oaths, and Subscribe as before is said; or upon refusal so to do, shall be Suspended from the execution of their Offices, until they shall take the said Oaths, and Subscribe, as aforesaid.

128. *The Quality of Surrogates.*
At p. 1191.

PROCTORS.

129. *Proctors not to retain Causes without the lawful Assignment of the Parties.*
At p. 1221.

130. *Proctors not to retain Causes without the Counsel of an Advocate.*

For Lessening and Abridging the multitude of Suits, and Contentions, as also for Preventing the Complaints of Suitors in Courts Ecclesiastical, who many times are overthrown by the oversight and negligence, or by the ignorance and insufficiency of Proctors; and likewise for the furtherance and . . .

The rest of the canon is to be found at p. 1217.

131. *Proctors not to conclude in any Cause without the Knowledge of an Advocate.*
At p. 1217.

Canon 132 relates to the now abrogated jurisdiction of the Ecclesiastical Courts in testamentary causes. Its title is as follows:—

Proctors prohibited the Oath in animam domini sui.

133. *Proctors not to be clamorous in Court.*

Forasmuch as it is found by experience that the loud and confused cries and clamours of Proctors in the Courts of the Archbishop are not only troublesome and offensive to the Judges and Advocates, but also give occasion to the standers-by of contempt and calumny toward the Court itself, that more respect may be had to the dignity of the Judge than heretofore, and that causes may more easily and commodiously be handled and despatched: we charge and enjoin, that all Proctors in the said Courts do especially intend, that the acts be faithfully entered and set down by the Registrar, according to the advice and direction of the Advocate; that the said Proctors refrain loud speech and babbling, and behave themselves quietly and modestly; and that, when either the Judges or Advocates, or any of them, shall happen to speak, they presently be silent, upon pain of silencing for two whole terms then immediately following every such offence of theirs. And if any of them shall the second time offend herein, and after due monition, shall not reform himself, let him be for ever removed from his practice.

REGISTRARS.

134. *Abuses to be reformed in Registrars.*
At pp. 1225, 1226.

135. *A certain Rate of Fees due to all Ecclesiastical Officers.*

No Bishop, Suffragan, Chancellor, Commissary, Archdeacon, Official, nor any other exercising Ecclesiastical Jurisdiction whatsoever, nor any Register of any Ecclesiastical Courts, nor any Minister belonging to any of the said Officers or Courts, shall hereafter, for any Cause incident to their several Offices, take or receive any other or greater Fees, than such as were certified to the most Reverend Father in God, John, late Archbishop of Canterbury, in the Year of

our Lord God One thousand five hundred ninety and seven, and were by him Ratified and Approved, under pain that every such Judge, Officer or Minister offending herein shall be Suspended from the Exercise of their several Offices, for the space of six Months for every such Offence. Always provided, that if any Question shall arise concerning the certainty of the said Fees or any of them, then those Fees shall be held for lawful, which the Archbishop of Canterbury for the time being shall under his Hand approve, except the Statutes of this Realm before made, do in any Particular Case express some other Fees to be due. Provided furthermore, that no Fee or Money shall be received either by the Archbishop, or any Bishop or Suffragan, either directly or indirectly, for admitting of any into Sacred Orders, nor that any other person or persons under the said Archbishop, Bishop or Suffragan, shall for Parchment, Writing, Wax, Sealing, or any other respect thereunto appertaining, take above Ten shillings, under such pains as are already by law prescribed.

136. *A Table of the Rates and Fees to be set up in Courts and Registries.*

We do likewise constitute and appoint, That the Registers belonging to every such Ecclesiastical Judge, shall place two Tables, containing the several Rates and Sums of all the said Fees; one in the usual Place or Consistory where the Court is kept, and the other in his Registry, and both of them in such sort, as every man, whom it concerneth, may without difficulty come to the View and Perusal thereof, and take a Copy of them; the same Tables to be so set up before the Feast of the Nativity next ensuing. And if any Register shall fail to place the said Tables according to the Tenor hereof, he shall be Suspended from the execution of his Office, until he cause the same to be accordingly done; And the said Tables being once set up, if he shall at any time remove or suffer the same to be removed, hidden or any way hindred from sight, contrary to the true meaning of this Constitution, he shall for every such Offence be Suspended from the Exercise of his Office for the space of Six Months.

137. *The whole Fees for shewing Letters of Orders and other Licences due but once in every Bishop's Time.*

At p. 1349.

APPARITORS.

138. *The Number of Apparitors restrained.*

At pp. 1246, 1247.

AUTHORITY OF SYNODS.

139. *A National Synod the Church Representative.*

140. *Synods conclude as well the Absent as the Present.*

141. *Depravers of the Synod censured.*

These canons are to be found at p. 1958.

We (*a*) of Our Princely Inclination, and Royal Care for the Maintenance of the present Estate and Government of the Church of England, by the Laws of this Our Realm now Settled and Established, having diligently, with great Contentment and Comfort, read and considered of all these their said Canons, Orders, Ordinances, and Constitutions, agreed upon, as is before expressed; and finding the same such, as we are perswaded will be very profitable, not only to our Clergy, but to the whole Church of this Our Kingdom, and to all the true Members of it (if they be well observed), Have therefore for Us, Our Heirs and Lawful Successors, of Our Especial Grace, certain Knowledge, and meer Motion, given, and by these Presents do give Our Royal Assent, according to the Form of the said Statute or Act of Parliament aforesaid, to all and every of the said Canons, Orders, Ordinances and Constitutions, and to all and every thing in them contained, as they are before written.

And furthermore, We do not only by Our said Prerogative Royal, and Supreme Authority in Causes Ecclesiastical, Ratifie, Confirm, and Establish, by these Our Letters Patents, the said Canons, Orders, Ordinances and Constitutions, and all and every thing in them contained, as is aforesaid; but do likewise Propound, Publish, and straightway Enjoyn and Command by Our said Authority, and by these our Letters Patents, the same to be diligently observed, executed, and equally kept by all Our Loving Subjects of this Our Kingdom, both within the Province of Canterbury and York, in all Points wherein they do or may concern every or any of them, according to this Our Will and Pleasure hereby signified and expressed: And that likewise for the better Observation of them, every Minister, by what Name or Title soever he be called, shall in the Parish Church or Chapel where he hath Charge, read all the said Canons, Orders, Ordinances and Constitutions once every year, upon some Sundays or Holydays in the afternoon before Divine Service, dividing the same to such sort, as that the one half may be Read one Day, and the other another Day: The Book of the said Canons to be provided at the Charge of the Parish betwixt this and the Feast of the Nativity of Our Lord God next ensuing: Straightly charging and commanding all Archbishops, Bishops, and all other that exercise any Ecclesiastical Jurisdiction within this Realm, every man in his place, to see, and procure (so much as in them lieth) all and every of the same Canons, Orders, Ordinances and Constitutions to be in all Points duly observed, not sparing to execute the Penalties in them severally mentioned, upon any that shall wittingly or wilfully break, or neglect to observe the same, as they tender the Honour of God, the Peace of the Church, the Tranquillity of the Kingdom, and their Duties and Service to Us their King and Sovereign. In Witness, &c.

(*a*) James I.

APPENDIX III.

AS TO THE EARLY HISTORY OF THE BRITISH CHURCH.

"THE groundlessness of the so often alleged 'Orientalism' of the
" early British Church,—Oriental in no other sense than that its
" Christianity originated like all Christianity in Asia, and found its
" way to Britain through (most probably) Lyons, and not through
" the then equally Greek Church of Rome, but without imprinting
" one single trace upon the British Church itself of any one thing in
" a peculiar sense Greek or Oriental,—the sweeping away of ficti-
" tious personages like King Lucius, or of gratuitous assumptions
" like that of S. Paul's personal preaching in these islands,—the
" placing the British Easter controversy upon its right footing, once
" more of a mere confusion of cycles,—these and the like results,
" whatever ingenious partizans on either side may make of them,
" are certainly interesting to our patriotism, and may perhaps be
" made remotely practical for present polemics. Much again among
" the specially Welsh documents is chiefly interesting, except to the
" inhabitants of the Principality itself, in the way of illustrating
" national character as impressed vividly upon a national Church
" rather than in any larger sense. But other points emerge in the
" volume of still living interest.

" The futility, injustice, and utter mischief to discipline, of Papal ap-
" peals, considered solely in their practical aspect, and as exhibited in
" the cases of Bishop Urban and of Giraldus in the beginnings respec-
" tively of the 12th and 13th centuries,—the contest between Chap-
" ter, Crown, and Pope, for the right of nomination to Bishoprics, a
" contest complicated in Wales by questions of race, and of English
" domination,—the well-known Archiepiscopal summons to a synod
" in 1125, mentioning 'permission' given to the Papal legate to hold
" it,—the repeated mention of diocesan synods,—the freedom and
" self-government accorded to the native Welsh Church of almost
" all dates, and diminished gradually as Henry III. and Edward I.
" brought English law to bear upon the subject, *pari passu* with their
" gradual and attempted Anglicizing of Wales,—the fearful abuse of
" spiritual powers and the exceeding worldliness of the Church,
" exhibited in all the relations of England to Wales during the same
" period, and especially in the monstrous wickedness with which
" excommunications and interdicts were scattered about at random,
" while the darker shades of the picture are relieved by the unselfish
" charity and piety, however oddly expressed, of such as Archbishop

" Peckham, and by the obviously sincere religion of Edward him-
" self,—the commencement of that bane of the Welsh Church, the
" imposing upon it of a clergy that could not speak Welsh, and the
" treating its sees as mere pieces of preferment,—all these are surely
" subjects which have a living interest, and belong to questions
" of which the moving forces are active in the present day" (*a*).

(*a*) Councils and Ecclesiastical Documents relating to Great Britain and Ireland. Ed. A. W. Haddan, B.D., and W. Stubbs, M.A. Vol. I. Preface, p. xviii. See an account of the formal schism between the British and the Saxon (and Roman) Churches on the two points of Easter and Baptism, Ib. App. D.

APPENDIX IV.

RULES AND REGULATIONS

To be observed in all Causes, Suits or Proceedings instituted in the Arches Court of Canterbury.

THE official principal of the Court of Arches having considered it expedient that some of the existing orders and regulations now observed in the proceedings of the said court should be amended, and that additional orders should be made for further expediting and regulating the said proceedings, does hereby order and direct that the following rules and regulations (in lieu of the existing rules and regulations) shall be observed from and after the 1st January, 1867.

Order.

1. All decrees, citations, monitions, inhibitions, compulsories, and other instruments under seal, shall be prepared in and issued from the registry of this court, in forms to be approved of by the judge, on written application (from the proctor of the party or parties requiring the same, and signed by him), and no act of court shall be necessary to lead such decrees, citations, monitions, inhibitions, compulsories, or other instruments, and the same shall bear date on the day on which they are respectively issued.

Decrees, &c. to be prepared in registry.

No act necessary to lead same.

2. All decrees, citations, monitions, inhibitions, compulsories, and other instruments heretofore returnable or brought into court or in chambers, shall be returnable or brought into the registry of the Arches Court, and the said decrees, citations, monitions, inhibitions, compulsories, and all other instruments so returned or brought into the said registry shall have the same full force and effect in law as the like instruments have heretofore had when returned into court.

Decrees, &c. returnable in registry.

3. All such instruments shall be so returnable, if served within fifty miles of London, on the third day after service, and if beyond that distance on the sixth day after service, and if not returned into the registry within three days of the day on which they are so returnable, they shall be void and of none effect, save and except that this rule shall not apply to compulsories, and that monitions for transmission of process shall be returnable in ten days, and not be void if not returned within that period. The proctor shall file his proxy in the registry on the day on which he returns his decree.

Decrees, &c. when made returnable.

If not returned, void.

4. The return of all instruments into the registry shall be entered by the registrar on the day on which they are so returned in a book to be kept for that purpose.

Book for entering returns.

5. An appearance shall be entered in the registry by the proctor for the party cited, within six days after the return of the decree or citation, and he shall file his proxy at the same time, and if no such

Appearance to be entered in six days.

If no appearance,

may proceed in default.

appearance be entered within that time it shall be competent to the party promoting the suit to proceed in default of such appearance, but an appearance may be entered at any time during the dependance of the suit with the consent of the judge in chambers.

Articles, &c. to be filed within six days.

6. On an appearance being entered a duplicate copy thereof shall be given to the proctor returning the decree, who shall file his articles, libel, or petition, in the registry, within six days from his having such notice, and deliver a copy thereof to the proctor for the party cited.

To declare within eight days whether opposed.

7. The proctor for the party cited shall declare by notice in writing, to be left in the registry within eight days after his being furnished with a copy of the articles, libel, or plea, whether or not he opposes the admission thereof. And if he opposes the same, or in default of appearance, the registrar shall send the papers to the judge, who will thereupon appoint a day to hear counsel and to decide as to the admissibility thereof.

Alteration or amendment in articles, &c. to be made within ten days.

8. If the articles, libel, or plea shall be ordered by the judge to be altered or amended, such alteration or amendment shall be made in the articles, libel, or plea filed in the registry within ten days from the judge's order, and a copy thereof left with the other proctor, who shall within eight days give notice whether he further opposes the admission thereof.

If not opposed, to give issue.

9. If the proctor for the party cited declare he does not oppose the admission of the said plea, or neglect to declare within the required time, the same shall stand admitted, and the said proctor, on the admission thereof, shall, in all plenary suits, be required thereupon to leave written notice in the registry whether he gives a negative or affirmative issue thereto. If an affirmative issue be given, the registrar shall send the papers to the judge, who will appoint a day for the hearing.

If affirmative, papers to judge.

If negative issue, to declare whether plea.

10. If the proctor for the party cited gives a negative issue, he shall at the same time declare whether he intends to plead or not, and a copy of the notice shall be left with the proctor for the promoter the same day. If he does not give in any plea, or if the proceedings be carried on in default, the proctor for the promoter shall declare whether he intends to prove his case by examining witnesses orally or in writing. And in the event of the witnesses being examined orally, the papers shall be sent to the judge to appoint a day or days for taking evidence, hearing arguments, and giving judgment.

If no plea, to declare whether witnesses are to be examined orally or in writing.

If orally, papers to be sent to judge.

If responsive, plea to be given in within six days.

11. If a responsive plea be given in, the same shall be filed in the registry within six days from the notice mentioned in the ninth rule, and the same time shall be allowed (as in case of articles, &c.) for the other proctor to declare whether such plea is admitted or opposed, and if opposed the same shall be sent to the judge in like manner as in case of articles, &c.

Clerical error in plea may be corrected.

12. In the event of any clerical or verbal error being discovered in any plea after it has been filed in the registry, and previous to any evidence being taken thereon, it shall be competent to the registrar, on written application from the proctor, to correct the same, with consent in writing of the other proctor.

Answers.

13. If, on the admission of any libel or plea, the proctor requires the answers of the other party thereto, he shall within three days from the time of such admission leave notice in the registry thereof, and notice shall be given by the other proctor within a week subsequent thereto whether he requires a requisition or commission for taking such answers, and if the party whose answers are required resides within

fifty miles of London, such answers shall be brought into the registry within ten days from the date of such last notice, or the issuing of such commission; if beyond that distance, then within fifteen days; but if the party to give in the answers be abroad, such further reasonable time shall be allowed as the distance and circumstances may require. Any party in a suit producing himself for his personal answers before a surrogate may be sworn and afterwards repeated to his said answers in default of the appearance of the other proctor, if he refuse or neglect to attend.

Declaration as to no further pleas.

14. On the admission of the last plea both proctors shall file a declaration in the registry, within six days, that no further pleas are to be given in, and they shall then declare whether they intend to examine witnesses *vivâ voce* or by depositions, and no witnesses shall be examined in the cause until such declaration is filed.

If by an examiner or commission, a month allowed.

15. In the event of the evidence being taken by an examiner in town, or under a commission, the proctor shall be allowed a month for so examining witnesses and lodging the depositions in the registry. Special application may be made to the judge in chambers for further time, if necessary, or if the witnesses reside abroad, and the evidence is to be taken under a requisition.

In all cases where the witnesses are to be examined under a requisition or commission, the notice to be left in the registry shall be signed by both proctors.

Witnesses before surrogate.

16. In all cases where witnesses are examined by an examiner of the court, they may be produced and sworn before a surrogate in default of the appearance of the other proctor or party, if he refuse or neglect to attend after having received written notice thereof.

Examinations taken by examiner.

Counsel may attend.

17. All written depositions shall be taken before an examiner of the court, or a commissioner acting under a commission; all such examinations and cross-examinations may be conducted either by counsel or proctors, or by the examiner or commissioner, as the proctors may determine, and where counsel are employed the fees of one counsel may be allowed on taxation.

Shorthand writer's notes to be evidence.

18. If the judge, on application, directs the evidence of the witnesses in any cause to be taken down by a shorthand writer, a transcript of the notes so taken by him shall be admitted as proof of such evidence if he has been previously sworn to report faithfully.

In compulsories witnesses may be required to produce papers.

19. In any compulsory requiring the attendance of witnesses, it shall be competent to insert a clause (where applied for) requiring any witness or witnesses to produce any paper, book, or document that may be considered material to the interest of the cause.

Notice as to documents to be produced at hearing.

20. In all cases where documents or papers in possession of either party are required to be produced at the hearing of the cause, a notice shall be left in the registry, signed by the proctor of the party, requiring their production three days, at least, before the hearing of the cause.

Articles to be shortened.

21. Articles, libels, petitions, or pleas shall be headed in the form annexed hereto (*a*), and shall shortly set forth or plead the several facts necessary to substantiate the charge or defence.

(*a*) The form is thus given:

Form of Heading of Articles, Libels, Petitions, or Pleas.

In the Arches Court of Canterbury.

The Office of the Judge promoted by A. *v.* B.

The Proctor for the (Promoter *or* Respondent) alleges and propounds as follows.

In proceedings against clerks not necessary to plead orders, institution, &c.

22. In proceedings against clerks in holy orders, it shall not be necessary to exhibit and annex their letters of orders, act on institution, or licence, as the case may be, and in giving a general issue the defendant shall be held to admit the same.

Appeal to be prosecuted within one month.

23. In the event of an appeal from any decree or order made by the judge, such appeal must be asserted either at the time of such decree or order being made, or by notice left in the registry within fifteen days from the time of such decree or order, and the said appeal must be duly prosecuted within one month from the date of such appeal being so asserted.

Otherwise proceedings to continue.

24. If no such appeal be prosecuted within the time limited by the preceding rule, the proceedings shall be continued, or the decree of the court carried into effect, as if there had been no appeal, unless notice be previously lodged in the registry, that the proctor asserting the appeal intends to make special application to the judge for an extension of time, which application may be made in chambers.

Bill of costs to be lodged within fourteen days.

25. When either of the parties is condemned in costs, the proctor shall lodge his bill of costs in the registry, and deliver a copy thereof to the other proctor within fourteen days from the day of the decree.

Notice as to time of taxation.

26. The registrar shall give notice to both proctors of the time appointed for taxing the said bill, and may proceed to do so (after such notice) in the absence of the proctor of the party condemned in costs, and on the completion of such taxation shall enter in the notice book his report of the amount to be allowed in respect of such costs.

If registrar's taxation objected to, notice within ten days.

27. If either of the proctors object to such taxation, notice thereof shall be left in the registry within ten days from the day of such taxation, and the same shall thereupon be referred to the judge, who may hear and determine on such objection in chambers, but if no such notice be left, the registrar's taxation shall be conclusive.

Monition within fourteen days.

28. If the proctor whose bill of costs has been taxed requires a monition to enforce the payment thereof, he shall lodge a written application in the registry, and leave a copy thereof with the other proctor within fourteen days from the time of the registrar's taxation or judge's decision thereon, as the case may be.

Special notice for contempt.

29. If a proctor wishes to apply to have a party pronounced in contempt for not having obeyed any decree, citation, monition, inhibition, compulsory, or other order of the court, he shall leave a notice in the registry containing full particulars of such intended application, and whether any and what notice thereof has been given to such party, and the date thereof.

Where party appears in person, rules to apply.

30. In case of a party appearing in person in any suit, either as promoter or defendant, the foregoing rules and regulations shall be applicable to, and observed by such party as far as circumstances will permit.

Forms of notices dated and signed.

31. All notices, declarations, &c., required by the foregoing rules to be given by proctors, shall be so given in forms to be approved of by the judge, and shall bear date on the day on which they are left in the registry, and shall be signed by the proctor or his substitute, and copies or duplicates of such notices, &c. shall be given on the day they are so dated and left in the registry to the other proctor in the cause.

Judge may shorten or extend time.

32. It shall be competent to the judge, on application in chambers, supported by affidavits, if necessary, to shorten or extend the times fixed by the foregoing or subsequent rules.

Notices to be entered in a book.

33. The registrar will enter in a book to be kept for that purpose the dates when the several papers, notices, &c. are filed, and the other proceedings taken, and report to the judge in case of any delay

or non-compliance with these orders, who shall thereupon make such orders for expediting the proceedings as he may see fit.

Orders not to be enforced from 15th August to 15th October.

34. The foregoing orders will not be enforced from 15th August to 15th October.

Rules to apply to petitions.

35. The foregoing rules and regulations shall be observed, as far as practicable, where the proceedings are by petition and affidavits.

Notices and forms to be followed.

36. The notices and forms annexed to these rules and regulations shall be followed as near as the circumstances of each case will permit (*b*).

(*b*) It is not considered necessary to insert these forms, except the one which has been already inserted under Rule 21.

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LONDON:
PRINTED BY C. ROWORTH AND SONS,
NEWTON STREET, W.C.

SUPPLEMENT

TO THE

ECCLESIASTICAL LAW

OF THE

Church of England.

BY

SIR ROBERT PHILLIMORE, D.C.L.

MEMBER OF HER MAJESTY'S MOST HONORABLE PRIVY COUNCIL.

LONDON:
HENRY SWEET, 3, CHANCERY LANE;
STEVENS & SONS, 119, CHANCERY LANE;
Law Publishers.
1876.

LONDON:
PRINTED BY C. ROWORTH AND SONS,
NEWTON STREET, HIGH HOLBORN.

ADVERTISEMENT.

THIS Supplement has been prepared for the purpose of bringing the original work down to the present time. The First Part contains, in addition to other new matter, the decisions and the legislation subsequent to the early part of the year 1873, when the work was published. It gives also a Table of Corrigenda to the original work.

The Second Part consists of the Public Worship Regulation Act, 1874, and the Rules and Orders made under the provisions of that Act, edited with Notes.

December, 1875.

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3 & 4 Vict. c. 70, p. 2160—*dele.*
c. 92, p. 661—*read,* 691.
5 Vict. c. 4—*read,* 5 Vict. sess. 2, c. 4.

p. lxi..5 & 6 Vict. c. 109—*read,* c. 119.
6 & 7 Vict. c. 22, p. 107—*dele.*
c. 31—*read,* c. 35.
c. 62—*add,* p. 107.
12 & 13 Vict. c. 49, p. 2058—*read,* 2038.
add, c. 79, p. 831.
13 & 14 Vict. c. 41—*add,* p. 1713.
c. 51, p. 1713—*dele.*
c. 79, p. 831—*dele.*
c. 98, p. 508—*read,* 504.
15 & 16 Vict.—*add,* c. 36, Add. lxx.
c. 56, 260 Add. lxx—*dele.*

TABLE OF STATUTES—*continued.*

p. lxii..17 & 18 Vict.—*add*, c. 47, p. 1253.
18 & 19 Vict. c. 41, p. 1253—*read*, 1083.
c. 120—*dele* p. 554.
19 & 20 Vict. c. 64, p. 1057—*dele.*
c. 76—*read*, c. 70.
c. 88—*dele* p. 831.
20 & 21 Vict. c. 85, p. 1070—*read*, 1076.
22 Vict. c. 221—*read*, c. 21.
23 & 24 Vict. c. 23, pp. 1517, 1518—*dele.*
c. 93—*add*, pp. 1517, 1518.
dele p. 1514.
c. 124—*add*, pp. 1632, 2096, 2097.
c. 142—*dele* pp. 1632, 2092, 2096, 2097.
26 & 27 Vict. c. 36—*add*, p. 34.
c. 37, p. 34—*dele.*
c. 120, p. 2104—*read*, 2140.

p. lxiii..30 & 31 Vict. c. 133, p. 858—*read*, 853.
32 & 33 Vict. c. 15—*read*, c. 16.
add, c. 111, p. 102.

p. lxx, line 27..15 & 16 Vict. c. 56—*read*, 36.

p. 22, note (*c*)..Van Espen, pars 1, *l*it. 13—*read*, *t*it.

p. 34, note (*d*)..26 & 27 Vict. c. 37—*read*, 36.

p. 107, note (*i*)..6 & 7 Vict. c. 22—*read*, 62.

p. 558, line 22..1 Vict. c. 23—*read*, 1 & 2 Vict.

p. 615, line 12..4 & 5 Will. 4, c. 45—*read*, 76.

p. 830, line 11..6 & 7 Will. 4, c. 75—*read*, 85.

p. 1092, note (*d*)..Hor*n*er *v.* Jones—*read*, Ho*m*er.

p. 1184, note (*l*)..8 Ad. & El. 640—*read*, 8 Ad. & El. *N. S.* 640.

p. 1231, line 24..and is entitled to a fee in each case for so doing—*read*, *He is entitled to no fee for so doing, but he has fees on searches and copies.*

p. 1253, line 24..18 & 19 Vict. c. 41—*read*, 17 & 18 Vict. c. 47.

p. 1504, lines 1, 2..2 & 3 Vict. c. 32—*read*, 62.

p. 1517, line 35..23 & 24 Vict. c. 23—*read*, 93.

p. 1713, note (*b*)..13 & 14 Vict. c. 51—*read*, 41.

p. 1752 note (*k*)..Smallbones *v.* Edney and *Queen*—*read*, *Lunn.*

p. 1833, line 11..32 & 33 Vict. c. 86—*read*, 56.

p. 2127, line 22..1 & 2 Vict. c. 197—*read*, 107.

p. 2256, line 3 from bottom..6 & 7 Vict. c. 34—*read*, 35.
last line..32 & 33 Vict. c. 15—*read*, 16.

p. 2263, line 8 from bottom..5 & 6 Vict. c. 109—*read*, 119.

p. 2272, line 17 and marginal note..21 Geo. 3, c. 35—*read*, 24 Geo. 3, sess. 2, c. 35.

p. 2294, Canon VIII., line 2..neminant—*read*, nominant.

ADDENDA.

Page lxx.

The case of *Laughton* v. *The Bishop of Sodor and Man* is reported L. R., 4 P. C. 495.

Page lxxvii.

The anonymous case decided by the Master of the Rolls is reported L. R., 15 Eq. 154.

The case of *Regina* v. *Allen* is reported L. R., 8 Q. B. 69.

Page 35.

Since *The Ecclesiastical Law* was published the Bishopric of St. Albans Act, 1875 (38 & 39 Vict. c. 34), has been passed.

This act provides for the creation of a new bishopric of St. Albans, "with a diocese consisting of the counties of "Hertford and Essex, and of that part of the county of "Kent which lies north of the River Thames, or of such "parts thereof as to her Majesty may seem meet." (Sect. 4.)

The abbey church of St. Albans, subject to the rights of the incumbent, is to be the cathedral church. (Ibid.)

The crown is also empowered to transfer to the residue of the diocese of Rochester "all such parishes situate "wholly or partly in the parliamentary divisions of East "Surrey and Mid Surrey as now form part of the diocese "of Winchester, also all such parishes situate in the county "of Surrey as now form part of the diocese of London." (Sect. 5.)

The income of the new bishop is to be made up by sale of Winchester House, by voluntary contributions (sects. 2, 3), and, subject to the rights of the present bishops, by an annual income of 1,000*l.*, taken from the endowments of Winchester and Rochester. (Sect. 6.) The bishopric is not to be constituted till an income of 2,000*l.*, exclusive of that derived from the endowments of these two sees, has been provided. (Sect. 4.)

The Bishop of Rochester's palace at Danbury may also be sold, and the surplus, after providing a new palace, carried to the St. Albans Bishopric Endowment Fund. (Sect. 11.)

Until there is a dean and chapter the Bishop of St. Albans is to be appointed by letters-patent; but when a dean and chapter is founded the bishop is to be appointed like other bishops. (Sect. 8.)

The Ecclesiastical Commissioners are empowered to frame schemes for giving to the bishop a court, officers and jurisdiction; for creating new archdeaconries and re-arranging the existing archdeaconries; for re-distributing the diocesan patronage between the four bishoprics affected; for founding honorary canonries in the cathedral of St. Albans, and some minor matters. (Sect. 9.)

The St. Albans Bishopric Endowment Fund is to be applied, first, in providing an annual income not exceeding 4,500*l.* for the bishop, and after that in endowing a dean and chapter. (Sect. 13.)

Special provisions are made for the present Bishop of Rochester. (Sect. 14.)

The following new clause relates to the number of bishops sitting in parliament:—

Sect. 7. "The number of lords spiritual sitting and voting as lords of parliament shall not be increased by the foundation of the bishopric of Saint Albans, and whenever there is a vacancy among such lords spiritual by the avoidance of any of the sees of Canterbury, York, London, Durham or Winchester, such vacancy shall be supplied by the issue of a writ of summons to the bishop acceding to the see so avoided; and if such vacancy is caused by the avoidance of any see other than the five sees aforesaid, such vacancy shall be supplied by the issue of a writ of summons to that bishop of a see in England who, having been longest appointed bishop of a see in England, has not previously become entitled to such writ.

"Provided, that where a bishop is translated from one see to another, and was at the date of his translation actually sitting as a lord of parliament, he shall not thereupon lose his right to receive a writ of summons to parliament."

Page 67.

See the new provision as to the number of lords spiritual sitting and voting in parliament in the Bishopric of St. Albans Act, just given.

Page 107.

The Bishops' Resignation Act, 1869, is made perpetual by 38 & 39 Vict. c. 19.

Page 135.

Letters of orders are not a deed so as to make the forgery of them felony. (*Reg.* v. *Morton*, L. R., 2 C. C. R. 22; 42 L. J., N. S., Mag. Ca. 58.)

Page 145.

24 Geo. 3, sess. 2, c. 35, 59 Geo. 3, c. 60, and 5 Vict. c. 6, are repealed in part, and 3 & 4 Vict. c. 33, is repealed altogether, by the Colonial Clergy Act, 1874, which also makes new provisions for all the matters to which these acts relate. *Vide infra*, addendum to page 2272.

Page 162.

It has been recently decided that cathedrals are exempt from the general rule of law which forbids the making of alterations in churches without a faculty; and that it is not necessary for a dean and chapter to obtain the consent of the bishop before making any such alterations. (*Boyd* v. *Phillpotts*, L. R., 4 Adm. & Eccl. 297; affirmed on appeal, *Phillpotts* v. *Boyd*, L. R., 6 P. C. 435.)

Page 204.

It has been recently decided that a bishop may at a visitation of his cathedral, and of the dean and chapter thereof, hear and determine any question raised as to the lawfulness or unlawfulness of any decoration set up in the cathedral. (*Phillpotts* v. *Boyd*. L. R., 6 P. C. 435.)

From the decision of the bishop in such a case, if it be within the province of Canterbury, the appeal lies to the Official Principal of the Arches Court of Canterbury. (*Boyd* v. *Phillpotts*, L. R., 4 Adm. & Eccl. 297.)

By the Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85), ss. 8, 17, provisions are made for representations of the introduction of unlawful decorations or ceremonies into a cathedral or collegiate church being preferred according to that act, and for enforcing decisions thereupon. *Vide infra*, where the act is printed *in extenso*.

Page 220.

By the Cathedral Acts Amendment Act, 1873 (36 & 37 Vict. c. 39), the powers given by 3 & 4 Vict. c. 113, s. 20,

are considerably extended; and the Commissioners are enabled to accept plans for removing the suspension from any canonry without assigning towards the re-endowment of the canonry a portion of the divisible corporate revenues remaining to the chapter (Sect. 1), and further to accept plans for adding new canonries or converting non-residentiary prebends into canonries, and for accepting endowments from private persons. (Sect. 2.)

The plan may provide for annexing to any such canonry "any spiritual, ecclesiastical, eleemosynary or educational "duties for the benefit of the Church of England, and in "connection with the diocese" of the cathedral or collegiate church, and for the residence and participation in the cathedral services of the holder of it, and for limiting the tenure of the holder to a term of years, or making it dependent upon his performing the duties specially assigned. The patronage, unless it be annexed to an existing office, is to be in the crown or in the bishop, where not otherwise provided in the bishop. (Sect. 3.)

The holder of a canonry may be given such rights of membership of the chapter as may be thought advisable, or may be given the status of an honorary canon, or, where there are non-residentiary prebendaries, that of a non-residentiary prebendary. The holder is to be visitable by the visitor of the chapter. (Sect. 4.)

The act extends to the Welsh cathedrals.

Page 227.

The Ecclesiastical Commissioners Act, 1873 (36 & 37 Vict. c. 64), contains provisions for severing from the deanery of Lichfield the rectory of Tattenhill, which it had been decided by the case of *Reg.* v. *Champneys* (L. R., 6 C. P. 384) was still annexed to the deanery. (Sects. 1, 2.)

It further provides that the proviso at the end of sect. 51 of 3 & 4 Vict. c. 113, cited in the text of *The Ecclesiastical Law*, that nothing therein contained should "in any manner apply to or affect any dignity, office or "prebend which is permanently annexed to any bishopric, "archdeaconry, professorship or lectureship, or to any "school or the mastership thereof, or the prebends of "Burgham, Bursalis, Exceit and Wyndham, in the "cathedral church of Chichester," shall, so far as it relates to any office annexed to any bishopric, "be repealed "as from the avoidance of the same bishopric which "happens next after the passing of this act, or as from

"any earlier date at which the bishop, by an instrument
"in writing under his hand, registered in the registry of
"the diocese of such bishopric, signifies his assent that
"such repeal shall take effect so far as regards his
"bishopric; and when such repeal takes effect (in the case
"of any bishopric) the said dignity, office or prebend
"shall be severed from the bishopric, and shall be subject
"to the provisions of the Ecclesiastical Commissioners
"Act, 1840 (*a*), and the acts amending the same relating
"to non-residentiary prebends."

Page 247.

Sect. 32 of 3 & 4 Vict. c. 113, is extended by 37 & 38 Vict. c. 63, which declares that the Ecclesiastical Commissioners shall have and shall be deemed to have always had power by scheme, with the consent of the bishop as to all new schemes, to alter the area of any archdeaconry or rural deanery, to diminish the number of archdeaconries or rural deaneries, to make new rural deaneries, to alter the names of any archdeaconry or rural deanery, and to give names to newly constituted ones.

But every parish must be in its entirety within a rural deanery, every rural deanery in its entirety within an archdeaconry, and an archdeaconry must not extend beyond a diocese. (Sect. 1.)

Bishops are to deposit in their diocesan registries a schedule of all rural deaneries so accounted at the passing of this act, and they are to be deemed legal rural deaneries. (Sect. 2.)

As to the alteration of archdeaconries under the bishopric of St. Albans Act, 1875 (38 & 39 Vict. c. 34), *vide supra*, addendum to page 35.

Page 250.

By the Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 88), s. 8, power is given to the archdeacon to make representations under that act as to any church or burial ground within his archdeaconry. *Vide infra*, where the act is printed *in extenso*.

Page 258.

For the further powers of increasing or diminishing the number of rural deaneries, or altering and naming them, given to the Ecclesiastical Commissioners by 37 & 38 Vict. c. 63, *vide supra*, addendum to page 247.

(*a*) 3 & 4 Vict. c. 113.

Page 362.

To the authorities cited in note (*u*) on this page and note (*b*) on page 363, should be added the case of *Briggs* v. *Sharp*, L. R., 20 Eq. 317.

Page 400.

The act 10 Anne, c. 21 (or c. 12), has been repealed by 37 & 38 Vict. c. 82.

Page 404.

It has been recently decided that, if a clerk, being himself patron, offers himself to the ordinary and prays to be admitted, the ordinary is bound thereupon to admit him, if he have the qualifications of, and just as if he were, an ordinary presentee. (*Walsh* v. *Bishop of Lincoln*, L. R., 10 C. P. 518.)

Page 440.

A clerk who is himself patron will not be allowed to sue the ordinary at the same time in *quare impedit* and in *duplex querela*, but will be put to his election. (*Walsh* v. *Bishop of Lincoln*, L. R., 4 Adm. & Eccl. 242.)

Page 465.

Where the ordinary is an actual and not a formal litigant in a suit in *quare impedit*, it seems that the writ to admit the clerk does not go to him. but to the metropolitan. (Mallory on *Quare Impedit*, Part I., p. 178; Part II., p. 94.) This course was pursued in the recent cases of *Marshall* v. *Bishop of Exeter* and *Walsh* v. *Bishop of Lincoln*.

Page 498.

By 12 & 13 Vict. c. 67, a sequestrator may now in his own name sue at law or in equity, or levy a distress, or take any other proceeding which might have been taken or levied by any incumbent if the benefice had not been under sequestration. He may also sue the incumbent himself. A sequestrator appointed at the instance of a creditor cannot, however, be required to take any such proceeding, unless security to indemnify him is given by the creditor. (Sect. 1.) Payment of any sum to a sequestrator lawfully appointed, with or without suit, is to be a discharge as against the incumbent, and the sequestrator is to account for all sums received by him. (Sect. 2.)

Page 501.

The decision in *Doe* d. *Kirby* v. *Carter* is perhaps affected by sect. 1 of 14 & 15 Vict. c. 25, which is as follows:—

"Where the lease or tenancy of any farm or lands held "by a tenant at rackrent shall determine by the death or "cesser of the estate of any landlord entitled for his life, "or for any other uncertain interest, instead of claims to "emblements, the tenant shall continue to hold and occupy "such farm or lands until the expiration of the then cur-"rent year of his tenancy, and shall then quit, upon the "terms of his lease or holding, in the same manner as if "such lease or tenancy were then determined by effluxion "of time or other lawful means during the continuance of "his landlord's estate; and the succeeding landlord or "owner shall be entitled to recover and receive of the "tenant, in the same manner as his predecessor or such "tenant's lessor could have done if he had been living or "had continued the landlord or lessor, a fair proportion "of the rent for the period which may have elapsed from "the day of the death or cesser of the estate of such pre-"decessor or lessor to the time of the tenant so quitting, "and the succeeding landlord or owner and the tenant "respectively shall, as between themselves and as against "each other, be entitled to all the benefits and advantages "and be subject to the terms, conditions and restrictions to "which the preceding landlord or lessor and such tenant "respectively would have been entitled and subject in "case the lease or tenancy had determined in manner "aforesaid at the expiration of such current year: pro-"vided always, that no notice to quit shall be necessary "or required by or from either party to determine any "such holding and occupation as aforesaid."

Page 503.

The act 1 & 2 Geo. 4, c. 92, has been repealed as obsolete by 36 & 37 Vict. c. 91.

Page 573.

The minister of a proprietary chapel, having the licence of the bishop granted with the consent of the previous incumbent, is not a curate within the meaning of section 95 of 1 & 2 Vict. c. 106. (*Richards* v. *Fincher*, L. R., 4 Adm. & Eccl. 255.)

Page 663.

Sect. 24 of 6 & 7 Will. 4, c. 86, has been repealed by sect. 54 of 37 & 38 Vict. c. 88. In lieu thereof the following provision is made by sect. 8 of this last act:—

"When the birth of any child has been registered and "the name, if any, by which it was registered is altered, "or if it was registered without a name, when a name is "given to it, the parent or guardian of such child, or other "person procuring such name to be altered or given, may, "within twelve months next after the registration of the "birth, deliver to the registrar or superintendent registrar "such certificate as hereinafter mentioned, and the regis- "trar or superintendent registrar, upon the receipt of that "certificate, and on payment of the appointed fee, shall, "without any erasure of the original entry, forthwith "enter in the register book the name mentioned in the "certificate as having been given to the child, and, having "stated upon the certificate the fact of such entry having "been made, shall forthwith send the certificate to the "registrar general, together with a certified copy of the "entry of the birth with the name so added.

"The certificate shall be in the form given in the first "schedule to this act, or as near thereto as circumstances "admit, and shall be signed by the minister or person who "performed the rite of baptism upon which the name was "given or altered, or, if the child is not baptized, shall be "signed by the father, mother, or guardian of the child, "or other person procuring the name of the child to be "given or altered.

"Every minister or person who performs the rite of "baptism shall deliver the certificate required by this "section on demand, on payment of a fee not exceeding "one shilling.

"The provisions of this section shall apply with the "prescribed modifications in the case of births at sea, of "which a return is sent to the registrar-general of births "and deaths in England."

The form given in the schedule is as follows:—

"I of in the county of do hereby "certify that on the 18 I baptized by the name "of a male child produced to me by as "the of and declared by the said to "have been born at in the county of on the " 18 .

"Witness my hand 18 .

"[*Signed by officiating minister.*]"

Page 678.

In the case of *Jenkins* v. *Cook*, decided in the Arches Court on the 16th of July, 1875, it was holden that a layman who had published a book of "Selections from the Old and New Testament," from which large portions of the Bible were omitted, on the ground, as he stated, that the parts omitted were in their present generally received sense quite incompatible with religion or decency, and who expressed his disbelief in the doctrines of eternal punishment, and, it appeared, punishment for sin at all, and the existence of the Devil, was rightly repelled from the Holy Communion by the incumbent of his parish, under the provisions of the second rubric in the Order of the Administration of the Lord's Supper and the 27th Canon.

It was further holden that the incumbent, having notified to the bishop the facts of the case and sought his advice thereon, and having then received from him either no "order and direction" at all or an "order and direction" which he obeyed in repelling the layman, had discharged the duty imposed upon him by the rubric, and was therefore not liable to criminal proceedings in the Ecclesiastical Court at the suit of the layman.

Page 681.

It is sufficient in charging a clerk in holy orders with an offence against the laws ecclesiastical in celebrating the Holy Communion when less than three persons communicated, to charge the fact simpliciter in the words of the rubric. If the clerk wishes to contend that there were other persons in the church whom he had ground to expect would communicate, he must plead this by way of defence. (*Parnell* v. *Roughton*, L. R., 6 P. C. 46.)

Page 712.

The act 14 & 15 Vict. c. 40, as to marriages in India, is repealed by 38 & 39 Vict. c. 66.

Page 716.

Sect. 12 of 6 & 7 Will. 4, c. 85, is repealed as obsolete by 37 & 38 Vict. c. 35.

Page 722.

The act 15 Geo. 2, c. 30, as to marriages of lunatics, is repealed as obsolete by 36 & 37 Vict. c. 91.

Page 751.

The act 3 & 4 Vict. c. 52, is repealed as obsolete by 37 & 38 Vict. c. 96.

Page 830.

The act 14 & 15 Vict. c. 40, is repealed by 38 & 39 Vict. c. 66.

The act 58 Geo. 3, c. 84, is repealed as obsolete by 36 & 37 Vict. c. 91.

A further act, 36 & 37 Vict. c. 16, has been passed regulating marriages in Ireland.

The following further acts confirming marriages, which through some defect in the celebration might be void, have been passed:—

36 & 37 Vict.	c. 1.	Cove Chapel, Tiverton.
	c. 20.	Fulford Chapel, Stone.
	c. 25.	Gretton Chapel, Winchcomb.
	c. 28.	St. John the Evangelist, Eton.
37 & 38 Vict.	c. 14.	St. Paul, Pooley Bridge.
	c. 17.	St. John the Evangelist, Bentley.

Page 843.

By 48 Geo. 3, c. 75, where dead bodies are cast on shore from the seas, the churchwardens or overseers of the parish, or in extra-parochial places the constable or head-borough, are to remove the bodies to some convenient place and cause them to be buried in the churchyard. (Sect. 1.) Their expenses in so doing are to be repaid by the treasurer of the county. (Sect. 6.) The minister, parish clerk and sexton are to perform their respective duties at this as at other funerals, receiving such fees as are paid to them for funerals made at the expense of the parish. (Sect. 2.)

Page 847.

The following words in sect. 2 of 15 & 16 Vict. c. 86, are repealed by 38 & 39 Vict. c. 66:—

"Or where any order made under the Nuisances Re-"moval and Diseases Prevention Act, 1848, directing the "provisions of that act for the prevention of epidemic, "endemic and contagious diseases to be put in force, is in "force within such part or parts, then seven days."

Page 861.

By 37 & 38 Vict. c. 88, s. 17, a coroner, upon holding an inquest, may order a body to be buried before registry

of the death; and the registrar, upon registering a death or receiving a written requisition to attend and register a death, or upon receiving written notice of a death accompanied by a medical certificate, shall give a certificate that he has registered or received notice of the death, as the case may be.

The section then provides as follows:

"The person who buries or performs any funeral or "religious service for the burial of any dead body, as to "which no order or certificate under this section is de- "livered to him, shall, within seven days after the burial, "give notice thereof in writing to the registrar, and if he "fail so to do shall be liable to a penalty not exceeding "ten pounds."

Sect. 18 makes provision for the burial of still-born children.

Page 867.

An action at law may be successfully maintained by an incumbent, as upon a special contract, for a special fee payable upon the burial of a non-parishioner in a vault. (*Nevill* v. *Bridger*, L. R., 9 Ex. 214.)

Page 872.

In the case of *Cronshaw* v. *Wigan Burial Board* (L. R., 8 Q. B. 217), where a church had been built and had a district assigned to it under 58 Geo. 3, c. 45, and 59 Geo. 3, c. 134, and authority was given to perform baptisms, marriages and burials in the new church, and the fees therefor were to be received by the incumbent of the new church, it was holden by the Exchequer Chamber that the district assigned to the new church became a separate and distinct parish for ecclesiastical purposes under 19 & 20 Vict. c. 104, s. 14, so that upon the death of the clerk, who was incumbent of the mother church at the time of the assignment of the district, the incumbent of the district had a right, under sect. 5 of 20 & 21 Vict. c. 81, to perform the burials of his parishioners within the cemetery provided by the burial board for the whole of the old parish, and to receive the fees on burials.

The same point was decided by the Queen's Bench in a case where an action was brought by a sexton. (*Ormerod* v. *Blackburn Burial Board*, 21 W. R. 539.)

Page 888.

In *Keet* v. *Smith* (decided July 31, 1875), (L. R., 4 Adm. & Eccl. 398), it was holden in the Arches Court, that

a tombstone on which there was to be an inscription in which the deceased was described as the "daughter of the Rev. H. Keet, Wesleyan Minister," to which the incumbent and the bishop objected, and for which a faculty had been refused in the Consistory Court, was not one for which the Court of Arches would overrule the exercise of discretion by the ordinary, and grant a faculty from the Metropolitan's Court.

Page 929.

The case of *Hutchins* v. *Denziloe*, cited in the text as to the control of the organist by the incumbent, was followed, and the law again laid down, in the case of *Wyndham* v. *Cole*, decided in the Arches Court on the 20th of October, 1875.

The incumbent is responsible for what he permits or sanctions other clerks to do during divine service in his church. (*Parnell* v. *Roughton*, L. R., 6 P. C. 46.)

Page 932.

In the case of *Boyd* v. *Phillpotts* (L. R., 4 Adm. & Eccl. 297; affirmed on appeal, *Phillpotts* v. *Boyd*, 6 P. C. 435), it was holden that a reredos erected in Exeter Cathedral of carved stone, having sculptured representations in high relief of the Ascension, the Transfiguration, and the Descent of the Holy Ghost on the day of Pentecost, surmounted with figures of angels and a cross, was not unlawful.

In the case of *Durst* v. *Masters* (decided in the Arches Court, October 20, 1875), it was holden that a moveable cross of wood placed on a ledge, which ledge was upon the Holy Table, was not unlawful.

Page 984.

In *Martin* v. *Mackonochie* (second suit) (L. R., 4 Adm. & Eccl. 279) the use of lighted candles on or near the Holy Table, when not required for the purpose of giving light, was pronounced unlawful.

Page 991.

In *Martin* v. *Mackonochie* (second suit) (L. R., 4 Adm. & Eccl. 279), it was holden that, though the minister's making the sign of the cross to the congregation was, as had been already decided in *Elphinstone* v. *Purchas* (cited in the text), unlawful, yet the crossing of himself by the minister during the service was an act of private devotion which was not unlawful.

Page 1036.

34 & 35 Vict. c. 87, is continued by 38 & 39 Vict. c. 72, until December 31, 1876, and the end of the then next session of parliament.

Page 1042.

In *Terry* v. *Brighton Aquarium Co.* (L. R., 10 Q. B. 306), and *Warner* v. *Brighton Aquarium Co.* (L. R., 10 Ex. 291), the opening of the Brighton Aquarium on Sunday was holden to be unlawful within the act 21 Geo. 3, c. 49.

By 38 & 39 Vict. c. 80, the crown may remit any penalties recovered under 21 Geo. 3, c. 49.

Page 1050.

The Bank Holydays Act, 1871, is extended in its operation to the Customs and Inland Revenue Offices, and, in certain cases, to the Docks, by 38 & 39 Vict. c. 13, s. 1; and it is further provided that when the 26th of December falls on a Sunday, the 27th shall be a holiday under the first act and this act. (Sect. 2.)

Page 1092.

The act 53 Geo. 3, c. 160, is repealed as obsolete by 36 & 37 Vict. c. 91.

Page 1142.

In the case of *Walsh* v. *The Bishop of Lincoln* (L. R., 10 C. P. 518), it was decided by the Court of Common Pleas that the purchase of a life estate in an advowson by a clerk, and the use by him of the first presentation that accrued, to present or offer himself for admission to the ordinary, was not unlawful within the statute 13 Anne, c. 11, s. 2.

Page 1183.

In the case of *Richards* v. *Fincher* (L. R., 4 Adm. & Eccl. 255), it was holden by the Court of Arches not only that the bishop could not grant a licence to a clerk to officiate in the parish of another without the consent of the incumbent of the parish (which had been decided in *Hodgson* v. *Dillon*, cited in the text), but further, that upon the avoidance of the benefice by the incumbent who had given his consent, any succeeding incumbent could signify his dissent to the licence and prevent the clerk from officiating under it.

Page 1188.

3 & 4 Vict. c. 33, s. 4, given in the text, is repealed by 37 & 38 Vict. c. 77.

Page 1207.

By the Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85), s. 7, it is provided as follows:—

"Whensoever a vacancy shall occur in the office of "official principal of the Arches Court of Canterbury, "the judge" [that is, the judge appointed under this act] "shall become *ex officio* such official principal, and all "proceedings thereafter taken before the judge in relation "to matters arising within the province of Canterbury "shall be deemed to be taken in the Arches Court of "Canterbury; and whensoever a vacancy shall occur in "the office of official principal or auditor of the Chancery "Court of York, the judge shall become *ex officio* such "official principal or auditor, and all proceedings there-"after taken before the judge in relation to matters arising "within the province of York shall be deemed to be taken "in the Chancery Court of York; and whensoever a "vacancy shall occur in the office of master of the facul-"ties to the Archbishop of Canterbury, such judge shall "become *ex officio* such master of the faculties."

Under the provisions of the Supreme Court of Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 8, the official principal of the Arches Court, at the time of the passing of the Public Worship Regulation Act, has resigned his office as such official principal, and the judge appointed under the Public Worship Regulation Act has therefore become official principal of the Arches Court.

By the Ecclesiastical Fees Act, 1875 (38 & 39 Vict. c. 76), s. 6, it is further provided, as to the official principal of the Chancery Court, as follows:—

"It shall be lawful for the worshipful Granville Har-"court Vernon, if he shall think fit, to resign, by a writing "under his hand and seal, the office of official principal "or auditor of the Chancery Court of York, now held by "him under letters-patent from the Archbishop of York, "without invalidating by such resignation the said letters-"patent so far as they relate to other offices not so re-"signed by him."

Page 1215.

By 10 & 11 Vict. c. 98, s. 9, every person appointed to the office of judge, registrar or other officer of any eccle-

siastical court, since the passing of 6 & 7 Will. 4, c. 77, shall hold his office subject to all regulations and alterations affecting the same which may be made by authority of parliament, and shall acquire no claim to compensation in case his office is altered or abolished by parliament.

Page 1225.

It was holden by the Arches Court, in the case of *Burch* v. *Reid* (L. R., 4 Adm. & Eccl. 112), that proctors retain their privilege of exclusive practice in that court, though in many of the ecclesiastical courts solicitors can now practise.

Page 1231.

For the effect of the act 10 & 11 Vict. c. 98, s. 9, on the status of registrars appointed since 6 & 7 Will. 4, c. 77, *vide supra*, addendum to page 1215.

For the duties and fees of registrars under the Public Worship Regulation Act, 1874, *vide infra.*

By 7 & 8 Vict. c. 68, s. 2, the registrar of every ecclesiastical court and the registrar of every vicar-general or diocese shall yearly, on or before the 20th of January, transmit to one of her Majesty's principal Secretaries of State "a true account in writing of the gross and net "amounts of all such fees, allowances, gratuities, per- "quisites and emoluments respectively as shall have been "received or become due in the year ending the 5th day "of January in such year on account of the judge of such "court or vicar-general, or on account of such registrar, "or (except of surrogates) of any other officer, clerk or "minister of such court or registry, by virtue of his office "or employment."

And by the Ecclesiastical Fees Act, 1875 (38 & 39 Vict. c. 76), s. 4, if he fail to transmit this account before the 1st of March, or make any wilful misstatement as to the amount received by or due to him, he shall be liable to a penalty of 20*l.*, to be recovered for the Ecclesiastical Commissioners for England, by action by their secretary brought in the county court of the district in which the registry of the diocese is situate.

By sect. 2, "Every person who shall be appointed after "the passing of this act to the office of secretary, apparitor, "seal keeper or other officer employed in the transaction "of official business, by any archbishop or bishop holding "a see in England, whether such office be or be not an office "in any ecclesiastical court in England, shall hold the same

"subject to all regulations and alterations affecting the "same, or affecting the fees receivable in respect thereof, "which may hereafter be made by authority of parliament; "nor shall any person by his appointment to any such "office acquire any claim or title to compensation in case "the same be hereafter altered or abolished by act of "parliament: provided that nothing contained in this sec- "tion shall be construed to give to any person appointed "before the passing of this act to any of the said offices "any right as to tenure of office, or any claim or title to "compensation not possessed by him before the passing of "this act."

Sect. 3. "Every person who shall after the passing of "this act be appointed to any of the offices mentioned in "the last preceding section shall on or before the 1st day "of March in every year transmit to one of her Majesty's "principal Secretaries of State a true account, in writing, "of the gross and net amounts of all such fees, allowances, "gratuities, perquisites and emoluments as shall have been "received by him or become due to him in the year end- "ing the 5th day of January in such year by virtue of his "office or employment."

If these officers fail to make these returns, or make any wilful misstatement, they are subject to the same penalty as has been already mentioned in the case of registrars.

Page 1248.

For the effect upon the status of apparitors of the acts 10 & 11 Vict. c. 98, s. 9, and 38 & 39 Vict. c. 76, s. 2, and their duty in certain cases to make returns of their fees under 38 & 39 Vict. c. 76, ss. 3, 4, *vide supra*, addenda to pages 1215 and 1231.

Page 1250.

On application for a faculty to remove articles put in a church without a faculty, those who appear in opposition may pray in the same suit for a faculty to confirm. (*Gardner* v. *Ellis*, L. R., 4 Adm. & Eccl. 265.)

Page 1253.

In the case of *Walsh* v. *Bishop of Lincoln*, in the Arches Court (L. R., 4 Adm. & Eccl. p. 242), Mr. Walsh was ordered to elect between proceeding further in this suit, which was one of *duplex querela*, and an action of *quare impedit* brought by him substantially for the same right

in the Court of Common Pleas; and, on his failing to elect, his suit was dismissed.

Page 1254.

The merits of an appeal cannot be argued and decided on an objection to the admission of the libel of appeal. (*Boyd* v. *Phillpotts*, L. R., 4 Adm. & Eccl. 325.)

Page 1257.

Where a suit is begun by and founded on a monition, without articles, it is a civil, not a criminal suit; and therefore the monition must show that the party proceeding has a civil interest, in order to entitle him to maintain his suit. (*Fagg and Mummery* v. *Lee*, L. R., 4 Adm. & Eccl. 135; affirmed on appeal, 6 P. C. 38.)

Page 1271.

By the Judicature Act, 1873 (36 & 37 Vict. c. 66), sect. 21, it is provided as follows:—

"It shall be lawful for her Majesty, if she shall think "fit, at any time hereafter, by Order in Council, to direct "that all appeals and petitions whatsoever to her Majesty "in Council which according to the laws now in force "ought to be heard by or before the Judicial Committee "of her Majesty's Privy Council, shall, from and after a "time to be fixed by such order, be referred for hearing "to and be heard by her Majesty's Court of Appeal; and "from and after the time fixed by such order all such "appeals and petitions shall be referred for hearing to and "be heard by the said Court of Appeal accordingly, and "shall not be heard by the said Judicial Committee; and "for all the purposes of and incidental to the hearing of "such appeals or petitions, and the reports to be made to "her Majesty thereon, and all orders thereon to be after"wards made by her Majesty in Council, and also for all "purposes of and incidental to the enforcement of any "such orders as may be made by the said Court of Appeal "or by her Majesty, pursuant to this section (but not for "any other purpose), all the power, authority and juris"diction now by law vested in the said Judicial Com"mittee shall be transferred to and vested in the said "Court of Appeal.

"The Court of Appeal, when hearing any appeals in "ecclesiastical causes which may be referred to it in "manner aforesaid, shall be constituted of such and so "many of the judges thereof, and shall be assisted by such

" assessors being archbishops or bishops of the Church of " England as her Majesty, by any general rules made " with the advice of the judges of the said court, or any " five of them (of whom the Lord Chancellor shall be " one), and of the archbishops and bishops who are mem- " bers of her Majesty's Privy Council, or any two of them " (and which general rules shall be made by Order in " Council), may think fit to direct: Provided that such " rules shall be laid before each House of Parliament " within forty days of the making of the same, if Parlia- " ment be then sitting, or if not, then within forty days of " the commencement of the then next ensuing session; " and if an address is presented to her Majesty by either " House of Parliament within the next subsequent forty " days on which the said House shall have sat, praying " that any such rules may be annulled, her Majesty may " thereupon by Order in Council annul the same; and the " rules so annulled shall thenceforth become void and of " no effect, but without prejudice to the validity of any " proceedings which may in the meantime have been taken " under the same."

But by the Judicature Act, 1875 (38 & 39 Vict. c. 77), sect. 2, the section just set forth " shall not commence or " come into operation until the first day of November, " 1876."

Page 1318.

Sect. 19 of 3 & 4 Vict. c. 86, does not except a suit brought in criminal form, promoted by an incumbent of a parish against another clerk in holy orders for officiating in the parish without his leave, from the general operation of the act. Such a suit must therefore be brought in accordance with the general provisions of the act. (*Richards* v. *Fincher*, L. R., 4 Adm. & Eccl. 107.)

Page 1319.

The provision in sect. 3 of 3 & 4 Vict. c. 86, directing that the notice of intention to issue a commission shall contain the name, addition and residence of the party on whose application it is to issue, does not enable the party accused to claim a preliminary hearing of objections to the *locus standi* of the party on whose application it is to issue. (*Ex parte Edwards*, L. R., 9 Ch. App. 138.)

Page 1346.

Sect. 28 of 4 & 5 Vict. c. 39, has been repealed as obsolete by 37 & 38 Vict. c. 96.

Page 1378.

3 & 4 Vict. c. 33, s. 4, has been repealed by 37 & 38 Vict. c. 77.

Page 1388.

As to the power given to a sequestrator to sue in his own name by 12 & 13 Vict. c. 67, *vide supra*, addendum to page 498.

Page 1472.

Sect. 3 of 1 & 2 Vict. c. 23, is repealed as obsolete by 37 & 38 Vict. c. 96.

Page 1533.

Since the decision in *Russell* v. *The Tithe Commissioners* given in the text, the Tithe Commutation Acts Amendment Act, 1873 (36 & 37 Vict. c. 42), has been passed.

By this act so much of sections 40 and 42 of 6 & 7 Will. 4, c. 71, sections 26 to 33, inclusive, of 2 & 3 Vict. c. 62, sections 18 & 19 of 3 & 4 Vict. c. 15, and section 42 of 23 & 24 Vict. c. 93, "and of the powers therein contained conferred on the Tithe Commissioners as provide for the charging of an additional rent-charge by way of extraordinary charge on market gardens newly cultivated as such, shall extend and apply only to a parish in which an extraordinary charge for market gardens was distinguished at the time of commutation." (Sect. 1.)

Sect. 2 has a saving for pending proceedings.

Page 1590.

The case of *Vigar* v. *Dudman* referred to in the text has since been affirmed on appeal to the House of Lords. (L. R., 6 H. L. 212.)

Page 1595.

By the Consolidated Fund (Permanent Charges Redemption) Act, 1873 (36 & 37 Vict. c. 57), the Treasury may contract for the redemption of certain annuities payable out of the Consolidated Fund, including, among others, annuities payable to ecclesiastical corporations. In the case of any such annuity the Ecclesiastical Commissioners are to assent to the contract for redemption, and the redemption money is to be paid to them.

Page 1680.

Sects. 7, 8 and 9 of 55 Geo. 3, c. 147, and so much of sect. 10 as relates to any mortgage, are repealed as obsolete by 36 & 37 Vict. c. 91.

Page 1702.

The Agricultural Holdings (England) Act, 1875 (38 & 39 Vict. c. 92), which allows tenants to execute certain improvements, called improvements of the first class, only with consent of the landlord, and provides for the tenant receiving compensation for these improvements executed after such consent, and for improvements of the second class (except where under notice to quit), and of the third class, executed without such consent, and which further allows the landlord and tenant to agree as to the amount and mode and time of payment of compensation, and gives the landlord power to obtain a charge on the land for the compensation which he has paid to the tenant, contains the following provisions as to ecclesiastical landlords:—

Sect. 48. "Where lands are assigned or secured as an "endowment of a see, the powers by this act conferred "on a landlord shall not be exercised by the archbishop "or bishop in respect of those lands, except with the "previous approval in writing of the Estates Committee "of the Ecclesiastical Commissioners for England."

Sect. 49. "Where a landlord is incumbent of an eccle-"siastical benefice the powers by this act conferred on a "landlord shall not be exercised by him in respect of the "glebe land, or other land belonging to the benefice, "except with the previous approval, in writing, of the "Governors of Queen Anne's Bounty (that is, the "Governors of the Bounty of Queen Anne for the aug-"mentation of the maintenance of the poor clergy).

"In every such case the Governors of Queen Anne's "Bounty may, if they think fit, on behalf of the incum-"bent, out of any money in their hands, pay to the tenant "the amount of compensation due to him under this act; "and thereupon they may, instead of the incumbent, "obtain from the county court a charge on the holding in "respect thereof in favour of themselves. Every such "charge shall be effectual, notwithstanding any change of "the incumbent.

"The Governors of Queen's Anne's Bounty, before "granting their approval in any case under this section, "shall give notice of the application for their approval to "the patron of the benefice (that is, the person, officer,

"or authority who, in case the benefice were then vacant, "would be entitled to present thereto)."

Sect. 50. "The powers by this act conferred on a "landlord shall not be exercised by trustees for ecclesi-"astical or charitable purposes, except with the previous "approval in writing of the Charity Commissioners for "England and Wales."

Page 1707.

To the cases of *Hayward* v. *Pile* and *In re Wood's Estate* cited in the text should be added the lately decided case of *Hollier* v. *Burne* (L. R., 16 Eq. 163).

Page 1751.

The statute 11 & 12 Vict. c. 112, cited in note (*f*) to the text, has been repealed as obsolete by 38 & 39 Vict. c. 66.

Page 1775.

Sect. 30 of 3 Geo. 4, c. 72, has been repealed as obsolete by 36 & 37 Vict. c. 91.

Page 1783.

To the authority given in the text for granting a faculty for the erection of a school-house upon consecrated ground should be added that of *Re Bettison* (L. R., 4 Adm. & Eccl. 294), where such a faculty had been refused by the Consistory Court of Rochester, but was granted on appeal by the Court of Arches.

Page 1820.

In the case of *Regina* v. *Churchwardens of Wigan* (L. R., 9 Q. B. 317), it was holden by the Court of Exchequer Chamber, reversing the decision of the Court of Queen's Bench, that no rates to repay a loan made under 5 Geo. 4, c. 36, could be levied more than twenty years after the advance of the loan by the Public Works Loan Commissioners.

Page 1874.

Sect. 5 of 58 Geo. 3, c. 69, is repealed as obsolete by 36 & 37 Vict. c. 91.

Page 1971.

The act 53 Geo. 3, c. 160, referred to in note (*a*) to the text, has been repealed as obsolete by 36 & 37 Vict. c. 91.

Page 1978.

Sect. 16 of 4 & 5 Vict. c. 38, referred to in the text, has been repealed as obsolete by 37 & 38 Vict. c. 96.

Page 1979.

New powers of granting land for religious purposes have been given by the Places of Worship Sites Act, 1873 (36 & 37 Vict. c. 50), which provides as follows:—

Sect. 1. "Any person or persons being seised or entitled in fee simple, fee tail, or for life or lives of or to any manor or lands of freehold tenure, and having the beneficial interest therein, and being in possession for the time being, may grant, convey, or enfranchise by way of gift, sale, or exchange in fee simple, or for any term of years, any quantity not exceeding one acre of such land, not being part of a demesne or pleasure ground attached to any mansion house, as a site for a church, chapel, meeting house, or other place of divine worship, or for the residence of a minister officiating in such place of worship or in any place of worship within one mile of such site, or for a burial place, or any number of such sites, provided that each such site does not exceed the extent of one acre: provided also, that no such grant, conveyance or enfranchisement made by any person seised or entitled only for life or lives of or to any such manor or lands shall be valid unless the person next entitled to the same for a beneficial interest in remainder in fee simple or fee tail (if legally competent) shall be a party to and join in the same, or if such person be a minor, or married woman, or lunatic, unless the guardian (*a*), husband, or committee of such person respectively shall in like manner concur: provided also, that in case the said land so granted, conveyed or enfranchised as aforesaid, or any part thereof, shall at any time be used for any purpose other than as a site for such place of worship or residence, or burial place, or, in the case of a place of worship or residence, shall cease for a year at one time to be used as such place of worship or residence, the same shall thereupon revert to and become a portion of the lands from which the same was severed, as fully to all intents and purposes as if this act had not been passed, anything herein contained to the contrary notwithstanding. The provisions hereinbefore contained with

(*a*) Where the natural guardian is the tenant for life, his concurrence will not be sufficient, and *semble* no conveyance can be made under this act. (*Re Marquis of Salisbury*, L. R. Weekly Notes, 1875, p. 156.)

respect to any manor or lands of freehold tenure shall apply to lands of copyhold or customary tenure, but so, nevertheless, that the provisions of the Lands Clauses Consolidation Act, 1845 (*b*), with respect to copyhold lands (being sections 95, 96, 97, and 98 of such act), shall for the purposes of this enactment be incorporated with this act."

Sect. 2. "The purchase money or enfranchisement money or money to be received for equality of exchange on any such sale, enfranchisement, or exchange shall, if such sale, enfranchisement, or exchange be made by any person or persons seised or entitled in fee simple or fee tail, be paid to the person or persons making such sale, enfranchisement, or exchange, but if such sale, enfranchisement, or exchange be made by any person or persons seised or entitled for life or lives only, then such purchase money, or enfranchisement money, or money to be received for equality of exchange, shall be paid to the existing trustees or trustee (if any) of the instrument under which such person or persons is or are so seised or entitled, to be held by them upon the trusts upon which the land conveyed for such site was held, or if there be no such existing trustees or trustee to two or more trustees to be nominated in writing by the person or persons making such sale, enfranchisement, or exchange; and the receipt of any person or persons to whom such money is hereby directed to be paid shall effectually discharge the person or persons paying such purchase or enfranchisement money or money for equality of exchange therefrom, and from all liability in respect of the application thereof; and the trustees so to be nominated as aforesaid shall invest such purchase or enfranchisement money or money to be received for equality of exchange in the purchase of other lands or hereditaments, to be settled to the same uses and trusts as the land conveyed for such site should have stood limited to; and until such investment, such purchase or enfranchisement money or money to be received for equality of exchange shall be invested upon such securities or investments as would for the time being be authorized by statute or by the Court of Chancery, and for the purposes of devolution and enjoyment shall be treated as land subject to the same uses and trusts as the land conveyed for such site should have stood limited to."

Sect. 3. "Where any person or persons is or are equitably entitled to any manor or lands, but the legal

(*b*) 8 Vict. c. 18.

estate therein shall be in some trustee or trustees, it shall be sufficient for such person or persons to convey or otherwise assure the same for the purposes of this act without the trustee or trustees being party or parties to the conveyance or other assurance thereof, and where any married woman shall be seised or possessed of or entitled to any estate or interest, manorial or otherwise, in land proposed to be conveyed or otherwise assured for the purposes of this act, she and her husband may convey, or otherwise assure the same, for such purposes by deed without any acknowledgment thereof; and where it is deemed expedient to purchase any land for the purposes aforesaid belonging to or vested in any infant or lunatic, such land may be conveyed or otherwise assured by the guardian of such infant or the committee of such lunatic respectively, who may receive the purchase money for the same, and give valid and sufficient discharges to the party paying such purchase money, who shall not be required to see to the application thereof; and in every such case respectively the legal estate shall, by such conveyance or other assurance, vest in the trustees of such place of worship or residence; and if any land taken under this act be subject to any rent, and part only of the land subject to any such rent be required to be taken for the purposes of this act, the apportionment of such rent may be settled by agreement between the owner of such rent and the person or persons to whom the land is conveyed; and if such apportionment be not so settled by agreement, then the same shall be settled by two justices as provided in the Lands Clauses Consolidation Act, 1845 (*c*), sect. 119: provided nevertheless, that nothing herein contained shall prejudice or affect the right of any person or persons entitled to any charge or incumbrance on such land."

Sect. 4. "All gifts, grants, conveyances, assurances and leases of any site for a place of worship, or the residence of a minister, under the provisions of this act, in respect of any land, messuages, or buildings, may be made according to the form following, or as near thereto as the circumstances of the case will admit; (that is to say),

"'I [*or* we] under the authority of an act passed in the thirty-sixth and thirty-seventh years of her Majesty Queen Victoria, intituled, An Act to afford further Facilities for the Conveyance of Land for Sites for Places of Religious Worship and for Burial Places, do hereby freely and voluntarily, and without

(*c*) 8 Vict. c. 18.

any valuable consideration [*or*, do, in the consideration of the sum of pounds to me or the said paid], grant [alienate] and convey [*or* lease] to A. B. all [*description of the premises*], and all [my *or* our *or* the right, title, and interest of the] to and in the same and every part thereof, to hold unto and to the use of the said and his or their heirs, or executors, or administrators, or successors, for the purposes of the said act, and to be applied as a site for a place of worship, or for a residence for a minister or ministers, officiating in , or for a burial place, and for no other purposes whatever. [*In case the site be conveyed to trustees, a clause providing for the removal of the trustees, and in cases where the land is purchased, exchanged, or demised, usual covenants or obligations for title may be added.*]

"'In witness whereof, the conveying and other parties have hereunto set their hands and seals, the day of .

"'Signed, sealed, and delivered by the said .

"'in the presence of of .'

"One witness to the execution of the document by each party shall be sufficient, and any assurance under this act shall be and continue valid if otherwise lawful, although the donor or grantor shall die within twelve calendar months from the execution thereof."

Sect. 5. "The persons hereinbefore specified may convey, by way of gift, sale, or exchange, any site or sites, not exceeding in the case of any one site the quantity aforesaid, for any of the purposes of the Church Building Acts, to the Ecclesiastical Commissioners for England, or as such commissioners may direct, and such commissioners may also act as trustees for the purpose of taking and holding any sites granted under this act; and all conveyances made under this present enactment shall be deemed to be made under the Church Building Acts, and the land conveyed shall vest in conformity with such conveyances and the Church Building Acts."

Sect. 6. "The provisions of this act shall not extend to Scotland or Ireland."

Pages 1990, 1991, 1994.

The statutes 19 & 20 Vict. c. 31; 22 & 23 Vict. c. 34, and 23 Vict. c. 23; sect. 44 of 17 & 18 Vict. c. 81, and sect. 28 of 19 & 20 Vict. c. 88, referred to in the text, have been repealed as obsolete by 38 & 39 Vict. c. 66.

Page 2055.

The Endowed Schools Act, 1869 (32 & 33 Vict. c. 56), has been amended by the Endowed Schools Act, 1873 (36 & 37 Vict. c. 87). The following sections seem to be material to this work:—

Sect. 6. "Where under the express terms of the original "instrument of foundation of any endowed school or edu-"cational endowment the holder of any particular office "is a member of the governing body of the school or "endowment, nothing in section seventeen of the principal "act shall be deemed to prevent the holder for the time "being of such office from being retained as a member of "the governing body of such school or endowment."

Sect. 7. "A scheme relating to any educational endow-"ment, originally given to charitable uses since the passing "of the act of the first year of the reign of William and "Mary, chapter eighteen (commonly called the Toleration "Act), if by the express terms of the original instrument "of foundation, or of the statutes or regulations made by "the founder, or under his authority in his lifetime, or "within fifty years after his death (which terms have been "observed down to the commencement of the principal "act), it is required that the majority of the members of "the governing body, or that the majority of the persons "electing the governing body of such endowment, or that "the principal teacher employed in the school, or that "the scholars educated by the endowment, shall be "members of a particular church, sect or denomination, "shall be excepted from the provisions of the principal "act mentioned in section nineteen of the principal act, "in like manner as a scheme mentioned in that section, "and that section shall be construed as if a scheme relating "to such an educational endowment, as is above in this "section mentioned, were a scheme relating to an educa-"tional endowment mentioned in sub-section two of the "said section."

Sect. 11. "Where a scheme under the principal act "gives the governing body of any endowed school power "to make regulations respecting the religious instruction "given at such school, the scheme shall also provide for "any alteration in such regulations not taking effect until "the expiration of not less than one year after notice of "the making of the alteration is given."

Page 2060.

The statute 6 Geo. 4, c. 133, has been repealed as obsolete by 36 & 37 Vict. c. 91.

Pages 2087, 2100.

By sect. 11 of 29 & 30 Vict. c. 111, the Ecclesiastical Commissioners were enabled to carry over the sum of one million, the produce of sales, to their common fund. By 38 & 39 Vict. c. 71, they are enabled to carry over the sum of one million more.

Pages 2142, 2143, 2144.

Sects. 5, 11, 27 of 3 Geo. 4, c. 72, and sect. 19 of 5 Geo. 4, c. 103, are repealed as obsolete by 36 & 37 Vict. c. 91, or 37 & 38 Vict. c. 35.

Pages 2147, 2150.

Sects. 1 and 3 of 1 & 2 Vict. c. 107, and sects. 13, 14 of 3 & 4 Vict. c. 60, are repealed as obsolete by 37 & 38 Vict. c. 96.

Page 2149.

The case of *Fowler* v. *Allen*, referred to in the text, has been affirmed on appeal by the House of Lords (L. R., 6 H. L. 219).

Page 2154.

Sect. 11 of 1 & 2 Vict. c. 107, has been repealed as obsolete by 37 & 38 Vict. c. 96; and sect. 30 of 3 Geo. 4, c. 72, has been similarly repealed by 36 & 37 Vict. c. 91.

Page 2168.

Sect. 20 of 58 Geo. 3, c. 45, has been repealed as obsolete by 36 & 37 Vict. c. 91.

Page 2191.

Sect. 12 of 9 Geo. 4, c. 42, is repealed as obsolete by 36 & 37 Vict. c. 91.

Page 2232.

The statutes 6 Geo. 4, c. 88, and 7 Geo. 4, c. 4, and all but sect. 1 of 5 Vict. sess. 2, c. 4, are repealed as obsolete by 37 & 38 Vict. c. 35 or c. 96.

Page 2264.

The provisions of 34 & 35 Vict. c. 62, s. 1, are extended to the Bishop of Calcutta by 37 & 38 Vict. c. 13.

Pages 2272, 2276—2282.

Sect. 2 of 24 Geo. 3, sess. 2, c. 35, sect. 4 of 5 Vict. c. 6, sects. 2, 3, 4, 5 of 59 Geo. 3, c. 60, and the whole statute 3 & 4 Vict. c. 33, are repealed by the Colonial Clergy Act, 1874 (37 & 38 Vict. c. 77), and the following provisions are made in lieu thereof:—

Sect. 2. "The enactments enumerated in Schedule A. annexed to this act (*d*) are repealed, but not so as to render invalid anything lawfully done in conformity with any of them."

Sect. 3. "Except as hereinafter mentioned, no person who has been or shall be ordained priest or deacon, as the case may be, by any bishop other than a bishop of a diocese in one of the churches aforesaid shall, unless he shall hold or have previously held preferment or a curacy in England, officiate as such priest or deacon in any church or chapel in England, without written permission from the archbishop of the province in which he proposes to officiate, and without also making and subscribing so much of the declaration contained in the Clerical Subscription Act, 1865, as follows; (that is to say,)

'I assent to the Thirty-nine Articles of Religion, and 'to the Book of Common Prayer, and of the ordering of 'bishops, priests, and deacons. I believe the doctrine of 'the Church of England as therein set forth to be agree- 'able to the Word of God; and in public prayer and 'administration of the sacraments, I, whilst ministering 'in England, will use the form in the said Book pre- 'scribed and none other, except so far as shall be ordered 'by lawful authority.'"

Sect. 4. "Except as hereinafter mentioned, no person who has been or shall be ordained priest or deacon, as the case may be, by any bishop other than a bishop of a diocese in one of the churches aforesaid, shall be entitled as such priest or deacon to be admitted or instituted to any benefice or other ecclesiastical preferment in England, or to act as curate therein, without the previous consent in writing of the bishop of the diocese in which such preferment or curacy may be situate."

Sect. 5. "Any person holding ecclesiastical preferment, or acting as curate in any diocese in England under the

(*d*) That is, 24 Geo. 3, sess. 2, c. 35, s. 2; 26 Geo. 3, c. 84 (so far as the same is in force in any part of her Majesty's dominions out of the United Kingdom); 59 Geo. 3, c. 60, ss. 2, 3, 4, 5; 3 & 4 Vict. c. 33; 5 Vict. c. 6, s. 4.

provisions of this act, may, with the written consent of the bishop of such diocese, request the archbishop of the province to give him a licence in writing under his hand and seal in the following form; that is to say,

'To the Rev. A. B.,

'We, C., by Divine Providence archbishop of D., do 'hereby give you the said A. B. authority to exercise 'your office of priest (*or* deacon) according to the pro-'visions of an act of the thirty-seventh and thirty-eighth 'years of her present Majesty, intituled An Act respect-'ing Colonial and certain other Clergy.

'Given under our hand and seal on the day 'of .

'C. (L.S.) D.'

And if the archbishop shall think fit to issue such licence, the same shall be registered in the registry of the province, and the person receiving the licence shall thenceforth possess all such rights and advantages, and be subject to all such duties and liabilities as he would have possessed and been subject to if he had been ordained by the bishop of a diocese in England: provided that no such licence shall be issued to any person who has not held ecclesiastical preferment or acted as curate for a period or periods exceeding in the aggregate two years."

Sect. 6. "All appointments, admissions, institutions, or inductions to ecclesiastical preferment in England, and all appointments to act as curate therein, which shall hereafter be made contrary to the provisions of this act, shall be null and void."

Sect. 7. "If any person shall officiate as priest or deacon in any church or chapel in England contrary to the provisions of this act, or if any bishop not being bishop of a diocese in England shall perform episcopal functions in any such church or chapel without the consent in writing of the bishop of the diocese in which such church or chapel is situate, he shall for every such offence forfeit and pay the sum of ten pounds to the governors of Queen Anne's Bounty, to be recovered by action brought within six months after the commission of such offence by the treasurer of the said bounty in one of her Majesty's superior courts of common law; and the incumbent or curate of any church or chapel who shall knowingly allow such offence to be committed therein shall be subject to a like penalty, to be recovered in the same manner."

Sect. 8. "Any person ordained a priest or deacon in pursuance of such request and commission as are mentioned in an act of the fifteenth and sixteenth years of her

present Majesty, chapter fifty-two, shall, for the purposes of this act, be deemed to have been so ordained by the bishop of a diocese in England, and it shall not be necessary that the bishop to whom such commission shall have been given should have exercised his office within her Majesty's dominions, or by virtue of her Majesty's royal letters patent, provided that such bishop be a bishop in communion with the Church of England; and such commission shall not become void by the death of the grantor until after seven days: provided always, that any such act of ordination by any such bishop as aforesaid shall be subject to the same laws and provisions as to the titles and as to the oaths and subscriptions of the persons to be ordained, and as to the registration of such act, as if it had been performed by the bishop of the diocese; and that the letters of orders of any persons so ordained by any such bishop shall be issued in the name of, and be subscribed with the signature of such bishop as commissary of the bishop of the diocese, and shall be sealed with the seal of the bishop of such diocese."

Sect. 9. "Any person ordained a deacon or priest under the provisions of an act of the second session of the twenty-fourth year of King George the Third, chapter thirty-five, or under the first section of an act of the fifty-ninth year of King George the Third, chapter sixty, shall be subject to the provisions contained in this act."

Sect. 10. "No admission, institution, induction or appointment to any benefice or other ecclesiastical preferment within her Majesty's dominions, nor any appointment to act as curate therein, nor any ministerial act performed by any person as priest or deacon of any of the churches aforesaid, shall be or be deemed to have been invalid at law by reason of its contrariety to any of the enactments set forth in Schedule B. to this act annexed (*e*), unless its validity shall be inconsistent with the validity of some act, matter or thing lawfully done before the passing of this act."

Sect. 11. "Nothing in this act contained shall alter or affect any of the provisions of an act of the twenty-seventh and twenty-eighth years of her present Majesty, chapter ninety-four, intituled 'An Act to remove disabilities affecting the bishops and clergy of the Protestant Episcopal Church in Scotland.'"

(*e*) 24 Geo. 3, sess. 2, c. 35, s. 2; 26 Geo. 3, c. 84, s. 3; 59 Geo. 3. c. 60, ss. 2, 3, 4, 5; 3 & 4 Vict. c. 33, ss. 6, 7: 5 Vict. c. 6, s. 4.

Sect. 12. "It shall be lawful for the Archbishop of Canterbury or the Archbishop of York for the time being, in consecrating any person to the office of bishop for the purpose of exercising episcopal functions elsewhere than in England, to dispense, if he think fit, with the oath of due obedience to the archbishop."

Sect. 13. "Nothing contained in an act of the fifty-third year of King George the Third, chapter one hundred and fifty-five, or in an act of the third and fourth years of King William the Fourth, chapter eighty-five, or in any letters patent issued as mentioned in the said acts, or either of them, shall prevent any person who shall be or shall have been bishop of any diocese in India from performing episcopal functions, not extending to the exercise of jurisdiction, in any diocese or reputed diocese at the request of the bishop thereof."

Sect. 14. "In this act the word 'bishop' shall, when not inconsistent with the context, include archbishop; the words 'bishop' and 'archbishop,' in the matters of 'permission' and 'consent,' and of 'consent and licence,' shall include the lawful commissary of a bishop or an archbishop; the word 'England' shall include the Isle of Man and the Channel Islands; and the term 'church or chapel' shall mean church or chapel subject to the ecclesiastical law of the Church of England.

Part II.

THE PUBLIC WORSHIP REGULATION ACT, 1874.

37 & 38 Vict. c. 85.

An Act for the better Administration of the Laws respecting the Regulation of Public Worship.

[7th August, 1874.]

Whereas it is expedient that in certain cases further regulations should be made for the administration of the laws relating to the performance of divine service according to the use of the Church of England:

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

Short title.

1. This act may be cited as The Public Worship Regulation Act, 1874.

Commencement of act.

2. This act shall come into operation on the first day of July one thousand eight hundred and seventy-five, except where expressly hereinafter provided.

Extent of act.

3. This act shall extend to that part of the United Kingdom called England, to the Channel Islands, and the Isle of Man.

Proceedings under this act not to be deemed proceedings under 3 & 4 Vict. c. 86, s. 23.

4. Proceedings taken under this act shall not be deemed to be such proceedings as are mentioned in the act of the third and fourth year of the reign of her Majesty, chapter eighty-six, section twenty-three (*a*).

Saving of jurisdiction.

5. Nothing in this act contained, save as herein expressly provided, shall be construed to affect or repeal any jurisdiction which may now be in force for the due administration of ecclesiastical law.

Interpretation of terms.

6. In this act the following terms shall, if not inconsistent with the context, be thus interpreted—

"Bishop."

The term "bishop" means the archbishop or bishop of the diocese in which the church or burial ground is situate to which a representation relates:

"Book of

The term "Book of Common Prayer" means the book

(*a*) See The Ecclesiastical Law, p. 1314.

annexed to the act of the fourteenth year of the reign of King Charles the Second, chapter four, intituled "The Book of Common Prayer, and Administration "of the Sacraments and other Rites and Ceremonies "of the Church, according to the use of the Church "of England; together with the Psalter or Psalms "of David, pointed as they are to be sung or said in "churches; and the form or manner of making, or-"daining, and consecrating of Bishops, Priests, and "Deacons;" together with such alterations as have from time to time been or may hereafter be made in the said book by lawful authority (*c*): Common Prayer."

The term "burial ground" means any churchyard, cemetery or burial ground, or the part of any cemetery or burial ground, in which, at the burial of any corpse therein, the order for the burial of the dead contained in the Book of Common Prayer is directed by law to be used: "Burial ground."

The term "church" means any church, chapel, or place of public worship in which the incumbent is by law or by the terms of licence from the bishop required to conduct divine service according to the Book of Common Prayer: "Church."

The term "diocese" means the diocese in which the church or burial ground is situate to which a representation relates, and comprehends all places which are situate within the limits of such diocese: "Diocese."

The term "incumbent" means the person or persons in holy orders legally responsible for the due performance of divine service in any church, or of the order for the burial of the dead in any burial ground: "Incumbent."

The term "parish" means any parish, ecclesiastical district, chapelry, or place, over which any incumbent has the exclusive cure of souls (*d*): "Parish."

The term "parishioner" means a male person of full age who before making any representation under this act has transmitted to the bishop under his hand the declaration contained in Schedule (A) to this act, and who has, and for one year next before taking any proceeding under this act has had, his usual place of abode in the parish within which the church or burial "Parishioner."

(*c*) *E.g.* the new Lectionary established by 34 & 35 Vict. c. 37.

(*d*) There are many places over which the incumbent has not exclusive cure of souls,—where, for instance, baptisms, marriages and burials are solemnized by the incumbent of the mother church. These would seem not to be "parishes" within this definition.

ground is situate, or for the use of which the burial ground is legally provided, to which the representation relates:

"Barrister-at-law."

The term "barrister-at-law" shall in the Isle of Man include advocate:

"Rules and orders."

The term "rules and orders" means the rules and orders framed under the provisions of this Act (*e*).

Appointment and duties of judge.

7. The Archbishop of Canterbury and the Archbishop of York may, but subject to the approval of her Majesty to be signified under her sign manual, appoint from time to time a barrister-at-law who has been in actual practice for ten years, or a person who has been a judge of one of the superior courts of law or equity, or of any court to which the jurisdiction of any such court has been or may hereafter be transferred by authority of parliament, to be, during good behaviour, a judge of the provincial courts of Canterbury and York, hereinafter called the judge (*f*).

If the said archbishops shall not, within six months after the passing of this act, or within six months after the occurrence of any vacancy in the office, appoint the said judge, her Majesty may by letters-patent appoint some person, qualified as aforesaid, to be such judge.

Whensoever a vacancy shall occur in the office of official principal of the Arches Court of Canterbury, the judge shall become ex officio such official principal, and all proceedings thereafter taken before the judge in relation to matters arising within the province of Canterbury shall be deemed to be taken in the Arches Court of Canterbury (*g*); and whensoever a vacancy shall occur in the office of official principal or auditor of the Chancery Court of York, the judge shall become ex officio such official principal or auditor, and all proceedings thereafter taken before the judge in relation to matters arising within the province of York shall be deemed to be taken in the Chancery Court of York (*h*); and whensoever a vacancy shall occur

(*e*) *Vide infra.*

(*f*) The Right Hon. James Plaisted Baron Penzance has been appointed the first judge under this act. By 38 & 39 Vict. c. 76, s. 5, a sum of 1,112*l*. 18*s*. 1*d*. in the hands of Queen Anne's Bounty may be appropriated for the payment of the judge and his clerk.

(*g*) Under the provisions of 38 & 39 Vict. c. 77, s. 8, the official principal of the Arches Court and Master of the Faculties has resigned these offices, to which Lord Penzance has succeeded.

(*h*) By sect. 6 of 38 & 39 Vict. c. 76, the Worshipful Granville Vernon was enabled to resign the office of official principal or auditor of the Chancery Court of York, without resigning his other offices. It is believed that he has done so, and that Lord Penzance has succeeded him.

in the office of master of the faculties to the Archbishop of Canterbury, such judge shall become ex officio such master of the faculties.

Every person appointed to be a judge under this act shall be a member of the Church of England, and shall, before entering on his office, sign the declaration in Schedule (A.) to this act; and if at any time any such judge shall cease to be a member of the church, his office shall thereupon be vacant.

This section shall come into operation immediately after the passing of this act.

Representation by archdeacon, churchwarden, parishioners, or inhabitants of diocese.

8. If the archdeacon of the archdeaconry, or a churchwarden of the parish (*i*), or any three parishioners of the parish (*i*), within which archdeaconry or parish any church or burial ground is situate, or for the use of any part of which any burial ground is legally provided, or in case of cathedral or collegiate churches, any three inhabitants of the diocese, being male persons of full age, who have signed and transmitted to the bishop under their hands the declaration contained in Schedule (A.) under this act, and who have, and for one year next before taking any proceeding under this act have had, their usual place of abode in the diocese within which the cathedral or collegiate church is situated, shall be of opinion,—

(1.) That in such church any alteration in or addition to the fabric, ornaments, or furniture thereof has been made without lawful authority, or that any decoration forbidden by law has been introduced into such church (*k*); or,

(2.) That the incumbent has within the preceding twelve months used or permitted to be used in such church or burial ground any unlawful ornament of the minister of the church, or neglected to use any prescribed ornament or vesture; or,

(3.) That the incumbent has within the preceding twelve months failed to observe, or to cause to be observed, the directions contained in the Book of Common Prayer relating to the performance, in

(*i*) See definition of "parish" in sect. 6, *supra*.

(*k*) This clause seems to follow the distinction drawn in *Westerton* v. *Liddell* between "ornaments" (*ornamenta*) and decorations. See The Ecclesiastical Law, pp. 921, 931. But while decorations and ornaments of the minister (sub-sect. 2), if illegal, come within the purview of this act, ornaments of the church apparently only do so, when the complaint is that they were put up without lawful authority, *i.e.* without a faculty. See The Ecclesiastical Law, p. 1792.

such church or burial ground, of the services, rites, and ceremonies ordered by the said book, or has made or permitted to be made any unlawful addition to, alteration of, or omission from such services, rites, and ceremonies,—

such archdeacon, churchwarden, parishioners, or such inhabitants of the diocese, may, if he or they think fit, represent the same to the bishop, by sending to the bishop a form (*l*), as contained in Schedule (B.) to this act, duly filled up and signed, and accompanied by a declaration made by him or them under the act of the fifth and sixth year of the reign of King William the Fourth, chapter sixty-two, affirming the truth of the statements contained in the representation (*m*): provided, that no proceedings shall be taken under this act as regards any alteration in or addition to the fabric of a church if such alteration or addition has been completed five years before the commencement of such proceedings (*n*).

Proceedings on representation.

9. Unless the bishop shall be of opinion, after considering the whole circumstances of the case, that proceedings should not be taken on the representation, (in which case he shall state in writing the reason for his opinion (*o*), and such statement shall be deposited in the registry of the diocese, and a copy thereof shall forthwith be transmitted to the person or some one of the persons who shall have made the representation, and to the person complained of,) he shall within twenty-one days after receiving the representation transmit a copy thereof to the person complained of (*p*), and shall require such person, and also the person making the representation, to state in writing within twenty-one days whether they are willing to submit to the directions of the bishop touching the matter of the said representation, without appeal (*q*); and if they shall state their willingness to submit to the directions of the bishop without appeal, the bishop shall forthwith proceed

(*l*) By delivery or by a registered packet to the diocesan registry. Rules and Orders, 1.

(*m*) See Rules and Orders, Appendix, No. 3.

(*n*) This proviso does not apparently extend to ornaments or furniture.

(*o*) A form of such statement is suggested in the Appendix to the Rules and Orders, No. 6.

(*p*) The Rules and Orders order this to be done by the diocesan registrar. Rule 6. The person complained of must acknowledge the receipt of the representation and other documents; otherwise personal or substituted service may be effected on him, of which he has to bear the costs, unless the bishop otherwise order. Ibid.

(*q*) Forms of requisition and consent are given in the Rules and Orders. Rule 7; Appendix, Nos. 8, 9.

to hear the matter of the representation in such manner as he shall think fit, and shall pronounce such judgment and issue such monition (if any) as he may think proper, and no appeal shall lie from such judgment or monition.

Provided, that no judgment so pronounced by the bishop shall be considered as finally deciding any question of law so that it may not be again raised by other parties.

The parties may, at any time after the making of a representation to the bishop, join in stating any questions arising in such proceedings in a special case signed by a barrister-at-law for the opinion of the judge, and the parties after signing and transmitting the same to the bishop may require it to be transmitted to the judge for hearing, and the judge shall hear and determine the question or questions arising thereon, and any judgment pronounced by the bishop shall be in conformity with such determination (*r*).

If the person making the representation and the person complained of shall not, within the time aforesaid, state their willingness to submit to the directions of the bishop, the bishop shall forthwith transmit the representation in the mode prescribed by the rules and orders to the archbishop of the province (*s*), and the archbishop shall forthwith require the judge to hear the matter of the representation at any place within the diocese or province, or in London or Westminster (*t*).

The judge shall give not less than twenty-eight days' notice to the parties of the time and place at which he will proceed to hear the matter of the said representation (*u*). The judge before proceeding to give such notice shall require from the person making the representation such security for costs as the judge may think proper, such security to be given in the manner prescribed by the rules and orders (*v*).

The person complained of shall within twenty-one days

(*r*) Rules 8, 9, 10 and Forms Nos. 10, 11 in the Appendix relate to "special cases."

(*s*) The Rules and Orders require the representation to be transmitted to the registry of the Arches Court or of the Chancery Court, as the case may be. Rule 2. For form of transmission, see Rule 11 and Appendix No. 12.

(*t*) See Appendix to Rules and Orders, No. 13.

(*u*) See Rule 15.

(*v*) That is, by deposit of a sum of money, or by bond with two sureties for a like sum, to the amount which the provincial registrar may think proper. In the first case under the act (*Clifton* v. *Ridsdale*) this has been fixed at 300*l*. The judge may, at the application of the party complained of, increase this security after answer and reply. See Rules 12, 13, 14; Appendix, Nos. 14, 15.

after such notice transmit to the judge, and to the person making the representation, a succinct answer to the representation (*w*), and in default of such answer he shall be deemed to have denied the truth or relevancy of the representation.

In all proceedings before the judge under this act the evidence shall be given vivâ voce, in open court, and upon oath: and the judge shall have the powers of a court of record (*x*), and may require and enforce the attendance of witnesses, and the production of evidences, books, or writings, in the like manner as a judge of one of the superior courts of law or equity, or of any court to which the jurisdiction of any such court has been or may hereafter be transferred by authority of parliament.

Unless the parties shall both agree that the evidence shall be taken down by a shorthand writer, and that a special case shall not be stated (*y*), the judge shall state the facts proved before him in the form of a special case, similar to a special case stated under the Common Law Procedure Acts, 1852–1854 (*z*).

The judge shall pronounce judgment on the matter of the representation, and shall deliver to the parties, on application, and to the bishop (*a*), a copy of the special case, if any, and judgment.

The judge shall issue such monition (if any) (*b*) and make such order as to costs as the judgment shall require.

Upon every judgment of the judge, or monition issued in accordance therewith, an appeal shall lie, in the form prescribed by rules and orders (*c*), to her Majesty in council (*d*).

The judge may, on application in any case, suspend the execution of such monition pending an appeal, if he shall think fit (*e*).

(*w*) The Rules and Orders further provide that, with the leave of the judge, the person complaining may reply to the answer, and that either party may obtain leave to amend their representation, answer or reply. See Rules 16, 17, 18; Appendix, Nos. 16, 17.

(*x*) These are powers not enjoyed by the ecclesiastical courts.

(*y*) See Rule 19; Appendix, No. 18.

(*z*) 15 & 16 Vict. c. 76: 17 & 18 Vict. c. 125.

(*a*) See Rule 20.

(*b*) See Rule 22; Appendix, Nos. 19, 20.

(*c*) See Rule 23; Appendix, No. 21.

(*d*) The appeal will then be heard by the Judicial Committee of the Privy Council, as it is constituted by statute for the hearing of cases within its general jurisdiction, not as it is constituted under 3 & 4 Vict. c. 86, with the attendance of one or more archbishops or bishops being privy councillors.

(*e*) See Rules 24, 25; Appendix, Nos. 22, 23. This provision

10. The registrar of the diocese, or his deputy duly appointed, shall perform such duties in relation to this act and shall receive such fees as may be prescribed by the rules and orders (*f*).

Registrar of the diocese to perform duties under the act.

11. In any proceedings under this act either party may appear either by himself in person or by counsel, or by any proctor or any attorney or solicitor (*g*).

Parties may appear in person or by counsel, &c.

12. For the purpose of an appeal to her Majesty in council under this act, the special case settled by the judge, or a copy of the shorthand writer's notes, as the case may be, shall be transmitted in the manner prescribed by rules and orders, and no fresh evidence shall be admitted upon appeal except by the permission of the tribunal hearing the appeal.

No fresh evidence to be admitted on appeal.

13. Obedience by an incumbent to a monition or order of the bishop or judge, as the case may be, shall be enforced, if necessary, in the manner prescribed by rules and orders, by an order inhibiting the incumbent from performing any service of the church or otherwise exercising the cure of souls within the diocese for a term not exceeding three months (*h*); provided that at the expiration of such term the inhibition shall not be relaxed until the incumbent shall, by writing under his hand, in the form prescribed by the rules and orders, undertake to pay due obedience to such monition or order, or to the part thereof which shall not have been annulled (*i*); provided that if such inhibition shall remain in force for

Inhibition of incumbent.

would seem to indicate that unless the judge suspends the execution of the monition it remains in force pending the appeal. In appeals from the ecclesiastical courts, the law was that an appeal simply did not suspend the decree of the court below, but an inhibition might always be applied for by the appellant, by which the court of appeal inhibited the court appealed from, from doing anything to the prejudice of the appeal. This inhibition is issued as a matter of course from the appeal registry on an appeal from the Arches or Chancery Courts to the Privy Council, and it would seem as if it might still be issued, even when the suit, in which the appeal was, was one under this act.

(*f*) See Rule 21, which also provides for the attendance of the provincial registrar at the hearing.

(*g*) Only proctors have till now been permitted to practise in the Arches and Chancery Courts. See *Burch* v. *Reid*, *addendum* to p. 1225, *supra*. It may become a question whether solicitors may or may not practise in these courts in suits under this act.

(*h*) See Rules 26, 27, 29, 30, 31; Appendix, Nos. 24, 25, 26.

(*i*) By the Rules and Orders, Rule 28, the incumbent has to take out a summons to show cause why a relaxation should not issue, accompanying it with an undertaking to pay obedience to the monition. Appendix, No. 27; see Nos. 28, 29.

more than three years from the date of the issuing of the monition, or from the final determination of an appeal therefrom, whichever shall last happen, or if a second inhibition in regard to the same monition shall be issued within three years from the relaxation of an inhibition, any benefice or other ecclesiastical preferment held by the incumbent in the parish in which the church or burial ground is situate, or for the use of which the burial ground is legally provided, in relation to which church or burial ground such monition has been issued as aforesaid, shall thereupon become void, unless the bishop shall, for some special reason stated by him in writing, postpone for a period not exceeding three months the date at which, unless such inhibition be relaxed, such benefice or other ecclesiastical preferment shall become void as aforesaid (*k*); and upon any such avoidance it shall be lawful for the patron of such benefice or other ecclesiastical preferment to appoint, present, collate, or nominate to the same as if such incumbent were dead; and the provisions contained in the act of the first and second year of the reign of her Majesty, chapter one hundred and six, section fifty-eight (*l*), in reference to notice to the patron, and as to lapse, shall be applicable to any benefice or other ecclesiastical preferment avoided under this act; and it shall not be lawful for the patron at any time to appoint, present, collate, or nominate to such benefice or such other ecclesiastical preferment the incumbent by whom the same was avoided under this act.

The bishop may, during such inhibition, unless he is satisfied that due provision is otherwise made for the spiritual charge of the parish, make due provision for the service of the church and the cure of souls, and it shall be lawful for the bishop to raise the sum required from time to time for such provision by sequestration of the profits of such benefice or other ecclesiastical preferment.

Any question as to whether a monition or order given or issued after proceedings before the bishop or judge, as the case may be, has or has not been obeyed shall be determined by the bishop or the judge, and any proceedings to enforce obedience to such monition or order shall be taken by direction of the judge (*m*).

Faculty not necessary in certain cases.

14. It shall not be necessary to obtain a faculty from the ordinary in order lawfully to obey any monition issued under this act, and if the judge shall direct in any monition that a faculty shall be applied for, such fees only shall

(*k*) A form of postponement is given in the Appendix, No. 41.

(*l*) See The Ecclesiastical Law, p. 1308.

(*m*) See Rule 26; Appendix, No. 24.

be paid for such faculty as may be directed by the rules and orders (*n*); provided that nothing in this act contained shall be construed to limit or control the discretion vested by law in the ordinary as to the grant or refusal of a faculty: provided also, that a faculty shall, on application, be granted, if unopposed, on payment of such a fee (not exceeding two guineas) as shall be prescribed by the rules and orders, in respect of any alteration in or addition to the fabric of any church, or in respect of any ornaments or furniture, not being contrary to law, made or existing in any church at the time of the passing of this act.

Service of notices.

15. All notices and other documents directed to be given to any person under this act shall be given in the manner prescribed by rules and orders (*o*).

Substitute for bishop when patron or in case of illness.

16. If any bishop shall be patron of the benefice or of any ecclesiastical preferment held by the incumbent respecting whom a representation shall have been made, or shall be unable from illness to discharge any of the duties imposed upon him by this act in regard to any representation, the archbishop of the province shall act in the place of such bishop in all matters thereafter arising in relation to such representation (*p*); and if any archbishop shall be patron of the benefice or of any ecclesiastical preferment held by the incumbent respecting whom a representation shall have been made, or shall be unable from illness to discharge any of the duties imposed upon him by this act in regard to any representation, her Majesty may, by her sign manual, appoint an archbishop or bishop to act in the place of such archbishop in all matters thereafter arising in relation to such representation (*q*).

(*n*) See Table of Fees, *nomine* Faculty, *infra*. It is not easy to understand what is meant by this part of the section. The orders made under this act will be either made by the bishop sitting judicially or by the judge in the Arches or Chancery Court. No faculty could be required to authorize persons to obey such orders. Possibly it was intended to provide for orders made by the judge under this act before he became judge of the Arches and Chancery Courts. The provision for applying for faculties under the direction of the judge may be intended for cases where a decoration has been set up without lawful authority (sect. 8 (1)), but is nevertheless such an one as the court might approve, and as to which a faculty to confirm might issue. See *Sieveking* v. *Evans*, in The Ecclesiastical Law, p. 1793, and *Gardner* v. *Ellis*, *addendum* to p. 1250, *supra*.

(*o*) See Rule 36.

(*p*) A somewhat analogous clause is to be found in 3 & 4 Vict. c. 86. See The Ecclesiastical Law, p. 1330.

(*q*) The last part of this section has no precedent in the act 3 & 4 Vict. c. 86.

Provisions relating to cathedral or collegiate church.

17. The duties appointed under this act to be performed by the bishop of the diocese shall in the case of a cathedral or collegiate church be performed by the visitor thereof.

If any complaint shall be made concerning the fabric, ornaments, furniture, or decorations of a cathedral or collegiate church, the person complained of shall be the dean and chapter of such cathedral or collegiate church (*r*), and in the event of obedience not being rendered to a monition relating to the fabric, ornaments, furniture, or decorations of such cathedral or collegiate church, the visitor or the judge, as the case may be, shall have power to carry into effect (*s*) the directions contained in such monition, and, if necessary, to raise the sum required to defray the cost thereof by sequestration of the profits of the preferments held in such cathedral or collegiate church by the dean and chapter thereof (*t*).

If any complaint shall be made concerning the ornaments of the minister in a cathedral or collegiate church, or as to the observance therein of the directions contained in the Book of Common Prayer, relating to the performance of the services, rites, and ceremonies ordered by the said book, or as to any alleged addition to, alteration of, or omission from such services, rites, and ceremonies in such cathedral or collegiate church, the person complained of shall be the clerk in holy orders alleged to have offended in the matter complained of; and the visitor or the judge, as the case may be, in the event of obedience not being rendered to a monition, shall have the same power as to inhibition, and the preferment held in such cathedral or collegiate church by the person complained of shall be subject to the same conditions as to avoidance, notice and lapse, and as to any subsequent appointment, presentation, collation, or nomination thereto, and as to due provision being made for the performance of the duties of such

(*r*) There is sometimes a doubt whether a church is or not a collegiate church. This provision would seem to make it clear that only such churches as not being cathedrals have deans and chapters are collegiate churches within this act. Westminster and Windsor are the two principal if not the only collegiate churches under this act, and of them the crown is visitor. The operation of this section in their cases, first enabling the crown as visitor to send the complaint to the judge and then giving an appeal from the judge to the crown in council, seems not to have been considered.

(*s*) There is no provision here how or through whom the judge is to carry his monition into effect. Rule 32 provides for the issue of a precept to the registrar or other person or persons named by the judge. See Appendix, Nos. 30, 31.

(*t*) See Appendix, No. 32.

person, as are contained in this act concerning an incumbent to whom a monition has been issued, and concerning any benefice or other ecclesiastical preferment held by such incumbent (*u*).

Limitation of proceedings against incumbent.

18. When a sentence has been pronounced by consent, or any suit or proceeding has been commenced against any incumbent under the act of the third and fourth year of the reign of her Majesty, chapter eighty-six, he shall not be liable to proceedings under this act in respect of the same matter; and no incumbent proceeded against under this act shall be liable to proceedings under the said act of the third and fourth year of the reign of her Majesty, in respect of any matter upon which judgment has been pronounced under this act.

Rules for settling procedure and fees under this act.

19. Her Majesty may by order in council, at any time either before or after the commencement of this act, by and with the advice of the Lord High Chancellor, the Lord Chief Justice of England, the judge to be appointed under this act, and the archbishops and bishops who are members of her Majesty's Privy Council, or any two of the said persons, one of them being the Lord High Chancellor or the Lord Chief Justice of England, cause rules and orders to be made for regulating the procedure and settling the fees to be taken in proceedings under this act, so far as the same may not be expressly regulated by this act, and from time to time alter or amend such rules and orders (*v*). All rules and orders made in pursuance of this section shall be laid before each House of Parliament within forty days after the same are made, if parliament is then sitting, or if not, within forty days after the then next meeting of parliament; and if an address is presented to her Majesty by either of the said Houses within the next subsequent forty days on which the House shall have sat praying that any such rules may be annulled, her Majesty may thereupon by Order in Council annul the same, and the rules and orders so annulled shall thenceforth become void, without prejudice to the validity of any proceedings already taken under the same.

(*u*) *Vide supra*, sect. 13. (*v*) These rules follow.

[SCHEDULES.

SCHEDULES referred to in the foregoing Act.

SCHEDULE (A.)

I do hereby solemnly declare that I am a member of the Church of England as by law established.

Witness my hand this day of .

SCHEDULE (B.)

"PUBLIC WORSHIP REGULATION ACT, 1874."

To the Right Rev. Father in God, *A.*, by Divine permission Lord Bishop of *B.*

I, [We,] *C. D.*, Archdeacon of the archdeaconry of , [*or* a churchwarden *or* three parishioners of the parish of *E.*,] in your Lordship's diocese, do hereby represent that [*the person or persons complained of*] has *or* have [*state the matter to be represented; if more than one, then under separate heads*] (*x*).

Dated this day of 18 .

(Signed) *C. D.*

(*x*) See note to Appendix No. 2 to the Rules and Orders, where this form is repeated.

ORDER IN COUNCIL.

At the Court at Windsor, the 28th day of June, 1875.

Present:—The QUEEN'S Most Excellent Majesty in Council.

WHEREAS by an act passed in the last session of parliament, intituled, "An Act for the better administration of the Laws respecting the regulation of Public Worship," it is enacted that her Majesty may, by Order in Council, at any time either before or after the commencement of the said act, by and with the advice of the Lord High Chancellor, the Lord Chief Justice of England, the judge to be appointed under the said act, and the archbishops and bishops who are members of her Majesty's Privy Council, or any two of the said persons, one of them being the Lord High Chancellor or the Lord Chief Justice of England, cause Rules and Orders to be made for regulating the procedure and settling the fees to be taken in proceedings under the said act, so far as the same may not be expressly regulated by the said act; And whereas the Right Honourable James Plaisted, Baron Penzance, has been duly appointed judge under the said act: Now, therefore, her Majesty, in pursuance of the said act, and by and with the advice of Her Privy Council, and of the Right Honourable Hugh M'Calmont, Baron Cairns, the Lord High Chancellor, the Right Honourable Sir Alexander James Edmund Cockburn, Baronet, the Lord Chief Justice of England, the said Right Honourable James Plaisted, Baron Penzance, the Right Honourable and Most Reverend Archibald Campbell, Lord Archbishop of Canterbury, the Right Honourable and Most Reverend William, Lord Archbishop of York, and the Right Honourable and Right Reverend John, Lord Bishop of London, is pleased to make and issue the Rules and Orders hereunto annexed for regulating the said procedure, and to make and ordain the annexed Table of Fees to be taken in proceedings under the said act.

C. L. PEEL.

RULES *and* ORDERS *made under the Provisions of the* PUBLIC WORSHIP REGULATION ACT, 1874 (37 & 38 *Vict. c.* 85), *referred to in the foregoing Order.*

Representations, &c.

1. The representation, declarations, and all other documents required by the act or by these rules and orders to be transmitted to the bishop, shall be either delivered at or sent by post in a registered packet to the registry of the diocese within the jurisdiction of which the church or burial ground, to which the representation relates, is situate. Such registry is hereinafter called "the Diocesan Registry," and the registrar thereof is hereinafter called "the Diocesan Registrar." The word "complainant" is hereinafter used to designate the person (or persons if more than one) making the representation.

2. All documents required by the act or by these rules and orders to be transmitted to the archbishop or the judge shall be either delivered at or sent in manner above mentioned to the registry of the Arches Court of Canterbury (when the matter arises within the province of Canterbury), or the registry of the Chancery Court of York (when the matter arises within the province of York). Such registry is hereinafter called the "Provincial Registry," and the registrar thereof is hereinafter called the "Provincial Registrar."

3. All documents and notices required by these rules and orders to be transmitted to the diocesan or provincial registries may be either delivered at or sent in manner above mentioned to such registries, and all documents and notices to be issued from the said registries may be sent by post in like manner.

4. The forms of declaration and representation are printed in the Appendix, Nos. 1, 2 and 3 (*a*). The declaration, No. 1, in cases where such declaration is required, and in other cases the representation is to be accompanied by an address, to which documents and notices for the complainant may be sent. The diocesan registrar shall acknowledge the receipt of all documents on the days on which they shall be respectively received.—A form of receipt is given in the Appendix, No. 4.

5. The bishop may call attention by notice in writing to any formal defects which may appear on the face of the representation, and require the same to be amended by the

(*a*) Sect. 8 and Schedules (A.) and (B.) of the act.

complainant.—A form of such notice is given in the Appendix, No. 5 (*b*).

6. Within twenty-one days after the receipt of the representation, unless the bishop directs that proceedings shall not be taken on it, Form No. 6, the diocesan registrar shall transmit a copy thereof and of the declarations to the person complained of, hereinafter called the "respondent," addressed to him at the parish to which the representation relates, together with a form of receipt to be signed by the respondent, and returned to the diocesan registry (*c*). The form of receipt is given in the Appendix, No. 7. If at the end of a week after the transmission of the representation the signed receipt shall not be returned to the diocesan registry, the diocesan registrar shall cause a duplicate copy of the representation to be personally served upon the respondent; or in case personal service cannot be effected, the diocesan registrar shall substitute such other mode of service as the bishop may direct. The expense of such personal or substituted service shall be borne by the respondent, unless the bishop shall otherwise order.

Consent to submit to Bishop's directions.

7. The diocesan registrar shall, concurrently with such transmission of the copy of the representation, also transmit to the complainant and respondent respectively the form of consent given in the Appendix to submit to the directions of the bishop touching the representation, together with the requisition relating thereto; and such consent is to be signed and returned into the diocesan registry within twenty-one days, if the parties desire the representation to be heard and determined by the bishop. —The forms of requisition and consent are Nos. 8 and 9 in the Appendix.

Special case for Judge's opinion.

8. At any time after the return of such consents, and before the expiration of the said twenty-one days, a special case, signed by the parties and a barrister-at-law, for the opinion of the judge, may be transmitted to the bishop. Such case is to contain a succinct statement of facts, followed by a distinct statement of the questions submitted for the opinion of the judge.—A form of special case is given in the Appendix, No. 10.

(*b*) There is no provision for this in the act, and, considering the minuteness of the directions as to procedure in the act, it might be open to doubt whether this additional piece of procedure could be introduced.

(*c*) Sect. 9 of the act.

9. The special case shall be forthwith transmitted, Form No. 11, by the diocesan registrar to the judge, who shall be at liberty to require the same to be amended, and to order the transmission to the provincial registry of the representation, and all documents relating thereto.

10. The provincial registrar shall give notice in writing to the parties of the time and place appointed by the judge for the hearing of the special case; and on the determination thereof the provincial registrar shall transmit to the diocesan registrar the determination of the judge, together with the representation and other documents in his possession.

Transmission to Archbishop of Representation in case of non-submission to Bishop.

11. If the parties, or either of them, shall fail to return to the diocesan registry the consent duly signed, to submit to the bishop's directions, within twenty-one days after the same shall have been sent to them as aforesaid, the diocesan registrar shall forthwith transmit the representation to the archbishop, who shall thereupon require the judge to hear the same.—The forms of such transmission and requisition are given in the Appendix, Nos. 12 and 13.

Security for Respondent's Costs.

12. The complainant shall deposit in the provincial registry such a sum of money as the judge, upon the report of the provincial registrar, shall order, or a bond with two sureties for the like sum, as security for the costs of the respondent, together with an affidavit of justification by the sureties.—A form of bond and of affidavit of justification is given in the Appendix, Nos. 14 and 15.

13. The judge shall be at liberty, upon the application of the respondent, after the answer and reply (if any) shall have been transmitted, to order further security to be given in manner above set forth, to such amount as he shall think proper (*d*).

14. For the purpose of fixing the amount of such further security the parties must attend the provincial registrar upon summons to be taken out by the respondent, and the provincial registrar shall report to the judge.

Notice of Hearing before Judge.

15. After security shall have been given, the provincial registrar shall forthwith give notice to the parties of the

(*d*) This is a provision not contained in the act.

time and place appointed by the judge for hearing the said representation; such notice not to be less than twenty-eight days.

Answer to Representation, &c.

16. The answer (if any) of the respondent shall be delivered at or transmitted to the provincial registry within twenty-one days of the date of such notice, and be accompanied by an address to which documents and notices for him may be sent.

17. It shall not be lawful for the complainant, except with the leave of the judge, to reply to such answer. Such reply, if allowed, is to be delivered at or transmitted to the provincial registry within such time as the judge may direct (*e*).

18. Either party shall be at liberty to apply to the judge or the provincial registrar for an order upon the other party to amend the representation, answer, or other statement respectively, or for liberty to correct errors in their own statements (*f*).—A form of answer and reply is given in the Appendix, Nos. 16 and 17.

Evidence at the Hearing.

19. A form of agreement is given in the Appendix, No. 18, to be signed by all parties, and delivered at or transmitted to the provincial registry before the hearing, in case they desire that the evidence shall be taken down by a shorthand writer, and that the shorthand writer's notes, duly certified by him, shall be used on appeal, and that a special case shall not be stated.

Copy of Judgment, &c. to be transmitted to Bishop.

20. The provincial registrar shall transmit to the diocesan registry an official copy of the judgment and of the special case (if any), and the fees payable in respect of such copies shall be paid by the complainant in the first instance, but shall be costs in the cause. The fees payable in respect of any such copies applied for by the parties shall be paid by them respectively on making application.

(*e*) There is nothing in the act to negative the right of reply, though no provision is made for it.

(*f*) There is no provision for this in the act. *Vide supra*, note (*b*).

Attendance of Registrar at Hearing.

21. At every hearing before the judge, whether of the representation or of any incidental matter, and whether in court or chambers, the judge shall be attended by the provincial registrar if sitting in London, or Westminster, or at York, or the diocesan registrar if sitting elsewhere. Such diocesan registrar shall transmit to the provincial registrar the minutes of the proceedings at the hearing to be recorded by him. The judge, when sitting in London or Westminster, shall be at liberty to substitute the registrar of the Arches Court of Canterbury for the registrar of the Chancery Court of York, although the matter may have arisen within the province of York, but such registrar shall transmit to the provincial registry at York the minutes of the proceedings to be recorded therein (*g*). The registrars shall, in addition to the other duties hereby required of them, file and preserve all documents received at their respective registries, other than those which they are required to transmit elsewhere. The bishop shall, in like manner, be attended by the diocesan registrar, who shall be charged with like duties in all proceedings before the bishop.

Monition.

22. A monition, if ordered by a bishop or the judge, shall be issued from the diocesan or provincial registry (as the case may be), upon the application of the complainant and the delivery of a præcipe for the same.

Forms of monition and præcipe are given in the Appendix, Nos. 19 and 20.

Appeal.

23. A party desirous of appealing from a judgment or monition shall deliver into the provincial registry a notice of appeal within fifteen days of the service of the monition, in a case where a monition is issued, and in any other case within fifteen days of the date of the judgment; and thereupon the certified notes of evidence, or the special case settled by the judge (as the case may be), shall be trans-

(*g*) Sect. 10 of the act only provides that diocesan registrars "shall perform such duties in "relation to this act . . . as "may be prescribed by the Rules "and Orders." Now, however, that the judge will sit in the Arches or Chancery Court, he can, it is presumed, require the attendance of the registrar of that court of which he is sitting as judge.

mitted by the provincial registrar with the other documents to the appeal registry in manner required by the Court of Appeal.

A form of notice of appeal is given in the Appendix, No. 21.

Suspension pending Appeal of the Execution of a Monition.

24. A respondent shall be at liberty at any time after notice of appeal shall have been given to apply for a summons against the complainant to show cause why the execution of a monition should not be suspended pending the appeal. At the hearing of such summons the judge will require such evidence and make such order as he shall think fit.

25. A suspension, if ordered by the judge, shall be issued from the provincial registry upon the application of the respondent, and the delivery of a præcipe for the same.

Forms of suspension and præcipe are given in the Appendix, Nos. 22 and 23.

Enforcing Obedience (*h*).

26. It shall be competent for the complainant, at any time after the service of a monition, to apply for a summons against the respondent, to show cause why an inhibition should not issue to enforce obedience to the monition. Such application shall be supported by the report of the bishop, Form No. 24 in the Appendix, in case of disobedience to a bishop's monition, or an affidavit in case of disobedience to the judge's monition. At the hearing of such summons the judge will require such further evidence as he shall think fit.

27. An inhibition, if ordered by the judge, shall be issued from the provincial registry upon the application of the complainant, and the delivery of a præcipe for the same.

Forms of inhibition and præcipe are given in the Appendix, Nos. 25 and 26.

28. At the expiry of the term named in the inhibition it shall be competent for the respondent, on delivering an undertaking to obey the monition, Form No. 27 in the Appendix, to apply for a summons against the complainant, to show cause why a relaxation should not issue, and,

(*h*) Sect. 13 of the act.

if ordered by the judge, the relaxation shall be issued from the provincial registry, upon the application of the respondent, and the delivery of a præcipe for the same.

Forms of relaxation and præcipe are given in the Appendix, Nos. 28 and 29.

29. A monition, inhibition and relaxation, when signed by the provincial or diocesan registrar (as the case may be), shall be effectual without further attestation.

30. Every monition and inhibition shall be personally served, except in cases where personal service cannot be effected, when such other mode of service shall be substituted as the judge or registrar may direct. Such instruments shall be returnable into the provincial or diocesan registry (as the case may be) within a week of such service respectively.

31. A copy of every inhibition to enforce obedience to a bishop's monition shall be transmitted to the bishop by the provincial registrar.

Enforcing Obedience of Dean and Chapter (*i*).

32. In the event of obedience not being rendered to any monition relating to the fabric, ornaments, furniture or decorations of a cathedral or collegiate church, a precept, if ordered by the judge, shall be issued from the provincial registry, upon the application of the complainant, and the delivery of a præcipe for the same, authorizing the registrar, or other person or persons named by the judge, to carry into effect the directions contained in the said monition.—Forms of such precept and præcipe, and of sequestration of the profits of the preferments held in such cathedral or collegiate church by the dean and chapter thereof, are given in the Appendix, Nos. 30, 31 and 32.

Subpœnas.

33. A subpœna may include the names of any number of witnesses. The party shall take it, together with a præcipe, to the provincial registry, where it shall be signed, and the præcipe deposited.—Forms are given in the Appendix, Nos. 33, 34, 35 and 36.

Admission of Documents.

34. Either party may call upon the other, by notice in writing, to admit any document, saving just exceptions,

(*i*) Sect. 17 of the act.

and in case of refusal or neglect to admit the same, the costs of proving the document shall be paid by the party so neglecting or refusing, whatever the result of the cause may be, unless at the hearing the judge shall certify that the refusal was reasonable; and no costs of proving any document shall be allowed as costs in the cause, except in cases where the omission to give the notice was in the opinion of the registrar a saving of expense.—A form of notice to admit is given in the Appendix, No. 37.

Notices.

35. All notices required by these rules and orders shall be in writing, and signed by the party.

Service of Notices, &c. (*k*).

36. It shall be sufficient to transmit all notices and other documents intended for the complainant to the address furnished by him as aforesaid, and to address all notices and other documents intended for the respondent to the parish to which the representation relates, unless and until the respondent shall furnish to the diocesan registry or the provincial registry (as the case may be) another address to which documents may be sent, from which time all such notices and other documents shall be sent to such other address.

Appearance by Proctor or Solicitor (*l*).

37. Whenever an appearance is entered by a proctor or solicitor for a complainant or respondent, all notices and other documents required by these rules and orders to be transmitted to or by the parties, shall, in lieu thereof, be transmitted or delivered to or by their proctor or solicitor at the address furnished by him, and all acts to be done by the parties may be done by their proctors or solicitors.—A form of appearance is given in the Appendix, No. 38.

Change of Proctor or Solicitor.

38. A party may obtain an order to change his proctor or solicitor upon application by summons to the judge, or,

(*k*) Sect. 15 of the act.

(*l*) Sect. 11 of the act, and see note thereupon. It has been ruled by the judge, in *Clifton* v. *Ridsdale*, that a party appearing by a proctor must file a proxy as in ordinary suits in the Arches Court.

in his absence, to the provincial registrar. In case the former proctor or solicitor neglects to file his bill of costs for taxation at the time required by the order served upon him, the party may, with the sanction of the judge or provincial registrar, proceed by the new proctor or solicitor without previous payment of such costs.

Time fixed by these Rules.

39. The judge shall in every case in which a time is fixed by these rules and orders for the performance of any act have power to extend the same with such qualifications and restrictions, and on such terms as to him may seem fit.

40. To prevent the time limited for the performance of any act, or for any proceeding in default, from expiring before application can be made to the judge for an extension thereof, the provincial registrar may, upon reasonable cause being shown, extend the time.

41. The time fixed by these rules and orders for the performance of any act shall in all cases be exclusive of Sundays, Christmas Day and Good Friday.

Affidavits.

42. Every affidavit is to be drawn in the first person, and the addition and true place of abode of every deponent is to be inserted therein. Affidavits may be sworn before the judge, or any provincial or diocesan registrar, or a commissioner to administer oaths in chancery.

43. In every affidavit made by two or more persons the names of the several persons making it are to be written in the jurat.

44. No affidavit will be admitted in which any material part is written on an erasure, or in the jurat of which there is any interlineation or erasure, or in which there is any interlineation the extent of which at the time when the affidavit was sworn is not clearly shown by the initials of the authority before whom it was sworn.

45. Where an affidavit is made by any person who is blind, or who, from his or her signature or otherwise, appears to be illiterate, the authority before whom such affidavit is made is to state in the jurat that the affidavit was read in the presence of the party making the same, and that such party seemed perfectly to understand the same, and also made his or her mark, or wrote his or her signature thereto, in the presence of the authority.

46. No affidavit is to be deemed sufficient which has been sworn before the party on whose behalf the same is offered, or before his proctor or solicitor, or before a partner or clerk of his proctor or solicitor.

47. Proctors and solicitors, and their clerks respectively, if acting for any other proctor or solicitor, shall be subject to the rules and orders in respect of taking affidavits which are applicable to those in whose stead they are acting.

48. Where a special time is fixed for filing affidavits, no affidavit filed after that time shall be used unless by leave of the judge.

49. The above rules and orders in respect to affidavits shall, so far as the same are applicable, be observed in respect to affirmations and declarations.

Taxing Bills of Costs.

50. All bills of costs are referred to the registrar of the respective registry for taxation, and may be taxed by him without any special order for that purpose. Such bills are to be filed in the registry.

51. Notice of the time appointed for taxation will be forwarded to the party filing the bill at the address furnished by such party.

52. The party who has obtained an appointment to tax a bill of costs shall give the other party to be heard on the taxation thereof at least one clear day's notice of such appointment, and shall at or before the same time deliver to him or them a copy of the bill to be taxed.

53. When an appointment has been made by the registrar for taxing any bill of costs, and any parties to be heard on the taxation do not attend at the time appointed, the registrar may nevertheless proceed to tax the bill after the expiration of a quarter of an hour, upon being satisfied by affidavit that the party not in attendance had due notice of the time appointed.

54. The bill of costs of any proctor or solicitor will be taxed on his application as against his client after sufficient notice given to the person or persons liable for the payment thereof, or on the application of such person or persons after sufficient notice given to the practitioner.

55. The fees payable on the taxation of any bill of costs shall be paid by the party on whose application the bill is taxed, and shall be allowed as part of such bill; but if more than one-sixth of the amount of any bill of costs taxed as between practitioner and client is disallowed on the taxation thereof, no costs incurred in such taxation shall be allowed as part of such bill.

56. If an order for payment of costs is required (*m*), the same may be obtained by summons on the amount of such costs being certified by the registrar. A form of monition for costs is given in the Appendix, No. 39.

Summonses.

57. Where the decision of the judge is required, a summons may be taken out by either party in reference to any incidental matter arising out of or connected with any proceedings under the act. A form is given in the Appendix, No. 40.

58. A true copy of the summons is to be served on the party summoned three clear days at least before the summons is returnable, and before five o'clock p.m. On Saturdays the copy of the summons is to be served before two o'clock p.m.

59. On the day and at the hour named in the summons the party taking out the same is to present himself, with the original summons, before the judge at the place appointed for hearing the same.

60. Both parties will be heard by the judge, who will make such order as he may think fit, and a minute of such order will be made by the provincial registrar.

61. If the party summoned do not appear after the lapse of half an hour from the time named in the summons, the party taking out the summons shall be at liberty to go before the judge, who will thereupon make such order as he may think fit.

62. An attendance on behalf of the party summoned for the space of half an hour, if the party taking out the summons do not during such time appear, will be deemed sufficient, and bar the party taking out the summons from the right to go before the judge on that occasion.

63. If a formal order is desired, the same may be obtained from the provincial registrar on the application of either party, and for that purpose the original summons, or the copy, served on the party summoned must be filed on the provincial registry. An order will thereupon be drawn up and delivered to the person filing such summons or copy.

64. If a summons is brought to the provincial registry with consent to an order endorsed thereon signed by the party summoned, or by his proctor or solicitor, an order will be drawn up without the necessity of going before

(*m*) Sect. 9 of the act.

the judge, provided that the order sought is in the opinion of the provincial registrar one which under the circumstances would be made by the judge.

Cases not provided for.

65. In any case not provided for by these rules the directions of the judge shall be obtained upon a summons to be taken out by the party requiring such directions.

Note.—In the event of the judge becoming official principal of the Arches Court of Canterbury, or of the Chancery Court of York (*n*), these rules and orders and the forms and fees prescribed shall be applicable *mutatis mutandis* to all cases thereafter arising, such necessary alterations in the style of the forms being made as the judge may direct.

(*n*) Both these events have happened. See sect. 7 of the act, and notes (*g*) and (*h*) thereto.

APPENDIX.

FORMS,

Which are to be followed as nearly as the circumstances of each case will allow.

No. 1.—*Declaration* (*a*).

Public Worship Regulation Act, 1874.

I [We], C. D., of , do hereby solemnly declare that I am a member of the Church of England as by law established.

Witness my hand this day of 187 .

(Signed) C. D.

Address to which documents and notices for the complainant may be sent.

[*Here insert address.*]

(Signed) C. D.

No. 2.—*Representation* (*b*).

Public Worship Regulation Act, 1874.

To the Right Reverend Father in God, A., by Divine Permission, Lord Bishop of B.

I [We], C. D., archdeacon of the archdeaconry of [*or* a churchwarden *or* three parishioners of the parish of E.] in your lord-

(*a*) This is the same as the form in Schedule (A.) to the act, with the address added.

(*b*) This is the same as the form in Schedule (B.) to the act; but the note at the end is not in the act, and is material.

ship's diocese, do hereby represent that [*the person complained of*] has [*state the matter to be represented; if more than one, then under separate heads*].

Dated this day of 187 .

(Signed) C. D.

Note.—The nature of the complaint is to be stated generally. A detailed statement of facts is not to be given.

No. 3.—*Statutory Declaration affirming the Truth of the Representation.*

Public Worship Regulation Act, 1874.

I, C. D., of , do hereby solemnly and sincerely declare as follows: that the several statements contained in the representation hereunto annexed made by me in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend E. F., clerk, rector [*or* vicar, &c.] of I. K., in the diocese of B., is the person complained of, are true according to the best of my knowledge and belief. And I make this solemn declaration conscientiously believing the same to be true, and by virtue of an act of parliament, &c., &c. (*Statutory Form*).

Declared by, &c. &c.

(Signed) C. D.

Note.—This declaration must also show that the complainant is duly qualified under the act to make the representation.

No. 4.—*Registrar's Receipt for Documents.*

The Diocesan Registry of B.

Public Worship Regulation Act, 1874.

I hereby acknowledge to have received this day of 187 , the under-mentioned documents:—

Declaration of C. D. that he is a member of the Church of England, dated day of 187 .

[*or*]

1. Representation bearing date day of 187 , made by C. D. in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend E. F., clerk, rector [*or* vicar, &c.] of I. K., in the diocese of B., is the person complained of.
2. Statutory declaration made by C. D.
3. . . . . . .
4. . . . . . .

(Signed) X. Y.,
Diocesan Registrar.

No. 5.—*Notice by Bishop requiring amendment of Representation* (q).

The Diocesan Registry of B.

Public Worship Regulation Act, 1874.

In the matter of the representation of C. D., made in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend E. F., clerk, rector [*or* vicar, &c.] of I. K., in the diocese of B., is the person complained of.

We, A., Bishop of B., hereby require you within eight days hereof to amend the representation transmitted by you in the following particulars :—

[*Here state the particulars requiring amendment.*]

Dated this day of 187 .

(Signed) X. Y.,
Diocesan Registrar.

To C. D.

No. 6.—*Statement by Bishop of his Reason why Proceedings should not be taken on Representation.*

The Diocesan Registry of B.

Public Worship Regulation Act, 1874.

In the matter of the representation of C. D , made in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend E. F., clerk, rector [*or* vicar, &c.] of I. K., in the diocese of B., is the person complained of.

We, A., Bishop of B., having in pursuance of the provisions of the Public Worship Regulation Act, 1874, considered the whole circumstances attending the above representation, are of opinion that proceedings should not be taken thereon for the following reason [*here state reason for bishop's opinion*].

Dated this day of 187 .

(Signed) A.

No. 7.—*Respondent's Receipt for Representation and other Documents.*

The Diocesan Registry of B.

Public Worship Regulation Act, 1874.

In the matter of the representation of C. D., made in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend E. F., clerk, rector [*or* vicar, &c.] of I. K., in the diocese of B., is the person complained of.

I, the Reverend E. F., clerk, rector [*or* vicar, &c.] of I. K., in the diocese of B., do hereby acknowledge to have received this day of 187 , the under-mentioned documents :—

1. Declaration of C. D., that he is a member of the Church of England.
2. The said representation.
3. Statutory declaration.
4. . . . . . .
5. . . . . . .

(Signed) E. F.

(q) See Rule 5 and note thereon.

No. 8.—*Requisition by Bishop as to Consent of Parties to submit to his Directions.*

The Diocesan Registry of B.

Public Worship Regulation Act, 1874.

In the matter of the representation of C. D., made in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend E. F., clerk, rector [*or* vicar, &c.] of I. K., in the diocese of B., is the person complained of.

We, A., Bishop of B., hereby require you to state in writing within twenty-one days from the date hereof whether you are willing to submit to our directions, without appeal, touching the matter of the above-mentioned representation.

Dated this day of 187 .

(Signed) X. Y.,
Diocesan Registrar.

To C. D., the complainant, [*or*]
To the Reverend E. F., clerk, rector [*or* vicar, &c.] of I. K., in the diocese of B., the respondent.

No. 9.—*Consent to submit to Bishop's Directions.*

Public Worship Regulation Act, 1874.

In the matter of the representation of C. D., made in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend E. F., clerk, rector [*or* vicar, &c.] of I. K., in the diocese of B., is the person complained of.

I, C. D., the complainant [*or* the Reverend E. F., the respondent], do hereby state in writing that I am willing to submit, without appeal, to the directions of the Right Reverend A., Lord Bishop of B., touching the matter of the said representation.

Dated this day of 187 .

(Signed) C. D.
or
E. F.

To the Right Reverend Father in God,
A., Lord Bishop of B.

No. 10.—*Special Case for the Opinion of the Judge.*

The Diocesan Registry of B.

Public Worship Regulation Act, 1874.

In the matter of the representation of C. D., made in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend E. F., clerk, rector [*or* vicar, &c.] of I. K., in the diocese of B., is the person complained of.

Special case stated for the opinion of the judge.

[*Here follow statements of facts in paragraphs.*]

1. . . . . . .
2. . . . . . .
3. . . . . . .

and

The questions for the opinion of the judge are,—

1. . . . . . .
2. . . . . . .
3. . . . . . .

(Signed) C. D.
E. F.
Barrister-at-Law.

We, the said C. D. and E. F., hereby require this special case to be transmitted to the judge for hearing.

Dated this day of 187 .

(Signed) C. D.
E. F.

To the Diocesan Registrar of B.

No. 11.—*Transmission of Special Case by the Bishop to the Judge.*

A., by Divine permission, Bishop of B., to the Right Honourable James Plaisted, Baron Penzance, a Judge of the Provincial Court of Canterbury [*or* York] : (*r*) greeting :

Whereas in the matter of the representation of C. D., made in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend E. F., clerk, rector [*or* vicar, &c.] of I. K., in our diocese of B., is the person complained of, the parties have stated their willingness to submit to our directions, without appeal, touching the matter of the said representation, and have joined in stating certain questions arising in the said matter in a special case for the opinion of the judge, and have required us to transmit the same to the judge for hearing :

Now, therefore, we, the bishop aforesaid, do hereby transmit the said special case to you, the judge aforesaid, requesting that you will proceed to hear and determine the questions arising thereon in accordance with the provisions of the said act.

Given under our hand this day of 187 .

(Signed) X. Y.,
Diocesan Registrar.

No. 12.—*Transmission of Representation to Archbishop in case of Non-submission to Bishop.*

A., by Divine permission, Bishop of B., to the Right Honourable and Most Reverend Archibald Campbell, Lord Archbishop of Canterbury [*or* William, Lord Archbishop of York]: greeting:

Whereas a representation has been made to us by C. D., in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend E. F., clerk, rector [*or* vicar, &c.] of I. K., in our diocese of B., is the person complained of:

And whereas the said C. D. and E. F. have failed within the time prescribed by the said act to state their willingness to submit to our directions touching the matters of the said representation :

Now we, the bishop aforesaid, do hereby transmit the said representation to your grace in accordance with the provisions of the said act.

Dated this day of 187 .

(Signed) X. Y.,
Diocesan Registrar.

(*r*) As to style of judge, see note at end of Rules.

No. 13.—*Requisition from Archbishop to Judge to hear Representation.*

Archibald Campbell, by Divine Providence, Archbishop of Canterbury [*or* William, Archbishop of York], to the Right Honourable James Plaisted, Baron Penzance, a Judge of the Provincial Court of Canterbury [*or* York]: greeting:

Whereas the Right Reverend Father in God, A., Lord Bishop of B., has transmitted to us a representation made by C. D., in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend E. F., clerk, rector [*or* vicar, &c.] of I. K., in the diocese of B., is the person complained of:

And whereas the said bishop has signified to us that the said parties have not within the time prescribed by the said act for that purpose stated their willingness to submit to his directions touching the matter of the said representation:

Now we, the archbishop aforesaid, do hereby require you, the judge aforesaid, to hear and determine the matter of the said representation at any place in London or Westminster, or within the said diocese of B., as you may deem fit.

Given under our hand this day of 187 .

(Signed) A. C., Cantuar.
or
W., Ebor.

No. 14.—*Bond for securing Respondent's Costs.*

IN THE PROVINCIAL COURT OF CANTERBURY [*or* YORK].

Public Worship Regulation Act, 1874.

Know all men by these presents, that we, C. D., of, &c., L. M., of, &c., and N. O., of, &c., are held and firmly bound unto X. Y., the Registrar of the Provincial Court of Canterbury [*or* York], in the penal sum of pounds of good and lawful money of Great Britain, to be paid to the said X. Y., for which payment to be well and truly made we bind ourselves, and every of us, for the whole, our heirs, executors or administrators, firmly by these presents, sealed with our seals. Dated the day of 187 .

Whereas a representation has been made by C. D. to the Right Reverend A., Bishop of B., in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend E. F., clerk, rector [*or* vicar, &c.] of I. K., in the diocese of B., is the person complained of:

Now the condition of this obligation is such, that if the above-bounden C. D., his heirs, executors or administrators, shall, if so ordered by the Right Honourable James Plaisted Baron Penzance, a judge of the said court, well and truly pay, or cause to be paid, to the above-named E. F., his heirs, executors, administrators or assigns, the full sum of pounds of good and lawful money of Great Britain, or the lawful costs of the said E. F., of and incidental to the said representation to the extent of pounds, then this obligation is to be void and of none effect, otherwise to remain in full force and virtue.

Signed, sealed and delivered by the said C. D., L. M. and N. O., in the presence of

A Commissioner to administer Oaths in Chancery in England.

C. D. (L.S.)
L. M. (L.S.)
N. O. (L.S.)

No. 15.—*Affidavit of Justification.*

IN THE PROVINCIAL COURT OF CANTERBURY [*or* YORK].

Public Worship Regulation Act, 1874.

We, L. M., of , and N. O., of , the proposed sureties for C. D., in the annexed bond, severally make oath and say that we are respectively worth the sum of pounds sterling, after payment of all our just debts, and we further severally make oath that we are not sureties in any other matter [*or* that we are respectively sureties in the sum of pounds for (*here specify particulars of any other suretyship*), but not in any other matter, and that we are respectively worth the said sum of pounds, after payment of the amount of the said suretyships, if the same shall become payable, as well as of our just debts.]

(Signed) L. M.

Sworn by, &c. N. O.

No. 16.—*Answer of Respondent to Representation.*

IN THE PROVINCIAL COURT OF CANTERBURY [*or* YORK].

Public Worship Regulation Act, 1874.

In the matter of the representation of C. D., made in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend E. F., clerk, rector [*or* vicar, &c.] of I. K., in the diocese of B., is the person complained of.

I, the Reverend E. F., clerk, rector [*or* vicar, &c.] of I. K., in the diocese of B., in answer to the said representation, say:—

1. That [*here state which of the facts alleged in the representation he denies, and succinctly the general grounds of defence; and, if more than one, under separate heads*].

Note.—A detailed statement of facts is not to be given.

Whereupon I humbly pray that I may be dismissed from all further observance of justice in the matter of the said representation.

Dated this day of 187 .

(Signed) E. F.

No. 17.—*Reply, or any further Statement* (*s*).

These are to follow, in point of form, the directions given above as to the answer.

No. 18.—*Agreement as Notes of Evidence by Shorthand Writer.*

Public Worship Regulation Act, 1874.

IN THE PROVINCIAL COURT OF CANTERBURY [*or* YORK].

In the matter of the representation of C. D., made in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend E. F., clerk, rector [*or* vicar, &c.] of I. K., in the diocese of B., is the person complained of.

We, C. D, &c., and the Reverend E. F., clerk, the complainant and respondent respectively in the above matter, do hereby agree

(*s*) See Rule 17 and note thereon.

that the evidence at the hearing of the representation shall be taken down by a shorthand writer, and that a special case shall not be stated by the judge.

Dated this day of 187 .

(Signed) C. D.
E. F.

No. 19.—*Monition.*

A., by Divine permission, Bishop of B.,

or

James Plaisted, Baron Penzance, a Judge of the Provincial Court of Canterbury [*or* York], to E. F., clerk, rector [*or* vicar, &c.] of I. K., in the diocese of B., greeting:

Whereas at the hearing of the matter of a representation made by C. D. in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which you, the said E. F., are the person complained of, we did pronounce that [*here state tenour of judgment*]:

Now we do therefore command you, the said E. F., to [*here state particulars of monition*], and herein fail not.

Given at the day of 187 .

(Signed) X. Y.,
Diocesan Registrar *or* Provincial Registrar.

No. 20.—*Præcipe for Monition.*

IN THE DIOCESAN REGISTRY OF B.,

or

IN THE PROVINCIAL COURT OF CANTERBURY [*or* YORK].

Public Worship Regulation Act, 1874.

In the matter of the representation of C. D., made in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend E. F., clerk, rector [*or* vicar, &c.] of I. K., in the diocese of B., is the person complained of.

Præcipe for a monition against the respondent, in pursuance of the order of the Right Honourable James Plaisted, Baron Penzance, a judge of the said Court, made on the day of 187 .

Dated this day of 187 .

(Signed) C. D.

To X. Y.,
The Diocesan Registrar *or* Provincial Registrar.

No. 21.—*Appeal from Judgment or Monition.*

IN THE PROVINCIAL COURT OF CANTERBURY [*or* YORK].

Public Worship Regulation Act, 1874.

In the matter of the representation of C. D., made in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend E. F., clerk, rector [*or* vicar, &c.], of I. K., in the diocese of B., is the person complained of.

Whereas at the hearing of the above representation the Right Honourable James Plaisted, Baron Penzance, a judge of the said

Court, did, on the day of 187 , order (*here state tenour of judgment*) [*or* issue a monition commanding the said E. F. to, &c.] (*here state tenour of monition*):

And whereas the said monition was served on the said E. F., on the day of 187 .

Now, therefore, take notice that I, the said C. D. [*or* E. F.], hereby appeal from the said order [*or* monition] to her Majesty in Council.

Dated this day of 187 .

(Signed) C. D.
or
E. F.

To X. Y.,
The Provincial Registrar.

No. 22.—*Suspension of Monition pending Appeal.*

James Plaisted, Baron Penzance, a judge of the Provincial Court of Canterbury [*or* York], to E. F., clerk, rector [*or* vicar, &c.], of I. K., in the diocese of B., greeting:

Whereas in the matter of a representation made by C. D., in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the said E. F. is the person complained of, a monition was issued by us [*or* by the Right Reverend A. Lord Bishop of B.], bearing date the day of 187 , and duly served on the said E. F., commanding him to, &c. [*here state tenour of monition*]: And whereas the said E. F. has duly appealed from the said monition to her Majesty in Council: now we do hereby on the application of the said E. F., and for certain good reasons to us made known suspend the execution of such monition pending the said appeal, or until we shall otherwise order.

Given at the day of 187 .

(Signed) X. Y.,
Provincial Registrar.

No. 23.—*Præcipe for Suspension of Monition pending Appeal.*

IN THE PROVINCIAL COURT OF CANTERBURY [*or* YORK].

Public Worship Regulation Act, 1874.

In the matter of the representation of C. D., made in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend E. F., clerk, rector [*or* vicar, &c.] of I. K., in the diocese of B., is the person complained of.

Præcipe for suspension of monition pending appeal, in pursuance of the order of the Right Honourable James Plaisted, Baron Penzance, a judge of the said Court, made on the day of 187 .

Dated this day of 187 .

(Signed) E. F.

To X. Y.,
The Provincial Registrar.

No. 24.—*Report by the Bishop of the Respondent's Disobedience to Monition.*

A., by Divine permission, Bishop of B., to the Right Hon. James Plaisted, Baron Penzance, a judge of the Provincial Court of Canterbury [*or* York], greeting:

Whereas, in the matter of the representation of C. D., made in pursuance of the provisions of the Public Worship Regulation Act, 1874, wherein E. F., clerk, rector [*or* vicar, &c.] of I. K., in our diocese of B., is the person complained of, a monition was issued under our hand, bearing date the day of 187 , commanding the said E. F. to [*here set out tenour of monition*]:

Now we, the bishop aforesaid, do hereby certify and make known to you, the judge aforesaid, that it has been made to appear to us that the said E. F. has failed to obey our aforesaid monition by [*here state the acts of disobedience*], and we do hereby request that you, the judge aforesaid, will direct such proceedings to be taken as may be necessary to enforce the obedience of the said E. F. to our aforesaid monition.

Given under our hand this day of 187 .

(Signed) A.

No. 25.—*Inhibition.*

James Plaisted, Baron Penzance, a judge of the Provincial Court of Canterbury [*or* York], to all and singular literate persons in and throughout the said province, greeting: Whereas, in the matter of a representation made by C. D., in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend E. F., clerk, rector [*or* vicar, &c.], of I. K., in the diocese of B., is the person complained of, a monition was issued by us [*or* by the Right Reverend A., Lord Bishop of B.], bearing date the day of 187 , and duly served on the said E. F., commanding him to, &c. [*here state tenour of monition*]: And whereas it has been made to appear before us that the said E. F. has failed to pay due obedience to the said monition in regard to the following matters; that is to say [*here state the acts of disobedience*]:

We do therefore hereby order, that for such his disobedience he, the said E. F., be inhibited for the term of months from the time of the publication of this inhibition, and thereafter until the same shall have been duly relaxed, from performing any service of the church, or otherwise exercising the cure of souls within the said diocese; and we do hereby command that you, or some or one of you, do on Sunday next, the day of , or on the Sunday next after the receipt by you of these presents, previous to the commencement of divine service in the parish church of I. K. aforesaid, by affixing these presents on the principal door of the said church, and leaving thereon affixed a true copy hereof, and also by showing these presents to the said E. F., and by leaving with him a true copy hereof, notify to him, and to all others whom it may concern, that he, the said E. F., is inhibited as aforesaid from performing any service of the church, or otherwise exercising the cure of souls within the said diocese, and hereof fail not.

Given at the day of 187 .

(Signed) X. Y.,
Provincial Registrar.

No. 26.—*Præcipe for Inhibition.*

IN THE PROVINCIAL COURT OF CANTERBURY [*or* YORK].

Public Worship Regulation Act, 1874.

In the matter of the representation of C. D., made in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend E. F., clerk, rector [*or* vicar, &c.], of I. K., in the diocese of B., is the person complained of:

Præcipe for inhibition against the respondent, in pursuance of the order of the Right Honourable James Plaisted, Baron Penzance, a judge of the said court, made on the day of 187 .

(Signed) C. D.

To X. Y.,
The Provincial Registrar.

No. 27.—*Undertaking by Respondent to obey Monition.*

IN THE PROVINCIAL COURT OF CANTERBURY [*or* YORK].

Public Worship Regulation Act, 1874.

In the matter of a representation made by C. D., in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which I, the Reverend E. F., clerk, rector [*or* vicar, &c.], of I. K., in the diocese of B., am the person complained of:

Whereas a monition was issued by the Right Reverend A., Lord Bishop of B. [*or* by the Right Honourable James Plaisted, Baron Penzance, a judge of the said court], bearing date the day of 187 , commanding me to, &c. [*here state tenour of monition*]: And whereas by reason of my having failed to obey the said monition I was inhibited by the judge aforesaid for the term of months from performing any service of the church, or otherwise exercising the cure of souls within the said diocese: And whereas the said term has expired:

Now I, the said E. F., do hereby undertake to pay due obedience for the future to such monition, and at all times to observe and do as therein ordered.

Dated this day of 187 .

(Signed) E. F.

Witness

No. 28.—*Relaxation of Inhibition.*

James Plaisted, Baron Penzance, a judge of the Provincial Court of Canterbury [*or* York], to all and singular literate persons in and throughout the said province, greeting: Whereas in the matter of a representation made by C. D. in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend E. F., clerk, rector [*or* vicar, &c.], of I. K., in the diocese of B., is the person complained of, an inhibition was issued by us, bearing date the day of 187 , whereby, by reason of the said E. F. having failed to obey a certain monition issued by us [*or* by the Right Reverend A., Lord Bishop of B.], he was inhibited for the term of months from performing any service of the church, or otherwise exercising the cure of souls within the said diocese: And

whereas the said term has expired, and the said E. F. has undertaken to pay due obedience for the future to the said monition:

Now we do therefore relax the said inhibition, justice so requiring.

Given at the day of 187 .

(Signed) X. Y.,
Provincial Registrar.

No. 29.—*Præcipe for Relaxation.*

IN THE PROVINCIAL COURT OF CANTERBURY [*or* YORK].

Public Worship Regulation Act, 1874.

In the matter of the representation of C. D., made in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend E. F., clerk, rector [*or* vicar, &c.] of I. K., in the diocese of B., is the person complained of:

Præcipe for relaxation against the respondent, in pursuance of the order of the Right Honourable James Plaisted, Baron Penzance, the judge of the said court, made on the day of 187 .

Dated this day of 187 .

(Signed) C. D.

To X. Y.,
The Provincial Registrar.

No. 30.—*Precept to carry into effect directions of a Monition in the case of a Cathedral or Collegiate Church.*

James Plaisted, Baron Penzance, a judge of the Provincial Court of Canterbury [*or* York], to X. Y., the registrar of the said court, greeting: Whereas in the matter of a representation made by C. D. in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the dean and chapter of the cathedral [*or* collegiate church] of , in the diocese of B., are complained of, a monition was issued by us [*or* by the Right Reverend A., Lord Bishop of B.], bearing date the day of 187 , and duly served, commanding the said dean and chapter to [*here state tenour of monition*]: And whereas it has been made to appear before us that the said dean and chapter have failed to pay due obedience to the said monition in regard to the following matters; (that is to say) [*here state the acts of disobedience*]:

We do therefore hereby authorize and command you, the said X. Y., to carry into effect the directions contained in such monition, and report to us the cost of so doing, and what you shall do in the premises you shall duly certify to us.

Given at the day of 187 .

(Signed) X. Y.,
Provincial Registrar

No. 31.—*Præcipe for Precept.*

IN THE PROVINCIAL COURT OF CANTERBURY [*or* YORK].

Public Worship Regulation Act, 1874.

In the matter of the representation of C. D., made in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend E. F., clerk, rector [*or* vicar, &c.] of I. K., in the diocese of B., is the person complained of.

Præcipe for precept to carry into effect the monition bearing date the day of 187 .

Dated this day of 187 .

To X. Y., (Signed) C. D.
The Provincial Registrar.

No. 32.—*Sequestration of Preferments of a Dean and Chapter.*

James Plaisted, Baron Penzance, a judge of the Provincial Court of Canterbury [*or* York], to [*here insert the names of sequestrators*], greeting: Whereas in the matter of a representation made by C. D. in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the dean and chapter of the cathedral [*or* collegiate church] of , in the diocese of B., are complained of, a precept was duly issued by us to X. Y., the provincial registrar of the said court, in pursuance of the said act, bearing date the day of 187 , authorizing and commanding him to carry into effect the directions contained in a certain monition issued by us [*or* by the Right Reverend A., Lord Bishop of B.], bearing date the day of , 187 : And whereas the said X. Y. has certified to us that he has carried into effect the said directions, and that in so doing the sum of has been necessarily expended:

We do therefore command you to take and sequester into your possession the rents, tithes, rentcharges in lieu of tithes, oblations, obventions, fruits, issues and profits, and all other ecclesiastical goods held in such cathedral [*or* collegiate church] by the dean and chapter thereof, and that you hold the same in your possession until you have levied the said sum of , or until our further direction herein, and that you from time to time report to us what you shall do in the said premises.

Given at , this day of 187 .

(Signed) X. Y.,
Provincial Registrar.

No. 33.—*Subpœna ad testificandum.*

James Plaisted, Baron Penzance, a judge of the Provincial Court of Canterbury [*or* York], to [*names of all witnesses included in the subpœna to be inserted*], greeting: We command you and every of you to be and appear in your proper persons before us at , in the county of on the day of 187 , by eleven of the clock in the forenoon of the same day, and so from day to day until you shall be discharged, to testify the truth according to your knowledge in the matter of a representation made by C. D. in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend E. F., clerk, rector [*or* vicar, &c.] of

I. K., in the diocese of B., is the person complained of on the part of the said C. D. [*or* E. F.], and on the aforesaid day to be heard before us. And this you or any of you shall by no means omit.

Given at the day of 187 .

(Signed) X. Y.,
Provincial Registrar.

No. 34.—*Præcipe for Subpœna ad testificandum.*

IN THE PROVINCIAL COURT OF CANTERBURY [*or* YORK].

Public Worship Regulation Act, 1874.

Præcipe for subpœna for [*insert witnesses' names*], to testify on the part of the complainant [*or* respondent] in the matter of a representation made by C. D. in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend E. F., clerk, rector [*or* vicar, &c.] of I. K., in the diocese of B., is the person complained of.

Dated this day of 187 .

(Signed) C. D.
or
E. F.

No. 35.—*Subpœna duces tecum.*

James Plaisted, Baron Penzance, a judge of the Provincial Court of Canterbury [*or* York], to [*names of all witnesses included in the subpœna to be inserted*], greeting: We command you and every of you to be and appear in your proper persons before us at in the county of on the day of 187 , by of the clock in the noon of the same day, and so from day to day until you shall be discharged, and also that you bring with you and produce at the time and place aforesaid [*here describe shortly the deed, letter, paper, &c., required to be produced*], then and there to testify and show all and singular those things which you or either of you know, or the said deed or document doth import, of and concerning the matter of a representation made by C. D. in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend E. F., clerk, rector [*or* vicar, &c.] of I. K., in the diocese of B., is the person complained of, on the part of the said C. D. [*or* E. F.], and on the aforesaid day to be heard before us. And this you or any of you shall by no means omit.

Given at the day of 187 .

(Signed) X. Y.
Provincial Registrar.

(* *Sic.*)

No. 36.—*Præcipe or* Subpœna duces tecum.*

IN THE PROVINCIAL COURT OF CANTERBURY [*or* YORK].

Public Worship Regulation Act, 1874.

Præcipe for subpœna for [*insert witnesses' names*], to testify and produce, &c., on the part of the complainant [*or* respondent] in the matter of a representation made by C. D. in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the

Reverend E. F., clerk, rector [*or* vicar, &c.] of I. K., in the diocese of B., is the person complained of.

Dated this day of 187 .

(Signed) C. D.
or
E. F.

No. 37.—*Notice to admit Documents.*

IN THE PROVINCIAL COURT OF CANTERBURY [*or* YORK].

Public Worship Regulation Act, 1874.

Take notice that in the matter of a representation made by C. D. in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend E. F., clerk, rector [*or* vicar, &c.] of I. K., in the diocese of B., is the person complained of, the said C. D. [*or* E. F.] proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the said E. F. [*or* C. D.], his proctor, solicitor, or agent, at , on , between the hours of ; and the said E. F. [*or* C. D.] is hereby required within forty-eight hours from the last-mentioned hour to admit that such of the said documents as are specified to be originals were respectively written, signed, or executed, as they purport respectively to have been, that such as are specified as copies are true copies, and such documents as are stated to have been sent or delivered were so served, sent, or delivered respectively, saving all just exceptions to the admissibility of all such documents as evidence in this cause.

Dated this day of 187 .

(Signed) C. D.
or
E. F.

To E. F.
or
C. D.

[*Here describe the documents.*]

No. 38.—*Entry of appearance by a Proctor or Solicitor.*

The Diocesan Registry of B.

Public Worship Regulation Act, 1874.

In the matter of a representation made by C. D. in pursuance of the provisions of the Public Worship Regulation Act, 1874, wherein the Reverend E. F., clerk, rector [*or* vicar, &c.] of I. K., in the diocese of B., is the person complained of.

I, G. H., the proctor or solicitor of the said C. D. *or* E. F., appear on his behalf.

Dated this day of 187 .

[*Here insert address required for communications.*]

(Signed) G. H.

No. 39.—*Monition for Costs.*

James Plaisted, Baron Penzance, a judge of the Provincial Court of Canterbury [*or* York], to C. D. *or* E. F., rector [*or* vicar, &c.] of I. K., in the diocese of B., greeting: Whereas at the hearing of

the matter of a representation made by C. D. in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend E. F., clerk, rector [*or* vicar, &c.] of I. K., in the diocese of B. [*description to be omitted if mentioned before*], is the person complained of, the sum of has been found to be due from you, the said C. D. [*or* E. F.], to the said E. F. [*or* C. D.], and his proctors or solicitors, Messieurs , for the costs incurred by him in the said matter, and on which you were condemned at the hearing of the said representation:

We, therefore, hereby command you, the said C. D. [*or* E. F.], to pay within six days from the service hereof (inclusive of the day of service) the said sum of to the said E. F. [*or* C. D., *or* to the said Messieurs], and herein fail not.

Given at this day of 187 .

(Signed) X. Y.,
Provincial Registrar.

No. 40.—*Summons.*

IN THE PROVINCIAL COURT OF CANTERBURY [*or* YORK].

Public Worship Regulation Act, 1874.

In the matter of a representation now pending before us, made by C. D. in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Reverend E. F., clerk, rector [*or* vicar, &c.] of I. K., in the diocese of B., is the person complained of.

Let the said C. D. *or* E. F. attend before the Right Honourable James Plaisted, Baron Penzance, a judge of the Provincial Court of Canterbury [*or* York], on next, the day of 187 , at of the clock in the noon, to show cause why

[*Here state object of summons.*]

Dated this day of 187 .

(Signed) X. Y.,
Provincial Registrar.

No. 41.—*Postponement by Bishop of Avoidance* (*t*).

A., by Divine permission, Bishop of B., to E. F., rector [*or* vicar, &c.] of I. K., in our said diocese of B., and all others whom it may concern, greeting:

Whereas in the matter of a representation made by C. D., in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the said E. F. is the person complained of, an inhibition was issued by the Right Honourable James Plaisted, Baron Penzance, a judge of the Provincial Court of Canterbury [*or* York], bearing date the day of 187 , by reason of the disobedience of the said E. F., to a certain monition issued by the said judge [*or* by us] bearing date the day of 187 , by which inhibition the said E. F. was inhibited for the term of months from the time of publication thereof, and thereafter until the same should have been duly relaxed, from *&c.*: And whereas the said E. F. has not undertaken to pay due obedience to the said monition, and the said inhibition has therefore not been relaxed, but has since

(*t*) See sect. 13 of the act.

the date thereof remained and is still in force: And whereas by reason of the premises the said rectory [*or* vicarage, *&c.*] of I. K. might shortly become void, unless the avoidance thereof be postponed by us in accordance with the provisions of the said act:

Now we, the bishop aforesaid, do hereby, for the reason that [*here state reason*], order that, notwithstanding the said inhibition may remain in force for more than three years from the date of the said monition, the avoidance of the said rectory [*or* vicarage, *&c.*] shall be postponed for [*here state time, not exceeding three months the date at which the same would have become void*].

Dated this day of 187 .

(Signed) X. Y.,
Diocesan Registrar.

FEES to be taken by the DIOCESAN or PROVINCIAL REGISTRIES (as the case may be).

It is ordered that the fees in the subjoined table be paid and received in the diocesan and provincial registries respectively, and that the proceeds be applied in discharge of the expenses of carrying the act into execution, and in remunerating the officers and persons employed therein, other than the judge, in such manner, at such times and in such proportions as the judge shall from time to time direct, until further order be made herein; provided always, that the fees received in the diocesan registries shall be applied exclusively to the expenses incurred and officers employed in the diocesan registries and courts, and the fees received in the provincial registries to the expenses incurred and persons employed in the provincial courts.

Preparation of Instruments.

	£	s.	d.
Registrar's receipt for documents	0	5	0
Bishop's notice to amend representations	0	10	0
Respondent's receipt for documents	0	5	0
Requisition by bishop as to submission	0	5	0
Consent to submit	0	5	0
Transmission of special case for opinion of judge	0	5	0
Transmission of representation to archbishop	0	5	0
Requisition to judge to hear representation	0	5	0
Security for costs	0	10	0
Monition	1	0	0
Report from bishop to judge of respondent's disobedience	0	10	0
Inhibition	0	10	0
Relaxation of ditto	0	10	0
Præcept as to cathedral church, &c.	0	10	0
Sequestration of profits of dean and chapter	0	10	0
Subpœna (for every witness)	0	2	6
Monition for costs	0	10	0

Appearance.

	£	s.	d.
On entry of an appearance by proctor or solicitor	0	5	0
On amending an appearance	0	5	0
Search for appearance	0	1	0

	£	s.	d.
Filing Fees.			
Filing representation	0	5	0
Filing special case for the opinion of the judge . .	0	5	0
Filing answer to representation	0	5	0
Filing reply, &c.	0	5	0
Filing every affidavit or other document not otherwise specified	0	2	6
Reference to Registrar for his Report.			
On each reference as to the amount of further security to be given (including registrar's report) . . .	0	6	8
Setting Down.			
Setting down a special case for hearing . . .	0	5	0
Setting down a representation for hearing . . .	0	5	0
Summons.			
Summons to attend in chambers	0	2	6
For entering judge's order and summons . . .	0	2	6
If a final order in the matter	0	10	0
Notices.			
Preparing every notice required to be given by the registrar	0	5	0
Hearing.			
On every hearing before the judge of a representation or special case, to be paid by the party setting down the same	1	10	0
If the hearing continues more than one day, for every subsequent day or part of day, from the same party .	1	0	0
Entering Judgment or Order.			
Entering judgment, to be paid by the complainant .	0	10	0
If the special matter thereof shall exceed five folios, for every additional folio	0	1	0
Entering any order or decree of judge not otherwise specified to be paid by the party obtaining the same (in case of doubt the judge to direct) . . .	0	5	0
Office Copies and Extracts.			
For every office copy or extract of a minute, judgment, order, or other document, if five folios or under .	0	2	6
If exceeding five folios, per folio	0	0	6
Searches.			
Every search in the registry in reference to representation	0	1	0
Attendances.			
Attendance to transmit any document required to be transmitted from the registry, in addition to postage and registration fee	0	3	4
Attendance on the judge on any occasion other than a hearing	0	6	8
For attendance to serve respondent with representation under Rule No. 6, such a sum is to be allowed as the bishop may consider reasonable under the circumstances.			

Oath.

	£	s.	d.
For every oath administered by a registrar to each deponent	0	1	0
For marking every exhibit	0	1	0

Taxing Costs.

	£	s.	d.
Taxing every bill of costs:			
When taxed as between complainant and respondent, per folio	0	0	6
When taxed as between practitioner and client, per folio	0	1	0
For postponement of appointment for taxation of costs, to be paid by the party at whose instance the appointment is postponed:			
If the bill of costs is five folios or under	0	1	0
If exceeding five folios and under fifteen folios	0	2	6
If exceeding fifteen folios	0	5	0

Faculty.

	£	s.	d.
For every faculty granted in pursuance of the 14th section of the act, unless otherwise ordered by the judge	2	2	0

Note.—All folios to consist of seventy-two words.

COSTS to be allowed PROCTORS or SOLICITORS.

Instructions.

	£	s.	d.
Instructions for representation, answer, reply, &c., and for declarations, special affidavits, &c.	0	13	4
Ditto to defend	0	13	4
Ditto for brief, or case for hearing	1	0	0
If there are several witnesses and the brief is necessarily long an additional fee will be allowed.			

Representation, &c., and Copies.

	£	s.	d.
Drawing and engrossing representation, if ten folios or under	1	0	0
If exceeding ten folios, for every additional folio	0	1	4
Drawing and engrossing answer, reply, and other statements, if ten folios or under	1	0	0
If exceeding ten folios, for every additional folio	0	1	4
Copies of representation or other statements to file, at per folio	0	0	4

Special Case.

	£	s.	d.
Instructions	0	13	4
Drawing special case for the judge's opinion, including copy	1	0	0
If exceeding ten folios, for every additional folio, including copy	0	1	4

Case on Evidence.

	£	s.	d.
For case to advise on evidence, including copy for counsel	1	0	0

Drawing Instruments.

	£	s.	d.
Drawing any instrument to be filed in or issued by the registry for which no other fee is herein allowed, and for copy to be filed or issued:			
If five folios or under	0	6	8
If above five folios, per folio	0	1	4

Perusing and abstracting.

For perusing and abstracting representation, answer, &c., and all other papers, and exhibits of all kinds, per folio:			
If five folios or under	0	5	0
If above five folios, per folio	0	0	4

Briefs and Cases for Hearing.

For drawing same, per folio	0	1	0
For each copy, per folio	0	0	4

Maps and Plans.

For maps or plans . . . each from	1	1	0
		to	
	3	3	0
Copies of same if required . . . each from	0	10	0
		to	
	1	0	0

Affidavits.

Drawing affidavit:			
If five folios or under, including copy	0	6	8
If above five folios, per folio, including copy	0	1	4

Copies.

For every plain copy of any instrument, per folio:			
If five folios or under	0	2	6
If above five folios, per folio	0	0	4
If the same or any part thereof are required to be made *fac-simile*, for the part or parts copied *fac-simile*, in addition to the above, per folio	0	0	2

Collating.

For collating copy of any instrument with the original, or with another copy thereof, per folio, in addition to the fee for attendance:			
If five folios or under	0	2	6
If above five folios, per folio	0	0	2

Notices.

All notices, if three folios or under, inclusive of copy and service	0	5	0
If exceeding three folios, for every additional folio	0	1	0

Summonses.

Drawing summons	0	3	4
Copy of summons or order of the judge, and service	0	5	0

Subpœna.

	£	s.	d.
Subpœna ad testificandum, including præcipe	0	5	0
Subpœna duces tecum, if five folios or under, including præcipe	0	5	0
If exceeding five folios, for each additional folio	0	1	0
Service of a subpœna, if within two miles of the place of business of the practitioner or of the person employed to effect the service	0	5	0
If beyond that distance, in addition for every mile one way	0	1	0
Affidavit of service, if three folios or under	0	5	0
If more than three folios, for every folio, including copy	0	1	4

In cases in which the person to be served shall avoid service, or the service shall be effected beyond the jurisdiction, except in Scotland and Ireland, such a sum to be allowed for service as the registrar may consider reasonable under the circumstances.

Attendances.

	£	s.	d.
For attendance on and feeing counsel when the fee is one guinea	0	6	8
When the fee exceeds one guinea and is under five guineas	0	13	4
When the fee is five guineas and upwards	1	0	0
Attendance on consultation	0	13	4
Attendance on conference	0	13	4
Attendance in pursuance of notice to admit	0	6	8
For every hour after the first	0	6	8
On trial or hearing	2	2	0
If it lasts the whole day	3	3	0
For all attendances in chambers before the judge	0	13	4
All ordinary attendances before a commissioner, on counsel, in the registry, or upon the adverse parties or practitioner, for which no other fee is herein allowed	0	6	8

Term Fees, Letters and Messengers.

	£	s.	d.
Term fee, letters and messengers, for each term in which any business is done in court or in chambers other than obtaining an order for taxation, or attending the taxation of bills of costs	0	15	0
For every letter written to any person other than the practitioner's own client	0	3	6

Bills of Costs.

	£	s.	d.
Drawing bill of costs and copy for taxation, per folio	0	1	0
Copy for the adverse party, per folio	0	0	4
Attendance on taxation of bill of costs	0	13	4
If above an hour, for each additional hour or part of an hour	0	6	8

If it should become necessary for proctors or solicitors to transact any business for which no fee is herein specified, such fee shall be allowed to them as would be allowed for similar business done in the courts of common law and equity.

Note.—All folios to consist of seventy-two words.

COSTS to be allowed Proctors or Solicitors for the Use of other Persons.

Counsel's Clerks' Fees.

Not to exceed as under:	£	s.	d.
Upon a fee to counsel under 5 guineas	0	2	6
5 guineas and under 10 guineas	0	5	0
10 guineas and under 20 guineas	0	10	0
20 guineas and under 30 guineas	0	15	0
30 guineas and under 50 guineas	1	0	0
50 guineas and upwards—at per cent. on the fee paid	2	10	0
On consultations:			
Senior's clerk	0	7	6
Junior's clerk	0	2	6
On general retainer	0	10	6
On common retainer	0	2	6
On conference	0	5	0

Witnesses' Expenses.

Allowance to witnesses, including their board and lodging, as between party and party:	£	s.	d.
Common witnesses, such as labourers, journeymen, &c., &c.:			
If resident within five miles of the place of hearing, per diem	0	5	0
If beyond that distance, per diem	0	7	6
Master tradesmen, yeomen, farmers, &c.:			
If resident within five miles of the place of hearing, per diem	0	10	0
If resident beyond that distance, per diem	0	15	0
Auctioneers and accountants:			
If resident within five miles of the place of hearing, per diem	1	1	0
If resident beyond that distance, per diem	2	2	0
Professional men, including notaries, engineers, and surveyors, &c.:			
If resident within five miles of the place of hearing, per diem	1	1	0
If resident beyond that distance, per diem	3	3	0
Clerks to attornies or others:			
If resident within five miles of the place of hearing, per diem	0	10	6
If resident beyond that distance, per diem	1	1	0
Esquires, bankers, merchants and gentlemen, per diem	1	1	0
Females according to station in life:			
If resident within five miles of the place of hearing, per diem, from	0	5	0
to	0	10	0
If resident beyond that distance, per diem, from	0	7	6
to	1	0	0

	£	s.	d.
Police inspector:			
If resident within five miles of the place of hearing, per diem	0	7	6
If resident beyond that distance, per diem	0	10	0
Police constable:			
If resident within five miles of the place of hearing, per diem	0	5	0
If resident beyond that distance, per diem	0	7	6

The travelling expenses of witnesses will be allowed according to the sums reasonably and actually paid; but in no case will there be an allowance for such expenses of more than 1*s.* per mile one way.

A. C. Cantuar.
Cairns, C.
W. Ebor.
J. London.
Penzance.
A. E. Cockburn.

FINIS.

LONDON:
PRINTED BY C. ROWORTH AND SONS,
NEWTON STREET, HIGH HOLBORN.

December, 1875.

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OF

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